



COMPETITION LAW IN INDIA

A BRIEF OVERVIEW

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HISTORY

- There was no effective competition law regulation before independence.
- Section 27 of the Indian Contract Act, 1872.
- Article 38 & 39 of the Indian Constitution, 1950.
- Command and control policy.
- The evolution of Monopolistic and Restrictive Practices Act, 1969.
- Salient features of MRTP Act
- Difference between MRTP Act and the Competition Act, 2002



What is Competition Law?

Not defined in the Competition Act, 2002.

- Branch of Economic law
- Govern the behavior of enterprises/market participants
- Producer of goods and services fairly compete with each other
- Competition is “a situation in a market in which firms or sellers independently strive for the buyers’ patronage in order to achieve a particular business objective for example, profits, sales or market share” (World Bank, 1999).



Evolution of Competition Act, 2002



- **October 1999 - Raghavan Committee**
 - Recommended a modern competition law for the country in line with international developments and practices.
 - Advocated for a legislation providing for voluntary notification of combinations, calibrated introduction of the provisions of a competition law in line with post-1991 liberalization regime.



Features of Competition Act, 2002



Competition Commission of India empowered to:

- Inquire into *Anti-Competitive Agreements* i.e. Cartels, Bid-Rigging etc. (Section 3)
- Inquire into *Abuse of Dominant Position* including Predatory Pricing etc. (Section 4)
- *Regulate Combinations* i.e. Mergers, Acquisitions etc. (Sections 5 & 6)
- Undertake *Competition Advocacy* i.e. advice on policy issues, create public awareness, training on competition issues etc. (Section 49)



What is Agreement

Defined under Section 2(b) of the Competition Act, 2002, which includes any :

-
- Arrangement
 - Understanding or
 - Action in concert

Whether or not

- in writing;
- intended to be legally enforceable



Enterprise



Section 2(h) defines 'Enterprise'

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, defence and space.

Title : Anti Competitive Agreement

Language : Hindi

Duration : 60 sec

Client : Competition Commission of India

Producer : super-ads



Anti-Competitive Agreements



Anti-Competitive Agreements - Classified into two types:

- Horizontal Agreements, Section 3(3) - cartel, bid-rigging etc.
- Vertical Agreements, Section 3(4) - exclusive supply, tie in arrangement etc.



HORIZONTAL AGREEMENTS



Horizontal Agreements



- An agreement entered between two or more enterprises operating at same level of business
- Directly or indirectly determining purchase or sale price
- Limit or control production, supply, market, technical development, investment or provision of services
- Shares the market by way of allocation of geographical area
- Bid rigging/collusive bidding
- 'Shall presume' rule applies to Horizontal Agreements.
- Burden of proof is on the person or enterprise



Horizontal Agreements



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- Horizontal Agreements, often termed as Cartels, considered most pernicious under the Competition Law.
 - Penalty : Up to 3 times of profit of contravening enterprise for each year of the continuance of such agreement or 10% of its average turnover, whichever is higher.



Case law



In re: Alleged Cartelization by Cement Manufacturers.

- ▶ MRTP Commission took suo-motu cognizance of this matter, and was later transferred to Competition Commission under section 66(6). CCI found the act and conduct of the cement companies to be a 'Cartel' as the cement companies were acting together to *limit, control* and also *attempted to control the production and price of cement in the market* in India
- ▶ Penalty of Rs. 6307 crore was imposed on the 11 cement companies and their associations, fixed at 50 per cent of their profits during 2009 -10 and 2010 -11.



