



IOD Masterclass for Directors

Competition Law and Policy and Corporate Governance

by

**Vinod Dhall ©,
Member & acting Chairman**

Competition Commission of India

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Corporate Governance and Competition

- Corporate governance refers to 'internal behaviour' of company – Companies Act, Cl. 49
- Anticompetitive conduct relate to 'external behaviour' in the market – Competition Act
- Both compliances are important
- Competition ensures maximization of consumer welfare and efficiencies in market
- India enacted Competition Act,2002, and established Competition Commission of India in Octo,2003 as enforcement authority

India's new Competition Law

- Competition Act, 2002 enacted in January 2003
- Competition Commission of India established in October 2003
- Has one Member /Acting Chairman, plus small complement of staff
- Provisions regarding Competition Advocacy notified
- Substantive enforcement provisions not yet notified
- Amendments Bill in Parliament

Why Competition ?

- Competition promotes allocative and productive efficiencies, innovation, consumer welfare, and economic and political democracy
- Is an essential condition for national competitiveness
- Empirical studies/evidence from several countries testify to benefits: Australia, US, UK, New Zealand
- *Benefits in India already visible*

Roles of Competition Law and Policy

Competition Policy has two elements:

- Competition Policy – set of policies that enhance competition, give primacy to market forces, allow entry and exit, reduce controls, minimize regulation, etc. *Most countries migrating to competition-oriented, market-based policies*
- Competition Law – Law to prohibit anti-competitive practices and regulate potentially anti-competitive mergers; and prevent unwarranted government/regulatory intervention. *Over 100 countries have adopted modern competition laws*

Role of Competition Commission of India

- Act provides for a Commission to: eliminate anti-competitive practices, promote and sustain competition, protect consumers' interests, ensure freedom of trade.
- Commission's role is normally ex-post, not ex-ante (except in mergers).
- Commission is off-market, not in-market, regulator – unlike other regulators. *Can be likened to a referee.*

What is Prohibited in Competition Act?

- Agreements having *AAEC**, including cartels
- Abuses of dominant position
- Combinations that have, or likely to have, *AAEC** - *provides for Regulation of Combinations*

*AAEC: “appreciable adverse effect on competition”

Anti Competitive Agreements - Examples

- Horizontal Agreements, including cartels, which:
 - Fix (determine) prices
 - Limit or control production, supply, technical development, etc.
 - Allocate areas or customers
 - Bid rigging or collusive bidding

Presumed to have 'AAEC'
- Vertical agreements such as:
 - Tie-in
 - Exclusive supply/distribution
 - Refusal to deal
 - Resale price maintenance

Subject to "rule of reason"

Abuse of Dominance - Examples

- Not dominance, but its abuse is prohibited
- Dominance determined by several factors e.g. market share, share of competitors, entry barriers, size and resource of enterprise / competitors, etc.
- *Examples of abuse*
 - Exclusionary – predatory pricing, denying market access, use dominance in one market to enter other relevant market.
 - Exploitative – discriminatory price/condition

Regulation of Combinations - Examples

- Combination includes merger, amalgamation, acquisition of shares, acquiring of control. Can be horizontal, vertical, conglomerate.
- Liberal Regime:-
 - Very high threshold limit; smaller combinations outside regulation
 - Voluntary, not mandatory, notification
 - Disposal within 90 working days, failing which deemed approval.
 - But suo moto inquiry possible.
- Worldwide, vast majority of mergers not interfered with by competition authorities.

Orders / Remedies in Competition Commission

- Cease and desist order
- Penalty up to 10% of turnover
- In case of cartels, penalty 10% of T.O. or three times of cartelized profit, whichever is higher
- Compensation (damages)
- Agreement having AAEC is void
- Order can modify agreement
- In case of Combination – can be approved, approved with modification, or refused approval.
- In case of dominant enterprise – order can recommend division

Who can approach Commission?

- Any person; includes individual, company, firm, association, statutory corporation, government company, body corporate, legal authority, etc.
- Consumer; means one who buys goods/avails services for consideration
- Association of persons or consumers or trade association
- Reference by central/state government, statutory authority

Competition Act and MRTP Act

Based on liberalized regime

- Competition concepts expressly defined; major role for economic analysis
- Provides for regulation of combinations
- Provides for advocacy
- Power to impose penalty – deterrence factor
- Statutory authority can seek CCI's opinion
- Government Departments within its ambit

Based on command and control regime

- Competition concepts not expressly defined
- No regulation of combinations
- Has no advocacy role
- No power to impose penalty
- No provision for statutory authorities to seek opinion
- Government Departments outside its ambit

Important concepts

- Relevant market-- relevant product market, relevant geographic market
- AAEC- based on appreciable adverse effect on competition
- Dominant position
- Effects doctrine
- Neutrality between private/government
- Economic analysis extensively used

Competition Advocacy and Public Awareness

➤ Competition Advocacy

- With Government/Regulators, to promote pro-competition policies, laws, regulations
- Competition principles interface with policies relating to: disinvestment, concessions, industrial/sector policies, subsidies, international agreements, entry/exit policies, etc.

➤ Public Awareness

- with industry, chambers, trade associations, etc. to strengthen compliance and competition culture

Present activities of Competition Commission

- Professional ground work:
 - Study of economic, legal concepts
 - Market studies/research projects through reputed institutions
 - Draft regulations
 - Competition Forum
 - Close networking with experts

Present activities

Cont...

➤ Competition Advocacy:

- Advocacy with central government ministries; preparation of draft National Competition Policy
- Advocacy with state governments
- Seminars, workshops (So far 28)
- Interaction with chambers, associations, professional institutions
- Advocacy literature
- Advocacy with 140 universities/institutions

Present activities

Cont...

- Administration and capacity building:
 - Training of staff, within and outside country
 - Implementation of capacity building projects, with overseas assistance
 - Library
 - Website
 - Model is lean, professional organisation

How enterprises can achieve compliance?

A guide of OFT, UK states:

- Compliance important because consequences potentially serious: investigation, penalty, damages, voidance of agreements, adverse publicity
- Businesses advised to raise awareness among employees, especially those in sales, marketing, purchasing
- Large businesses advised to have formal compliance programme, with four suggested features:
 - Support of senior management
 - Appropriate policy and procedures; compliance manual incorporating clear policy statement, giving provisions of competition law, examples of prohibited behavior, etc.
 - Training
 - Regular evaluation
- Compliance programme is mitigating factor for OFT; involvement of senior management is aggravating factor

Disclaimer

This presentation provides only an introduction to competition law, and should not be relied on as a substitute for the law itself.

Further, this presentation is subject to any changes which may be made in the competition law at anytime in future.



Competition Commission of India

Website: competitioncommission.gov.in

'B' Wing, HUDCO Vishala,
14, Bhikaji Cama Place,
New Delhi –110066

Ph: 91-11-26177175, 26701605, 26171600

Fax: 91-11-26169278