Competition Act, 2002

COMPETITION ADVOCACY

Fair Competition For Greater Good

Fair Competition
For Greater Good

भारतीय प्रतिस्पर्धा आयोग

COMPETITION COMMISSION OF INDIA

VISION

To promote and sustain an enabling competition culture through engagement and enforcement that would inspire businesses to be fair, competitive and innovative; enhance consumer welfare; and support economic growth.

MISSION 2020

Competition Commission of India aims to establish a robust competitive environment through :-

- *proactive engagement with all stakeholders, including consumers, industry, government and international jurisdictions*

- *being a knowledge intensive organization with high competence levels*

- *professionalism, transparency, resolve and wisdom in enforcement*

DISCLAIMER

This quick guide is published as part of the Competition Advocacy and Awareness Programme of the Competition Commission of India (the Commission). Its contents should, in no way, be treated as official views of the Commission. Readers are advised to carefully study the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007 and the Competition (Amendment) Act, 2009, and seek legal advice, wherever necessary.

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Meaning and Scope of Competition Compliance

Competition compliance programme (CCP) is a formal internal framework to ensure business, i.e., the management and individual employees, comply with competition law voluntarily. It is aimed at preventing the risk of violation of the Act, knowingly or unknowingly and is based on principle 'Prevention is better than cure'.

Enterprises should not indulge into anti-competitive behavior such as price fixing, creation of entry barriers, deliberate reduction in output, allocation of markets, bid-rigging, tie-in sales, predatory pricing, discriminatory pricing etc., which reduces market efficiencies or cause consumer harm.

The Act covers all economic agents-producers, service providers, traders, sellers, buyers, etc. which include 'Association of Enterprises', public sector enterprises and government departments engaged in commercial activities. Members of trade association are typically competitors and while participating in association activities / attending association meetings-must be sensitive to the risk of violating competition law. Dominant enterprises have special responsibility that their conduct does not result in abuse of dominant position. Similarly, enterprises should also comply with the relevant provisions of the Act before consummating any part of a combination. Proper processes should be laid for compliance during inquiry & investigations and search & seizure etc. and CCI should be promptly informed in case of any violation of the Act is noticed.

Q.1 What is meant by a Competition Compliance Programme (CCP)?

Ans. Compliance involves the active efforts on the part of an enterprise to comply with the provisions of the Act. When the enterprise takes certain necessary and concrete steps to ensure that knowingly or unknowingly it does not infringe the provisions of the Act, it can be stated to follow a CCP.

Q.2 What are the objectives of CCP?

Ans. The CCP should have the following three main objectives:

(i) Prevent violation of law, i.e. the Competition Act, 2002 and all Rules, Regulations & Orders made there-under.
(ii) Promote a culture of compliance, and
(iii) Encourage good corporate citizenship

Q.3 What are the advantages of maintaining a CCP?

Ans. Broadly, CCP offers the following advantages:

- Inculcates a culture of compliance throughout the organization which in turn can be a business enhancer offering positive benefits to business
- Provides enterprises with a competitive advantage by enabling them to detect any violation at an early stage and take corrective measures to their advantage
- Assists enterprises to enhance reputation and build goodwill. Enterprises that contravene the provisions of the Act may suffer damage to their reputation, damaging years of careful marketing and brand development
- Obviates or reduces the costs and negative effects of litigation and regulatory intervention.
- Establishes enterprises as having social conscience, economic ethics and national interest at heart.
- The existence of a strong CCP reflecting the eagerness of the management to comply may temper the severity of the punishment that may be meted out for violation.

Q.4 What are some of the major costs of non-compliance?

Ans. Non-compliance can be very costly for enterprises. The chances of conviction are, therefore, high for non-compliant enterprises. The consequent cost to the enterprise may be one or more of the following:

- Damage to reputation that has been built at very high cost
- Heavy fines: Ten per cent of the average of the turn over for the preceding three years of violation, for anti-competitive agreements and abuse of dominance. In the case of a cartel there are provisions for imposing on each member of the cartel a monetary penalty of up to three times of its profit for each year of the continuance of such cartel or ten per cent to its turnover for each year of the continuance of such cartel, whichever is higher. In view of the Supreme Court Order dated 08.05.2017 in the Excel Crop. Care Ltd. Vs. CCI & Anr. Case (Civil Appeals No. 53-55, 2874 & 2922 of 2014), the penalty would be imposed on an enity's turnover pertaining to the products and services in question that have been affected by contravention.
- Abuse of dominance can also result in division of the dominant enterprise being ordered by the Commission
- In case a violation is determined by the Commission, affected parties can approach the National Company Law Tribunal (NCLAT) for compensation, which can be very large depending on the type of violation involved
- Drain of resources in handling competition law infringement cases
- Loss of business as potential customers / investors / joint venture partner may be put off.

Q.5 What are the benefits of compliance with Competition Act?

Ans. The benefits of compliance include the following:

- Helps avoid fines or mitigate the level of the fine
- Potentially void agreements can be avoided
- Potential action for compensation can be avoided
- A number of indirect costs, that may otherwise be avoidable, can be avoided
- Helps benefit from 'leniency' provisions in the Act
- Helps increased awareness on competition law among employees

Q.6 What are the elements of a CCP?

Ans. A well formulated and adequate compliance programme should address the business realities faced by the enterprise concerned.

The basic issue is its situation in the market – whether it is a dominant player, going by the definition in the Act. A dominant enterprise needs to be particularly cautious about its behaviour in the market as the law explicitly prohibits certain types of behaviour by dominant enterprises. The law also recognizes group dominance. Every dominant enterprise should make it a point to educate its employees, especially senior executives, about the type of behaviour that should be carefully avoided.

Enterprises that have entered into agreements or are in the process of negotiating agreements, especially agreements with competitors should take precautions to ensure that they remain on the right side of law.

Enterprises that are members of industry/business associations need to have a clear idea about the Competition Law.

A Compliance Programme should be implemented to ensure that it is of practical use on a day-to-day basis. A sophisticated legal treatise may not be the appropriate document for the employees who look after the work on a day-to-day basis and may not be legally trained.

Compliance Programmes will have to be custom-made for each enterprise and an "off the shelf' programme is very unlikely to serve the purpose.

Practical guidelines should be made available to reflect the market position of the company.

Some of the areas that may be covered in Guidelines are:

- Types of external discussion that will always be prohibited (e.g. pricing)
- Guidelines on the information that can be legitimately exchanged and what constitutes confidential or commercially sensitive information
- Guidelines for the proper conduct of meetings with competitors (or suppliers/ customers)
- Guidelines on direct and indirect price fixing (including re-sale price maintenance, where suitable)
- Guidance on how to deal with complaints from customers and/or suppliers;
- Guidance for dominant companies on the care to be taken while dealing with customers/suppliers
- Practical examples of 'Dos & Don'ts', along with real-life examples from the company's business would turn out to be very effective.

Q.7 What are the essential features of a CCP?

Ans. The essential features of a Competition Compliance Programme are:

- Explicit statement of the commitment of senior management to the Compliance Programme
- Availability of an Enterprise's Compliance Policy
- Training and education of employees
- Compliance manual
- The main principles of the compliance policy should be set out in simple and plain language that is easily understandable.
- An effective Compliance Policy may include seeking a written undertaking from employees to conduct their business dealings within the compliance framework and taking disciplinary action against employees whose actions result in an infringement of the law.
- The relevant procedures should enable the employees to seek advice on whether a particular transaction complies with competition law and report activities that they suspect infringe the law. These practices should be included in the "best practices" norms of every enterprise.

The enterprises may consider the following as essential elements for devising an effective Compliance Policy:

- An overarching commitment to comply with the Competition Act and regulations, orders and directions issued by the Government and Competition Commission of India

- Placing a duty on all employees and directors to conduct their business dealings within this overall policy and seeking a written undertaking from them to this effect
- A commitment to take disciplinary action against employees/CEOs/directors/ proprietors/partners for intentionally or negligently involving the company in an infringement of the provisions of the Act.

Q.8 How can the commitment of Senior Management be made explicit?

Ans. The support of Senior Management must be visible, active and regularly reinforced. Commitment of senior management must be driven from the topmost level to take responsibility for its implementation. The element of commitment can best be achieved in a number of ways, including:

- A personal message to staff from the most senior officials in the enterprise stating their commitment to the compliance programme
- Referring to the compliance policy in the company's 'Mission Statement' or Code of Conduct and Ethics
- Making adherence to the programme one of the overall objectives of the enterprise
- Designating a member of senior management team to take overall responsibility (Compliance Officer) for ensuring that the compliance programme is:
  - properly designed
  - regularly monitored
  - effectively implemented
  - reported upon at regular intervals to the Board

Effectiveness of a Compliance Policy will be enhanced if it is linked to an enterprise's human resource (HR) and disciplinary policy. This would prompt employees to attach seriousness to the compliance issues. Besides, this would reflect the seriousness of the management to compliance, as far as the competition authority is concerned.

Different levels of infringements can be dealt with by increasing levels of sanction, resulting ultimately in dismissal for the most serious infringement.

Competition compliance can also be built into the existing staff appraisal procedures, so that employees are regularly asked to sign a form to confirm that they are not aware of any existing compliance breaches. This will help detecting any anticompetitive practice that may exist at early stage.

Most of the enterprises have a policy in place for retaining financial information for accounting and tax purposes. Documents relevant to prove the compliance of the enterprise and its employees with competition law provisions will have to be retained for adequate period to save the embarrassment of not being able to defend in case of allegation related to infringement.

Effectiveness of a Compliance Policy will be enhanced if it is linked to an enterprise's Human Resource (HR) and disciplinary policy.

Q.9 What is the role of training in a CCP?

Ans. An enterprise should consider having an active training programme that includes instruction by knowledgeable professionals having expertise and experience in corporate compliances. The training should be as practical as possible, including case studies drawn from the enterprise's actual experiences. It should also highlight the consequences of violations.

The objective is to enable all officers and employees to develop capabilities to recognize and identify law-violating activity related to their business. Compliance education must contain sufficient practical explanation/examples on difficult legal concepts and issues. It is, therefore, advisable that enterprises integrate compliance education as part of overall training and education programme of the enterprise.

It is advisable for an enterprise introducing the Compliance Programme for the first time to make the compliance education mandatory for all officers and employees, in respect of the enterprise's compliance policy, purpose of the programme, and compliance measures.

Those enterprises which are effectively operating and implementing the Compliance Programme should regularly revise the programme rather than repeating the same year after year, keeping in view the:

- changes in business environment
- market share
- competition in relevant market
- changes in competition regime

PREPARING THE EMPLOYEES FOR INVESTIGATIONS

When faced with an inquiry, investigators will interact with the employees responsible for the task. However, employees, in general, should be aware of the possibility of such investigations and must render all possible cooperation to the investigation agency.

IDENTIFY EMPLOYEES AND DIVISIONS AT RISK

It is necessary to identify the employees and divisions that are likely to be exposed to competition law risks. These can normally be:

- those doing sales and marketing;
- anyone having direct contact with competitors;
- those engaged in setting up and operation of distribution arrangements;
- strategists dealing with combinations.

Engagement of senior management is a must for the compliance programme to be taken seriously by employees.

CONFIDENTIALITY

Unless confidentiality is assured employees may not turn up to inform about alleged infringement, especially if known people are involved. Contacting the Compliance Officer to inform verbally in the first instance may work towards confidentiality. Documentation has to follow and action taken report also will have to be documented so as to ensure that the issue has not been ignored or tacitly approved.

Q.10 What is Active Risk Management (ARM) and why is ARM approach to compliance important?

Ans. Compliance Programme is aimed at avoiding or minimizing the risk of infringement/ non-compliance, with all its consequences for the enterprise.

However, as the law evolves, procedures and regulations are regularly streamlined and views and outlook on issues change. A static policy towards risk management through Compliance Programme may not serve the purpose; it may even turn out to be counterproductive.

A dynamic environment necessitates active risk management. What was consistent with the competition law yesterday may be declared inconsistent today; or the conditions under which behaviour is considered consistent today may become inconsistent under different conditions tomorrow. Therefore, an active risk management is called for. This is all the more important in the case of agreements.

ACTIVE RISK MANAGEMENT
IN THE CASE OF AGREEMENTS

- It is important to keep a record of all the agreements signed by the company and assessed for competition compatibility. The risk from an agreement found violating provision of the competition Act by the Commission may be very costly for the enterprise.
- There should be a time table for review of the status of the agreement from competition angle. There should be a system for reminding the official concerned about this. The responsibility could be entrusted to a senior executive of the commercial division since the risk is most felt by the commercial wing.
- Marketing/sales/procurement department should liaise with the legal department. Every agreement on record should be subjected to competition review every three to five years. For very large enterprises such review could be on yearly basis.
- When such active risk management is not found feasible in-house, assistance of specialized external agencies should be sought.

An effective Compliance Programme may also include a system of audit. At the time of the start of the compliance programme an internal audit of procedures and documents, including email, may be introduced. This may be repeated at intervals to ascertain if the policy is working. The nature of such audit will have to be tailored to the nature of the enterprise concerned.

While auditing the procedures, documents and emails of each and every employee may be a herculean task, it would be always possible to identify those individuals who are most at risk and to conduct an audit of a "snap shot" of their e-mails on a given day. External legal advisers could be employed to do such auditing to avoid embarrassment to the employees concerned while auditing their correspondence/email.

Q.11 **Is it essential to evaluate and review the CCP?**

Ans. Enterprises are advised to ensure that the Compliance Programme represents current best practices, remains relevant, comprehensive and effective. Periodic evaluation of Compliance Programme is suggested to keep it relevant. The process may include evaluation of individual employees' knowledge of law, policy and procedures. Adherence to compliance policy could also be used as one of the criteria for individual's and department's/division's performance appraisal. It is important to ensure that the evaluation process remains as transparent and open as possible.

The evaluation should also include as to whether the Compliance Programme achieves expected results, and whether the system is appropriate and effective. The evaluation findings should be appropriately reflected in the overall operational system, including compliance monitoring, education programs, and the compliance manual.

It is worth emphasizing that evaluating implementation of Compliance Programme depends on motivation for compliance, impetus of leadership, distribution of authority and responsibility, support of human and physical resources, and communication within the enterprise. The enterprises are, therefore, advised to set evaluation criteria conforming to their compliance policy.

Q.12 What are the performance indices for evaluation of CCP?

Ans. The enterprises may also consider devising performance indices to evaluate the Compliance Programme. An illustrative list of performance indices may include:

- How well are all the officers and employees aware of the Chief Executive's determination and commitment as regards compliance?
- Do officers and employees have a clear understanding of what kind of conduct violates competition law?
- Do officers and employees properly recognize the 'dos and don'ts' of preventing violations of law?

- Is compliance accountability accurately perceived at all levels of management?
- To what extent do the enterprise's business practices conform to the provisions of competition law and other related regulations?
- How high is the enterprise's level of conformity compared to other enterprises engaging in the same business activities?
- How many violations took place and how serious were they?
- What kind of corrective action was taken against those violations, and how effective have they been?
- How often internal monitoring is carried out and has the monitoring proved effective in preventing and detecting violations of law?
- To whom and to what extent is compliance education provided, and how effective are education programs?

Q.13 What care should be taken by executives/employees while dealing with Trade Associations?

Ans. Executives/employees of enterprises should avoid discussing the following topics while dealing with trade associations and/or with competitors:

- Past, current or future prices
- What constitutes a 'fair profit level'
- Pricing policy and actual costs of individual enterprises
- Possible increase or decrease in prices
- Standardization or stabilization of prices
- Bidding prices for projects
- Collusive tendering (bid rigging)
- Standardization of credit and trade terms
- Control of production
- Division or allocation of markets
- Select customers to deal or not to deal because of the above reasons
- Control of supply in the market

Q.14 What is the role of Compliance Officer?

Ans. In order to ensure effectiveness of compliance programme, it is desirable that a Compliance Officer with appropriate delegation of authority be appointed to enforce the Compliance Programme.