Case law



In re: Aluminium Phosphide Tablets Manufacturers, Suo Motu Case No. 02 of 2011

- The Commission examined the allegation of anti-competitive acts and conduct in the tender for procurement of Aluminium Phosphide Tablets required for preservation of central pool food grains by Food Corporation of India. In this case, the Commission *inter alia* noted that the identical bid price is not possible unless there is some sort of prior understanding.
- The Commission found the collective action of identical bids, common entry in the premises of FCI before submission of bids as indicative of ‘plus’ factors in support of existence of an understanding among the parties. The Commission apart from issuing a cease and desist order imposed a penalty upon each of the contravening party @ 9% of the average turnover of the company.
- The matter was challenged in appeal before the Appellate Tribunal which upheld the order of CCI, however, the penalty amount was reduced by applying the principle of “relevant turnover”. The Supreme Court upheld the order of CCI.



HORIZONTAL AGREEMENT



B. P. Khare, Principal Chief Engineer, South Eastern Railway vs. M/s Orissa Concrete and Allied Industries Ltd. And Ors.

- ▶ South Eastern Railway floated tenders for Anti-Theft Elastic Rail Clips - Offers submitted by 29 firms, quoted rates in range of 66.49 to 66.51 and much less than 50% of total tender quantity. Bidders were located across the country.
- ▶ Factors such as bid documents containing same handwriting, common omissions and language mistakes, format of covering letter, tender fee payment, past conduct *etc.* indicated that firms entered into an agreement to influence the prices. Contravention of section 3(3)(d) read with section 3(1) of the Competition Act.
- ▶ CCI held that conduct of parties were amounting to bid rigging and intended to eliminate competition in tender and manipulate the process of bidding.



HORIZONTAL AGREEMENT



Suo Moto Case No. 3 of 2012 (Cartelization in supply of spare parts to Indian Railways, Patiala, Punjab)

- ▶ CCI took suo moto cognizance in the matter based on letter received from Manager, Diesel Loco Modernization Works, Punjab alleging cartelization in the tender floated for procurement of **Feed Valves used in diesel locomotives**.
- ▶ CCI held that all the 3 OPs were quoted identical rates of Rs. 17,147.54 for the Feed Valves per piece. CCI also found that all the three OPs have their manufacturing units located at different parts of India viz. Haryana, West Bengal and Tamil Nadu with different cost of production, transportation etc. cannot quote the identical rates in the bid unless there was a collusion amongst each other.
- ▶ All the 3 OPs have violated Section 3(3) of the Competition Act, 2002 and penalty over 60 Crores @ 2% of average Turnover was imposed on the Companies.



Public Procurement

- **Efficient procurement** - best value for money, Vigorous competition amongst suppliers, innovation, level of investment and efficiency.

- Conversely, when competition is curtailed, more than fair price paid for lower quality resultantly wasting the government money for inferior goods/services.
- **Competition issues:** Cartelization/collusive bidding/bid-rigging, Restricting entry through entry barriers and Abuse of dominance. The procurement mechanism adopted in most government departments is itself not designed keeping in mind the importance of competition in ensuring efficient outcome. Moreover, in some cases the mechanism itself is facilitating anti-competitive practices.



Indicators of Bid Rigging



- Small number of companies
- Little or no entry

- Market conditions
- Industry associations
- Repetitive bidding
- Identical or simple products or services
- Few if any substitutes
- Little or no technological change



VERTICAL AGREEMENTS



Vertical Agreements



Agreements between different level of production and distribution chain are called vertical agreements viz.

Manufacturer-Dealer

Dealer-Supplier

Wholesaler-Retailer etc.

Following agreements are prohibited under Competition Act:

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



Vertical Restraint-Case Law



Shamsher Kataria vs. Honda Siel Cars and 13 Ors.(Case No.03/2011)

- ▶ In a first major Order passed under section 3(4) of the Competition Act,2002, CCI had imposed penalty of more than Rs.2500 Crores upon 14 major car manufacturers for violating the Act.
- ▶ It was held that all the major auto manufactures were not allowing its spare parts and diagnostic tools to be sold in the open car market and forcing the consumers to buy it from their authorized dealers.
- ▶ The CCI relied various judgments while passing the detailed order.
- ▶ Some of the Car Manufacturers have filed writ petitions in different High Courts to stop the proceedings before the Commission and DG but in vain.
- ▶ The Appellate Tribunal upheld the order partially on merits. Now the matter is pending in Supreme Court.



