



Competition Commission of India

COMPETITION LAW AND POLICY IN INDIA

by
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Early Stages

- Planned economic development since early 1950s.
- Commanding heights in public sector
- Industrial (development & regulation) Act, 1951 and
- Monopolies and Restrictive Trade Practices Act, 1969
 - Comprehensive control over direction, pattern and quantum of investment
 - Extensive reservations and concessions in favour of small – scale industry
- Despite industrial growth/diversification – complex network of controls/regulations fettered freedom of enterprises



Transition

- Industrial policy statement of 1980
 - focused attention on need for promoting domestic market, technological modernization, competition in up gradation and
- Reforms since 1991- on a much broader scale and scope
- Industrial policy statement of 1991
 - emphasized attainment of technological dynamism and international competitiveness
 - Indian industry could scarcely be competitive with the rest of the world if it had to operate within an over regulated environment



Relaxing of Controls

- Starting from 1991 – further liberalization of industrial licensing, dispensing with the requirement of prior governmental approval before effecting expansion of undertakings registered under MRTP Act, 1969
- Progressively diluting the monopoly of public sector except for security and statutory concerns
- Abolition of levy and non-levy price system
- Reducing purchase preference for PSUs



Strengthening of Reforms

- Further reforms of trade policy substantially reduced the barrier to domestic industries
- Common thread running through the economic reforms-since 1991 – has been to free the economy from governmental controls and allow market forces to determine economy activity.



Expert Group

- Singapore ministerial declaration in 1996 – followed by setting up of an expert group by Union Ministry of Commerce in Oct. 1997
- To study issues relating to interaction between trade and competition policy, including anti-competitive practices and the effect of mergers and amalgamations on competition in order to identify areas that may merit consideration in the WTO framework
- Expert group, in Jan. 1999 report, suggested enactment of new Competition Law



Raghavan Committee

- FM on 27-2-1999 declared in budget speech that MRTPC has become obsolete in the light of international economic developments relating to competition laws
- High level committee on competition policy and law constituted in Oct. 99
- Inter-alia, the committee noted
 - in conditions of effective competition, rivals have equal opportunities to compete for business on the basis and quality of their outputs, and resource deployment follows market success in meeting consumers' demand at the lowest possible cost



Do We Need It : ET-Feb 5, 2009

5-2-09(ET)

Get set to fly high

IndiGo, SpiceJet & Paramount Airways Hiring Across Departments

Mithun Roy
MUMBAI

IF LAYOFFS and pay cuts have become the order of the day, the aviation industry is piloting a new trend in India Inc by looking to recruit people. Budget carriers such as IndiGo and SpiceJet and business-class airline, Paramount Airways, have set the ball rolling by hiring people across departments since January.

IndiGo, India's largest budget carrier, will hire nearly 50 pilots for its operations in Kolkata, Bangalore, Hyderabad and Pune. "We are looking to hire 30-50 captains and the recruitment process would conclude soon," said IndiGo president Aditya Ghosh. The carrier employs 228 pilots for its fleet of 19 aircraft and plans to add 30 more destinations by 2010. Today, it has more than 100 flights connecting 20 destinations and accounts for a 14.7% market share.

SpiceJet has hired pilots—expats as well—last month, with another round of hiring likely to be completed by March. It plans to increase the number of flights by a fifth in the current fiscal and double the frequency on routes like Delhi, Kolkata, Mumbai, Hyderabad and Chennai. The number of daily flights will increase to 120 from the existing 98 in 20 cities.

Those in the training business are understandably relieved about the development. "We have placed about 400 students between October and December. Our placement record has improved by 5% as compared to the same period last year," said Air

OUT OF AIR POCKET

- **IndiGo, India's largest budget carrier, will hire 50 pilots for its Kolkata, Bangalore, Hyderabad & Pune ops**
- **SpiceJet has hired pilots—expats as well—last month, with another round of hiring likely to be completed by Mar**
- **Paramount has released ads for pilots, cabin crew, airport managers, in-flight supervisors & ground instructors**

Hostess Academy founder & director Sapna Gupta.

Chennai-based Paramount Airways has released advertisements calling for pilots, cabin crew, airport managers, in-flight supervisors and ground instructors. The carrier, which is expanding its fleet, has a network of 12 destinations in the country.

Though the global economic scenario is gloomy, the trigger for the aviation sector has come from the 60% drop in aviation turbine fuel (ATF) prices since last September, experts opined.

"The fresh recruitment is necessary for an industry which has been adding capacity and increasing flights and routes," said Emkay Global research head Daljeet Kohli.