- The Compliance Officer should preferably be an independent professional with expertise and core competency in compliance and compliance management.
- He should be a focal point and in charge of designing a program, motivating officers and employees, managing any accompanying administrative/ organizational issue, preparing compliance manual, and auditing compliance.

Q. 15 How is the Compliance Manual important?

Ans. To facilitate compliance, the enterprises should develop a Compliance Manual and distribute it to their officers and employees as detailed guidelines for compliance with the provisions of the Act:

- The manual should incorporate the features set out above and contain up-to date information regarding its business(es), its operational environment, and relevant competition regimes.
- It is necessary that the manual incorporates full, relevant and correct information and is properly distributed.
- The Compliance Manual should be developed, distributed and implemented under the overall supervision of Compliance Officer.
- In-charge(s) of Departments/Divisions should be put under obligation to inform the Compliance Officer of any changes in the business environment and market scenario that may have bearing on compliance, including the opinion of subordinates concerning the Compliance Manual.
- The Enterprises are advised to constitute a Compliance Committee comprising senior management, with ultimate responsibility of overseeing the Compliance Programme, including conducting periodic review of its effectiveness.

For Reference:

CCI has published a 'Compliance Manual for Enterprises' which can be used by business enterprises for aligning their internal processes with the requirements of competition law. It can be downloaded from the Commission's website www.cci.gov.in .

COMPETITION COMPLIANCE PROGRAMME
CHECK LIST

- Compliance Programme will have to be tailor-made for each enterprise, though number of elements will be similar
- Compliance Officer: Identify a senior management personnel to oversee the implementation and monitoring of compliance programme
- Regular and adequate training on points of law as well as in identifying potential Violations
- Have a comprehensive compliance manual, intelligible to employees in general. It should contain useful illustrations
- Every enterprise should have a guidance or clearance procedure for situations where there may be doubt about possible course of action by employees for fear of violation of competition provisions
- Agreements will invariably have to be processed in consultation with the legal department to ensure that the provisions therein are consistent with the provisions of Competition Act, 2002. These should be reviewed periodically from the competition angle
- Employees should be educated about the use of language while communicating, whether it be verbal or written. Special care should be taken to ensure that the language used in email communication is appropriate
- Ensure a proper system of recording/minuting of meetings and other events that may serve as evidence of non-participation in anti-trust practices by the enterprise or its employees
- Compliance Programme should be suited to the situation in all countries where the enterprise is operating
- Active/dynamic risk management programme should be an essential element of the Compliance Programme
- It would be advisable to integrate the CCP into the overall compliance programmes of the enterprise

HOW TO FILE INFORMATION?

HOW TO FILE INFORMATION?

WHO CAN FILE THE INFORMATION?

- Any person, consumer or their association or trade association can file information before the Commission. Central Government or a State Government or a statutory authority can also make a reference to the Commission for making an inquiry. "Person" includes an individual, Hindu Undivided Family (HUF), firm, company, local authority, cooperative or any artificial juridical person.

WHAT ARE THE ISSUES ON WHICH INFORMATION CAN BE FILED?

- The information can be filed on the issues like anti-competitive agreements and abuse of dominant position or a combination which causes or is likely to cause an appreciable adverse effect on competition in the markets in India.

WHAT ARE THE SPECIFIC PROVISIONS IN THE COMPETITION ACT, 2002 (AS AMENDED), [THE ACT] ON ANTI-COMPETITIVE AGREEMENTS?

- As per Section 3(1) of the Act, no enterprise or associations 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.

- Any agreement entered into in contravention of the above provisions shall be void [Section 3 (2)].

- As per Section 3(3) of the Act, 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-

    - directly or indirectly determines purchase or sale price;

    - limits or controls production, supply, markets, technical development, investment or provision of services;

    - 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;

    - directly or indirectly results in bid rigging or collusive bidding shall be presumed to have an appreciable adverse effect on competition.

- As per Section 3(4) of the Act, any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets in respect of production, supply, distribution, storage, sale or price of or trade in goods or provision of services including-

  (a) tie-in arrangement,

  (b) exclusive supply agreement

  (c) exclusive distribution agreement,

  (d) refusal to deal,

  (e) resale price maintenance

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

- Section 3 (5) describes certain exceptions to Section 3 of the Act. Inter alia related to Intellectual Property Right (IPR) Laws.

WHAT ARE THE SPECIFIC PROVISIONS IN THE COMPETITION ACT, 2002 ON ABUSE OF DOMINANT POSITION?

- No enterprise or group shall abuse its dominant position [Section 4(1)].
- As per Section 4(2) of the Act, there shall be an abuse of dominant position, if any enterprise or a group:-

  (a) directly or indirectly, imposes unfair or discriminatory –
  (i) condition in purchase or sale of goods or services; or
  (ii) price in purchase or sale (including predatory price) of goods or service,

  (b) limits or restricts –
  (i) production of goods or provision of services or market therefor; or
  (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

  (c) indulges in practice or practices resulting in denial of market access in any manner, or

  (d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

  (e) uses its dominant position in one relevant market to enter into, or protect other relevant market.

HOW TO FILE INFORMATION BEFORE THE COMPETITION COMMISSION OF INDIA?

- **Your Legal Name:**

  - Indicate your complete postal address with PIN code and telephone number, fax number and also electronic mail address.

  - Indicate your preferred mode of service through which you would like to get reply from the Commission.

  - Mention name and address of the counsel or other authorized representative of the informant, if any.

  - Mention legal name and address(es) of the enterprise(s) alleged to have contravened the provisions of the Act.

Text of Information:

- The information should be in the form of statement of facts, containing details of the alleged contraventions of the Act. A complete list enlisting all documents, affidavits and evidence, as the case may be, in support of each of the alleged contraventions may also be furnished. A succinct narrative in support of the alleged contraventions would help the commission to examine your case expeditiously and in its right perspective.
- Mention relief or interim relief which you may seek from the Commission.
- Ensure that the information along-with the appendices and attachments is complete and duly verified by you before submitting to the Commission.
- The information filed should be signed by the individual himself/ herself, including a sole proprietor of a proprietorship firm, the Karta in the case of an HUF, the Managing Director and in his or her absence, any Director, duly authorized by the board of directors in the case of a company, etc. A valid Vakalat-nama should be filed through an Advocate.
- Your counsel may also append his or her signature to the information or reference as the case may be.

WHOM TO ADDRESS AND WHERE TO FILE?

- Information or reference or responses to the Commission should be sent to the Secretary, in person or by registered post or courier service or facsimile transmission addressed to the Secretary or to the authorized officer.

- However, any separate or additional document(s) you want to rely upon in support of the information, or reference should be filed in the form of a "Paper Book", at least seven days prior to the date of the ordinary meeting, after serving the copies of the said document(s) on the other parties to the proceedings, with documentary proof of such service. Such documents need to be serially numbered, prefaced by an index and should be supported by a verification.

- All information or references or responses or other documents which are required to be filed before the Commission should be typed in Arial 12 fonts on one side of A4 size (210 x 297mm or 8.27"x11.69") white bond paper in double space with 2" margin on the left and 1" margin on all other sides

- Only neat and legible photocopies or scanned documents duly certified as true copies may be filed as exhibits or annexures.

WHAT ARE THE FEES TO BE PAID?

- The information you file with the Commission should be accompanied by proof of having paid the fee as under: -

- Rs. 5,000 (five thousand) in case of individual or Hindu Undivided Family (HUF),

- Rs. 10,000 (ten thousand) in case of Non-Government Organisation (NGO), or Consumer Association, or a Co-operative Society, or Trust,

- Rs. 40,000 (forty thousand) in case of firm (including proprietorship, partnership or Limited Liability Partnership) or company (including one person company) having turnover in the preceding year upto rupees two crores,

- Rs. 1,00,000 (one lac) in case of firm (including proprietorship, partnership or Limited Liability Partnership) or company (including one person company) having turnover in the preceding year exceeding rupees two crore and upto rupees 50 crores,

- Rs. 50,000/- (Fifty Thousand) in the cases not covered under clause (a) or (b) or (c) or (d) above.

HOW TO PAY THE FEE?

The fee can be paid either by tendering demand draft or banker's cheque, payable in favour of *Competition Commission of India (Competition Fund),* New Delhi or through NEFT/RTGS/IMPS mode to the **Competition Commission of India (Competition Fund)** Account in: -

EITHER

Account No. 1988002100187687, IFSC Code-PUNB0198800 with Punjab National Bank, Bhikaji Cama Place, New Delhi- 110066

OR

Account No. 510131000002673, IFSC Code-UBIN0903736 with Union Bank of India, Bhikaji Cama Place, New Delhi- 110066.

For Assistance: In case of any doubt or you need any help, you can always approach Secretariat of the Commission. Landline number and email id of Secretary to the Commission is 20815009 (with International code +91 11; National STD 011) and secy@cci.gov.in. For enquiries relating to filing under Section 3 or 4 of the Act and under Section 5 and 6 of the Act can made at atdregistry@cci.gov.in and combination@cci.gov.in respectively. Contact Us page of CCI can be accessed at https://www.cci.gov.in/contact-us-0 for further information.

For Reference:

- For the details of the procedures related to inquiry and investigations, updated General regulations may be referred to for filing information. (also available on the CCI website www.cci.gov.in and at link http://www.cci.gov.in/sites/default/files/regulation_pdf/cci-general-regulations-as-amended.pdf).
- The Commission has also published Advocacy Series booklets on provisions relating to different anti-competitive practices. These can be downloaded from the Commission's web portal or hard copies can be obtained from the Facilitation Cell of Competition Commission of India.

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CARTELS

CARTELS

INTRODUCTION

The Competition Act, 2002 (as amended) [the Act] follows the philosophy of modern competition laws and aims at fostering competition and at protecting Indian markets against anti-competitive practices by enterprises. The Act prohibits anti-competitive agreements, abuse of dominant position by enterprises, and regulates combinations (mergers, amalgamations and acquisitions) with a view to ensure that there is no adverse effect on competition in India.

The Act prohibits any agreement which causes, or is likely to cause, appreciable adverse effect on competition in markets in India. Any such agreement is void.

An agreement may be horizontal i.e. between enterprises, persons, associations, etc. engaged in identical or similar trade of goods or provision of services, or it may be vertical i.e. amongst enterprises or persons at different stages or levels of the production chain in different markets.

Cartelisation is one of the horizontal agreements that shall be presumed to have appreciable adverse effect on competition under Section 3 of the Act.

WHAT IS A CARTEL?

Cartel is defined in Section 2, clause (c) of the Act:

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

Cartels are agreements between enterprises (including a person, a government department and association of persons / enterprises) not to compete on price, product (including goods and services) or customers. The Act gives a detailed definition of an enterprise in section 2 (h). The objective of a cartel is to raise price above competitive levels, resulting in injury to consumers and to the economy. For the consumers, cartelisation results in higher prices, poor quality and less or no choice for goods or/and services.

A cartel is said to exist when two or more enterprises enter into an explicit or implicit agreement to fix prices, to limit production and supply, to allocate market share or sales quotas, or to engage in collusive bidding or bid-rigging in one or more markets. An

important dimension in the definition of a cartel is that it requires an agreement between competing enterprises not to compete or to restrict competition.

An **international cartel** is said to exist, when not all of the enterprises in a cartel are based in the same country or when the cartel affects markets of more than one country.

An **import cartel** comprises enterprises (including an association of enterprises) that get together for the purpose of imports into the country.

An **export cartel** is made up of enterprises based in one country with an agreement to cartelize markets in other countries. In the Act, cartels meant exclusively for exports from India have been excluded from the provisions relating to anti-competitive agreements.

EXTRA - TERRITORIAL REACH

Anti-competitive activities, including cartels, taking place outside India but having effect on competition in India would fall within the ambit of the Act and can be inquired into by the Commission. The Act thus has extra territorial reach (section 32).

CARTELS - PRESUMED INJURIOUS

Agreements between enterprises engaged in identical or similar trade of goods or provision of services (commonly known as horizontal agreements) including cartels, of four types specified in the Act are presumed to have appreciable adverse effect on competition and, therefore, are anti-competitive and void.

However, horizontal agreements of the above four types mentioned in the preceding paragraphs, entered into by way of joint ventures are not presumed to have appreciable adverse effect on competition and are excluded from the above provisions of Section 3, sub section (3) of the Act if they increase efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Agreements other than those covered by Section 3, sub section (3) of the Act, including

- tie-in arrangement
- exclusive supply arrangement

- exclusive distribution agreement
- refusal to deal
- resale price maintenance

would not be presumed to have appreciable adverse effect on competition, and would be evaluated by the Commission based on facts using the 'rule of reason' approach.

COMMON CHARACTERISTICS OF CARTELS

- Usually cartels function in secrecy.
- The members of a cartel, by and large, seek to camouflage their activities to avoid detection by the Commission.
- Perpetuation of cartels is ensured through retaliation threats. If any member cheats, the cartel members retaliate through temporary price cuts to take business away or can isolate the cheating member.
- Another method, known as compensation scheme, is resorted to in order to discourage cheating. Under this scheme, if a member of a cartel was found to have sold more than its allocated share, it would have to compensate the other members.

CONDITIONS CONDUCIVE TO FORMATION OF CARTELS

If there is effective competition in the market, cartels would find it difficult to be formed and sustained. Some of the conditions that are conducive to cartelization are:

- high **concentration** - few competitors
- high entry and exit **barriers**
- **homogeneity** of the products (similar products)
- similar production **costs**
- excess **capacity**
- high **dependence** of the consumers on the product
- **history** of collusion
- **active** trade association

INQUIRY INTO CARTELS

In exercise of powers vested under Section 19 of the Act, the Commission may inquire into any alleged contravention of the provisions of Section 3 of the Act which inter alia proscribes cartels.

The Commission, on being satisfied that there exists a prima facie case of 'cartel', shall direct the Director General to cause an investigation and furnish a report. The Commission has the powers vested in a Civil Court under the Code of Civil Procedure in respect of matters like summoning or enforcing attendance of any person and examining him on oath, requiring discovery and production of documents and receiving evidence on affidavit. The Director General, for the purpose of carrying out investigation, is vested with powers of Civil Court besides powers to conduct 'search and seizure'.

Note: For the details of the procedures related to inquiry and investigations, please refer to Competition Commission of India (General) Regulation, 2009 dated May 21, 2009 (also available on the CCI website www.cci.gov.in)

POWERS OF THE COMMISSION

The Commission is empowered to inquire into any cartel, and to impose on each member of the cartel, a penalty of up to 3 times of its profit for each year of the continuance of such agreement or 10% of its turnover for each year of continuance of such agreement, whichever is higher. In case an enterprise is a 'company' its directors/officials who are guilty are also liable to be proceeded against.

In addition, the Commission has the power to pass inter alia any or all of the following orders (Section 27):

- direct the parties to a cartel agreement to discontinue and not to re-enter such agreement;
- direct the enterprises concerned to modify the agreement;
- direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any; and
- pass such other order or issue such directions as it may deem fit.

LENIENCY SCHEME

Section 46 of the Act empowers the Commission to grant leniency by levying a lesser penalty on a member of the cartel who provides full, true and vital information regarding the cartel. The scheme is designed to induce members to help in detection and investigation of cartels. This scheme is grounded on the premise that successful prosecution of cartels requires evidence supplied by a member of the cartel. Similar leniency schemes have proved very helpful to competition authorities of foreign jurisdictions in successfully proceeding against cartels.

The Commission has notified the Competition Commission of India (Lesser Penalty) Regulations, 2009 laying the process, procedure and methodology for granting leniency to the cartel members who breaks the ranks of the cartel and becomes helpful to the Commission and instrumental in busting the alleged cartel.

Note: For the details of the conditions for lesser penalty, please refer to Competition Commission of India (Lesser Penalty) Regulation, 2009dated August 13, 2009 (also available on the CCI website www.cci.gov.in)

INTERIM ORDER

Under Section 33 of the Act, during the pendency of an inquiry the Commission may temporarily restrain any party from continuing with the alleged contravention, until conclusion of the inquiry or until further orders, without giving notice to such party, where it deems necessary.