Exceptions to Anti-Competitive Agreements



Horizontal and Vertical Agreements imposing *reasonable restrictions* for protecting rights conferred under following statutes:

- Copyright Act, 1957;
- Patents Act, 1970;
- Trade and Merchandise Marks Act, 1958 or the Trade Marks Act, 1999;
- Geographical Indications of Goods (Registration and Protection) Act, 1999;
- Designs Act, 2000;
- Semi-conductor Integrated Circuits Layout-Design Act, 2000.



ABUSE OF DOMINANCE

TITLE : ABUSE OF DOMINANCE

VIDEO SPOT

LANGUAGE : HINDI

DURATION : 40 SECONDS

CLIENT : COMPETITION COMMISSION OF INDIA

PRODUCER : super-ads



What is Dominance

Dominant Position (Explanation to Section 4)

Dominant position is position of strength, enjoyed by enterprise, which enables it to :

- Operate independently of competitive forces in market;
- Affect its competitors and/or consumers in its favour.

Dominance itself is not prohibited, its *abuse* is; and Dominant position is always defined with context to the *relevant market*.



Concept of Relevant Market

- **Relevant Market [Section 2(r)]** - Comprises of either/or both relevant geographic market and relevant product market

- **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;
- **Relevant Product Market [Section 2(t)]** - Market comprising all goods/services which are substitutable by reason of characteristics, usage and prices.



Abuse of Dominance



- ▶ Imposing, directly or indirectly, unfair or discriminatory conditions or price in purchase or sale of goods/services;
- ▶ Limiting or restricting production of goods/services or technical development to the prejudice of customers;
- ▶ Indulging in practices resulting in denial of market access;
- ▶ Imposing conditions not relevant to subject of the contract or disadvantageous to the other party;
- ▶ Using dominant position in one relevant market to enter or protect other relevant market



Case Study



Belaire Owner's Association vs. DLF

M/s Magnolia Flat Owners Association & Anr. vs. DLF Universal and Others

- ▶ DLF imposed several clauses in Buyer's Agreement and action of *cancelling allotments, forfeiting deposits, keeping buyers in the dark about the eventual shape, size, location, earnest money, instalments, timely payments, delivery of possession, alternations and additional constructions* etc. of the apartments was held unfair
- ▶ DLF enjoyed dominant position in relevant market .
- ▶ Relevant Product Market - Provision of services of development of high end residential flats
- ▶ Relevant Geographical Market - Gurgaon, Haryana.
- ▶ The COMPAT upheld the order of CCI. Presently, pending in Supreme Court.



Case Study



Maharashtra State Power Generation Co. against Coal India Ltd. & other connected matters

- ▶ CCI has imposed a penalty of Rs.1773.05 crore on Coal India for abusing its dominant position under section 4 of the Competition Act.
- ▶ It was found that the CIL operates independently of market forces through its subsidiaries and enjoys dominance in the relevant market of production and supply of non-coking coal in India.
- ▶ It was also found that the CIL and its subsidiaries are imposing unfair/discriminatory conditions in the supply of non-coking coal to the power producers through Fuel Supply Agreements (FSA).
- ▶ Presently, the matter is pending in appeal.



