



**Enterprises and  
Competition Law and Policy**  
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# India's new Competition Law

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- 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.
- Competition (Amendment) Act, 2007 passed in September, 2007.

# Why Competition ?

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- Competition promotes allocative and productive efficiencies, innovation, consumer welfare.
- Is integral to a market-based economy
- Is an essential condition for national competitiveness

# Benefits of Competition -

- Paul London, Economist:
  - Competition contributed to economic growth more than technology, tax-cuts, budget policies; raised productivity by 4% per annum.
- Australian Productivity Commission study found:
  - Average household income went up by AUS \$ 7000 per annum on account of the competition policy in Australia
- OECD study of 2001 showed:
  - Pro-competition policy in New Zealand and the U.K. added around 2.5% to their employment rate over 1978-1998.
- EU White Paper on Competitiveness, 1994: Ensuring fair competition in the market is an essential ingredient for enhancing and maintenance of competitiveness in the economy.
- Joseph Stiglitz, Project Syndicate, August, 2001
  - “Strong competition policy is not just a luxury to be enjoyed by rich countries, but a real necessity for the countries striving to create market economies:
- Barnes & Hasbel: the policy that guarantee free entry and liquidation of companies has contributed 30-50% of economic growth in U.S.A. and U.K.
- India – benefits since reforms: enhanced growth, competitiveness, consumer welfare

# Roles of Competition Law and Policy

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## *Maintenance of Competition : pre-requisites*

- 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. *About 106 countries have adopted modern competition laws.*
- *Competition culture and awareness*

# Role of Competition Commission of India

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- Preamble: Act for establishing 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 – is unlike other regulators. *Can be likened to a referee.*

# What is Prohibited ?

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- 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 -

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- 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"



# Anti-Competitive Agreements - *Examples*

- Global Lysine cartel, decided in US (1996) – turning point in global anti-cartel action
- 5 firms (2 – Japanese, 2 – S. Korean, 1 – US) were prosecuted for fixing prices for 5 years
- High penalties; ADM, cartel leader, fined \$100 m.
- Tough (blue collar) investigative techniques
- Other examples: Vitamins, air cargo, cement, construction companies.

# Abuse of Dominance

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- 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

# Abuse of Dominance - Examples

- United Brands prosecuted by European Commission. ECJ held following amount to abuse (1978):
  - Refusal to supply long standing customer
  - Differing prices for equivalent transactions
  - Excessive pricing, having no reasonable relation to economic value
  - Court assessed UB's dominance from combination of several factors.
  - Microsoft case

# Regulation of Combinations

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- Combination includes merger, amalgamation, acquisition of shares, acquiring of control. Can be horizontal, vertical, conglomerate.
- *Features:-*
  - Very high thresholds; smaller combinations outside regulation
  - Mandatory pre-notification
  - Disposal within 210 days, failing which deemed approval; intermediate stages have time caps
  - But suo moto inquiry possible.
- Worldwide, vast majority of mergers not interfered with by competition authorities.

# Regulation of Combinations - Examples

- FTC, US successfully opposed (1997) pre merger notification by Staples and Office Depot – office supplies super stores
- Based on economic analysis, Court accepted office supply super stores as relevant market.
- Court recognized undeniable benefits brought by firms to consumers.
- However, Court rejected efficiency argument and granted preliminary injunction.
- Gencor – Lonrho; UPM – Mactac; EDP – ENI-GDP

# Remedies in Competition Act

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- Agreement having AAEC is void
- 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.
- Order can modify agreement

# Remedies in Competition Act

(Contd..)

- In case of Combination – can be approved, approved with modification, or refused approval.
- In case of dominant enterprise –division can be ordered.
- Compensation claim, after CCI decision, before Appellate Tribunal
- Failure to comply: further penalties, prosecution before CMM, Delhi

# Who can approach Commission?

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- 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.

Thus an enterprise adversely affected, can also approach Commission.



# Competition Act and MRTP Act

## Based on liberalized regime. Economically literate and strong

- 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

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## Economic analysis extensively used

- Relevant market-- relevant product market (6), relevant geographic market (8).
- AAEC- based on appreciable adverse effect on competition (6)
- Dominant position (13)
- Merger assessment factors (14)
  
- Effects doctrine and international cooperation
- Neutrality between private/government
- Leniency provision for cartels

# Competition Advocacy and Awareness

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## ➤ 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 Commission

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- Competition Advocacy and Awareness:
  - Advocacy with Central Government Ministries e.g. Posts, Warehousing, Shipping, Telecom; National Competition Policy
  - Advocacy with regulators e.g. TRAI, BIS, RBI
  - Advocacy with State Governments
  - Seminars, workshops (so far 58)
  - Interaction with chambers, trade associations, professional institutions
  - Advocacy literature and Articles
  - Advocacy with 140 universities/institutions
  - Preparation of model Competition Compliance Programme (CCP)

# Present activities of Commission

(Contd...)

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

# Present activities

Cont...

## ➤ Capacity building:

- Model is lean, professional organization; IIMB organizational study
- Implementation of capacity building projects, with overseas assistance
- Training of staff, within and outside country
- Competition Forum
- Library
- Website

# How enterprises can achieve compliance?

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## 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.

# Role of Trade Associations

## Observations in OFT's Guide:

- Functions of Trade Associations are useful to members
- May also be beneficial in increasing efficiency of markets.
- However, Trade Associations should take care not to be used directly/indirectly as vehicle for anti-competitive activity.

*( Trade Associations can facilitate compliance by generating awareness, educating members, propagating compliance programme, etc)*



# 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

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