Note: For the details of the procedures related to interim orders please refer to CCI (General Regulation), 2009 specified dated May 21, 2009 (also available on the CCI website www.cci.gov.in)

APPEALS

The National Company Law Tribunal (NCLAT) is established under Section 53A of the Act, to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under specified sections of the Act.

An appeal has to be filed within 60 days of receipt of the order / direction / decision of the Commission.

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BID RIGGING

BID RIGGING

INTRODUCTION

The Competition Act, 2002, (as amended), [the Act], follows the philosophy of modern competition laws and aims at fostering competition and at protecting Indian markets against anti-competitive practices by enterprises. The Act prohibits anti-competitive agreements, abuse of dominant position by enterprises, and regulates combinations (mergers, amalgamations and acquisitions) with a view to ensure that there is no adverse effect on competition in India.

The Act prohibits any agreement which causes, or is likely to cause, appreciable adverse effect on competition in markets in India. Any such agreement is void.

An agreement may be horizontal i.e. between enterprises, persons, associations, etc. engaged in identical or similar trade of goods or provision of services, or it may be vertical i.e. amongst enterprises or persons at different stages or levels of the production chain in different markets in respect of goods and services.

Bid rigging or collusive bidding is one of the horizontal agreements that shall be presumed to have appreciable adverse effect on competition under Section 3 of the Act.

WHAT IS BID RIGGING?

The explanation to sub-section (3) of Section 3, of the Act defines

> "bid rigging" as "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."

Bid rigging takes place when bidders collude and keep the bid amount at a pre-determined level. Such pre-determination is by way of intentional manipulation by the members of the bidding group. Bidders could be actual or potential ones, but they collude and act in concert.

BID RIGGING IS ANTI-COMPETITIVE

Bidding, as a practice, is intended to enable the procurement of goods or services on the most favourable terms and conditions. Invitation of bids is resorted to both by Government (and Government entities) and private bodies (companies, corporations, etc.).

But the objective of securing the most favourable prices and conditions may be negated if the prospective bidders collude or act in concert. Such collusive bidding or bid rigging contravenes the very purpose of inviting tenders and is inherently anti-competitive.

Collusive bidding or bid rigging may occur in various ways. Some of the most commonly adopted ways are:

- agreements to submit identical bids agreements as to who shall submit the lowest bid, agreements for the submission of cover bids (voluntarily inflated bids)
- agreements not to bid against each other,
- agreements on common norms to calculate prices or terms of bids
- agreements to squeeze out outside bidders
- agreements designating bid winners in advance on a rotational basis, or on a geographical or customer allocation basis
- agreement as to the bids which any of the parties may offer at an auction for the sale of goods or any agreement through which any party agrees to abstain from bidding for any auction for the sale of goods, which eliminates or distorts competition

Inherent in some of these agreements, is a compensation system to the unsuccessful bidders by dividing a certain percentage of profits of successful bidders.

If bid rigging takes place in Government tenders, it is likely to have severe adverse effects on its purchases and on public spending.

Bid rigging or collusive bidding is treated with severity in the law. The presumptive approach reflects the severe treatment.

FORMS OF BID RIGGING

Bid rigging may take many forms, but most bid rigging conspiracies usually fall into one or more of the following categories:

BID SUPPRESSION

In bid suppression schemes, one or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor’s bid will be accepted.

COMPLEMENTARY BIDDING

Complementary bidding (also known as 'cover' or 'courtesy' bidding) occurs when some competitors agree to submit bids that are either too high to be accepted or contain special terms that will not be acceptable to the buyer. Such bids are not intended to secure the buyer's acceptance, but are merely designed to give the appearance of genuine competitive bidding. Complementary bidding schemes are the most frequently occurring forms of bid rigging, and they defraud purchasers by creating the appearance of competition to conceal secretly inflated prices.

BID ROTATION

In bid rotation schemes, all conspirators submit bids but take turns to be the lowest bidder. The terms of the rotation may vary; for example, competitors may take turns on contracts according to the size of the contract, allocating equal amounts to each conspirator or allocating volumes that correspond to the size of each conspirator. A strict bid rotation pattern defies the law of chance and suggests that collusion is taking place.

SUBCONTRACTING

Subcontracting arrangements are often part of a bid rigging scheme. Competitors, who agree not to bid or to submit a losing bid, frequently receive subcontracts or supply contracts in exchange from the successful bidder. In some schemes, a low bidder will agree to withdraw its bid in favour of the next low bidder in exchange for a lucrative subcontract that divides the illegally obtained higher price between them.

Almost all forms of bid rigging schemes have one thing in common: an agreement among some or all of the bidders, which predetermines the winning bidder and limits or eliminates competition among the conspiring vendors.

SOME SUSPICIOUS BEHAVIOUR PATTERNS

Bid rigging can be difficult to detect. However, suspicions may be aroused by unusual bidding or something a bidder says or does. An agreement (in collusion) not to respond to an invitation to tender until after discussions with other persons invited to tender, is also a bid rigging offence. Certain patterns in bids can give rise to suspicion of collusion. Situations of suspicious behaviour include the following (illustrative and not exhaustive):

1) The bid offers by different bidders contain same or similar errors and irregularities (spelling, grammatical and calculation). This may indicate that the designated bid winner has prepared all other bids (of the losers).

2) Bid documents contain the same corrections and alterations indicating last minute changes.

3) A bidder seeks a bid package for himself/herself and also for the competitor.

4) A bidder submits his/her bid and also the competitor's bid.

5) A party brings multiple bids to a bid opening and submits its bid after coming to know who else is bidding.

6) A bidder makes a statement indicating advance knowledge of the offers of the competitors.

7) A bidder makes a statement that a bid is a 'complementary', 'token' or 'cover' bid.

8) A bidder makes a statement that the bidders have discussed prices and reached an understanding.

INQUIRY INTO BID RIGGING

In exercise of powers vested under Section 19 of the Act, the Commission may inquire into any alleged contravention under sub-section (3) of Section 3 of the Act that proscribes bid rigging.

The Commission, on being satisfied that there exists a prima facie case of bid rigging, shall direct the Director General to cause an investigation and furnish a report. The Commission has the powers vested in a Civil Court under the Code of Civil Procedure in respect of matters like summoning or enforcing attendance of any person and examining him on oath, requiring discovery and production of documents and receiving evidence on affidavit. The Director General, for the purpose of carrying out investigation, is also vested with powers of civil court besides powers to conduct 'search and seizure'.

Note: For the details of the procedures related to inquiry and investigations please refer to Competition Commission of India (Lesser Penalty) Regulation, 2009 dated May 21, 2009 (also available on the CCI website www.cci.gov.in)

POWERS OF THE COMMISSION

After the inquiry the Commission may pass inter-alia any or all of the following orders under Section 27 of the Act:

1) direct the parties to discontinue and not to re-enter such agreement;
2) direct that the agreements shall stand modified to the extent and in the manner may be specified in the order by the Commission.
3) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any; and
4) pass such other orders or issue such directions as it may deem fit.

PENALTY

The Commission may impose such penalty as it deems fit. The penalty can be up to 10% of the average turnover for the last three preceding financial years upon each of such persons or enterprises which are parties to bid-rigging or collusive bidding. In case the bid-rigging or collusive bidding agreement referred to in sub-section (3) of section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to 3 times of its profit for each year of the continuance of such agreement or 10% of its turnover for each year of the continuance of such agreement, whichever is higher. The penalty can therefore be severe, and result in heavy financial and other cost on the erring party.

Section 46 the Act empowers the Commission to impose lesser penalty upon a party in a cartel including big rigging if it makes true, full and vital disclosure leading to busting of the cartel.

However, during the investigation if it is found that the party has not complied with the condition on which lesser penalty was imposed or disclosure is not vital or false evidence has been furnished, the party may not receive the leniency.

Note: For the details of the conditions for lesser penalty, please refer to Competition Commission of India (Lesser Penalty) Regulation, 2009 dated August 13, 2009 (also available on the CCI website www.cci.gov.in)

INTERIM ORDER

Under section 33 of the Act, during the pendency of an inquiry into bid rigging, the Commission may temporarily restrain any party from carrying on the offending act until conclusion of the inquiry or until further orders, without giving notice to such party, where it deems necessary.

Note: For the details of the procedures related to interim orders, please refer to CCI (General) Regulation No. 2 of 2009 dated May 21, 2009 (also available on the CCI website www.cci.gov.in)

APPEALS

The NCLAT is also empowered to award compensation for loss suffered on account of contravention of the directions or decision or order of the Commission mentioned therein.

An appeal has to be filed within 60 days of receipt of the order / direction / decision of the Commission.

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PUBLIC PROCUREMENT

PUBLIC PROCUREMENT

Public procurement is the purchase of goods and services by the public sector and is a key economic activity of governments, accounting for on an average of 10-25% of gross domestic product (GDP) of national economies worldwide (European Commission 2014). In India, government procurement constitutes a significant percentage of the GDP.

Procurement of goods and services is carried out by various ministries, departments, municipal and other local bodies, statutory corporations and public undertakings both at the Centre and at the State level.

The primary objective of an effective procurement policy is the promotion of efficiency, i.e. selection of a supplier with the lowest price or, more generally, the achievement of the best value for money. Effective public procurement avoids mismanagement and waste of public funds. Vigorous competition among suppliers helps governments realize these objectives. Conversely, when competition is curtailed - for example, when suppliers engage in bid rigging -taxpayers' money is wasted as governments pay more than a fair price.

It is critical that procurement regulations do not unwittingly facilitate collusive arrangements. The formal rules that govern procurement, the way in which an auction is carried out and the design of the auction itself can all act to hinder competition and help promote or sustain bid-rigging conspiracies.

COMPETITION CONCERNS IN PUBLIC PROCUREMENT

The competition concerns arising from public procurement are largely the same that can arise in an ordinary market context such as collusive agreements between bidders during the auction process or across auction. In past, many Comptroller and Auditor General of India (CAG) audit reports, vigilance reports of Central Vigilance Commission (CVC) and various studies have highlighted wide scale prevalence of cartelization and bid rigging in government procurements.

The overarching concern with public procurement is that, because formal rules governing public procurement make communication among rivals easier, they can promote collusion among bidders and therefore reduce rivalry, with detrimental effects on the efficiency of the procurement process. In particular, in those instances where entry is difficult and when bidding is not based on a 'winner-takes all' competition, collusion can emerge as easily in auctions and bidding processes as in ordinary economic markets.

It is frequently noticed that the procurement mechanism adopted in most government departments is itself not designed keeping in mind the importance of competition in ensuring efficient outcome. Moreover, in some cases the mechanism itself is facilitating anticompetitive practices. The peculiarity in case of public procurements is that, due to the regulations and legislations, the officials have limited strategic options to curb such practices. Whereas a private purchaser can choose his purchasing strategy flexibly, the public sector has limited options to respond dynamically to anti-competitive behaviours owing to strict regulatory/ legislative framework and detailed administrative regulations/ procedures at multiple levels. These rules are set as an attempt to avoid any abuse of discretion by the public sector. However, full transparency of the procurement process and its outcome can promote collusion.

Disclosing information such as the identity of the bidders and the terms and conditions of each bid allows competitors to detect deviations from a collusive agreement, punish those firms and better coordinate future tenders.

IMPORTANCE OF COMPETITION IN PUBLIC PROCUREMENT

An efficient public procurement policy can affect competition in a number of ways:

(i) Short-term effects on competition amongst potential suppliers i.e. effects on the intensity of competition amongst existing suppliers in a particular tender is just one possible effect, but it is not the only one.

(ii) Apart from immediate impact (loss of public money) of anti-competitive practices, there is a deeper consequence on overall efficiency in the domestic market. Public procurement can have other, longer-term effects on competition as public procurement can affect important features of an industry sector (such as the degree of innovation, the level of investment, vertical integration, etc.). This in turn would be reflected in the level of competition in future tenders.

ROLE OF COMPETITION AGENCY IN PUBLIC PROCUREMENT

Reducing collusion in public procurement requires strict enforcement of competition laws and the education of public procurement agencies at all levels of government to help them design efficient procurement processes and detect collusion.

a. Enforcement

The most direct way for the competition authority to promote competition in the public procurement market is to identify and correct bid-riggings through strict law enforcement. By increasing the bid-rigging detection rate and heavily punishing identified bid-riggers, the competition authority can effectively prevent bid-rigging as companies will learn that the benefits of bid-rigging is smaller than the loss they will suffer once their collusion is identified.

Many jurisdictions have specific prohibitions in their competition laws forbidding bid rigging or considering bid-rigging as per se violation of the competition rules. Other countries simply base their enforcement practice against bid-rigging on the general antitrust laws against anti-competitive agreements. In India, the Competition Act, 2002 specifically prohibits bid-rigging or collusive bidding (direct or indirect) under Section 3(1) read with Section 3(3)(d) thereof. It is one of the four horizontal agreements that are presumed to have appreciable adverse effect on competition (AAEC).

The Competition Commission of India ('the Commission'/ CCI) is empowered to inquire into such anti-competitive agreements, and to impose on each person or enterprises which are parties to such agreements, a penalty of up to 10% of the average turnover for the three preceding financial years.

Further, in case such agreement has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or 10% of its turnover for each year of the continuance of such agreement, whichever is higher.

In case an enterprise is a 'company', its directors/officials who are guilty are also liable to be proceeded against.

In addition, the Commission has the power to pass inter alia any or all of the following orders (Section 27):

- direct the parties to a cartel agreement to discontinue and not to re-enter such agreement;
- direct that agreements shall stand modified to the extent as may be specified by the Commission.
- direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any; and
- pass such other order or issue such directions as it may deem fit.

b. Advocacy

Many competition authorities are also involved in advocacy efforts to increase awareness of the risks of bid rigging in procurement tenders. There are many examples of educational programs to this end. Some authorities have regular bid rigging educational programs for procurement agencies; others organize ad hoc seminars and training courses.

These outreach programs have proved extremely useful for a number of reasons:

(i) they help competition and public procurement officials to develop closer working relationships;

(ii) they help educate procurement officials about what they should look for in order to detect bid-rigging through actual examples of bidding patterns and conduct which may indicate that bid-rigging is occurring;

(iii) they train procurement officials to collect evidence that can be used to prosecute better and more effectively bid-rigging conduct;

(iv) they help educate public procurement officials and government investigators about the cost of bid rigging on the government and ultimately on the taxpayers; and

(v) they warn procurement officials not to participate in bid-rigging and other illegal conduct which undermines competition in procurement tenders.

INDUSTRY, PRODUCT AND SERVICE CHARACTERISTICS THAT HELP SUPPORT COLLUSION

The Organisation for Economic Co-operation and Development (OECD) has enlisted various industries and product characteristics that are prone to collusion. These are:

(i) **Small number of companies**: Bid-rigging is more likely to occur when a small number of companies supply the good or service. The fewer the number of sellers, the easier it is for them to reach an agreement on how to rig bids.

(ii) **Little or no entry**: When few businesses have recently entered or are likely to enter a market because it is costly, hard or slow to enter, firms in that market are protected from the competitive pressure of potential new entrants. The protective barrier helps support bid-rigging efforts.

(iii) **Market conditions**: Significant changes in demand or supply conditions tend to destabilize ongoing bid-rigging agreements. A constant, predictable flow of demand from the public sector tends to increase the risk of collusion. At the same time, during periods of economic upheaval or uncertainty, incentives for competitors to rig bids increase as they seek to replace lost business with collusive gains.

(iv) **Industry associations**: Industry associations can be used as legitimate, pro-competitive mechanisms for members of a business or service sector to promote standards, innovation and competition. Conversely, when subverted to illegal, anti-competitive purposes, these associations have been used by company officials to meet and conceal their discussions about ways and means to reach and implement a bid-rigging agreement.

(v) **Repetitive bidding**: Repetitive purchases increase the chances of collusion. The bidding frequency helps members of a bid-rigging agreement allocate contracts among themselves. In addition, the members of the cartel can punish a cheater by targeting the bids originally allocated to him. Thus, contracts for goods or services that are regular and recurring may require special tools and vigilance to discourage collusive tendering.