Regulation of Combinations



- ▶ Section 6 deals with Regulation of Combinations.
- ▶ Merger review is necessary to prevent:
 - Enterprises from acquiring dominant position which can be abused
 - Concentration of market power that can reduce competition and diminish product quality and/or availability
- ▶ The major concerns are increase in prices of goods, innovation and the impact on consumer choice.
- ▶ All combinations meeting the threshold limits as prescribed, need pre approval of CCI.
- ▶ Any Person/ Enterprise, who/ which proposes to enter into a combination, shall give notice to the Commission within 30 days
- ▶ Act provides 210 days for the Commission to decide
- ▶ Deeming provision - on expiry of the prescribed period if no order is passed, the combination is deemed to be approved



FEW LANDMARK CASES



Combinations

- ▶ **Holcim - Lafarge**
 - ▶ Merger approved subject to divestiture of two cement plants, one in Jharkhand and other plant in Chhattisgarh
- ▶ **Sun Pharma - Ranbaxy**
 - ▶ Merger approved subject to divestiture of products relating to seven relevant markets for formulations
- ▶ **PVR - DT Cinemas**
 - ▶ The Proposed combination comprised acquisitions of 39 screens of DT Cinema by PVR.
 - ▶ The Commission delineated five relevant markets in which transaction was perceived to give rise to competition concern.
 - ▶ The Commission approved the combination subject to certain divestitures being made by the parties.



CCI'S ORGANIZATIONAL STRUCTURE



COMPETITION COMMISSION OF INDIA

CHAIRPERSON & SIX MEMBERS

Secretariat

Divisions

DG Office

Advocacy
Division

International
Division

Capacity Building
Division

Economic
Division

Combination
Division

Legal &
Investigation
Divisions

Antitrust
Division



PRINCIPLES OF NATURAL JUSTICE



Section 36 of the Competition Act, 2002

In discharge of its functions, Commission guided by :

- ▶ Principles of Natural Justice
- ▶ Rules made by Central Government; and
- ▶ Its own procedure.

Principles of natural justice to ensure procedural fairness and fair decision:

- ▶ *The Bias Rule: Nemo Judex in Causa Sua*
- ▶ *The Hearing Rule: Audi Alteram Partem*
- ▶ *The Evidence Rule: Reasoned decision reached after taking into account all relevant facts and circumstances*



POWERS OF COMPETITION COMMISSION



Commission entrusted with certain powers of Civil Court under Section 36(2), viz.

- ▶ Summoning & enforcing attendance and examination on oath;
- ▶ Discovery and production of documents
- ▶ Receiving Evidence on Affidavit
- ▶ Issuing Commission for examination of witnesses and documents
- ▶ Requisitioning of Public Records under Indian Evidence Act.



PROCESS FOLLOWED AT CCI



Case Initiation (Section 19)

