



Competition Law: Indian Perspective

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Disclaimer: Views expressed during this Presentation do not necessarily reflect those of CCI. Data used have been taken from various sources and should be verified if intended to be used further.



Why Competition?



Competition forces firms to reduce their cost to remain competitive

Competition forces firms to reduce their profit margins to the minimum and pass on their efficiency gains to consumers

Competition pushes firms to innovate



Why Companies indulge in anticompetitive conducts?



Drive up the prices or to prevent decrease in prices

Increase or maintain profits

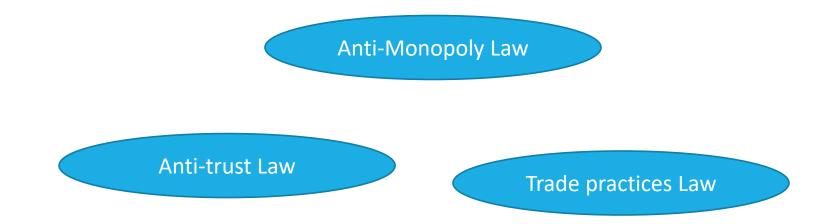
Avoid expense on innovation





Why Competition Law?

Law that promotes or seeks to maintain market conditions by regulating anti-competitive conduct by companies.







- Monopolies and Restrictive Trade Practices Act, 1969
- Liberalization
 - Comprehensive economic reforms since 1991 carried the economy to a new trajectory(Monetary Policy; Fiscal Policy; Trade and Investment Policies)
 - With the introduction of these reforms the MRTP Act became obsolete
 - Policy approach shifted from controlling monopolies to promoting competition





Objectives of the Act (Section 18 of the Act)

- ■To provide, keeping in view of the economic development of the country, for the establishment of a commission to prevent practices having adverse effect on competition;
- To promote and sustain competition in markets;
- To protect the interest of consumers; and
- ■To ensure freedom of trade carried on by other participants in markets, in India.





Enforcement Functions:

- Prohibitions of anti-competitive agreements (Section 3)
- Prohibitions of abuse of dominant position (Section 4)

Regulation of combinations (Sections 5 & 6)

Competitive Neutrality: Equally applicable to public as well as private enterprises.





Other Functions include:

- Advisory functions
- Advocacy functions
- Legislative functions



Anti-competitive Agreements









Enterprise: Defined under Section 2(h) of the Competition Act, 2002, which includes

- Person or Department of Government
- Engaged in production, storage, supply, distribution, acquisition, or control of articles or goods or provision of services etc.

Excludes: Sovereign Functions, *viz.* atomic energy, currency, defense and space.



What is Anti-Competitive Agreement

Section 3(1) and 3(2) of the Competition Act, 2002:

"(1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on <u>competition (AAEC)</u> within India.

(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be <u>void</u>."





Agreement: includes any

- Arrangement
- Understanding or
- Action in concert
- Whether or not
- in writing;
- intended to be legally enforceable





Agreements having **Appreciable Adverse Effect on Competition (AAEC)** in India are prohibited [Section 3 (1)]

Anti-Competitive Agreements:

- Horizontal Agreements Section3(3)
- Vertical Agreements Section 3(4)



Horizontal Agreements Section 3(3)



- Horizontal Agreements, often termed as Cartels, considered most pernicious under the Competition Law.
- Section 2(c) of the Competition Act, 2002:

"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, or, trade in goods or provision of services

Horizontal Agreements Section 3(3)



An agreement entered between two or more enterprises operating at same level of business.

- to control production,
- supply or
- directly or indirectly determining purchase or sale price.
- bid rigging

'Shall presume to have AAEC' rule applies to Horizontal Agreements.

Burden of proof is on the person or enterprise;



Types of anti-competitive agreements under Section 3(3)









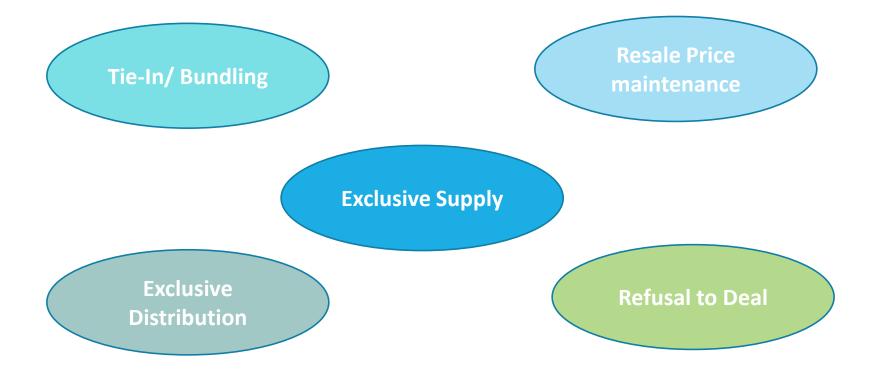
Section 3(4)

Agreements between different levels of production and distribution chain are called vertical agreements *viz.* Manufacturer-Dealer; Dealer-Supplier and Wholesaler-Retailer etc.

- □Tie-in arrangements
- Exclusive Supply Agreement
- Exclusive Distribution Agreement
- Refusal to Deal
- Resale Price Maintenance









Steps to be avoided by Procurement Officials in framing procurement policies



Creation of barriers to new entrants in the market;

- driving existing competitors out of the market;
- □ foreclosure of competition by hindering entry into the market;
- denial of accrual of benefits to consumers;
- disallowing improvements in production or distribution of goods or provision of services





Abuse of Dominant Position



Abuse of Dominant Position Section 4



'Dominant position' means:

a position of strength which enables an enterprise to operate independently of competitive forces prevailing in the market.

