

# Admissibility and Evaluation of Evidences under Competition Act, 2002

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A.K Chauhan  
Director General CCI  
New Delhi

# Agenda

1. Provisions of Inquiry and Investigation under Competition Act, 2002
2. Admissibility of different kind of evidences
3. Evaluation of evidences

# Provisions of Inquiry and investigation under Competition Act, 2002

The Commission may form a **prima facie opinion** on :

- Receipt of a reference from the Central /state Government
- Receipt of a reference from Statutory authority
- Information received from any person, consumer & assoc. u/s 19
- Own knowledge

## Process of inquiry

- Process of inquiry commences with order u/s 26 (1)
- Once Prima facie opinion is formed, it may direct DG to conduct investigation.
- Once DG finds that contraventions stand established , the Commission may conduct further inquiry.

## Manner of Inquiry

**Section 36(2)** : The Commission and DG -Same powers as vested in a **Civil Court** under the **Code of Civil Procedure** , 1908 in respect of 5 matters:

- **Summon** -enforcing the attendance - examining him on oath
- Requiring the **discovery and production** of documents
- Receiving evidence on **affidavit**
- Issuing **commissions** for the examination of witnesses or documents
- **Requisitioning** , any public record or document or copy from any public office ( Sec. 123 & 124 of Evidence Act )

# Manner of Inquiry process

## Sec. 36(3) : Appointment of experts specific for the case inquiry:

Economics, commerce, accountancy, international trade or any discipline includes market Surveys

## Sec.36 (4) : Authorisation by Commission

(a) Direct **any person** to produce before the DG or the Secretary or an officer authorised - Any books or document of trade in his possession or custody ( eg. Accountant / Auditor)

(b) Direct **any person** to produce before the DG or the Secretary or an officer authorised any books or document in his possession in respect of trade carried by him ( eg. Owner- Partner )

## Powers of Director General (Sec.41)

- Director General shall have all the powers as are conferred upon the Commission under Section 36(2).
- Provisions of Section 240(2) and Section 240A of the Companies Act, 1956 (1 of 1956) shall apply to an investigation made by the DG or any other person investigating under his authority, as they apply to an Inspector appointed under that Act.
- Powers under Section 240 A are to exercised after taking authorizations from the Chief Metropolitan Magistrate, Delhi.

# Types/ source of evidence

- Pre-existing evidence :
  - 1) information u/s 19(1)
  - 2) information in public domain
- Compulsory request based on inquiry u/s 36 (2)
  - Evidences from experts u/s 36 (3)
  - Evidences from persons u/s 36 (4) & 36 (5)
- Search & seizure operation u/s 41 (3) rws 240A of Company Act



# Categories of evidences

- Documentary evidences : written submission, affidavits ,photos, books of a/c, printed material
- Oral evidences : statements of parties , witnesses
- Economic evidences: Market assessment, demand & supply , cost & sale pricing
- Financial evidences : FSA , data analysis
- Electronic evidences : audio, videos , telephony & emails

# Admission of Evidence – Regulation 41

## Forms of evidence

Commission or the Director General, may admit evidence taken in the form :

- i. verifiable transcripts of **tape recordings**
- ii. unedited versions of **video recording**
- iii. **electronic mail, telephone records**
- iv. written signed unsworn **statements** of individuals
- v. **written & signed submission** in responses to questionnaires
- vi. **interviews - recording of statement (examination in chief - cross examination – Re-examination)**
- vii. **comments or opinions or analysis of experts** based upon market surveys or economic studies ( Forensic IT Expert missing !! )
- viii. other authoritative texts or otherwise in **public domain**

## Admission of evidence – contd.

- (a) **certificate**, or other document, duly certified by a gazetted officer, or a statutory authority, or a Magistrate or a Notary or the Secretary of the Commission; (e.g registration cert. )
- (b) **entries in the books of account**, including electronic form, entries in any public or other official book, register or record or an electronic record, made by a public servant ( Cash or ledger A/C, or IT return Excise or Sales Tax etc)
- (c) **opinion** of any person acquainted with the handwriting of the person by whom a document is supposed to have been written or signed as evidence
- (d) opinion of the **handwriting experts** or the experts in identifying finger impressions or the persons specially skilled in interpretation of foreign law or of science or art;

# Admission of evidence –contd.

- (e) all **Acts , Statutes, Govt. Notification** are presumed to be true admissible by a court of law under section 57 of the Indian Evidence Act, 1872
- (g) **admission or confession** or acceptance of fact by party in writing as proved ;
- (h) presume that any document purporting to be a certified copy of any record of any authority, court or government of any **foreign country** as genuine and accurate, ( eg certificate from Ambassador of the country)
- (i) any **other such documents** including electronic records in evidence as may be relevant and material for the proceedings.

# Admission of evidence – Indian Evidence Act

Sections of the Indian Evidence Act, applicable to matters relating to:

- (a) Section 22A – when oral admission as to contents of electronic records are relevant;
- (b) Section 47A - opinion as to digital signature when relevant;
- (c) Section 65B - admissibility of electronic records;
- (d) Section 67A - proof as to digital signature;
- (e) Section 73A - proof as to verification of digital signature;
- (f) Section 81A - presumption as to Gazettes in electronic forms;
- (g) Section 85A - presumption as to electronic agreements;

## Admission of evidence-contd.

- (h) Section 85B - presumption as to electronic records and electronic signatures;
- (i) Section 85C - presumption as to digital signature certificates;
- (j) Section 88A - presumption as to electronic messages;
- (k) Section 89 – presumption as to due execution etc., of documents not produced;
- (l) Section 90A - presumption as to electronic records five years old;