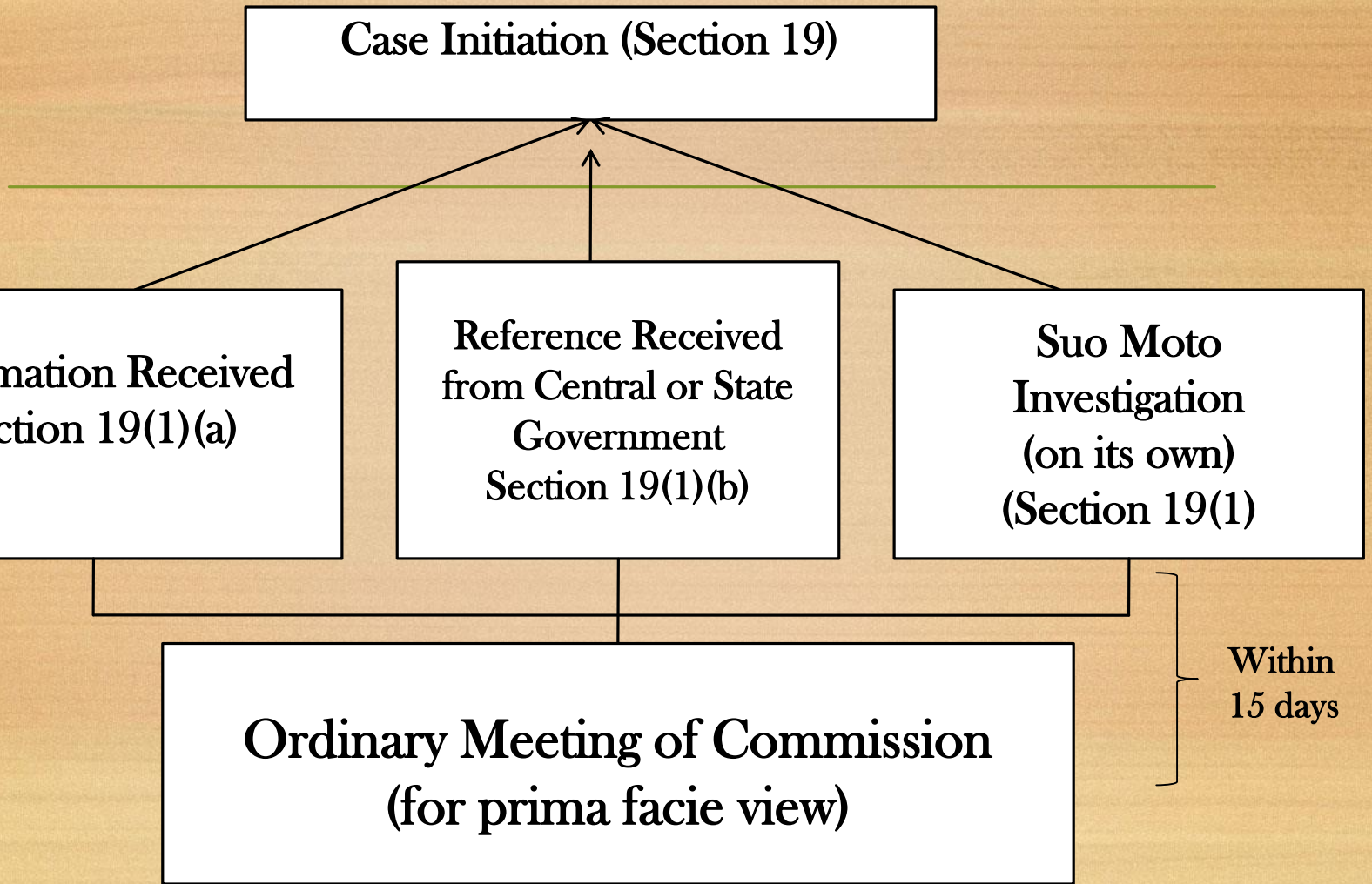
**Information Received
Section 19(1)(a)**

**Reference Received
from Central or State
Government
Section 19(1)(b)**

**Suo Moto
Investigation
(on its own)
(Section 19(1))**

**Ordinary Meeting of Commission
(for prima facie view)**

**Within
15 days**





PROCESS (...continued)



Need not follow formal rules of procedure*

Ordinary Meeting of Commission
(for prima facie view)

Within 60 days

Prima Facie Case
(no appeal lies in COMPAT)

Prima Facie
(No Case)

