



Competition Commission of India

COMPETITION LAW AND POLICY IN INDIA

by
P.D. Sudhakar & K.K. Sharma

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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



Wave of Liberalisation

- 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



Need for Overhaul

- The Department Related Parliamentary Standing Committee on Home Affairs, to which the Competition Bill 2001 was referred for examination concluded that the rigidly structured MRTP Act also necessitate its repeal in view of government policy being a facilitator rather than a regulator



Law Enacted

- In mid term appraisal of 9th five year plan, Planning Commission recognized the need of a National Competition Policy
- Enactment of Competition Act 2002, pursuant to Raghavan Committee's Report
- National Common Minimum Programme 2004 (UPA) desired to strengthen all regulatory institutions to ensure that competition is free and fair



Present Status

- Competition Act, 2002 enacted in January 2003
- Competition Commission of India established in October, 2003 with one Member
- Full constitution of Commission and enforcement could not be taken up due to legal challenge leading to process of amendments
- Competition (Amendment) Act, 2007 passed in September 2007
- Process for full constitution of the Commission set in motion



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]



Broad Mandate

Provisions of CA 02:

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



Reach of the Commission

- All enterprises, whether public or private [S 2(h)/ Expln. cl. (I)]
- Departments of government except activities relatable to sovereign functions including Atomic energy, Currency, Defence and Space (S 2(h))
- Extra-territoriality (S 32)
- Provision to enter into MOUs or arrangements with foreign competition authorities (S 18)



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 - based on '*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,
- IPRs
 - **Copyright**
 - **Patent**
 - **Trade mark**
 - **Geographical indicators**
 - **Industrial designs**
 - **Semi-conductor Integrated Circuits Layout Designs**



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 Provision

- 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))
- DG is empowered to investigate into contraventions of the Act when so directed by the commission and has the powers of a civil court for gathering evidence {Section 41(1) & (2)}



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.



Powers of DG

- DG has powers as are vested in the 'Inspector' in terms of Section 240 & 240 A of the Companies Act, 1956.
- These powers, inter-alia, include 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))



Deterrence & Penalty-I

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



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 (S27 (d))
- **Heavy penalty** – imposing on each member of cartel, a monetary penalty of up to three 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))



Leniency Regulations

- *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))*



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



Dominance

- Factors (S 19(4))
 - 1) Market share of enterprise
 - 2) Size and resources of enterprise
 - 3) Size and importance of competitors
 - 4) Commercial advantage of enterprise over competitors
 - 5) Vertical integration
 - 6) Dependence of consumers
 - 7) Dominant position as a result of a statute
 - 8) Entry barriers
 - 9) Countervailing buying power
 - 10) Market structure and size of market
 - 11) Social obligations and costs
 - 12) Contribution to economic development
 - 13) Any other factor



Relevant Market-I

- Relevant Geographic Market (S 19(6))
 - 1) Regulatory trade barriers
 - 2) Local specification requirements
 - 3) National procurement policies
 - 4) Adequate distribution facilities
 - 5) Transport costs
 - 6) Language
 - 7) Consumer preferences
 - 8) Need for secure or regular supplies or rapid after-sales services



Relevant Market-II

- Relevant Product Market (S 19(7))
 - 1) Physical characteristics or end-use of goods
 - 2) Price of goods or service
 - 3) Consumer preference
 - 4) Exclusion of in-house production
 - 5) Existence of specialized producers
 - 6) Classification of industrial products



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



Effectively Per Se Prohibition

- **No enterprise or group of enterprises shall abuse its dominance position (S 4)**
- Act envisages *per se* prohibition of abuse of dominant position



Remedies for AOD

- Cease and desist order
- Specifying future terms and conditions
- Imposition of penalties
- Structural remedies include 'division of enterprise'
- 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) (Rs. 2000 cr) | US \$ 1500 m (Rs. 1500 cr) (Rs. 6000 cr) |
| | Group | US \$ 2000 m (Rs. 500 cr) (Rs. 8000 cr) | US\$ 6000 m (Rs. 1500 cr) (Rs. 24000 cr) |



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



Determining Factors -I

1. Actual and potential level of competition through imports
2. Extent of barriers to entry into the market
3. Level of concentration in the market (HHI, CR)
4. Degree or countervailing power in the market
5. Likelihood of post combination price/profit increase
6. Extent of effective competition in the market - post combination
7. Extent to which substitute are/likely to be available
8. Market share in the relevant market-individually and combined



Determining Factors -II

9. Removal of vigorous and effective competitor from the market
10. Nature and extent of vertical integration in the market
11. Possibility of failing business
12. Nature and extent of innovation
13. Contribution to economic development
14. Whether the benefit of combination outweigh adverse effect of combination

(S 20(4))



Orders of CCI

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



Combination Regulations-I

- *Some relaxation for marginal combinations (R 5)*
- *Special provisions for hostile takeovers (R 10)*
- *Permitting additional time when sought by parties (R 18)*
- *Rectification of mistakes (R 20)*
- *Intimation of changes, not affecting assessment (R 22)*
- *Deemed clearance in 30/60 days in most cases (R 26)*
- *Pre-notification consultation being considered*



Combination Regulations-II

- *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)*



Competition Advocacy & Awareness

- Central or State Government can refer policy or law relating to competition or any other matter for Commission's opinion – not binding (S 49(1)/(2)) – 60 days
- Commission required to take measures for “competition advocacy, awareness and training” (S 49(3))
 - with industry, trade associations etc. to strengthen competition culture and improve compliance
- Commission may give opinion suo-motu to Government, regulators, other authorities (S 49(3)/ GR 60)
 - Competition principles interface with policies relating to: disinvestment, concessions, industrial policy, international agreements, entry/exist policies etc.
- Provision for mutual consultation between Commission and regulators (S 21/21A)-60 days



Other Principles in the Act

- Competitive neutrality [S 2(h)/expln (I)]
- Effects doctrine (S 32)
- International co-operation (S 18)
- Exclusive jurisdiction in competition matters (S 53B/ 53T /61)
- Confidentiality (S 57/GR 38)



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 & 43 (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 lakh extendable to Rs. one crore** (S 44)
- False statement/ omitting information – **fine upto Rs. one crore**
- Lesser penalty (S46)



Present Activities of Commission

- Competition advocacy and awareness
- Ground-work--professional & legal-including 7 draft regulations and internal guidelines, etc.
- Institutional capacity building, including staffing and training-IIM B entrusted with organizational study
- IIM B suggested – economists 40% , lawyers 40% and financial analysts etc. 20%-Training – high priority, on going



Preparatory Work-I

- Draft Competition Commission (General) Regulations 200_
- Draft Competition Commission (Combination) Regulations 200_
- Draft Competition Commission (Lesser Penalty) Regulations 200_
- Draft Competition Commission (Meeting for Transaction of Business) Regulations 200_
- Draft Competition Commission (Determination of Cost of Production) Regulation 200_



Preparatory Work-II

- Draft Competition Commission (Procedure for Engagement of Experts and Professionals) Regulations 200_
- Draft Competition Commission (Calling upon Experts to Assist in Conduct of Inquiry) Regulations 200_
- Preparation of Advocacy Booklets on
 - Competition Compliance Programme
 - Bid rigging
 - Intellectual Property Rights
 - Abuse of Dominance
 - Activities
 - Cartel
 - FAQs



Guiding Principles of Commission

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



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



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

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



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)*



The Road Ahead

- Advocacy is already on
- The stage is all set for enforcement
- The fully constituted Commission expected to be in place in about a month's time
- Waiting for the curtain to rise
- In view of the good background work expected to deliver



Thank you