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They can't be so low cost, whines Kingfisher Airlines

Full-Service Carrier Voices Concerns Over 'Unrealistic' LCC Tariffs

Nirbhay Kumar
NEW DELHI

lated loss of Rs 8,000 crore in FY09. Following a 54% fall in ATF price since September



Do We Need It : ET-Feb 11, 2009

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MUTUAL BENEFIT

First Time, Full-Service & Budget Carriers Join Hands

AIRLINES GANG UP TO HIKE FARES

UP, UP & AWAY

The Action

- Fares to go up between Rs 1,000

The Concern

- The concerted action by the

The Impact

- A Mumbai-Delhi ticket will



Present Status

- Competition Act, 2002 enacted in January 2003
- Competition Commission of India established in October, 2003
- Legal challenges delayed full constitution of the Commission and enforcement work
- Competition (Amendment) Act, 2007 passed in September 2007
- Full constitution of Commission on March 1, 2009
- On May 20, 2009, sections 3 & 4 brought into force



Broad Mandate

- Prohibit anti-competitive agreements (S 3)
- Prohibit abuse of dominant position (S 4)
- Regulate combinations (S 6)
- Mandate competition advocacy (S 49)



Duties of the Commission

- Prevent practices having adverse effect on competition
- Promote and sustain competition in markets
- Protect the interests of consumers
- Ensure freedom of trade carried on by other participants in markets, in India

[Preamble and Section 18]



The Law

- Prohibits anti-competitive agreements (S 3)
- Prohibits abuse of dominant position (S 4)
- Regulates combinations (S 6)
- Mandates competition advocacy (S 49)



Salient Features

- All enterprises, whether public or private [S 2(h)]. Departments of government except activities relatable to sovereign functions including Atomic energy, Currency, Defence and Space (S 2(h))
- Extra-territoriality (S 32)
- Co-operation with foreign competition authorities (S 18)
- Exclusive jurisdiction in competition matters (S 53B/ 53T /61)
- Confidentiality (S 57/GR 35)



Anti-competitive Agreements-I

- Horizontal agreements ‘presumed’ anti-competitive (Price fixing, Quantity/supply limiting, Market sharing, Bid rigging/collusive bid) (S 3(3))
- Vertical agreements –if cause AAEC(‘rule of reason’)(S 3 (1)/(2))
- Exempted from these provisions:
 - *Efficiency enhancing JVs exempted from presumptive rule (S 3(3) proviso)*
 - *Agreement imposing reasonable conditions for protecting IPRs (S 3(5)(i))*
 - *Agreements for exports (S 3(5)(ii))*



Anti-competitive Agreements-II

- Vertical agreements include:
 - Tie-in-sale
 - Refusal to deal
 - Exclusive supply arrangement
 - Exclusive distribution arrangement,
 - Resale price maintenance
- IPR s
 - Patent
 - Trade mark
 - Geographical indicators
 - Industrial designs
 - Semi-conductor Integrated Circuits Layout Designs



Factors for AAEC

- Creation for barriers to new entrant
- Driving existing competitors out of market
- Foreclosure of competition by hindering entry
- Accrual of benefits to consumers
- Improvements in production or distribution of goods/services
- Promotion of technical, scientific and economic development by means of production or distribution of goods/services



Cartel

“ *Cartel includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control **or attempt to control** the production, distribution, sale or price of, trade in goods or provision of services” (S 2 (c))*

- Cartels are in the nature of prohibited horizontal agreements and presumed to have *AAEC*



Leniency Provisions

- For inducing any member of a Cartel to make **full, true and vital disclosure**, the Commission has been empowered to levy lesser penalty
- The party making disclosure will, however, be subject to other directions of the Commission as per provisions of the Act
- Clarity, certainty and fairness are critical to make leniency programme effective and, for this, Commission can take suitable measures including formulation of Regulations etc.
(S 46)
- Draft Regulations framed



Powers of Enforcement

- CCI has powers of a civil court for gathering evidence
- After *prima facie* determination CCI shall direct DG to investigate (S 26(1))
- Includes powers of seizure of documents with the approval of the Chief Metropolitan Magistrate, Delhi, when there is reasonable ground to believe that books, papers or documents may be destroyed, mutilated, altered, falsified or secreted. (S 41(3))



Gathering Evidence

- Powers of a civil court for gathering evidence
 - Summoning and enforcing attendance of any person and examining him on oath;
 - Requiring the discovery and production of documents;
 - Receiving evidence on affidavits;
 - Issuing commissions for the examination of witnesses or documents;
 - Requisitioning any public record or document or copy of such record or document from any office.



Deterrence & Penalty-I

- CCI empowered to pass following orders against anti-competitive agreements (including cartels) :
 - **Temporary restraint orders**— during the inquiry (S 33)
 - **Cease and desist order** - directing parties to discontinue and not to re-enter such agreements (S 27(a))



Deterrence & Penalty-II

- **Modification of agreement** -directing parties to modify the agreements to the extent and in the manner as may be specified in the order (S 27 (d))
- **Penalty** – anti-competitive agreements :
 - Up to 10% of average turnover of last 3 yrs
 - If a cartel- on each member of cartel- up to 3 times of its profit for each year of the continuance of such agreement or 10% of its turnover for each year of the continuance of such agreement, whichever is higher (S 27 (b))



Effectiveness against Cartels

- The availability of explicit definition of 'Cartel' in the Act
- Adequate powers of investigation
- Leniency programme for members of a cartel to defect
- Power to impose deterrent penalty linked with profits or turnover on each member of the cartel during the continuance of cartel
- Efforts to build strong competition culture including encouragement to public to submit information by ensuring confidentiality