Sent to DG for Investigation

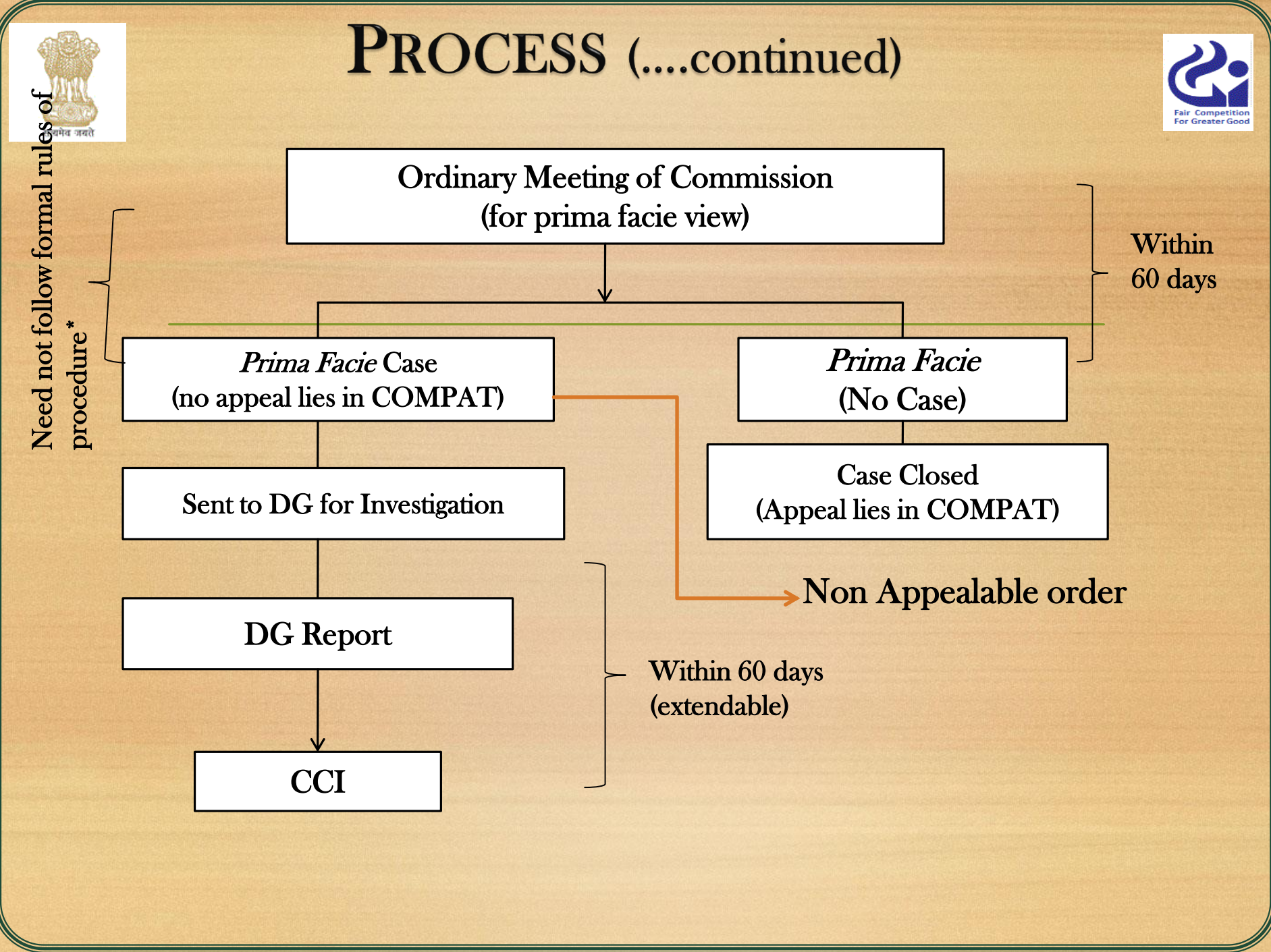
Case Closed
(Appeal lies in COMPAT)