(vi) **Identical or simple products or services**: When the products or services that individuals or companies sell are identical or very similar, it is easier for firms to reach an agreement on a common price structure.

(vii) **Few 'if any' substitutes**: When there are few, if any, good alternative products or services that can be substituted for the product or service that is being purchased, individuals or firms wishing to rig bids are more secure knowing that the purchaser has few, if any, good alternatives and thus their efforts to raise prices are more likely to be successful.

(viii) **Little or no technological change**: Little or no innovation in the product or service helps firms reach an agreement and maintain that agreement over time.

WARNING SIGNALS OF BID-RIGGING

The following factors are helpful in detecting bid-rigging:

(i) In Bids

- The same supplier is often the lowest bidder.
- There is a geographic allocation of winning tenders. Some firms submit tenders that win in only certain geographic areas.
- Regular suppliers fail to bid on a tender they would normally be expected to bid for, but have continued to bid for other tenders.
- Some suppliers unexpectedly withdraw from bidding.
- Certain companies always submit bids but never win.
- Each company seems to take a turn being the winning bidder.
- Two or more businesses submit a joint bid even though at least one of them could have bid on its own.
- The winning bidder repeatedly sub-contracts work to unsuccessful bidders.
- The winning bidder does not accept the contract and is later found to be a sub-contractor.
- Competitors regularly socialize or hold meetings shortly before the tender deadline.

(ii) In Documents

- Carefully compare all documents for evidence that suggests that the bids were prepared by the same person or were prepared jointly.
- Identical mistakes/ corrections in the bid documents or letters submitted by different companies, such as spelling errors.
- Bids from different companies contain similar handwriting or typeface or use identical forms or stationery.
- Bid documents from one company make express reference to competitors' bids or use another bidder's letterhead or fax number.
- Bids from different companies contain identical miscalculations.
- Bids from different companies contain a significant number of identical estimates of the cost of certain items.
- The packaging from different companies has similar postmarks or post metering machine marks.
- Bid documents from different companies indicate numerous last-minute adjustments, such as the use of erasers or other physical alterations.
- Bid documents submitted by different companies contain less detail that would be necessary or expected, or give other indications of not being genuine.

(iii) In Bid Pricing

Bid prices can be used to help uncover collusion. When other bids are much higher than the winner's bid, bidders may be using a cover bidding scheme. Bid prices that are higher than the engineering cost estimates or higher than prior bids for similar tenders may also indicate collusion. The following may be considered suspicious:

- Sudden and identical increases in price or price ranges by bidders that cannot be explained by cost increases.
- Anticipated discounts or rebates disappear unexpectedly.
- Identical pricing can raise concerns especially when one of the following is true:
    - Suppliers' prices were the same for a long period of time,
    - Suppliers' prices were previously different from one another,
    - Suppliers increased price and it is not justified by increased costs, or
    - Suppliers eliminated discounts, especially in a market where discounts were historically given.
- A large difference between the price of a winning bid and other bids.
- A certain supplier's bid is much higher for a particular contract than that supplier's bid for another similar contract.
- There are significant reductions from past price levels after a bid from a new or infrequent supplier, e.g., the new supplier may have disrupted an existing bidding cartel.
- Local suppliers are bidding higher prices for local delivery than for delivery to destinations farther away.
- Similar transportation costs are specified by local and non-local companies.
- Only one bidder contacts wholesalers for pricing information prior to a bid submission.
- Unexpected features of public bids in an auction, electronic or otherwise such as offers including unusual numbers where one would expect a rounded number of hundreds or thousands may indicate that bidders are using the bids themselves as a vehicle to collude by communicating information or signaling preferences.

(iv) In the Statements of Bidders

When working with vendors watch carefully for suspicious statements that suggest that companies may have reached an agreement or coordinated their prices or selling practices.

(v) In the Behaviour of Bidders

Look for references to meetings or events at which suppliers may have an opportunity to discuss prices, or behaviour that suggests a company is taking certain actions that only benefit other firms.

Forms of suspicious behavior could include the following:

- Suppliers meet privately before submitting bids, sometimes in the vicinity of the location where bids are to be submitted.
- Suppliers regularly socialize together or appear to hold regular meetings.
- A company requests a bid package for itself and a competitor.
- A company submits both its own and a competitor's bid and bidding documents.
- A bid is submitted by a company that is incapable of successfully completing the contract.
- A company brings multiple bids to a bid opening and chooses which bid to submit after determining (or trying to determine) who else is bidding.
- Several bidders make similar enquiries to the procurement agency or submit similar requests or materials.

ADDITIONAL CHECK-LIST FOR DETECTING BID-RIGGING:

Be alert for:

- Opportunities that bidders have to communicate with each other
- Relationships among bidders (e.g. JVs and sub-contracting)
- Suspicious bidding patterns and pricing patterns (e.g. unexpectedly high prices or unexpectedly low discounts)
- Unusual behaviour (e.g. unjustified withdrawal from tender, submitting the bid without required info).

In order to avoid bid-rigging, a check-list can be devised for designing tenders, which can be used by PSUs and State agencies. Such a check-list can be on following lines:

- Learn about the market and suppliers
- Maximize participation of potential bidders
- Define requirements clearly and avoid predictability
- Reduce communication among bidders

Use Certificates of Independent Bid Determination (CIBD) on an affidavit. CIBD typically require each bidder to sign a statement under oath that:

- it has not agreed with its competitors about bids,
- it has not disclosed bid prices to any of its competitors,
- it has not agreed to join or collude with others in any from which could lead to bid-rigging in any form or manner whatsoever, and
- it has not attempted to convince a competitor to rig bids.

METHODOLOGY TO REDUCE THE RISK OF BID-RIGGING

(i) Gather all Relevant Information of the Product/Services

- Be aware of the characteristics of the market from which one will purchase and recent industry activities or trends that may affect competition for the tender.
- Determine whether the market in which one will purchase has characteristics that make collusion more likely.
- Collect information on potential suppliers, their products, their prices and their costs. If possible, compare prices offered in B2B procurement.
- Collect information about recent price changes. Inform oneself about prices in neighboring geographic areas and about prices of possible alternative products.
- Collect information about past tenders for the same or similar products.
- Coordinate with other public sector procurers and clients who have recently purchased similar products or services to improve your understanding of the market and its participants.
- If one uses external consultants to help estimate prices or costs ensure that they have signed confidentiality agreements.

(ii) Encourage Participation of Maximum Potential Bidders

- Avoid unnecessary restrictions that may reduce the number of qualified bidders. Specify minimum requirements that are proportional to the size and content of the procurement contract. Do not specify minimum requirements that create an obstacle to participation, such as control on the size, composition, or nature of firms that may submit a bid.
- Note that requiring large monetary guarantees from bidders as a condition for bidding may prevent otherwise qualified small bidders from entering the tender process. If possible, ensure amounts are set only so high as to achieve the desired goal of requiring a guarantee.
- Reduce constraints on foreign participation in procurement whenever possible.
- To the extent possible, qualify bidders during the procurement process in order to avoid collusive practices among a pre-qualified group and to increase the amount of uncertainty among firms regarding the number and identity of bidders. Avoid a very long period of time between qualification and award, as this may facilitate collusion.
- Reduce the preparation costs of the bid. This can be accomplished in a number of ways:

  - By streamlining tendering procedures across time and products (e.g. use the same application forms, ask for the same type of information, etc.).
  - By packaging tenders (i.e. different procurement projects) to spread the fixed costs of preparing a bid.

- By keeping official lists of approved contractors or certification by official certification bodies.
- By allowing adequate time for firms to prepare and submit a bid. For example, consider publishing details of pipeline projects well in advance using trade and professional journals, websites or magazines.
- By using an electronic bidding system, if available.

- Whenever possible, allow bids on certain lots or objects within the contract, or on combinations thereof, rather than bids on the whole contract only.
- Do not disqualify bidders from future competitions or immediately remove them from a bidding list if they fail to submit a bid on a recent tender.
- Be flexible in regard to the number of firms from whom you require a bid. For example, if you start with a requirement for 5 bidders but receive bids from only 3 firms, consider whether it is possible to obtain a competitive outcome from the 3 firms, rather than insisting on a re-tendering exercise, which is likely to make it all the more clear that competition is scarce.

(iii) Train Staff

- Implement a regular training program on bid rigging and cartel detection for your staff, with the help of the competition agency or external legal consultants.
- Store information about the characteristics of past tenders (e.g., store information such as the product purchased, each participant's bid, and the identity of the winner).
- Periodically review the history of tenders for particular products or services and try to discern suspicious patterns, especially in industries susceptible to collusion.

(iv) Adopt a policy to review selected tenders periodically

- Undertake comparison checks between lists of companies that have submitted an expression of interest and companies that have submitted bids to identify possible trends such as bid withdrawals and use of sub-contractors.
- Conduct interviews with vendors who no longer bid on tenders and unsuccessful vendors.
- Establish a complaint mechanism for firms to convey competition concerns. For example, clearly identify the person or the office to which complaints must be submitted (and provide their contact details) and ensure an appropriate level of confidentiality.
- Make use of mechanisms, such as a whistleblower system, to collect information on bid rigging from companies and their employees. Consider launching requests in the media to invite companies to provide the authorities with information on potential collusion.
- Whistleblower Protection: Establish internal procedures that encourage or require officials to report suspicious statements or behaviour to the competition authorities in addition to the procurement agency's internal audit group and comptroller, and consider setting up incentives to encourage officials to do so.

- Establish cooperative relationships with the competition authority.

(v) Define Requirements of Procurement clearly (so as not to leave any room for the suppliers to define key terms to its own advantage).

(vi) Criteria for evaluating tender should be such that facilitates participation by maximum number of bidders in the bidding process, especially the small and medium level bidders.

STEPS PROCUREMENT OFFICIALS SHOULD TAKE IN CASE OF SUSPECTED BID-RIGGING

- Have a working understanding of the Competition Act, 2002 and other related laws/ rules dealing with public procurement.
- Do not discuss one's concerns with suspected participants.
- Keep all documents, including bid documents, correspondence, envelopes, etc.
- Keep a detailed record of all suspicious behavior/events/statements.
- After consulting with your internal legal staff, consider whether it is appropriate to proceed with the tender offer.
- File a formal reference with the Competition Commission of India.

OTHER FACTORS CAUSING COMPETITION DISTORTIONS

There are competition distortions caused by government policies and laws which require periodical reviews. Some such factors causing distortions to fair competition in bid riggings are:

- **Limiting number of suppliers**

  The number of suppliers in the procurement process may be limited when procurement rules lay down technical specification in terms of a proprietary product and do not lay down generic specifications

- **Barriers to entry**

  There is a tendency among public procurers to restrict participation to select big and reputed firms. Often this is done to reduce the cost of evaluating bids or to ensure the stability and quality of supply. However, this tendency could raise high entry barriers for new entrants leading to inefficient outcomes.

- **Competitive Neutrality**

  Competitive neutrality aims to provide a level playing field to public as well as private entities in the markets. The markets tend to be distorted as a result of structural advantages enjoyed by public entities which may cause distortionary effects on competition.

- **Information Asymmetry**

  It has been observed that there is no information available in the public domain suggesting goods or services and their quantum to be procured by the public authorities and sudden decision to procure any good or service strains the existing capacity of supply which creates a price pull factor often leading to inefficient procurement.

Note: To know the process to file information, please refer booklet on "How to File Information"

CONCLUSIONS

Ensuring effective functioning of public procurement in markets is a part of good governance. This necessitates addressing the challenge of promoting effective competition among suppliers and preventing collusion amongst the potential bidders. The competition law explicitly prohibits collusion among the bidders which ultimately affects the public exchequer and causes loss to public money. Thus, fair dealing in public procurement will not only help the procurer to get the best deal but also help the country to use its resources effectively.

Reducing collusion in public procurement requires efficient regulatory mechanism, strict enforcement of competition laws and awareness among public procurement agencies at all levels towards the adverse impacts of collusion. Fight against corruption and competition promotion policies is highly complementary.

To sum up, the policy planners, public procurement officials and CCI should work together as a team to deter bid rigging through robust enforcement, increased vigilance, and better designed public procurement programs.

Note: Procurement officials are also advised to consult CCI's Advocacy Booklet on "Provisions relating to Bid Rigging".

The Commission has published a 'Diagnostic Toolkit for Public Procurement Officers' which serves as a practical guide to public procurement officers to help them review their procurement system and its level of competition-efficiency. The Toolkit provides detailed guidelines and recommended best practices towards designing a competition efficient tendering system. The toolkit can be downloaded from Commission's website, www.cci.gov.in.

Acknowledgement

These contents are mainly drawn from OECD Guidelines for Fighting Bid Rigging in Public Procurement.

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ABUSE OF DOMINANCE

ABUSE OF DOMINANCE

INTRODUCTION

The Competition Act, 2002 (as amended), [the Act], follows the philosophy of modern competition laws and aims at fostering competition and at protecting Indian markets against anti-competitive practices by enterprises. The Act prohibits anti-competitive agreements, abuse of dominant position by enterprises, and regulates combinations (mergers, amalgamations and acquisitions) with a view to ensure that there is no adverse effect on competition in India.

This portion of the reading material addresses the applicability of Section 4 of the Act relating to abuse of dominant position (dominance) by enterprises.

Competition laws all over the world are primarily concerned with the exercise of market power and its abuse. The term "market power" is variously known as "dominant position", "monopoly power" and/or "substantial market power".

WHAT IS DOMINANCE?

The Act defines dominant position (dominance) in terms of a position of strength enjoyed by an enterprise, in the relevant market in India, which enables it to:

- operate independently of the competitive forces prevailing in the relevant market; or
- affect its competitors or consumers or the relevant market in its favour.

It is the ability of the enterprise to behave/act independently of the market forces that determines its dominant position. In a perfectly competitive market, no enterprise has control over the market, especially in the determination of the price of the product. However, perfect market conditions are more of an economic "ideal" than reality. Keeping this in view, the Act specifies a number of factors that should be taken into account while determining whether an enterprise is dominant or not.

RELEVANT MARKET[1]

Dominance has significance for competition only when the relevant market has been defined. The Act defines both the "Relevant Product Market" and the "Relevant Geographic Market under section 2(t) and 2(s) of the Act, respectively". The relevant market means "the market that may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets". The Act lays down several factors of which any one or all may be taken into account by the Commission while defining the relevant market.

1. sub-section (r) of Section 2

Relevant Product Market[2] is defined in terms of substitutability. It is the smallest set of products (both goods and services) which are substitutable among themselves, given a small but significant non-transitory increase in price (SSNIP). The market for cars, for example, may consist of separate 'relevant product markets' for small cars, midsize cars, luxury cars etc. as these are not substitutable for each other when there is a small change in price.

Relevant geographic market[3] is defined in terms of "the area in which the conditions of competition for supply of goods or provision of services or demand for services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas".

FACTORS TO DETERMINE DOMINANT POSITION[4]

Dominance been traditionally defined in terms of market share of the enterprise or group of enterprises concerned. However, a number of other factors play a role in determining the influence of an enterprise or a group of enterprises in the market. These include:

- market share;
- the size and resources of the enterprise;
- size and importance of competitors;
- economic power of the enterprise;
- vertical integration;
- dependence of consumers on the enterprise;
- extent of entry and exit barriers in the market; countervailing buying power;
- market structure and size of the market;
- source of dominant position viz. whether obtained due to statute etc.;
- social costs and obligations and contribution of enterprise enjoying dominant position to the economic development of India.

The Commission is also authorized to take into account any other factor which it may consider relevant for the determination of dominance.

ABUSE OF DOMINANCE

Dominance is not considered bad *per se* but its abuse is. Abuse is stated to occur when an enterprise or a group of enterprises uses its dominant position in the relevant market in an exclusionary or/and an exploitative manner.

2. sub-section (t) of Section 2
3. sub-section (s) of Section 2
4. sub-section (4) of Section 19

The Act gives an exhaustive list of practices that shall constitute abuse of dominant position and, therefore, are prohibited. Such practices shall constitute abuse only when adopted by an enterprise enjoying dominant position in the relevant market in India.

