



Competition Commission of India

Competition Law, Compliance and Corporate Governance

Keynote address by

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Competition : Benefits



Is foundation of efficiently working market system:

- Maximizes consumer welfare, its ultimate raison d'être. Lower prices, wider choice and better services. Redressal against exploitation.
- Accelerates economic growth; higher efficiency / productivity.
- Generates innovation; dynamic efficiency.
- For enterprises : level playing field, redressal against anti-competitive practices.



Empirical evidence of benefits

- Australia:
 - Average household income was up by A\$ 7,000/- per annum on account of the competition policy (APC study quoted by OECD).
 - Gains from reform ~ 5.5% of GDP (Paul Crampton, OECD-IADB).
- EU: White Paper on Growth, Competitiveness and Employment, 1993-Ensuring fair competition in market is essential ingredient for enhancing and maintaining competitiveness in economy.
- New Zealand, UK: Pro-competition policy in New Zealand and UK added around 2.5% to their employment rate over 1978-1998 (OECD).
- USA: Fall in prices following deregulation of certain industries.(OECD) In 1990s, competition contributed most to economic growth; raised productivity by 4% p.a. (Paul London).
- **India: Benefits since reforms - increased consumer welfare, enhanced growth, greater competitiveness.**



Competition and Competitiveness

Competition is one of the key drivers of competitiveness.

International studies reveal :

- Competition is mechanism that helps more productive and efficient companies expand and take market share from less productive ones, which either go out of business or become more efficient. (MGI Study)
- When Government policies limit competition, even unintentionally, economic growth slows and nations remain poor. (MGI Study)
- India at 16th position in market dominance, but ranked 37th in Business Competitiveness Index out of 102 countries surveyed. (WEF)



Competition and Competitiveness

- Close negative relation between market dominance and Business Competitiveness Index; higher the level of market dominance, lesser is competitiveness. (WEF)
- Study of 670 British companies: market power led to reduced productivity. (S. Nickell)
- Unequivocal evidence relating to higher costs/charges in concentrated markets. (Scherer & Roses)
- UNCTAD: In long run full competition essential for competitiveness.

Role of Competition Law and Policy



Both Competition Law and Policy have roles in maintaining free & fair competition:

- Competition Policy – set of market based policies that enhance competition, facilitate entry and exit, reduce administrative controls, minimize regulations, etc.
Increasing number of countries migrating to competition oriented policies.
- Competition Law – a law to prohibit and penalize anti-competitive practices by enterprises and regulate potentially anti-competitive mergers. (Market Failures).
Could also provide for Competition Advocacy.

About 100 countries have adopted Competition Law.



Competition Act, 2002 - Objective

Competition Act, 2002 notified in January, 2003. Stated objective in Preamble is to provide “for the establishment of a Commission” to:

- Eliminate practices having adverse effect on competition.
- Promote and sustain competition.
- Protect interests of consumers.
- Ensure freedom of trade carried on by other participants in markets in India.



Competition Act, 2002 - Main features

- I Prohibits Anti - Competitive Agreements.
- II Prohibits Abuse of Dominant Position.
- III Provides for Regulation of Combinations.
- IV Enjoins Competition Advocacy.

[Sections 3, 4, 5, 6 and 49]

**Off-market, not in-market. Ex-post, not ex-ante,, except in combinations.*



I - Anti-Competitive Agreements

- Agreement amongst competitors (horizontal agreement), including cartels – *presumed* to have *appreciable adverse effect* on competition. Cartels most pernicious violation.
- Price fixing, sharing of market, limiting production, supply, etc., bid rigging, collusive bidding.
- Agreement such as between manufacturer and distributor (vertical agreement) – subject to *Rule of Reason*; *burden of proof lies on prosecutor*.
- Tie-in arrangement, exclusive supply/distribution agreement, refusal to deal, resale price maintenance.
- Agreement includes arrangement or understanding, oral, or in writing, not necessarily enforceable by law

[Section 3]

Anti-Competitive Agreements - *Example*



Global Lysine cartel, decided in US (1996) – turning point in anti-cartel action :

- 5 firms (2 Japanese, 2 S.Korean, 1 US) prosecuted for forming cartel and fixing prices for 5 years.
- High penalties imposed; ADM (cartel leader) fined \$100 m.
- Rigorous investigation with help of FBI.
- Major role of economic analysis in calculation of overcharge.