DG Report

Non Appealable order

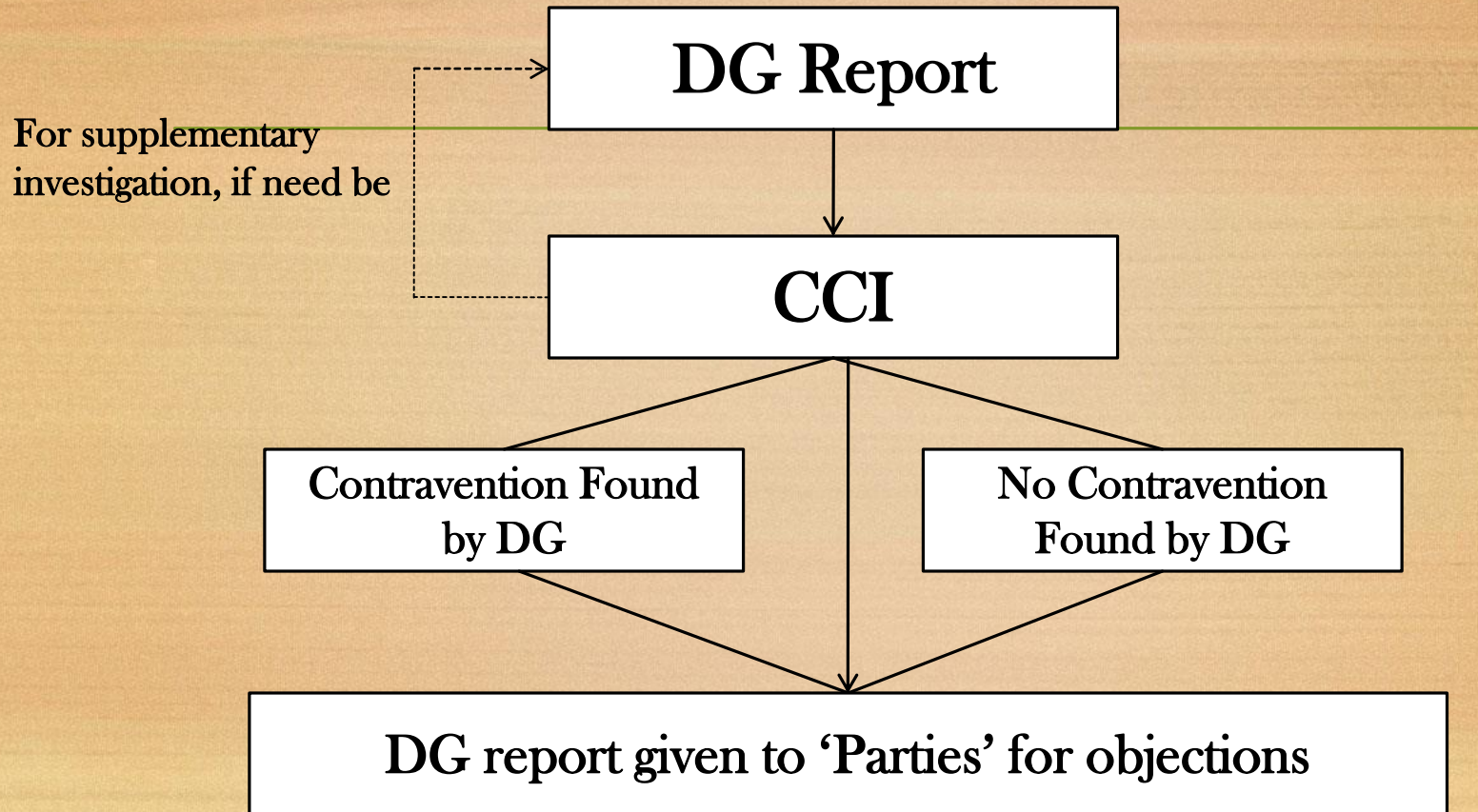
CCI

Within 60 days
(extendable)





AFTER RECEIPT OF DG REPORT





FINAL HEARING



DG report given to 'Parties' for objections

Objections are received from parties

Oral Submissions by Parties (Inquisitorial in nature)

- Parties or their Authorized representatives;
- Confidentiality Issues;
- Issues regarding cross examination;
- Issues regarding submission of additional evidence etc.



