



The Competition Act, 2002

Talk by

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Competition : Benefits

- Is foundation of efficiently working market system:
- Maximizes consumer welfare. Lower prices, wider choice and better services.
- Accelerates economic growth; higher efficiency / productivity.
- Generates innovation; dynamic efficiency.
- For enterprises, provides level playing field, redressal against anti-competitive practices.



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 106 countries have adopted Competition Law.



Status of Indian Competition Law

- Competition Act, 2002 passed in January 2003
- Competition Commission of India established under Act in October, 2003 with one Member/ Acting Chairman
- Enforcement provisions not notified due to legal challenge leading to process of amendments
- Competition (Amendment) Act, 2007 passed in October 2007 – stage set for full activation of Commission

Competition Act, 2002 - Objective



Competition Act, 2002 notified in January, 2003. Amended by Competition (Amendment) Act, 2007. 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

- WTO : *“Law is broadly comparable to those of other jurisdictions with effective laws in this area and, for the most part, embodies a modern economics - based approach” (Trade Policy Review of India 2007)*
- OECD : *“close to state-of-the-art” (Economic Survey India Report 2007)*

Competition Act, 2002 - Main features



- 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



- Two types: Horizontal & Vertical
- Agreements amongst competitors (horizontal agreements), 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.*
- Other horizontal agreements and vertical agreements – 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



- 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*



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



- 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*



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 & Awareness

- Central or State Government can refer policy or law relating to competition or any other matter for Commission's opinion – opinion not binding
- Commission required to take measures for “competition advocacy, awareness and training”
- Commission may give opinion suo-motu to Government, regulators, other authorities
- Provision for mutual consultation between Commission and regulators

- [section 49]



Examples of Competition Advocacy: 1

- 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*
 - *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 11th Five Year Plan document.*



Other Highlights of Act

- 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”

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

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



- 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 profit.
- Agreement having AAEC is void
- Order can modify agreement
- In case of dominant enterprise – order for division of dominant enterprise.
- In case of Combination – can be approved, approved with modification, or refused approval.



Guiding Principles of Commission

- Commission to be in sync with markets
- Minimize compliance costs for enterprises and enforcement costs for Commission
- Fully professional organisation with required skills
- Confidentiality for business, transparency for Commission
- Consultative approach



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.



How enterprises can achieve compliance?

- 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

- 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)



Issue 1:

Why shift to mandatory filing ?

- Recommended by Parliamentary Standing Committee
- Overwhelming majority of jurisdictions have mandatory filing – only 8 countries believed to have voluntary filing
- Voluntary filing could give rise to uncertainty, high cost of unscrambling, discretionary investigation
- Debate in some voluntary regimes for shifting to mandatory filing



Issue 2: Triggering Event

- Act sets filing deadline of 30 days after board's approval in case of merger/amalgamation, or execution of "*any agreement or other document*" in case of acquisition
- Draft implementing Regulations provide
 - *Window for admitting notification even after 30 days*
 - "*Other document*" may allow flexibility in triggering event



Issue 3:

Waiting period of 210 days

- Prior to amendment, time limit was 90 working days from date of publication of combination details; therefore time limit was uncertain
- Draft implementing Regulations provide:
 - *TL of 30 days to approve combination or issue show cause notice for further investigation. Else deemed approved*
 - *If short form used, TL 60 days*
- Thus overwhelming majority of combinations will be decided in 30 days



Issue 4: Domestic Nexus

- Act provides domestic nexus: assets of Rs. 500 crore (\$ 125 m) or turnover of Rs. 1500 crore (\$ 375 m)
- Draft implementing Regulations provide at least two parties each to have assets of Rs. 200 crore (\$ 50 m) or turnover of Rs. 600 crores (\$ 150 m)



Issue 5:

Relief from filing requirement

- Draft implementing Regulations: following not anti – competitive:
 - Acquisition
 - of shares/ voting rights not exceeding 26%, provided not leading to control
 - of assets not directly related to business, solely as investment, or in ordinary course of business, provided not leading to control
 - in process of under writing,
 - by succession, will, etc.
 - by foreign state
 - Amended or renewed tender offer
 - Similar other acquisitions



Issue 6: Burden of Notification

- Commission intends keeping notification forms/information as simple as possible
- However, information in respect of listed factors for assessing combination required
- Short form stipulated



Combination Regulations: Other features

- *Permitting additional time when sought by parties (R 18)*
- *Rectification of mistakes (R 20)*
- *Intimation of changes, not affecting assessment (R 22)*
- *Pre-notification consultation being considered*



Combination Regulations: Other features

(contd.)

- *Provision for personal appearance / opportunity of being heard before final order (R 41)*
- *Enabling provision for appointing independent trustees, at cost of parties, for overseeing compliance of remedies (R 54)*

Leniency Regulations: main features



- *Principles: certainty, confidentiality, transparency, “first through the door”*
- *Eligibility: full, true & vital disclosure; continuing cooperation*
- *Marker system— first applicant entitled to full leniency; subsequent applicants to lesser leniency on graded scale (R 3&4)*
- *Identity of applicant to be kept confidential (R 8)*
- *Upon signing agreement, leniency to be granted; can only be withdrawn if terms of agreement violated (R 6 (18))*



General Regulations: Main features

- *Preliminary conference (R 19)*
- *Consent order (R 35)*
- *Confidentiality (R 38)*
- *Closed door meetings (R 50)*
- *Prima facie order within 90 days (R 18)*
- *Final order by Commission within 21 days of final meeting (R 33 (3))*



Meeting Regulations: Main features

- *Maximum 3 adjournments in a matter (R 5 (c))*
- *Meetings through video conference (R 5 (d))*
- *Fortnightly meeting for competition advocacy (R 7)*



Staffing and Training

- *IIM B entrusted with organisational study, including staffing, training etc.*
- *IIM B suggested – economists 40% , lawyers 40% and financial analysts etc. 20%*
- *Training – high priority, on going; expanded training programme planned*

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