❖ *Issues*

- Direct evidence usually difficult. Might require search and seizure operation as per section 41. Might necessitate reliance on circumstantial evidence, leniency provision.
- Injury caused to developing countries by global cartels.



II - Abuse of Dominance

- Not dominance, but its abuse is prohibited.
- Acts deemed to be abuse are (Sec.4):
 - ★ Unfair or discriminatory pricing (including predatory pricing).
 - ★ Limiting production or technical development
 - ★ Denial of market access.
 - ★ Conclusion of contracts subject to supplementary obligations.
 - ★ Use of dominant position in one market to enter into or protect the other market.
- Dominance not based on arithmetical figure, but on several factors listed in Act (Sec. 19).
- False or misleading facts disparaging the goods, services or trade of another by a dominant enterprise needs to be included amongst 'Abuses'



Abuse of Dominance - *Example*

United Brands company prosecuted by European Competition Commissioner.

- Court determined UB's dominance from combination of several factors.

Court held following amounted to abuse (1978):

- Refusal to supply long standing customer.
- Discriminatory pricing for equivalent transactions.
- Excessive pricing, having no reasonable relation to economic value.
- *Issues:* Determination of relevant product market, relevant geographic market – economic tools available e.g. cross elasticity, substitutability, SSNIP/HMT. Factors given in section 19.

III-Regulation of Combinations



- Combination is a broad term: includes merger, amalgamation, acquisition of shares, acquiring of control, etc.

Act provides liberal regime

- High threshold limits – only large combinations subject to regulation
- Voluntary notification regime.
- Commission to decide in 90 working days, else combination is *deemed approved*.
- However, Commission can take suo motu action within 1 yr after combination

Regulation of Combinations - *Example*



FTC, US successfully opposed (1997) merger between Staples and Office Depot – two office supplies super stores:

- Court accepted “office supply super stores” as relevant market; used economic tools e.g. CR, HHI, “Brown Shoe” indices.
- Court recognized benefits to consumers by firms. But found reasonable probability that proposed merger may substantially lessen competition; rejected efficiency argument.

❖ *Issues*

- Involves predicting future structure/conduct; factors given in section 20.



IV-Competition Advocacy

- The Commission *shall* take suitable measures to:
 - ★ Promote competition advocacy.
 - ★ Create public awareness.
 - ★ Impart training about competition issues.
- The Commission shall render opinion on a reference from the Central Government on a policy / law on competition; not binding.

[Section 49]



Other Highlights

- Government departments/undertakings included [*section 2(b)*]-
Competitive Neutrality .
- Reference by statutory authorities [*section 21*].
- Effects Doctrine [*section 32*].
- International co-operation [*proviso to section 18*].

Reference by Statutory Authority



Authority *may* refer for CCI opinion:

- Only during pendency of a proceeding before it.
- Provided a party raises a competition issue.
- CCI to give its opinion within 60 days.
- Opinion is not binding; Authority may pass order “as it deems fit”.
- Possibility of overlap/conflict in jurisdictions between statutory authority and CCI.

[Section 21]



Effects doctrine

- Following liberalization/globalization, cross-border economic activity has grown enormously.
- This has increased vulnerability to overseas/cross-border economic mal-practices/offences.
- CCI's jurisdiction expressly extended to anti-competitive practices/combinations taking place outside India, but having effect in markets in India.
- This will better protect domestic markets/consumers.

[Section 32]

International cooperation



- For discharging its duties/functions, CCI can enter into memorandum/arrangement with any agency of any foreign country.
- Such arrangements important for inquiries against overseas/cross-border violations.
- International cooperation and effects doctrine mutually complementary.
- Such agreements exist between several competition authorities.

[Section 18]



Competition Act - an Economic Law

Economic concepts/ analysis fundamental to the Law:

- Relevant market-- relevant product market, relevant geographic market. (SSNIP test)
- Dominant position. (Abuse of Dominance)
- AAEC – Appreciable Adverse Effect on Competition by agreements/Abuse of Dominance.
- AAEC – By Combinations. (HHI, CR)

Competition Act and MRTP Act



Part of liberalized regime; focus on promoting competition

- Provides for regulation of combinations.
- Dominance is based on host of factors.
- Standard provisions on abuse of dominance.
- Provides for Competition Advocacy.
- Statutory authority can seek CCI's opinion.