Commission considers, *inter alia*, the following factors to determine whether an enterprise is dominant (Section 19(4));

market share;

size and resources/ importance of the enterprise/ competitors;

dependence of consumers on enterprise;

structure and size of market;

social obligations/costs; any other factor relevant





Relevant Market [Section 2(r)]

Relevant Product Market [Section 2(t)]

Market comprising all goods/services which are substitutable by reason of characteristics, usage and prices.

Relevant Geographic Market [Section 2(s)]

Area in which conditions of competition for supply or demand of goods/services are homogenous and can be distinguished from other areas;





Dominance *per se* is not anti-competitive but Abuse of dominance is.

- Abuse of dominant position [section 4(2)]:
- Unfair or discriminatory pricing (including predatory pricing)
- Limiting production or technical development
- Denial of market access, in any manner
- Conclusion of contracts subject to supplementary obligations which have no connection with the subject of the contract
- Use of dominant position in one market to enter into or protect other relevant market





Up to 3 times of profit of contravening enterprise for each year of the continuance of such agreement

or

10% of its average turnover for last three financial years

whichever is higher;





- It offers incentives to those cartel members who choose to share information and cooperate with the Commission
- CCI (Lesser penalty) Regulations, 2009







Mergers & Acquisitions









Preventing a competition problem from arising more effective than fixing it afterwards

Mergers between competitors can be costly for consumer and market as a whole

Mergers between vertically integrated entities may raise less concern but they may also lead to competition concern

Given efficiencies in case of M&As, competition authority conduct a quick screening exercise





Relevant provisions of the Act effective from June 01, 2011
Regulations finalised on May 11, 2011

Combinations where the prescribed thresholds are met - require prior approval of the CCI

Acquisition of control, shares, voting rights or assets

Mergers

Amalgamations

Mandatory notification requirement and suspensory regime

Commission's Regulation – to form *prima facie* opinion about AAEC within 30 working days

Act provides for 210 days for the Commission to decide (prescribed period)

Deeming provision - on expiry of the prescribed period if no order is passed, the combination is deemed to be approved





Combination Thresholds

Criteria		Assets	Turnover
Only within India	Individu al	Rs.2,000 Crore	Rs.6000 Crore
	Group	Rs.8,000 Crore	Rs.24,000 Crore
Within and	Individu al	US \$ 1 billion with at least Rs.1000 crore in India	US \$ 3 billion with at least Rs.3000 crore in India
outside India	Group	US \$ 4 billion with at least Rs.1000 crore in India	US \$ 12 billion with at least Rs.3000 crore in India

Exemption from notifying for certain transactions – *Ease of doing business*

Transactions, *inter alia*, on account of covenant of loan agreement

Transactions mentioned in Schedule I of the Combination Regulations which includes

- Transactions where no change in control
- □Intra-group transactions

Acquisition of shares up to a prescribed limit in ordinary course of business or solely as an investment

Factors considered while assessing a combination

Section 20(4) of the Act provides for factors to be considered while assessing a combination. Some factors are:

- Degree of countervailing power in the market
- Extent of effective competition likely to sustain in a market
- Extent to which substitutes are available or are likely to be available in the market
- Possibility of a failing business
- Nature and extent of innovation

Nature of extent of innovationStatic & Dynamic efficiency





Acquisition of Monsanto Company by Bayer AG
Modification keeping into account innovation nature of the industry, farmers

Amalgamation of Videocon d2h Limited in and into Dish TV Limited
Modification keeping into account the end consumer





- Penalty on Thomas Cook for gun jumping during acquisition of Sterling Holidays
- Penalty on Avago for not notifying a combination Avago was acquiring Broadcom Corporation





Other aspects related to M&As

- Pre-Filing Consultation
- Intersection of Insolvency proceedings under Insolvency and Bankruptcy Code, 2016 and Competition Law
- Do It Yourself software



CCP involves active efforts on the part of an enterprise to comply with the provisions of competition Act so that knowingly or unknowingly, it does not infringe competition law.

Objectives:

Prevent violation of competition law

Promote culture of compliance

Encourage Good Corporate citizen ship



Advantages

Provides competitive edge by enabling them to detect any violation at early stage and take corrective action.

Assist in building reputation

Obviates or reduces litigation costs and costs arising out of non-compliance i.e. Penalty and sanctions.

Inculcates culture of compliance



Elements/ Guidelines on:

Types of external discussion that is always prohibited (ex. Pricing)

Information that can be legitimately exchanged and what constitutes confidential/ commercially sensitive.

Proper conduct of meetings with competitors(or suppliers/ customers)

How to deal with complaints of customers and/or suppliers.

Direct or indirect price fixing (RPM)



Features

Explicit statement from Senior Management

- Compliance Manual
- Compliance Officer
- Simple and plain language
- Training and education of employees

Written undertaking from employees to conduct business dealings within the compliance framework



Features

- Identification of employees and divisions at risk
- Disciplinary action for non-compliance
- May be linked with HR policy and Disciplinary Policy
- Compliance must be reported to the Board periodically
- Must be evaluated and reviewed periodically in a dynamic environment
- Customised programme- one size does not fit all



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Suspicious of Anti-competitive Behaviour

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