Abuse of dominance is judged in terms of the specified types of acts committed by a dominant enterprise alone or in concert. Such acts are prohibited under the law. Any abuse of the type specified in the Act[5] by a dominant firm shall stand prohibited.

Section 4 (2) of the Act specifies the following practices by a dominant enterprises or group of enterprise as abuses:

(i) directly or indirectly imposing unfair or discriminatory condition in purchase or sale of goods or service;
(ii) directly or indirectly imposing an unfair or discriminatory price in the purchase or sale (including predatory price) of goods or service;
(iii) limiting or restricting the production of goods or the provision of services or market;
(iv) limiting or restricting technical or scientific development relating to goods or services to the prejudice of consumers;
(v) denying market access in any manner;
(vi) making finalization of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;
(vii) using its dominant position in one relevant market to enter into, or protect, another relevant market.

EXPLOITATIVE AND EXCLUSIONARY BEHAVIOUR

Abuses as specified in the Act fall into two broad categories: exploitative (excessive or discriminatory pricing), and exclusionary (for example, denial of market access).

5. Clauses (a) to (e) of sub-section (2) of Section 4

PREDATORY PRICING

A "predatory price" under the Act means "the sale of goods or the provision of services, at a price which is below the cost, as may be determined by regulations, of production of goods or provision of services, with a view to reduce competition or eliminate the competitors" [Explanation (b) of Section 4] of the Act.

Predation is exclusionary behaviour and can be indulged in only by an enterprise / enterprise having a dominant position in the concerned relevant market.

The major elements involved in the determination of predatory behaviour are:

- Establishment of dominant position of the enterprise in the relevant market
- Pricing below cost for the relevant product in the relevant market by the dominant enterprise ['Cost', for this purpose, has been defined in the Competition Commission of India (Determination of Cost of Production) Regulations, 2009 as notified by the Commission.]
- Intention to reduce competition or eliminate competitors. This is traditionally known as the *predatory intent test*

ESSENTIAL FACILITIES DOCTRINE

Barrier to entry faced by new enterprises attempting to enter into the relevant market is a major restraint on the dynamics of competition. When a dominant enterprise in the relevant market controls some of the infrastructure or a facility that is necessary for accessing the market and which is neither easily reproducible at a reasonable cost in the short term nor interchangeable with other products/services, the enterprise may not without sound justification refuse to share it with its competitors at reasonable cost. This has come to beknown as the essential facility doctrine (EFD). It has been recognized that any application of the EFD should satisfy the following:

- The facility must be controlled by a dominant firm in the relevant market
- Competing enterprises/persons should lack a realistic ability to reproduce the facility
- Access to the facility is necessary in order to compete in the relevant market; and
- It must be feasible to provide access to the facility.

Subject to such conditions being satisfied and consistent with established competition law principles applicable to the specific case, the Commission may under the provisions of Section 4 (2) (c) of the Act (relating to denial of market access by a dominant enterprise) pass a remedial order under which the dominant enterprise must share the essential facility with its competitors in the downstream markets.

IPRs AND ABUSE OF DOMINANCE

While reasonable use of Intellectual Property Rights (IPRs) stand exempted from the rigors of Section 3 which relates to anti-competitive agreements, no such derogation is available in case of abuse of IPRs by right holders, in respect of specified abusive acts.

Intellectual Property Rights (IPRs) and competition laws are generally considered as contradictory to each other as IPRs grant exclusivity which some may believe hinders competition. But it is an established principle that the two are complementary and focus on same goal, i.e., innovations and general welfare. Therefore, IPRs are covered under competition laws but given special treatment in assessment.

Section 3 which relates to agreements explicitly exempts reasonable conditions imposed for protecting IPRs and Section 4 relating to abuse of dominance on account of holding of IPRs advises considering all the factors under the frame work of competition harm before arriving at any conclusion.

INQUIRY INTO ABUSE OF DOMINANCE

In exercise of powers vested under Section 19 of the Act, the Commission may inquire into any alleged contravention of section 4 (1) of the Act that prescribes abuse of dominance. Section 19 (4) gives a detailed list of factors that the Commission shall consider while inquiring into any allegation of abuse of dominance. Some of these factors are market share of the enterprise, size and resources of the enterprise, size and importance of the competitors, dependence of consumers, entry barriers, and social obligations and costs in the relevant geographic and product market.

The Commission, on being satisfied that there exists a *prima facie* case of abuse of dominance, shall direct the Director General to cause an investigation and furnish a report. The Commission has the powers equivalent to those vested in a Civil Court under the Code of Civil Procedure in respect of matters like summoning or enforcing attendance of any person and examining him on oath, requiring discovery and production of documents and receiving evidence on affidavit. The Director General, for the purpose of carrying out investigation, is vested with powers of a civil court besides having the powers to conduct 'search and seizure'.

***Note**: For the details of the procedures related to inquiry and investigations, please Refer to Competition Commission of India (General) Regulation, 2009 dated May 21, 2009 (also available on the CCI website www.cci.gov.in)*

POWERS OF THE COMMISSION

After inquiry, the Commission may pass *inter-alia* any or all of the following orders under Section 27 of the Act:

1) direct the parties to discontinue and not to re-enter in to such agreement;

2) direct the enterprise concerned to modify the agreement.

3) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any; and

> Dominance is not considered bad *per se* but its abuse is. Abuse is stated to occur when an enterprise or a group of enterprises uses its dominant position in the relevant market in an exclusionary or/ and an exploitative manner.

4) pass such other orders or issue such directions as it may deem fit.

5) The Commission can impose such penalty as it may deem fit. The penalty can be up to 10% of the average turnover for the last three preceding financial years upon each of such persons or enterprises which are parties to bid-rigging or collusive bidding.

6) Section 28 empowers the Commission to direct the division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position in the future.

INTERIM ORDER

Under Section 33 of the Act, during the pendency of an inquiry into abuse of dominant position, the Commission may temporarily restrain any party from continuance with the alleged offending act until conclusion of the inquiry or until further orders, without giving notice to such party, where it deems it necessary.

***Note**: For the details of the procedures related to interim orders please refer to Regulation No. 2 of 2009 dated May 21, 2009 (also available on the CCI website www.cci.gov.in)*

APPEALS

The National Company Law Tribunal (NCLAT) is constituted under Section 410 of the Companies Act, 2013 to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under specified sections of the Act.

An appeal has to be filed within 60 days of receipt of the order /direction/ decision of the Commission.

COMPENSATION [Section 53 N]

A person may move an application to NCLAT to adjudicate upon a claim for compensation that may arise from the findings of the Commission.

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COMBINATIONS

COMBINATIONS

INTRODUCTION

The Competition Act, 2002 (as amended), [the Act], follows the philosophy of modern competition laws and aims at fostering competition and protecting Indian markets against anti-competitive practices. The Act prohibits anti-competitive agreements, abuse of dominant position and regulates combinations (mergers and acquisitions) with a view to ensure that there is no adverse effect on competition in India. The provisions of the Act relating to regulation of combinations have been enforced with effect from June 1, 2011[1].

WHAT IS COMBINATION?

Broadly, combination under the Act means acquisition of control, shares, voting rights or assets, by a person over an enterprise and mergers and amalgamations between or amongst enterprises when the combining parties exceed the thresholds set in the Act. The thresholds are specified in the Act in terms of assets or turnover in India and abroad. The words combination and merger are used interchangeably in this booklet.

Entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India is prohibited and such combination shall be void.

THRESHOLDS FOR COMBINATIONS UNDER THE ACT

India is one of the fastest growing economies in the world. The growth process is driven both by organic and inorganic (through the mergers and acquisition route) growth of enterprises. It is neither feasible nor advisable to review all the mergers and acquisitions. It is natural to presume that in the case of small size combinations there is less likelihood of appreciable adverse effect on competition in markets in India. The Act provides for sufficiently high thresholds in terms of assets/turnover, for mandatory notification to the Commission.

The Act also provides for revision of the threshold limits every two years by the government, in consultation with the Commission, through notification, based on the changes in Whole sale Price Index (WPI) or fluctuations in exchange rates of rupee or foreign currencies[2].

The current thresholds for the combined assets/turnover of the parties to a combination are as follows:

1. See, Central Government notification S.O. 479 (E) dated March 4, 2011.
2. Sub-section (3) of Section 20 of the Act.

- **At Enterprise level:** The value of combined assets of the combining enterprises exceeds INR 2,000 crores or the combined turnover of the combining enterprise exceeds INR 6,000 crores, in India. In case either or both of the combining enterprises have assets/turnover outside India also, then the combined assets of the combining enterprises value exceed US$ 1000 million, including at least INR 1000 crores in India, or combined turnover exceeds US$ 3000 million, including at least INR 3000 crores in India.

- **At Group level:** The group to which the combining enterprise whose control, shares, assets or voting rights are being acquired, would belong after the acquisition, or the group to which the combining enterprise remaining after the merger or amalgamation, would belong has either assets of value of more than INR 8000 crores in India or turnover more than INR 24000 crores in India. Where the group has presence in India as well as outside India then the group has assets more than US$ 4 billion including at least INR 1000 crores in India or turnover more than US$ 12 billion including at least INR3000 crores in India.

The term 'Group' has been explained in the Act. Two enterprises belong to a "Group" if one is in position to exercise at least 26 percent voting rights or appoint at least 50 percent of the directors or controls the management or affairs in the other[3]. Vide notification S.O. 673 (E) dated 4th March, 2016, the Government has exempted "Group" exercising less than fifty per cent of voting rights in other enterprise from the provisions of section 5 of the Act for a period of five years from the date of publication of the notification.

The above thresholds are presented in the form of a table below:

	APPLICABLE TO	**ASSETS**		**TURNOVER**	
In India	Individual Parties	₹2,000cr.		₹ 6,000cr.	
	Group	₹8,000cr.		₹24,000cr.	
In India and outside		**ASSETS**		**TURNOVER**	
		Total	Minimum Indian Component out of Total	Total	Minimum Indian Component out of Total
	Individual parties	US$ 1 bn.	₹ 1000cr	US$ 3 bn.	₹ 3,000 cr
	Group	US$ 4 bn.	₹ 1000cr.	US$ 12 bn.	₹ 3,000 cr.

The turnover shall be determined by taking into account the values of sales of goods or services. The value of assets shall be determined by taking the book value of the assets as shown in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of proposed merger falls, as reduced by any depreciation. The value of assets shall include the brand value, value of good will, or Intellectual Property Rights etc. referred to in explanation(c) to section 5 of the Act.

Further, the Central Government vide notification No. S.O. 988(E) dated March 27, 2017 has specified that where a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise, the value of assets of the said portion or division or business and or attributable to it, shall be the relevant assets and turnover to be taken into account for the purpose of calculating the thresholds under Section 5 of the Act.

3. Explanation (b) to Section 5 of the Act.

EXEMPTION NOTIFICATIONS

In exercise of the powers conferred by clause (a) of Section 54 of the Act, the Central Government, in public interest, has exempted from notification:

- Such combinations where the value of assets being acquired, taken control of, merged or amalgamated is not more than rupees three hundred and fifty crores in India or turnover of not more than rupees one thousand crores in India.[4]

- A Banking Company in respect of which the Central Government has issued a notification under Section 45 of the Banking Regulation Act, 1949, from the application of the provisions of Sections 5 and 6 of the Act for a period of five years.

- Regional Rural Banks in respect of which the Central Government has issued a notification under sub-section (1) of section 23A of the Regional Rural Banks Act, 1976 (21 of 1976), from the application of provisions of sections 5 and 6 of the Competition Act, 2002 for a period of five years.[5]

- Central Public Sector Enterprises (CPSEs) operating in the Oil and Gas Sectors under the Petroleum Act, 1934 (30 of 1934) and the rules made thereunder or under the Oilfields (Regulation and Development) Act, 1948 (53 of 1948) and the rules made thereunder, along with their wholly or partly owned subsidiaries operating in the Oil and Gas Sectors, from the application of the provisions of sections 5 and 6 of the Act, for a period of five years.[6]

- All cases of reconstitution, transfer of the whole or any part thereof and amalgamation of nationalized banks, under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970) and the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 (40 of 1980), from the application of provisions of Sections 5 and 6 of the Competition Act, 2002 for a period of ten years.[7]

4 Ministry of Corporate Affairs notification S.O.988(E) dated March27, 2017
5 Ministry of Corporate Affairs notification S.O.2561 (E) dated August 10, 2017
6 Ministry of Corporate Affairs notification S.O.3714 (E) dated November 22, 2017
7 Ministry of Corporate Affairs notification S.O.2828 (E) dated August 30, 2017

COMBINATIONS IN RESPECT OF WHICH NOTICE NEED NOT NORMALLY BE FILED

The Combination Regulations provide that notice in respect of certain combinations, specified under Schedule I, need not normally be filed with the Commission as those transactions are ordinarily not likely to cause appreciable adverse effect on competition in India.

SCHEDULE I TO THE COMBINATION REGULATIONS

(1) An acquisition of shares or voting rights, referred to in sub-clause(i)or sub clause (ii) of clause (a) of section 5 of the Act, solely as an investment or in the ordinary course of business in so far as the total shares or voting rights held by the acquirer directly or indirectly, does not entitle the acquirer to hold twenty five per cent (25%) or more of the total shares or voting rights of the company, of which shares or voting rights are being acquired, directly or indirectly or in accordance with the execution of any document including a shareholders" agreement or articles of association, not leading to acquisition of control of the enterprise whose shares or voting rights are being acquired.

8[Explanation: -The acquisition of less than ten percent of the total shares or voting rights of an enterprise shall be treated as solely as an investment Provided that in relation to the said acquisition, -

(A) the Acquirer has ability to exercise only such rights that are exercisable by the ordinary shareholders of the enterprise whose shares or voting rights are being acquired to the extent of their respective shareholding; and

8 Ins. by the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2016.

(B) the Acquirer is not a member of the board of directors of the enterprise whose shares or voting rights are being acquired and does not have a right or intention to nominate a director on the board of directors of the enterprise whose shares or voting rights are being acquired and does not intend to participate in the affairs or management of the enterprise whose shares or voting rights are being acquired.]

(1A) An acquisition of additional shares or voting rights of an enterprise by the Acquirer or its group,[9][***] where the acquirer or its group, prior to acquisition, already holds twenty-five per cent (25%) or more shares or voting rights of the enterprise, but does not hold fifty percent (50%) or more of the shares or voting rights of the enterprise, either prior to or after such acquisition:

Provided that such acquisition does not result in acquisition of sole or joint control of such enterprise by the acquirer or its group.

(2) An acquisition of shares or voting rights, referred to in sub-clause (i) or subclause (ii) of clause (a) of section 5 of the Act, where the acquirer, prior to acquisition, has fifty percent (50%) or more shares or voting rights in the enterprise whose shares or voting rights are being acquired, except in the cases where the transaction results in transfer from joint control to sole control.

3) An acquisition of assets, referred to in sub-clause (i) or sub-clause (ii) of clause (a) of section 5 of the Act, not directly related to the business activity of the party acquiring the asset or made solely as an investment or in the ordinary course of business, not leading to control of the enterprise whose assets are being acquired except where the assets being acquired represent substantial business operations in a particular location or for a particular product or service of the enterprise, of which assets are being acquired, irrespective of whether such assets are organized as a separate legal entity or not.

4) An amended or renewed tender offer where a notice to the Commission has been filed by the party making the offer, prior to such amendment or renewal of the offer:

Provided that the compliance with regulation 16 relating to intimation of any change is duly made.

5) An acquisition of stock – in -trade, raw materials, stores and spares, trade receivables and other similar current assets in the ordinary course of business.

(6 An acquisition of shares or voting rights pursuant to a bonus issue or stock splits or consolidation of face value of shares or buy back of shares or subscription to rights issue of shares, not leading to acquisition of control.

9 Words "not resulting in gross acquisition of more than five per cent (5%) of the shares or voting rights of such enterprise in a financial year," omitted by the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2016.

(7) Any acquisition of shares or voting rights by a person acting as a securities underwriter or a registered stock broker of a stock exchange on behalf of its clients, in the ordinary course of its business and in the process of underwriting or stock broking, as the case may be.