Abuse of Dominant Position

- Not dominance but its abuse is prohibited (S 4(1))
- Dominance defined in Act, based on several listed factors (S 4(2)/19(4))
- Relevant market (product, geographic) to be determined as defined in Act (S 19(5)/(6)/(7))
- Abuses listed in Act (exclusive list)
(S 4(2)/factors19(3))



Definition

- Position of strength enjoyed by an enterprise in the **relevant market** which enables it to:
 - Operate independently of competitive forces prevailing in **relevant market**; or
 - Affect its competitors or consumers or the **relevant market** in its favour
- Ability to prevent effective competition *and*
- Ability to behave independently of two sets of market actors, namely:
 - Competitors
 - Consumers



Abuses

- Imposing unfair or discriminatory price or condition in purchase or sale, including predatory pricing
- Limits or restricts production of goods or provision of services or market therefor
- Limiting scientific development to the prejudice of consumers
- Denial of market access in any manner
- Conclusion of contract subject to supplementary obligations
- Use of position in one relevant market to enter into or protect other relevant market



Remedies for AOD

- Discontinue abuse (S 27(a))
- Abide by such other orders as CCI may pass (S 27(e))
- Up to 10% of average t.o. of last 3 yrs penalty (S 27 (b))
- 'Division of enterprise' (S 28)
- Such other order as may be deemed appropriate by Commission



Regulation of Combinations

- Combination defined, includes mergers & amalgamation, acquisition of shares, assets above thresholds and domestic nexus (S 5)
- Combination must be above thresholds defined in terms of total assets or turnover plus domestic nexus (S 5)
- Mandatory pre-notification (S 6 (2))
- Suspensive regime (S 6 (2A))
- Assessment of anti-competitive effect based on listed factors (S 20(4))



Thresholds

		Assets Total (In India)	Turn over Total (In India)
Only in India	No Group	Rs. 1000 cr	Rs. 3000 cr
	Group	Rs. 4000 cr	Rs. 12000 cr
In and outside India	No Group	US \$ 500 m (Rs. 500 cr)	US \$ 1500 m (Rs. 1500 cr)
	Group	US \$ 2000 m (Rs. 500 cr)	US\$ 6000 m (Rs. 1500 cr)



Orders on Combinations

- Competition Commission of India can:
 - Approve
 - Approve with modifications
 - Not approve
- If no order within 210 days, the combination deemed to have been approved
- Regulations specify shorter time limits- stage I
- Less than 10-15 per cent of notified combinations seen to have adverse effect on competition- elsewhere
- Very few (less than one in hundred) blocked
- Approval with Structural and/or Behavioural remedies



Review Period (s)

Country	Stage One	Stage Two
EU	25-35 W days	90-125 W days (35+125=160 W days or 224 days in the least)
France	5-8 weeks	Additional 4 months. Further extended by 4 more weeks (thus 5 ½ Months in total)
Spain	1 month	7 months
Singapore	30 W days	120 W days (30+120=150 W days)
China	30 W days	90-150 W days
Mexico	40 C days	145 (in complex cases)
Japan	30 C days	120 C days (more if information is late)
USA	30/15 C days	-----
Germany	1 month	3 months (1+3= 4 months)
India	30 c days (draft regulations)	210 C days (150 w days)

Indian time caps not very different from major jurisdictions



Competition Advocacy & Awareness

- Central or State Government can refer policy or law relating to competition or any other matter for opinion – not binding (S 49(1)/(2)) – 60 days
- Commission required to take measures for “competition advocacy, awareness and training” (S 49(3))
- Commission may give opinion suo-motu to Government, regulators, other authorities (S 49(3)/ GR 60)
- Provision for mutual consultation between Commission and regulators (S 21/21A)-60 days



Other Penalties

- Failure to comply with orders/ directions u/s 27, 28, 31, 32, 33, 42A and 43A – **fine upto Rs. one lakh per day** [S 42 (Max 10 Cr) & 43 (Max 1 Cr) (S 36 (2)/(4)) / 41(2)]
- Non furnishing of information on combinations – **upto 1% of turnover/ assets whichever is higher** (S 43A)
- Making false statement/ omission to furnish material information
 - On combinations– **not less than Rs. 50 lakhs extendable to Rs. one crore** (S 44)-penalty
 - Otherwise–**upto Rs. one crore**(S 45)-fine



Preparatory Work

- Draft Regulations 200_
- Attending telecons with ICN/ABA/IBA
- Preparation of Advocacy Booklets on
 - Competition Compliance Programme
 - Combinations
 - Bid rigging
 - Intellectual Property Rights
 - Abuse of Dominance
 - Activities
 - Cartel
 - FAQs



Wide consultations

- An international conference on “India’s New Merger Notification Regime (INMNR)” held on 15/16, March, 2008 in New Delhi, by IBA & others
- Delegates from ICN, EU, FTC, ACCC, IBA, ABA & leading legal firms across the world attended
- Benefitting from the experience of mature, functioning jurisdictions



Indian law in global context

- 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)*



Thank you

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