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# 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?



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- ❑ 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 anti-competitive conducts?

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- Drive up the prices or to prevent decrease in prices
- Increase or maintain profits
- Avoid expense on innovation



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# Why Competition Law?



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

Anti-Monopoly Law

Anti-trust Law

Trade practices Law



# Historical Background

- ❑ 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



# The Competition Act, 2002



## 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.



# The Competition Act, 2002



## 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.



# The Competition Act, 2002



Other Functions include:

- ❑ Advisory functions
- ❑ Advocacy functions
- ❑ Legislative functions





# Anti-competitive Agreements





# 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.



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Competition  
For Greater Good

# 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 competition (AAEC) within India.*

*(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.”*



# Anti-competitive Agreements

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Agreement: includes any

- ❑ Arrangement
- ❑ Understanding or
- ❑ Action in concert

Whether or not

- ❑ in writing;
- ❑ intended to be legally enforceable



# Anti-competitive Agreements



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

Anti-Competitive Agreements:

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



# Horizontal Agreements



## Section 3(3)

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- ❑ 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)

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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)



Price Fixing

Market Sharing

Limiting Market

Bid Rigging





# Vertical Agreements

## 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



# Types of anti-competitive agreements under Section 3(4)

Tie-In/ Bundling

Resale Price maintenance

Exclusive Supply

Exclusive Distribution

Refusal to Deal



# 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

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# Abuse of Dominant Position

## Section 4

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‘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



# Concept of Relevant Market



## 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;



# Abuse of Dominant Position



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



# Penalty

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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;





# Leniency Provisions

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



# Combinations





# Why provision for ex-ante assessment of combination?



- 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



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# Provision for Combinations



- 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



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# Combination Thresholds

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



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# 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 innovation
  - ❑ Static & Dynamic efficiency



# Few combination cases....

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- ❑ 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 in case of gun jumping



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- ❑ 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

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



# Competition Compliance Programme (CCP)



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



# Competition Compliance Programme (CCP)



## 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



# Competition Compliance Programme (CCP)



## 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)



# Competition Compliance Programme (CCP)



## 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



# Competition Compliance Programme (CCP)



## 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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# Contact CCI



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## Suspicious of Anti-competitive Behaviour

### Contact Us:

Competition Commission of India

8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Floor

Office Block 1, East Kidwai Nagar

New Delhi: 110023, India.

Log on to our website:

<http://www.cci.gov.in>



# Contact CCI

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## Contact for Competition Advocacy Session(s):

Competition Commission of India

8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Floor

Office Block 1, East Kidwai Nagar

New Delhi: 110023, India.

Email: [advocacy@cci.gov.in](mailto:advocacy@cci.gov.in)



# Competition Videos Links

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<https://www.cci.gov.in/advocacy-booklets>

<http://cci.gov.in/video-gallery/130>





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