Part of pre-liberalized regime; focus on curbing monopolies

- No regulation of combinations.
- Dominance is based on specified market share.
- Weak provisions regarding monopolistic trade practices.
- No advocacy role.
- No provision for statutory authorities to seek opinion.

Contd.....



Competition Act and MRTP Act (contd.)

- | | |
|--|--|
| <ul style="list-style-type: none">▪ Competition concepts expressly defined.▪ Power to impose penalty.▪ Government Departments within its ambit.▪ No compulsory registration of agreements | <ul style="list-style-type: none">▪ Several competition concepts not expressly defined/mentioned.▪ No power to impose penalty.▪ Government Departments outside its ambit.▪ Compulsory registration of restrictive trade agreements. |
|--|--|

Powers of Commission



- Cease and desist order
- Penalty up to 10% of average turnover for last three preceding financial years
- In case of cartels, penalty up to 10% of turnover or three times of cartelized profit, whichever is higher.
- Compensation (damages)
- To declare agreement having AAEC as 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 Central Government for division of dominant enterprise.

Present activities of CCI



- Competition Advocacy (including Public Awareness and Training).
- Professional Work (preparatory and foundational).
- Capacity building & administrative work.

Inquiries and regulation of combinations not commenced; concerned sections not yet notified.

Present work is preparatory and foundational; objective is to commence inquiry and regulatory work after notification of sections, without further delay at that stage, and to build CCI into highly professional organization.

Commission has been working with a small team of officials

May kindly refer to CCI booklet on “Activities” .

Present activities – Competition Advocacy



- Advocacy with central government ministries; preparation of draft discussion paper on National Competition Policy.
- Advocacy with state governments
- Seminars, workshops (So far 53).
- Interaction with chambers, associations, professional institutions, etc.
- Advocacy literature
- Advocacy with about 150 universities/institutions.

Present activities – Professional work



- Draft regulations.
- Market studies/research projects through reputed institutions.
- Preparation of “reference materials’ on anti competitive agreements and combinations.
- Study of economic, legal concepts.
- Competition Forum – 39 sessions.
- Close networking with experts.

Present activities – Capacity Building



- Training of staff.
- Implementation of capacity building projects.
- Study on Organisational Structure.
- Library
- Website

➤ *Model is lean, professional organisation.*

Role For Compliance programme.



- Section 35 of the Competition Act, 2002 entitles the company secretaries, cost accountants, & the chartered accountants to be authorized to represent a “complainant or defendant” before the Commission.
- The services of the cost accountants along with the chartered accountants will also be useful to calculate the turnover and value of assets of an enterprise, which is either being acquired or is being merged with other enterprise to determine whether the threshold limits under section 5 are attracted or not. The value of assets shall be calculated on the book value of the assets as shown in the audited books of account of the enterprise, under section 5 of the Competition Act.

Role For Compliance programme.



(Contd.)

- Company Secretaries can also help in devising a suitable Competition Compliance Programme (CCP) for the enterprise. The CCP reduces the risk of contraventions of the Act and its consequences.
- CCP is generally inexpensive vis-à-vis penalties which can be imposed.
- CCP acts as a mitigating factor for the enterprises and is commonly used in other jurisdictions. For instance, in US – a penalty can be reduced by more than 80%; in Australia – a relevant factor in assessing pecuniary penalty; in Netherlands – a relevant factor provided no senior executive is involved in the violation; in Canada – a mitigating conduct for sentencing purposes provided contravention has been terminated soon after it became known.
- Helps in early detection of contraventions of the Competition Act and serves as a tool for *competition audit*.



- Corporate governance is ethical conduct in the internal environment.
- Similarly, Competition Law compliance is ethical conduct in external environment, especially market.
- Corporate governance is aimed at stakeholders such as shareholders and creditors.
- Competition Law is focussed on welfare of consumers and economic efficiency, and level playing field for competitors.
- Compliance of both is essential.

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 amendments which may be made in the competition law at anytime in future.



Thank you

Website:

www.competitioncommission.gov.in