



Competition Commission of India

Competing Fairly and Legally in Modern Markets

by

Vinod Dhall

Member & Acting Chairman

at

Masterclass for Directors

at

Calcutta

1 December, 2007

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.
- Competition (Amendment) Act, 2007 passed in September, 2007. (Amended provisions considered here)

Why Competition ?

- 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

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*

Competition Policy

Policies affecting competition:

- Industrial Policy- licensing, location, size
- Trade policy- tariff/ physical controls
- IPRs: patents, copyrights
- Privatization/disinvestment
- Regulatory laws/policies
- Tax incentives, subsidies.
- Many others

Objectives of Competition Law

- Main objective is to maintain and protect the 'process of competition'.
- Must be distinguished from 'protecting competitors'.
 - *Other objectives*
 - Preventing exploitation by 'big capitalists'.
 - Protecting individual's 'economic liberty'
 - Protecting SMEs
 - Reducing government intervention in markets.

Role of Competition Commission of India

- 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 ?

- 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 -

➤ 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

- 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

- 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

- Agreement having AAEC is void
(is a consequence)
- 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?

- 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 law. Not
form-based but effect-based.**

- 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

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

➤ Competition Advocacy

- With Government to promote pro-competition policies, laws.
- With Regulators to promote pro-competition regulatory policies.

➤ Public Awareness

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

Present activities of Commission

- 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 Bar Council and (140) universities/institutions
 - Preparation of model Competition Compliance Programme (CCP)

Present activities of Commission

(Contd...)

➤ 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 (Contd...)

➤ 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?

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

Website: competitioncommission.gov.in

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

Ph: 91-11-26177175, 26701605,
Fax: 91-11-26169278