(8) An acquisition of shares or voting rights or assets, by one person or enterprise, of another person or enterprise within the same group, except in cases where the acquired enterprise is jointly controlled by enterprises that are notpart of the same group.

(9) A merger or amalgamation of two enterprises where one of the enterprises has more than fifty per cent (50%) shares or voting rights of the other enterprise, and/ or merger or amalgamation of enterprises in which more than fifty per cent (50%) shares or voting rights in each of such enterprises are held by enterprise(s) within the same group:
Provided that the transaction does not result in transfer from joint control to sole control.

(10) Acquisition of shares, control, voting rights or assets by a purchaser approved by the Commission pursuant to and in accordance with its order under section 31 of the Act.

COMBINATION NOTICE

The review process for combination under the Act involves mandatory pre-combination notification to the Commission. Any person or enterprise proposing to enter into a combination shall give notice to the Commission in the specified form disclosing the details of the proposed combination within 30 days of the approval of the proposal relating to merger or amalgamation by the board of directors or of the execution of any agreement or other document in relation to the acquisition, as the case may be.[10] In case, a notifiable combination is not notified, the Commission has the power to inquire into it within one year of the taking into effect of the combination.

Any combination for which notice has been filed with the Commission would not take effect for a period of 210 days from the date of notification or till the Commission passes an order, whichever is earlier. If the Commission does not pass an order during the said period of 210 days, the combination shall be deemed to have been approved.

10 In terms of Notification regarding exemption from notifying a combination with in thirty days dated June 27, 2017, the Central Government has exempted every person or enterprise from giving notice within thirty days mentioned in sub-section (2) of section 6 of the Act subject to the provisions of sub-section (2A) of Section 6 and Section 43 A of the Act for a period of five years from the date of notification.

ACQUISITION OR FINANCING FACILITY BY PFIs, VCFs ETC.

In case of share subscription or financing facility or any acquisition, *inter alia*, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement, details of such acquisition are required to be filed with the Commission within seven days from the date of acquisition.

PROCEDURE FOR INVESTIGATION OF COMBINATIONS

As per the Combination Regulations, the Commission shall form its *prima facie* opinion as to whether the combination is likely to cause or has caused appreciable adverse effect on competition within the relevant market in India within 30 working days from the receipt of the notice. If the Commission is *prima facie* of the opinion that a combination has caused or is likely to cause appreciable adverse effect on competition in Indian markets, it shall issue a notice to show cause to the parties as to why investigation in respect of such combination should not be conducted. On receipt of the response, if Commission is of the *prima facie* opinion that the combination has or is likely to have appreciable adverse effect on competition, the Commission shall deal with the notice as per the provisions of the Act.

EVALUATION OF 'APPRECIABLE ADVERSE EFFECT ON COMPETITION'

The Act envisages appreciable adverse effect on competition in the relevant market in India as the criterion for regulation of combinations. In order to evaluate appreciable adverse effect on competition, the Act empowers the Commission to evaluate the effect of Combination on the basis of factors mentioned in subsection (4) of Section20.

Factors to be considered by the Commission while evaluating appreciable adverse effect of Combinations on competition in the relevant market:

(a) actual and potential level of competition through imports in the market;

(b) extent of barriers to entry into the market;

(c) level of concentration in the market;

(d) degree of countervailing power in the market;

(e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;

(f) extent to effective competition likely to sustain in a market;

(g) extenttowhichsubstitutesareavailableorarelikelytobeavailableinthemarket;

(h) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;

(i) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;

(j) nature and extent of vertical integration in the market;

(k) possibility of a failing business;

(l) nature and extent of innovation;

(m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;

(n) whether the benefits of the combination outweigh the adverse impact of the combination, if any.

GREEN CHANNEL

As part of its ongoing and regular efforts to make combination approval faster and improve upon ease of doing business, the CCI has introduced an automatic system of approval for combinations under Green Channel. For the category of combination mentioned in Schedule III of Combination Regulations, the parties at their option, may choose this channel. Under this process, upon filing of a notice, and acknowledgement thereof, the proposed combination shall be deemed to have been approved by the Commission. Parties to the combination are encouraged to avail the facility of pre-filing consultation to determine whether their combination is eligible for Green Channel.

APPEALS

Under the relevant provisions of the Act, an appeal to National Company Law Tribunal (NCLAT) may be filed within 60 days of receipt of the order /direction/decision of the Commission.

The Commission also has the power to impose a fine which may extend to one percent of the total turnover or the assets of the combination, whichever is higher, for failure to give notice to the Commission of the combination.

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LENIENCY

LENIENCY

INTRODUCTION

This booklet contains information about the "Leniency Programme" for detecting Cartel[1] cases. This programme is designed to support effective enforcement of the Competition Act, 2002 (as amended), [the Act]. A transparent and predictable leniency programme has been proven to be an effective tool to detect, investigate and combat cartel cases worldwide.

The Competition Commission of India (CCI)

Competition Commission of India has been set up under an Act of Parliament with the mandate:

- to prevent practices having adverse effect on competition,
- to promote and sustain competition in market,
- 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 Competition Act, 2002

With a view to ensure that there is no adverse effect on competition in India, the Act prohibits:

- any agreement which causes, or is likely to cause, appreciable adverse effect on competition in markets in India,
- abuse of dominant position by enterprises

The Act also regulates entering into combinations (consisting of mergers, amalgamations and acquisitions).

Cartels: Penalty Provisions under the Act

Cartel formation is a pernicious offence under the Act. The Commission is empowered to inquire into any cartel, and to impose upon each person or enterprise included in that cartel, a penalty of up to 3 times of its profit for each year of the continuance of such agreement or10% of its turnover for each year of continuance of such agreement, whichever is higher.

In addition, the Commission has the power to pass inter-alia any or all of the following orders (Section27):

- direct the parties to a cartel agreement to discontinue and not to re-enter such agreement;
- direct the enterprises concerned to modify the agreement;

1 For details on Cartels, please see Appendix I.

- direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any; and
- pass such other order or issue such directions as it may deem fit.

LENIENCY PROGRAMME

What is Leniency Programme?

- Leniency programme is a type of whistle-blower protection, i.e., an official system of offering lenient treatment to a cartel member who reports to the Commission about the cartel.
- Competition authorities have framed various leniency programmes to encourage and incentivize various actors connected with the commission of such competition infringements to come forward and disclose such anticompetitive agreements andassistthecompetitionauthoritiesinlieuofimmunityorlenienttreatment.
- Leniency programme is a protection to those who come forward and submit information honestly, who would otherwise have to face stringent action by the Commission if existence of a cartel is detected by the Commission on its own.

Rationale of Leniency Programme

- It is an incentive to those cartel members who choose to share information and cooperate with the Commission.

Leniency Provisions under the Act

Section 46 of the Act provides for such leniency provisions which states:

"The Commission may, if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated Section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit, than leviable under this Act or the rules or the regulations:

Provided that lesser penalty shall not be imposed by the Commission in cases where the report of investigation directed under Section 26 has been received before making of such disclosure.

Provided further that lesser penalty shall be imposed by the Commission only in respect of a producer, seller, distributor, trader or service provider included in the cartel, who has made the full, true and vital disclosures under this section.

Provided also that lesser penalty shall not be imposed by the Commission if the person making the disclosure does not continue to cooperate with the Commission till the completion of the proceedings before the Commission.

Provided also that the Commission may, if it is satisfied that such producer, seller, distributor, trader or service provider included in the cartel had in the course of proceedings—

(a) not complied with the condition on which the lesser penalty was imposed by the Commission; or

(b) had given false evidence; or

(c) the disclosure made is not vital,

and thereupon such producer, seller, distributor, trader or service provider may be tried for the offence with respect to which the lesser penalty was imposed and shall also be liable to the imposition of penalty to which such person has been liable, had lesser penalty not been imposed."

> Competition authorities have framed various leniency programmes to encourage and incentivize various actors connected with the commission of such competition infringements to come forward and disclose such anti-competitive agreements and assist the competition authorities in lieu of immunity or lenient treatment.

Leniency Programme – For Whom?

Leniency programme is available for those enterprises / individuals who disclose to the Commission their role in a cartel and cooperate with subsequent investigations, are rewarded by a reduction of or complete amnesty from penalty. Leniency programs are universally accepted as being the best way to combat cartels.

To effectuate the leniency programme, the Commission has made Competition Commission of India (Lesser Penalty) Regulations, 2009. The salient features of the same are given in the succeeding Chapter.

THE REGULATION-COMPETITION COMMISSION OF INDIA (LESSER PENALTY) REGULATIONS, 2009[2]

To carry out the leniency provisions in the Act, Section 64 empowers the Commission to make regulations for matters in respect of which provisions is to be made by regulations. In pursuance of such powers, the Competition Commission of India (Lesser Penalty) Regulations, 2009 were brought out in August 2009. These Regulations provide the framework in which the Commission can give lower punishments than statutorily provided in the case of cartel membership.

There are three main components of a leniency programme. These are- a set of conditions to be satisfied for getting benefits under the leniency programme, the procedure for grant of lesser penalty, and the quantum of penalties that are waived when lenient treatment is meted out to the cartel member who cooperate with the Commission by submitting information on the cartel. Each of these components is described below.

Conditions to avail Benefits of Leniency Provisions

The applicant must:

- provide the information before the receipt of the report of investigation directed under Section 26 of the Act
- cease to further participate in the cartel from the time of its disclosure unless otherwise directed by the Commission

2 For details, please see Appendix II.

- provide vital disclosure in respect of violation under sub-section (3) of Section 3 of the Act
- provide all relevant information, documents and evidence as may be required by the Commission
- co-operate genuinely, fully, continuously and expeditiously throughout the investigation and other proceedings before the Commission
- not conceal, destroy, manipulate or remove the relevant documents in any manner, which may contribute to the establishment of a cartel.
- the reduction in monetary penalty will depend upon following situations-
  - the stage at which the applicant comes forward with the disclosure
  - the evidence already in possession of the Commission
  - the quality of the information provided by the applicant
  - the entire facts and circumstances of the case

Procedure for Grant of Lesser Penalty

- The applicant can make application either orally, or through e-mail or fax to the designated authority
- The Commission shall mark the priority status of the applicant and the designated authority shall convey the same to the applicant but mere acknowledgement shall not entitle the applicant for grant of lesser penalty
- The date and time of receipt of the application by the Commission shall be the date and time as recorded by the designated authority
- Unless the evidence submitted by the first applicant has been evaluated, the next applicant shall not be considered by the Commission.
- Lack of continuous cooperation entitles Commission to reject the application after providing due opportunity of hearing to that applicant.
- After rejection of the priority status of first applicant, the subsequent applicants shall move up in order of priority for grant of priority status by the Commission.

Quantum of Immunity under Leniency Provisions

The quantum of immunity available under leniency provisions in comparison to penalty prescribed under clause(b) of the Section 27 of the Act is as under-

Benefit of reduction in penalty upto or equal to 100% is available to the applicant if he is the first to make a vital disclosure enabling the Commission to form a *prima facie* opinion regarding the existence of a cartel on the basis of evidence submitted. Further,

- Benefit of reduction in penalty upto or equal to 100% is available even if the matter is under investigation but without disclosures made by the applicant; the Commission or the Director General did not have sufficient evidence to establish such a contravention

- Benefit of reduction in penalty upto or equal to 100% will only be considered, if at the time of the application, no other applicant has been granted such benefit by the Commission.
- The second and third or subsequent applicants in the priority status may also be granted benefit of reduction in penalty to the tune of 50% and 30%, respectively, of the full leviable penalty respectively on making a disclosure by submitting evidence, which provide a fillip to the already available evidence with the Commission or Director General for establishing the existence of the cartel.

CONFIDENTIALITY

Under the Competition Commission of India (Lesser Penalty) Regulations, 2009, it has been specifically mentioned that the identity of the applicant as well as information, documents and evidence furnished under these Regulations, shall be treated as confidential and shall not be disclosed, save under the three situations stated below-

- when the disclosure is required by law; or
- when the applicant has agreed to such disclosure in writing; or
- when there has been a public disclosure by the applicant.

Further, if required, such information, documents and evidence may also be disclosed by the Director General to the other parties during investigation, with prior approval of the Commission.

Non-confidential version of such information, documents and evidence would be shown to the other parties, only after investigation report of the Director General has been forwarded to the parties.

Such an arrangement of maintaining confidentiality would encourage submission of vital information with the Commission.

CONCLUSION

A transparent and predictable Leniency Program of the Commission supports the effective and efficient enforcement of the Act. Individuals and business organizations are more likely to come forward, cooperate, and plead guilty (rather than litigate) when they are aware of the relevant leniency considerations and the benefit that they can derive by a vailing of the leniency programme of the Commission.

Benefits of an effective Leniency Program are as follows:

- There is high risk of detection of cartels and the sanctions imposed on cartel participants on detection is quite greater than the benefits that can be availed by cartelization.
- There is great deal of transparency and certainty in leniency programme of the Commission. The applicant coming forward with vital disclosures and following the pre-determined conditions can assuredly avail leniency provisions under the Act.

- The evidence that are collected through cooperation lead to greater clarity in fixing responsibility
- The fear of adverse publicity and stigma of violator of laws of the land and the incentives provided under the leniency programme must induce violating enterprises to apply for leniency.

In nutshell, availing of leniency provisions is a win-win situation for the Commission as well as for the cartel member who agrees to share information with the Commission.

HOW TO CONTACT THE COMMISSION

Anyone wishing to obtain additional information about the Act, the Competition Commission of India (Lesser Penalty) Regulations, 2009, or to file information under any of these should contact the Commission at the following-

<table>
<tr><td colspan="2">Website: www.cci.gov.in
9th Floor, Office Block - 1
Kidwai Nagar (East)
New Delhi: 110023</td></tr>
<tr><td>For Enquiry relating to Competition Act, and Regulations,2002</td><td>Designated authority, under regulation 2(f) and 5 of the Competition Commission of India (Lesser Penalty) Regulation, 2009</td></tr>
<tr><td>Secretary</td><td>Secretary</td></tr>
<tr><td>Competition Commission of India
Tel.: +91–11–20815009
Fax: +91–11–20815019
Email: secy@cci.gov.in</td><td>Competition Commission of India
Tel.: +91–11–20815009
Fax: +91–11–20815019
Email: secy@cci.gov.in</td></tr>
</table>

Cartel[3]

According to the Act

Cartel is defined in Section 2, sub-section (c) of the Act as:

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

What is a "Cartel"?

- Cartels are agreements between enterprises (including a person, a government department and association of persons / enterprises) not to compete on price, product (including goods and services) or customers.
- The objective of a cartel is to raise price above competitive levels, resulting in injury to consumers and to the economy. For the consumers, cartelization results in higher prices, poor quality and less or no choice for goods or/and services.
- A cartel is said to exist when two or more enterprises enter into an explicit or implicit agreement to fix prices, to limit production and supply, to allocate market share or sales quotas, or to engage in collusive bidding or bid-rigging in one or more markets. An important dimension in the definition of a cartel is that it requires an agreement between competing enterprises not to compete or to restrict competition.
- Cartels are universally established as being the most pernicious form of agreement for competition regulators. It is the most egregious violations of competition law. One of the most important goals of Competition Policy is to root out cartels. To deter the conspirators of cartels, stringent provisions for imposition of strong sanctions including criminal prosecution have been incorporated in various jurisdiction world-over. In India, participating in a cartel is a civil offence.