Investigation by Director General



- **Role of the Director General** - To assist the Commission in investigating into any contravention of the provisions of the Act. (Section 16)
- No power to investigate Suo-Moto unlike MRTP Commission
- Only after receiving directions under Section 26(1) and thereafter, if required
- Submit report to the Commission with findings on each and every issue raised in information as well as in section 26(1) direction.
- Powers of Civil Court



POWERS OF COMPETITION COMMISSION OF INDIA



- ▶ Cease and desist order
- ▶ Penalty upto 10% of average turnover for last three preceding financial years
- ▶ In case of cartels, penalty upto 10% of turnover or three times of profit for each year of continuance of such agreement, whichever is higher.
- ▶ Agreements having AAEC *void*
- ▶ Modification of anti-competitive agreements
- ▶ In case of dominant position, order for division of enterprise
- ▶ Power to issue interim orders
- ▶ In case of combination-can be approved, approved with modification or refused approval.



Miscellaneous Provisions



- Duties of the Commission (Section 18) - as reflected in the Preamble of the Act
-
- Reference by Statutory Authority (Section 21)
 - Reference by Commission (Section 21A)
 - Procedure for Inquiry (Section 26)
 - Extra Territorial jurisdiction (Section 32)
 - Interim Orders (Section 33)
 - Appearance before the Commission (Section 35)
 - Rectification of Orders (Section 38) - No power to amend substantive part
 - Leniency Provisions (Section 46)
 - Contraventions by the Companies (Section 48)
 - Competition Advocacy (Section 49)
 - Confidentiality (Section 57)



National Companies Law Appellate Tribunal(NCLAT)



- ▶ Headed by retired Supreme Court Judge and two Members

- ▶ Only those orders are appealable which are specifically provided under Section 53A(a) - CCI vs. SAIL (SC)

- ▶ Before NCLAT, CCI is necessary party in suo-moto cases and proper party in other cases

- ▶ Appeal to be filed within 60 days

- ▶ Further appeal in Supreme Court (Section 53T)

- ▶ Power to award compensation

- ▶ Power to punish for contempt (Section 53U) - same power as High Courts.



Important Orders of COMPAT



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- ▶ **DLF**-Upheld the order passed by CCI.{Case No.19 of 2010 & connected cases}
 - ▶ **Excel Crop Ltd.**-Upheld the findings of CCI against collusive bidding by the 3 bidders but reduced the penalty by applying relevant turnover.{Suo Moto Case No.2 of 2011}
 - ▶ **PES Installations Pvt. Ltd.**-Upheld the findings of CCI for contravening section 3(3) (d) of the Act but reduced the penalty amount from 5% to 3% of the annual turnover.{Case No.43 of 2010}



IMPORTANT DIRECTIONS UNDER SECTION 26(1)



-
- Against Google
 - Against Intel
 - Against Maruti Suzuki India Limited
 - Against IRCTC
 - Against Honda Motorcycle and Scooters India Private Limited



ADVOCACY

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- ❖ Competition Advocacy is one of the main pillars of modern competition law which aims at creating, expanding and strengthening awareness of competition in the markets.
 - ❖ Under Section 49(3), CCI is mandated to take suitable measures for the promotion of competition advocacy, creation of awareness and imparting training about competition issues.
 - ❖ Central/State Government may make references to the CCI on competition policy and law issues. CCI is required to give opinion in 60 days.
 - ❖ Enforcement and advocacy are reinforcing activities and complement each other



OBJECTIVES & OUTREACH

○ Objectives

- Promote competition culture
- Create awareness of competition law
- Train stakeholders on competition issues
- Periodical meetings to discuss issues affecting competition

○ Outreach

- Government Departments
- Industries and associations viz. FICCI, CII, PHD etc
- Premier educational institutions viz., IIMs, NLUs, etc
- Training academies viz. LBSNAA, NADT, and others
- High Courts and Judicial academies
- Consumer organizations
- Others viz. World Bank, NGOs etc



Takeaways



- Competition compliance
- Advocacy and Training Programmes
- Reference to CCI in case of suspected cartel/bid rigging
- Reviewing existing laws, agreements and contracts in the light of Competition Act
- Please refer to CCI website for an updated information and latest orders
- You can also reach to us on social media viz., Facebook, LinkedIn, Twitter etc



THANK YOU
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