# Evaluation of Evidences

## Supporting of facts by filing of affidavit. (Regulation 42)

- (1) The Commission or the Director General, for sufficient reason, order that any particular fact or facts may be supported by affidavit.
- (2) The I.P or Opposite party may also file affidavit suo motto
- (3) Format & contents of affidavit , sworn before a Court, Magistrate, or Notary and duly signed
- (4) Alteration or erasure in affidavit needs to be signed by the authority
- (5) Refuse to admit affidavit if too many erasure or alteration – ask for new affidavit

## Filing of affidavit. (Regulation 42)

- (1) No affidavit filed after specified time be used by DG/CCI
- (2) Powers to relax the provision of regulation on affidavit if necessary or expedient.
- (3) Affidavit not corroborated by supporting evidences is likely to be rejected since not covered under the definition of “evidence” in sec.3 of Evidence Act. (*Supreme Court – Sudha Devi vs. MP Narayan AIR 1988 /381*)
- (4) Rejection of affidavit based on contrary facts & evidences collected on record.



# Evaluation of Additional Evidences – Reg-43

## Production of additional evidence before Commission –

- (1) The parties to the proceedings shall **not be entitled** to produce before the Commission additional evidence, either oral or documentary, which was in the possession or knowledge but was not produced before the Director General during investigation or sub-section (1A) of section 29 of the Act, -
- (2) Commission by reasoned order may allow on **some reasons** : enable to pass orders or for any other substantial cause, or if the Director General has not given sufficient opportunity .
- (3) Such document may be produced or such witness examined or such evidence adduced either before the Commission or before DG or any such authority
- (4) Additional evidence/document shall be made available by the Commission to the parties to the proceedings

# Evaluation of Evidences ( Reg. 44 )

## Power of Commission to call for information etc. – (post DG's report)

- (1) The Commission may, at any time **before passing orders** in a proceeding, require any of the parties or any other person whom the Commission considers appropriate, to produce such documents or other material objects as evidence.
- (2) The Commission or the Director General, as the case may be, may direct the **summoning of the witnesses, discovery and production** of any document or other material objects producible in evidence, **requisition** of any public record from any office, examination by an officer of the Commission the books, accounts or other documents or information in the custody or control of any person (Same as Sec.36 (2) and 36 (4))
- (3) The Commission or the Director General, may summon and enforce the attendance of any person and examine him to be examined on oath.

# Evaluation of Evidences-Commission (Reg. 45 )

## **Power of Commission or Director General to issue commissions -**

- (1) Commission or the Director General, either on its or his own motion or on an application made by a party to a proceeding may issue a commission for the examination on questionnaires or otherwise of the specified witness
- (2) Conditions of commission : Leaving India, public servant , illness, distance of more 500 km etc
- (3) Commission outside India through Indian high commissioner or embassy
- (4) Commission for examination of documents , examination of witness.
- (5) Appointment of commissioner - any public servant, or counsel such CA , Advocate. Company Sect, etc
- (6) Information and record to be furnished to commissioner.
- (7) Commissioner to comply to the direction and send report with evidences within fixed time period.

# Analysis of evidences

- Two types of analysis : (i) Per se (ii) Rule of reason
- **Per se** : Act or behavior by specific nature is anti-competitive . No requirement to prove AAEC
- **Rule of Reason** : Evaluation of market harm
- (i) Evaluate pro and anti competitive effects
- (ii) AAEC if anti competitive effects outweigh pro competitive effects
- Prepare a proof chart
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# Presumption vs. Rule of Reason

- Section 3(3)-uses expression “ **shall be presumed to have AAEC**” –It means that AAEC stands proved once anti competitive agreement is established .
- Section 4 of Indian Evidence Act – “Shall presume.”- Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved:” . **A rebuttable presumption**
- Such presumption is hence rebuttable by the defendant in the Act.
- Thus DG/ CCI has only to establish or prove various conduct or actions of the person or enterprise as stated in clause (a) to (d) of sec. 3(3) , then it is presumed to cause AAEC . (e.g Bid Rigging)
- DG/ CCI need not prove AAEC in Sec.3(3) as provided in sec.19(3)
- There is a Proviso to section 3(3) which provides for exception to “Joint Ventures” where AAEC need to be proved.

# Presumption vs. Rule of Reason

- When the words ‘**shall presume**’ have been mentioned and there is also a mention of proviso below the Section 3(3), it means that the presumption is conclusive.
- Why proviso giving exemptions, when the presumption is rebuttable?
- Thus providing such exception to such presumption in sec.3(3) would makes it “Non rebuttable” ?
- Are acts or conduct in section 3(3) anti –competitive “per se” ?  
( compare with FTC ) - NO
- Burden of proof is first on defendants to disprove the facts.
- Section 3(4)- Any Vertical Agreements would require Rule of Reason and thus AAEC and efficiency arguments have to be considered.

# Presumption vs. Rule of Reason

- Section 4(1) -uses expression No enterprise or group shall abuse its dominant position. Thus such conduct does not require proving of AAEC
- Section 4(2) – Proving of Dominance requires Rule of Reason as per section 19(4)
- DG/ CCI has only to establish or prove dominance as per section 19(4) by rule of reason
- Thereafter it has to prove the various conduct or actions of the enterprise or group as stated in clause (a) to (e) of sec. 4(2) then it is taken as Abuse of dominance per se.
- No requirement of AAEC in AOD

# Standard of evidences / Proof

- Beyond reasonable doubt : Concrete primary evidence
- Preponderance of probabilities - Circumstantial evidence
- The standard of proof is in between the two in the Act
- The finding of inquiry in CA 2002 , is hence based on combination of primary and circumstantial evidences
- Illustration of case : cartel cases – LPG cylinder , Stryker India , United phosphorus, Film producers etc.





*Thanks*