3 For more information on Cartels, please refer to the link given below:
»Log on to www.cci.gov.in
»Click on "Advocacy Booklets"
»Click on "Provisions Relating to Cartels"

[PUBLISHED IN THE GAZETTE OF INDIA, EXTRAORDINARY, PART III, SECTION 4,

THE COMPETITION COMMISSION OF INDIA
NOTIFICATION

The Competition Commission of India (Lesser Penalty) Regulations, 2009

(No.4 of 2009)

New Delhi, the 13th day of August, 2009

No. L-3(4)/Reg-L.P./2009-10/CCI. – In exercise of the powers conferred by section 64, read with section 46 and clause (b) of section 27 of the Competition Act, 2002 (12 of 2003), the Competition Commission of India hereby makes the following regulations, namely: -

1. Short title and commencement. –

(1) These regulations may be called the Competition Commission of India (Lesser Penalty) Regulations, 2009.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. Definitions. –

(1) In these regulations, unless the context otherwise requires,–

(a) "Act" means the Competition Act, 2002 (12 of 2003);

(b) ["applicant means an enterprise, as defined in clause(h) of section 2 of the Act, who is or was a member of a cartel and includes an individual who has been involved in the cartel on behalf of an enterprise, and submits an application for lesser penalty to the Commission];[1]

(c) "cartel" means a cartel as defined in clause (c) of section 2 of the Act;

(d) "Commission" means the Competition Commission of India established under sub-section (1) of section 7 of the Act;

(e) "company" means a company as defined in clause (a) of *Explanation* to sub-section (2) of section 48 of the Act;

(f) "designated authority" means an officer of the Commission who is authorized by the Chairperson to function as such, for the purpose of these regulations;

(g) "Director General" means the Director General as defined in clause (g) of section 2 of the Act;

[1]Subs. by the Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017 for: ***"Applicant"*** means an enterprise, as defined in clause (h) of section 2 of the Act, who is or was a member of a cartel and submits an application for lesser penalty to the Commission ‖.

[(ga) "Party" includes an enterprise or person defined in clauses (h) and (l) of section 2 of the Act, respectively, against whom inquiry or proceeding is instituted and shall include the Central Government, any State Government or any statutory authority and shall also include any person permitted to join the proceedings][2];

(h) "priority status" means the position of the applicant marked for giving the benefit of lesser penalty in the queue of the applicants;

(i) "vital disclosure" means full and true disclosure of information or evidence by the applicant to the Commission, which is sufficient to enable the Commission to form a *prima-facie* opinion about the existence of a cartel or which helps to establish the contravention of the provisions of section 3 of the Act.

(2) Words and expressions used but not defined in these regulations shall have the same meanings respectively as assigned to them in the Act, rules, regulations or in [The Companies Act, 2013 (18 of 2013)][3], as the case may be.

3. Conditions for lesser penalty

(1) An applicant, seeking the benefit of lesser penalty under section 46 of the Act, shall-

(a) cease to have further participation in the cartel from the time of its disclosure unless otherwise directed by the Commission;
(b) provide vital disclosure in respect of [contravention of the provisions][4] of section3 of the Act;
(c) provide all relevant information, documents and evidence as may be required by the Commission;
(d) co-operate genuinely, fully, continuously and expeditiously throughout the investigation and other proceedings before the Commission; and
(e) not conceal, destroy, manipulate or remove the relevant documents in any manner that may contribute to the establishment of a cartel.

[(1A) Where the applicant is an enterprise, it shall also provide the names of the individuals who have been involved in the cartel on its behalf and for whom lesser penalty is sought by such an enterprise.][5]

(2) Where an applicant fails to comply with the conditions mentioned in sub- regulation (1), the Commission shall be free to use the information and evidence submitted by the applicant, in accordance with the provisions of section 46 of the Act.

(3) Without prejudice to sub-regulations (1) and (2), the Commission may subject the applicant to further restrictions or conditions, as it may deem fit, after considering the facts and circumstances of the case.

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[2] Inserted by the Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017
[3]Subs. By the Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017 for the words, figures and brackets, "the Companies Act,1956 (1of 1956)"
[4] Subs. By the Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017 for the words, figures and brackets "violation under sub-section (3)"
[5] Inserted by the Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017.

(4) The discretion of the Commission, in regard to reduction in monetary penalty under these regulations, shall be exercised having due regard to–

(a) the stage at which the applicant comes forward with the disclosure;

(b) the evidence already in possession of the Commission;

(c) the quality of the information provided by the applicant; and

(d) the entire facts and circumstances of the case.

4. Grant of lesser penalty. —

Subject to the conditions laid down in regulation 3, the applicant and individual mentioned in sub-regulation (1A) of regulation 3 shall be granted benefit of lesser penalty than leviable under clause (b) of section 27 and section 48 of the Act, as the Commission may decide, in the following manner, namely; —

(a) The applicant and individual mentioned in sub-regulation (1A) of the regulation 3 may be granted benefit of reduction in penalty upto or equal to one hundred percent, if the applicant is the first to make a vital disclosure by submitting evidence of a cartel, enabling the Commission to form a prima-facie opinion regarding the existence of a cartel which is alleged to have contravened the provisions of section 3 of the Act and the Commission did not, at the time of application, have sufficient evidence to form such an opinion:

Provided that the Commission may also grant benefit of reduction in penalty up to or equal to one hundred per cent, to the applicant and individual mentioned in sub-regulation (1A) of regulation 3, if the applicant is the first to make a vital disclosure by submitting such evidence which establishes the contravention of the provisions of section 3 of the Act, by a cartel, in a matter under investigation and the Commission, or the Director General did not, at the time of application, have sufficient evidence to establish such a contravention.

(b) The applicants who are subsequent to the first applicant may also be granted benefit of reduction in penalty on making a disclosure by submitting evidence, which in the opinion of the Commission, may provide significant added value to the evidence already in possession of the Commission or the Director General, as the case may be, to establish the existence of the cartel, which is alleged to have contravened the provisions of section 3 of the Act.

***Explanation*— For the purposes of these regulations, "added value" means the extent to which the evidence provided enhances the ability of the Commission or the Director General, as the case may be, to establish the existence of a cartel, which is alleged to have contravened the provisions of section 3 of the Act.

(c) The reduction in monetary penalty referred to in clause (b) shall be in the following order—

(i) The applicant and individual mentioned in sub-regulation (1A) of regulation 3 marked as second in the priority status may be granted reduction of monetary penalty up to or equal to fifty percent of the full

(ii) penalty leviable; and

(iii) the applicant and individual mentioned in sub-regulation (1A) of regulation 3 marked as third or subsequent in the priority status may be granted reduction of penalty up to or equal to thirty percent of the full penalty leviable.][6]";

5. Procedure for grant of lesser penalty. –

(1) For the purpose of grant of lesser penalty, the applicant or its authorized representative may make an application containing all the material information as specified in the Schedule, or may contact, orally or through e-mail or fax, the designated authority for furnishing the information and evidence relating to the existence of a cartel. The designated authority shall, thereafter, [within five working

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[6] Subs. by the Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017 for:

"4. Grant of lesser penalty.–

Subject to the conditions laid down in regulation 3, the applicant may be granted benefit of lesser penalty than leviable under clause (b) of section 27 of the Act, as the commission may decide, in the following manner, namely;-

(a) The applicant may be granted benefit of reduction in penalty upto or equal to one hundred per cent, if the applicant is the first to make a vital disclosure by submitting evidence of a cartel, enabling the Commission to form a prima-facie opinion regarding the existence of a cartel which is alleged to have violated section 3 of the Act and the Commission did not, at the time of application, have sufficient evidence to form such an opinion:

Provided that the Commission may also grant benefit of reduction in penalty up to or equal to one hundred percent, if the applicant is the first to make a vital disclosure by submitting such evidence which establishes the contravention of section 3 of the Act in a matter under investigation and the Commission, or the Director General did not, at the time of application, have sufficient evidence to establish such a contravention:

Provided further that the application for the benefit of reduction in penalty up to or equal to one hundred per cent will only be considered, if at the time of the application, no other applicant has been granted such benefit by the Commission

(b) The applicants who are subsequent to the first applicant may also be granted benefit of reduction in penalty on making a disclosure by submitting evidence, which in the opinion of the Commission, may provide significant added value to the evidence already in possession of the Commission or the Director General, as the case may be, to establish the existence of the cartel, which is alleged to have violated section 3 of the Act.

Explanation – For the purposes of these regulations, ― added value‖ means the extent to which the evidence provided enhances the ability of the Commission or the Director General, as the case may be, to establish the existence of a cartel, which is alleged to have violated section 3 of the Act.

(c) The reduction in monetary penalty referred to in clause (b) shall be in the following order-

(i) the applicant marked as second in the priority status may be granted reduction of monetary penalty up to or equal to fifty percent of the full penalty leviable; and

(ii) the applicant (s) marked as third in the priority status may be granted reduction of penalty upto or equal to thirty percent of the full penalty leviable".

days][7], put up the matter before the Commission for its consideration.

(2) The Commission shall thereupon mark the priority status of the applicant and the designated authority shall convey the same to the applicant either on telephone, or through e-mail or fax. If the information received under sub-regulation (1) is oral or through e-mail or fax, the Commission shall direct the applicant to submit a written application containing all the material information as specified in the Schedule within a period not exceeding fifteen days.

(3) The date and time of receipt of the application by the Commission shall be the date and time as recorded by the designated authority or as recorded on the server or the facsimile transmission machine of the designated authority.

(4) Where the application, along with the necessary documents, is not received [within a period of fifteen days from the date of communication of direction under sub-regulation (2)][8] or during the further period as may be extended by the Commission, the applicant may for forfeit its claim for priority status and consequently for the benefit of grant of lesser penalty.

(5) The Commission, through its designated authority, shall provide written acknowledgement on the receipt of the application informing the priority status of the application but merely on that basis, it shall not entitle the applicant for grant of lesser penalty.

(6) Unless the evidence submitted by the first applicant has been evaluated, the next applicant shall not be considered by the Commission.

(7) Where the Commission is of the opinion that the applicant or its authorized representative, seeking the benefit of lesser penalty or priority status, has not provided full and true disclosure of the information and evidence as referred and described in the Schedule or as required by the Commission, from time to time, the Commission may take a decision after considering the facts and circumstances of the case for rejecting the application of the applicant, but before doing so the Commission shall provide an opportunity of hearing to such applicant.

(8) Where the benefit of the priority status is not granted to the first applicant, the subsequent applicants shall move up in order of priority for grant of priority status by the Commission and the procedure prescribed above, as in the case of first applicant, shall apply mutatis mutandis.

(9) The decision of the Commission of granting or rejecting the application for lesser penalty shall be communicated to the applicant.

6. Confidentiality. –

Notwithstanding anything contained in the Competition Commission of India (General) Regulations, 2009, the Commission or the Director General shall treat as confidential, —

(a) the identity of the applicant; and

(b) the information, documents and evidence furnished by the applicant under regulation 5:

Provided that the identity of the applicant or such information or documents or evidence may be disclosed if, —

(i) the disclosure is required by Law; or

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7 Subs. by the Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017 for the words, ― within three working days

8 Subs. by the Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017 for the words,–within a period of fifteen days of the first contact

(ii) the applicant has agreed to such disclosure in writing; or

(iii) there has been a public disclosure by the applicant

Provided further that where the Director General deems it necessary to disclose the information, documents and evidence furnished under Regulation 5 to any party for the purposes of investigation and the applicant has not agreed to such disclosure, the Director General may disclose such information, documents and evidence to such party for reasons to be recorded in writing and after taking prior approval of the Commission.][9]

[6A Inspection of documents. -

Notwithstanding the confidentiality under regulation 6, the provisions of sub-regulations (1), (3) and (4) of regulation 37 and the provisions of regulation 50 of the Competition Commission of India (General) Regulations, 2009, to the extent they relate to inspection, shall become applicable to the non-confidential version of the information, documents and evidence furnished by the applicant under regulation 5, after the Commission forwards a copy of the report containing the findings of the Director General to the party concerned:

Provided that such party shall not disclose the information, documents and evidence so obtained other than for the proceedings under the Act.][10]

7. Removal of difficulty. –

In the matter of interpretation or implementation of the provisions of these regulations, if any doubt or difficulty arises, the same shall be placed before the Commission and the decision of the Commission there on, shall be binding.

[9]Subs. By the Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017 for: **"6. Confidentiality."**

Notwithstanding anything contained in the Competition Commission of India (General) Regulations, 2009, the Commission shall treat as confidential the identity of the applicant or the information obtained from it and shall not disclose the identity or the information obtained unless-

(a) the disclosure is required by law; or

(b) the applicant has agreed to such disclosure in writing; or (c) there has been a public disclosurebythe applicant."

[10] Inserted by the Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017

THE SCHEDULE

CONTENTS OF THE APPLICATION

[See sub-regulations (1) and (2) of regulation 5]

The application for lesser penalty shall, inter-*alia*, include the following, namely; -

(a) name and address of the applicant or its authorized representative as well as of all other enterprises in the cartel;

(b) in case the applicant is based outside India, the address of the applicant in India for communication including the telephone numbers and the e- mail address, etc.;

(c) a detailed description of the alleged cartel arrangement, including its aims and objectives and the details of activities and functions carried out for securing such aims and objectives;

(d) the goods or services involved;

(e) the geographic market covered;

(f) the commencement and duration of the cartel;

(g) the estimated volume of business [affected in India by the alleged cartel][11];

(h) the names, positions, office locations and, wherever necessary, home addresses of all individuals who, in the knowledge of the applicant, are or have been associated with the alleged cartel, including those individuals which have been involved on behalf of the applicant;

(i) the details of other Competition Authorities, forums or courts, if any, which have been approached or are intended to be approached in relation to the alleged cartel;

(j) a descriptive list of evidence regarding the nature and content of evidence provided in support of the application for lesser penalty; and

(k) any other material information as may be directed by the Commission.

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[11]Subs. by the Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017 for the words, "affected by the alleged cartel"

FREQUENTLY ASKED QUESTIONS

FREQUENTLY ASKED QUESTIONS

Q.1 WHAT IS COMPETITION IN THE MARKET?

- In common parlance, competition in the market means sellers striving independently for buyers' patronage to maximize profit (or other business objectives).
- A buyer prefers to buy a product at a price that maximizes his benefits whereas the seller prefers to sell the product at a price that maximizes his profit.

Q.2 WHY DO WE NEED COMPETITION IN THE MARKET?

Competition is now almost universally acknowledged as the best means of ensuring that consumers have access to the broadest range of services at the most competitive prices. Producers will have maximum incentive to innovate, reduce their costs and meet consumer demand. Competition thus promotes allocative and productive efficiency. But all this requires healthy market conditions and governments across the globe are increasingly trying to remove market imperfections through appropriate regulations to promote competition.

Q.3 WHAT IS MEANT BY UNFAIR COMPETITION?

Unfair competition means adoption of practices such as collusive price fixing, deliberate reduction in output in order to increase prices, creation of barriers to entry, allocation of markets, tie-in sales, predatory pricing, discriminatory pricing, etc.

Q.4 WHAT CONSTITUTES COMPETITION LAW AND POLICY?

Competition law and policy is defined as those Government measures that affect the behaviour of enterprises and structure of the industry with a view to promote efficiency and maximize welfare.

There are two elements of such Government measures-

- **Competition Policy**: Set of policies, such as liberalized trade policy, relaxed FDI policy, de-regulation, etc., that enhances competition in the markets.
- **Competition Law**: To prevent anti-competitive practices with minimal intervention.

Q.5 WHAT ARE THE OBJECTIVES OF THE COMPETITION ACT, 2002 (AS AMENDED), [THEACT]?

The Preamble states that this is an Act to establish Commission to prevent anti-competitive practices, promote and sustain competition, protect the interests of the consumers and ensure freedom of trade in markets in India.

Q.6 HOW WOULD THE OBJECTIVES OF THE ACT BE ACHIEVED?

The objectives of the Act are sought to be achieved through the instrumentality of the Competition Commission of India (CCI) which has been established by the Central Government with effect from October 14, 2003.

Q.7 WHAT ARE THE FUNCTIONS OF CCI?

CCI shall prohibit anti-competitive agreements and abuse of dominance, and also regulate combinations (mergers or amalgamations or acquisitions) through a process of inquiry/investigation.

It shall give opinion on competition issues on a reference received from an authority established under any law (statutory authority) / Central Government / a State Government.

CCI is also mandated to undertake competition advocacy, create public awareness and impart training on competition issues.

Q.8 WHAT IS AN "AGREEMENT" UNDER THE ACT?

An "agreement" includes any arrangement or understanding or concerted action entered into between parties. It need not be in writing or formal or intended to be enforceable in law.

