

# *India's New Competition Law – Competition Act, 2002*

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Lecture by

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# Competition Act, 2002 - Objective

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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.

*(see also sec 18)*

# Competition Act, 2002 - Main features

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- I Prohibits Anti - Competitive Agreements. (Sec 3)
- II Prohibits Abuse of Dominant Position. (Sec 4)
- III Provides for Regulation of Combinations. (Sec 5,6)
- IV Enjoins Competition Advocacy. (Sec 49)

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

# I - Anti-Competitive Agreements

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- Two types: Horizontal & Vertical
- 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

# 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

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- 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(4).
- Relevant market needs to be first determined:
  - *Relevant product market. Sec 19(7)*
  - *Relevant geographic market. See 19(6)*

# Abuse of Dominance - *Example*

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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.
- Another example: Microsoft case (Tying-in, denying access, using dominance in one market to enter another)

# III-Regulation of Combinations

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- Combination includes: merger and amalgamation, acquiring of control, and acquisition of shares, voting rights, assets.
- High thresholds, including ‘domestic nexus’.
- Mandatory pre-notification before merger.
- Commission must decide in 210 days, else combination deemed approved.
- Combination assessed on rule of reason based on 14 factors.
- Commission can take suo motu action within 1 year after combination.



# Regulation of Combinations - *Example*

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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.
- ❖ Other examples:

# IV-Competition Advocacy

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- 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*]

# Examples of Competition Advocacy: 1

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- Initiatives by Commission in respect of :
  - *Department of Posts – Indian Post Office (Amendment Bill), 2006 – monopoly of letter mail, USO fee, new regulator, etc.*
  - *Department of Shipping – Shipping Conferences – tariff fixing; and Shipping Trade Practices Bill, 2005*
  - *Department of Telecom & TRAI – number portability, spectrum allocation, additional merger regulation, open access to telecom infrastructure*
  - *Ministry of Civil Aviation – price fixing by airline association*

# Examples of Competition Advocacy : 2

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- *Reserve Bank of India – competition issues in banking sector*
- *Department of Food & Public Distribution – Warehousing (Development & Regulation) Bill, 2005 – price monitoring by proposed regulator*
- *Department of Road Transport and Highways – Competition oriented reforms in Passenger Road Transport (in States)*
- *Planning Commission - model concession agreement*
- *Planning Commission – Competition Policy for 11<sup>th</sup> Five Year Plan document.*

# Other Highlights of Act

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Government departments/undertakings included [*section 2(b)*] i.e., Competitive Neutrality .

- Effects Doctrine [*section 32*].
- Relationship with Sector Regulators [*section 21, 21A*].
- International co-operation [*proviso to section 18*].

Excluded from competition scrutiny:

- Exports
- Reasonable restrictions on IPRs (patents, copyrights, etc)
- Efficiency enhancing JVs excluded from “presumptive rule”

# Effects doctrine

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- 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]*

# Relationship with Sector Regulators (sec 21)

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- Regulator can refer a competition issue arising in a proceeding to Commission for opinion. Commission to give opinion in 60 days; after which regulator may pass order.
- Similarly Commission may refer competition issue to sector regulator who must give opinion in 60 days after which Commission may pass order.

# International cooperation

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- 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

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*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

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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.

# Powers of Commission

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- 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.
- 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 for division of dominant enterprise.

# 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.

# How enterprises can achieve compliance?

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- 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.

(See Guide of OFT, UK)

# Role of Trade Associations

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- 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.

(See Guide of OFT, UK)

# 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](http://www.competitioncommission.gov.in)