Q.9 WHAT IS AN ANTI-COMPETITIVE AGREEMENT?

An anti-competitive agreement is an agreement having appreciable adverse effect on competition. Anti-competitive agreements include, but are not limited to-

- Agreement to limit production and/or supply;
- agreement to allocate markets;
- agreement to fix price;
- bid rigging or collusive bidding;
- conditional purchase/sale (tie-in arrangement);
- exclusive supply/distribution arrangement;
- resale price maintenance; and
- refusal to deal.

Q.10 WHAT CONSTITUTES ABUSE OF DOMINANCE?

Dominance refers to a position of strength which enables an enterprise to operate independently of competitive forces or to affect its competitors or consumers or the market in its favour. Abuse of dominant position impedes fair competition between firms, exploits consumers and makes it difficult for the other players to compete with the dominant undertaking on merit. Abuse of dominant position includes:

- imposing unfair conditions or price,
- predatory pricing,
- limiting production/market or technical development,
- creating barriers to entry,
- applying dissimilar conditions to similar transactions,
- denying market access, and

- using dominant position in one market to gain advantages in another market.

Q.11 WHEN THE COMMISSION MAY INITIATE INQUIRY INTO ANTI-COMPETITIVE AGREEMENTS/ABUSE OF DOMINANCE?

- On its own on the basis of information and knowledge in its possession, or
- On receipt of an information, or
- On receipt of a reference from the Central Government or a State Government or a statutory authority.

Q.12 WHO CAN PROVIDE INFORMATION?

Any person, consumer, consumer association or trade association can provide information relating to anti-competitive agreements and abuse of dominant position.

- A person includes an individual, Hindu Undivided Family (HUF), company, firm, Association of Persons (AOP), Body of Individuals (BOI), statutory corporation, cooperative society, artificial juridical person, local authority and body incorporated outside India.
- A consumer is a person who buys products (goods and services) for personal use or for other purposes.
- Intermediate customers can also provide information.

This information is to be fixed as per prescribed format and accompanied with prescribed fees. Please refer answer to Q.30 & Q.31.

Q.13 WHO CAN MAKE A REFERENCE FOR AN INQUIRY?

The Central Government or a State Government or an authority established under any law may make a reference for an inquiry. The reference shall be signed by an officer of level not less than joint secretary to the GOI.

Q.14 CAN THE COMMISSION INITIATE INQUIRY ON ITS OWN?

Yes, the Commission can initiate inquiry on its own on the basis of information or knowledge in its possession.

Q.15 HOW WILL THE COMMISSION PROCEED WITH AN INQUIRY?

On its own, or on receipt of information or reference, if the Commission is of the opinion that there is a prima facie case, it shall direct the Director General, appointed under the Act, to investigate the matter and report his findings to the Commission.

Q.16 WHAT WILL THE COMMISSION DO AFTER INVESTIGATION?

After receipt of the investigation report from the Director General

- The Commission may forward it to the concerned parties.
- If the investigation is on a reference from a statutory authority, the forwarding of report to the concerned authority is mandatory.

- If the report of the DG does not find any contravention of the Act, the Commission shall seek objections from the concerned parties.
- After considering the objections received, if any, the Commission may accept the report of the DG, or require further investigation to be made by the DG or make inquiries itself.
- In conclusion of the above broad processes, the Commission shall determine whether it is a case of anti-competitive agreement or abuse of dominant position or both and after hearing the concerned parties and pass appropriate orders.

Q.17 WHAT ORDERS THE COMMISSION CAN PASS IN CASE OF ANTI-COMPETITIVE AGREEMENTS AND ABUSE OF DOMINANT POSITION?

- During the course of inquiry, the Commission can pass interim order restraining a party from continuing with anti-competitive agreement or abuse of dominant position.
- The Commission can impose a penalty of not more than 10% of the average turnover for the last 3 preceding financial years of the enterprise. In case of a cartel, the Commission can impose on each member of the cartel, a penalty of upto 3 times of its profit for each year of the continuance of such agreement or up to 10% of its turnover for each year of continuance of such agreement, whichever is higher.
- After the inquiry, the Commission may direct a delinquent enterprise to discontinue and not to re-enter anti-competitive agreement or abuse its dominant position. The Commission may also direct modification of such agreement.
- The Commission may direct division of enterprise in case it enjoys dominant position to ensure that such enterprise does not abuse its dominant position.

Q.18 WHAT IS A COMBINATION UNDER THE ACT?

Vide Notification dated March 4, 2011, the Central Government has appointed 1st day of June 2011 as the date on which provisions relating to Combinations shall come into force.

Broadly, combination includes acquisition of control, shares, voting rights or assets, acquisition of control by a person over an enterprise where such person has control over another enterprise engaged in competing businesses, and mergers and amalgamations between or amongst enterprises where these exceed the thresholds specified in the Act in terms of assets or turnover. If a combination causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India, it is prohibited or combination may be approved with suitable modifications.

Q.19 WHAT ARE THE THRESHOLDS IN CASE OF COMBINATIONS?

The Act provides for sufficiently high thresholds in terms of assets/turnover, for mandatory notification to the Commission. The Act also provides for revision of the threshold limits every two years by the Government, in consultation with the Commission, through notification, based on the changes in Wholesale Price Index (WPI) or fluctuations in exchange rates of rupee or foreign currencies.

The current thresholds for the combined assets/turnover of the combining parties are as follows:

- **At Enterprise level:** The value of the combined assets of the combining enterprises exceeds INR 2,000 crores or the combined turnover of the combining enterprise exceeds INR 6,000 crores, in India. In case either or both of the combining enterprises have assets/turnover outside India also, then the combined assets of the combining enterprises value exceed US$ 1000 million, including at least INR 1000 crores in India, or combined turnover exceeds US$ 3000 million, including at least INR 3000 crores in India.
- **At Group level:** The group to which the enterprise whose control, shares, assets or voting rights are being acquired, would belong after the acquisition or the group to which the enterprise remaining after the merger or amalgamation, would belong has either assets of value of more than INR 8000 crores in India or turnover more than INR 24000 crores in India. Where the group has presence in India as well as outside India then the group has assets more than US$ 4 billion including at least INR 1000 crores in India or turnover more than US$ 12 billion including at least INR 3000 crores in India.

  The term 'Group' has been explained in the Act. Two enterprises belong to a "Group" if one is in position to exercise at least 26 per cent voting rights or appoint at least 50 percent of the directors or controls the management or affairs in the other. Vide notification S.O. 673 (E) dated 4th March, 2016, the Government has exempted "Group" exercising less than fifty per cent of voting rights in other enterprise from the provisions of section 5 of the Act for a period of five years from the date of publication of the notification.

The above thresholds are presented in the form of a table below:

	APPLICABLE TO	**ASSETS**		**TURNOVER**	
In India	Individual Parties	₹ 2,000 cr.		₹ 6,000 cr.	
	Group	₹ 8,000 cr.		₹ 24,000 cr.	
In India and outside		ASSETS		TURNOVER	
		Total	Minimum Indian Component out of Total	Total	Minimum Indian Component out of Total
	Individual Parties Group	US$1bn. US$4bn.	₹ 1000cr. ₹ 1000cr.	US$3bn. US$12bn.	₹ 3,000cr. ₹ 3,000cr.

1 Crore = 10 million

The turnover shall be determined by taking into account the values of sales of goods or services. The value of assets shall be determined by taking the book value of the assets as shown in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of proposed merger falls, as reduced by any depreciation. The value of assets shall include the brand value, value of goodwill, or Intellectual Property Rights etc. referred to in explanation (c) to section 5 of the Act.

The Central Government vide notification No. S.O. 988 (E) dated March 27, 2017 has specified that where a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise, the value of assets of the said portion or division or business and or attributable to it, shall be the relevant assets and turnover to be taken into account for the purpose of calculating the thresholds under Section 5 of the Act.

Q.20 DOES A FIRM PROPOSING TO COMBINE HAVE TO NOTIFY THE COMMISSION?

A firm proposing to enter into a combination, shall notify the Commission in the specified form disclosing the details of the proposed combination within 30 days of the approval of such proposal by the board of directors or execution of any agreement or other document.[1]

Q.21 IS THERE COMPULSORY WAIT PERIOD FOR A COMBINATION TO TAKE EFFECT?

Yes. The proposed combination can not take effect for a period of 210 days from the date it notifies the Commission or till the Commission passes an order, whichever is earlier. If the Commission does not pass an order during the said period of 210 days, the combination shall be deemed to have been approved.

Q.22 WHAT IS THE PROCEDURE FOR INVESTIGATION OF COMBINATIONS?

If the Commission is of the opinion that a combination is likely to cause or has caused adverse effect on competition, it shall issue a show cause notice to the parties as to why investigation in respect of such combination should not be conducted. On receipt of the response, if Commission is of the prima facie opinion that the combination has or is likely to have appreciable adverse effect on competition, it may direct publication of details, inviting objections from the public and hear them, if considered appropriate. It may invite any person, likely to be affected by the combination, to file his objections. The Commission may also inquire whether the disclosure made in the notice is correct and combination is likely to have an adverse effect on competition.

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1. In terms of Notification regarding exemption from notifying a combination within thirty days dated June 29, 2017, the Central Government has exempted every person or enterprise from giving notice within thirty days mentioned in sub-section (2) of section 6 of the Act subject to the provisions of sub-section (2 A) of Section 6 and Section 43 A of the Act for a period of five years from the date of notification.

Q.23 WHAT ORDERS THE COMMISSION CAN PASS IN CASE OF A COMBINATION?

- It shall approve the combination if no appreciable adverse effect on competition isfound.
- It shall disapprove of combination in case of appreciable adverse effect on competition.
- It may propose suitable modifications.

Q.24 IS THERE ANY LENIENCY ACCORDED TO ANYONE WHO PROVIDES INFORMATION ON ANY ANTI-COMPETITIVE AGREEMENT?

Section 46 of the Act empowers the Commission to grant leniency by levying a lesser penalty on a member of the cartel who provides full, true and vital information regarding the cartel. The scheme is designed to induce parties to any anti-competitive behaviour to break ranks to help in detection and investigation of cartels.

Q.25 WHO CAN REPRESENT THE PARTIES BEFORE THE COMMISSION?

A person or an enterprise may either appear in person or through any of its officers or authorize one or more chartered accountants or company secretaries or cost accountants or legal practitioners to represent his or its case before the Commission.

Q.26 WHO CAN MAKE A REFERENCE ON A COMPETITION POLICY?

The Central Government or a State Government, in formulating a policy relating to competition or in any other matter, may seek the opinion of the Commission by making a reference to it.

Q.27 WHO CAN MAKE A REFERENCE ON A COMPETITION ISSUE?

Any statutory authority can make a reference to the Commission for opinion on a competition issue that may arise during the course of a proceeding before it either at the behest of a party to the proceeding or on its own motion.

Q.28 CAN THE COMPETITION COMMISSION MAKE REFERENCE TO A STATUTORY AUTHORITY?

The Commission can make a reference to a statutory authority for opinion on a relevant issue that may arise during the course of proceeding before it, either at the behest of a party to the proceeding or on its own motion.

Q.29 WHAT ARE THE PROVISIONS OF APPEAL AGAINST ANY ORDER OF THE COMPETITION COMMISSION?

The Central Government has notified a National Company Law Tribunal (NCLAT) to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under specified sections of the Act, such as orders relating to notification of combination, inquiry by the Commission and penalties.

An appeal has to be filed within 60 days of receipt of the order/direction/decision of the Commission.

A person aggrieved with the direction, decision or order of the NCLAT can appeal to the Supreme Court of India within 60 days from the date of communication of the direction, decision or order.

Q.30 HOW TO FILE INFORMATION?

- Indicate your complete postal address with PIN code, telephone & fax number and email address. Mention legal name and address(es) of the enterprise(s) alleged to have contravened the provisions of the Act.
- The information should be duly signed by the authorised person in the form of statement of facts and should contain details of the alleged contraventions of the Act. It should be accompanied by supporting documents, affidavits and evidence.
- Any information or reference or responses to the Commission should be sent to the Secretary, in person or by registered post or courier service or facsimile transmission addressed to the Secretary or to the authorized officer.
- The information you file with the Commission should be accompanied by proof of having paid the fee by tendering demand draft or pay order or banker's cheque, payable in favour of Competition Commission of India (Competition Fund), New Delhi or through Electronic Clearance Service (ECS) by direct remittance to the Competition Commission of India (Competition Fund), Account No.1988002100187687 with Punjab National Bank, Bhikaji Cama Place, New Delhi-110066.
- For complete details of the prescribed procedure for filing information, please refer to the booklet titled "How to File Information?" or refer the Competition Commission of India (General) Regulations, 2009 which is also available on the Commission's website.

Q.31 WHAT ARE THE PRESCRIBED FEES?

The prescribed fees are as under:

a) Rs. 5,000 (five thousand) in case of individual or Hindu Undivided Family (HUF),

b) Rs. 10,000 (ten thousand) in case of Non-Government Organisation (NGO), or Consumer Association, or a Co-operative Society, or Trust,

c) Rs. 40,000 (forty thousand) in case of firm (including proprietorship, partnership or Limited Liability Partnership) or company (including one person company) having turnover in the preceding year upto rupees two crores,

d) Rs. 1,00,000 (one lac) in case of firm (including proprietorship, partnership or Limited Liability Partnership) or company (including one person company) having turnover in the preceding year exceeding rupees two crore and upto rupees 50 crores,

e) Rs. 50,000/- (Fifty Thousand) in the cases not covered under clause (a) or (b) or (c) or (d) above.

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Regulations

notified by the Competition Commission of India

No.	Title	Regulation Date
1	The Competition Commission of India (Meeting for Transaction of Business) Amendment Regulations, 2021	05/03/2021
2	CCI (Manner of Recovery of Monetary Penalty) Amendment Regulations, 2021	17/02/2021
3	CCI (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2020	26/11/2020
4	The Competition Commission of India (General) Amendment Regulations, 2020	06/02/2020
5	The Competition Commission of India (General) Amendment Regulations, 2019	20/11/2019
6	The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Second Amendment Regulations, 2019	30/10/2019
7	CCI (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2019	13/08/2019
8	The Competition Commission of India (General) Amendment regulations, 2018	06/12/2018
9	CCI (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2018	09/10/2018
10	The Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017	08/08/2017
11	CCI (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2016	07/01/2016
12	CCI (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2015	01/07/2015
13	CCI (Procedure For Engagement of Experts and Professionals) Amendment Regulations, 2014	21/11/2014
14	CCI (Manner of Recovery of Monetary Penalty) Amendment Regulations, 2014	30/07/2014
15	CCI (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2014	08/03/2014
16	CCI (General) Amendment Regulations, 2013 (No. 2 of 2013)	08/10/2013
17	CCI (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2013 (No. 1 of 2013)	04/04/2013

18	CCI (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2012 (No. 1 of 2012)	23/02/2012
19	CCI (General) Amendment Regulation, 2011 (2 of 2011)	22/11/2011
20	CCI (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (No. 3 of 2011)	11/05/2011
21	CCI (General) Amendment Regulation, 2011 (No. 1 of 2011)	04/04/2011
22	CCI (Manner of Recovery of Monetary Penalty) Regulation, 2011 (No. 1 of 2011)	08/02/2011
23	CCI (General) Amendment Regulations, 2010 (No. 1 of 2010)	20/10/2010
24	CCI (Determination of Cost of Production) Regulations, 2009 (No. 6 of 2009)	20/08/2009
25	CCI (General) Amendment Regulation, 2009 (No. 5 of 2009)	20/08/2009
26	CCI (Lesser Penalty) Regulations, 2009 (No. 4 of 2009)	13/08/2009
27	CCI (General) Regulation, 2009 (No. 2 of 2009)	22/05/2009
28	CCI (Meeting for Transaction of Business) Regulations, 2009 (No. 3 of 2009)	21/05/2009
29	CCI (Procedure for Engagement of Experts and Professionals) Regulations, 2009 (No. 1 of 2009)	15/05/2009