



TREATMENT OF INTELLECTUAL PROPERTY RIGHTS UNDER COMPETITION ACT, 2002



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Talking Points



- ❖ Overview of CA,2002
- ❖ Jurisdiction and Procedure
- ❖ Intellectual Property and Competition Law
- ❖ Some CCI cases
- ❖ Q & A



Background of Enactment of CA, 2002



- State sponsored to market induced growth model since 1991. Focus shifted from curbing monopolies to promoting competition.
- Based on Raghvan Committee (1999) recommendation, MRTP Act, 1969 was repealed and Competition Act, 2002 was enacted.
- CCI came into existence on 1st March, 2009
- The substantive provisions of the Act were notified w.e.f 20.05.2009 (relating to prohibition of anti-competitive agreements and AoD) and w.e.f 01.6.2011 (relating to regulation of combinations)



CA, 2002: Objectives



- ❖ To prevent practices having adverse effect on competition.
- ❖ To promote and sustain competition in markets.
- ❖ To protect the interests of consumers.
- ❖ To ensure freedom of trade carried on by other participants in markets in India.



Substantive Provisions of CA, 2002



Enforcement Provisions:

- ❖ Prohibition of Anti-Competitive Agreements (**Sec 3**)
- ❖ Prohibition of Abuse of Dominant Position (**Sec 4**)
- ❖ Regulation of Combinations (**Sec 5 & 6**)

Advisory Provisions:

- ❖ Reference by Statutory Authority [**Sec 21, Sec 49 (1)**]

Advocacy Provisions:

- ❖ Competition Advocacy [**Sec 49(3)**]



Provisions of Section 3



- ❖ Prohibits anti-competitive agreements - both horizontal and vertical.
- ❖ No enterprise or associations of enterprises or person or associations 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 - **Section 3(1)**.



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Horizontal Agreement



- ❖ **Section 3 (3)**: Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprises or practice carried on, or decisions taken by, any association of enterprises or association of persons, **including cartels**, engaged in identical or similar trade of goods or provision of services, shall be presumed to have appreciable adverse effect on competition (***Per se rule***) and therefore void; if it -



Horizontal Agreement



Contd..

- ❖ directly or indirectly determines purchase or sale prices - **Sec 3 (3) (a)**.
- ❖ limits or controls production, supply, markets, technical development, investment or provision of services - **Sec 3 (3) (b)**.
- ❖ shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way – **Sec 3 (3) (c)**.
- ❖ directly or indirectly results in bid rigging or collusive bidding - **Sec 3 (3) (d)**.



Two Modes of Analysis



❖ *Per se* analysis

- No need to prove anti-competitive effects

❖ **Rule of reason (RoR) analysis**

- Proof Chart
- Evaluate pro and anti-competitive effects
- Behaviour is a problem only if anti-competitive effects outweigh pro-competitive effects.



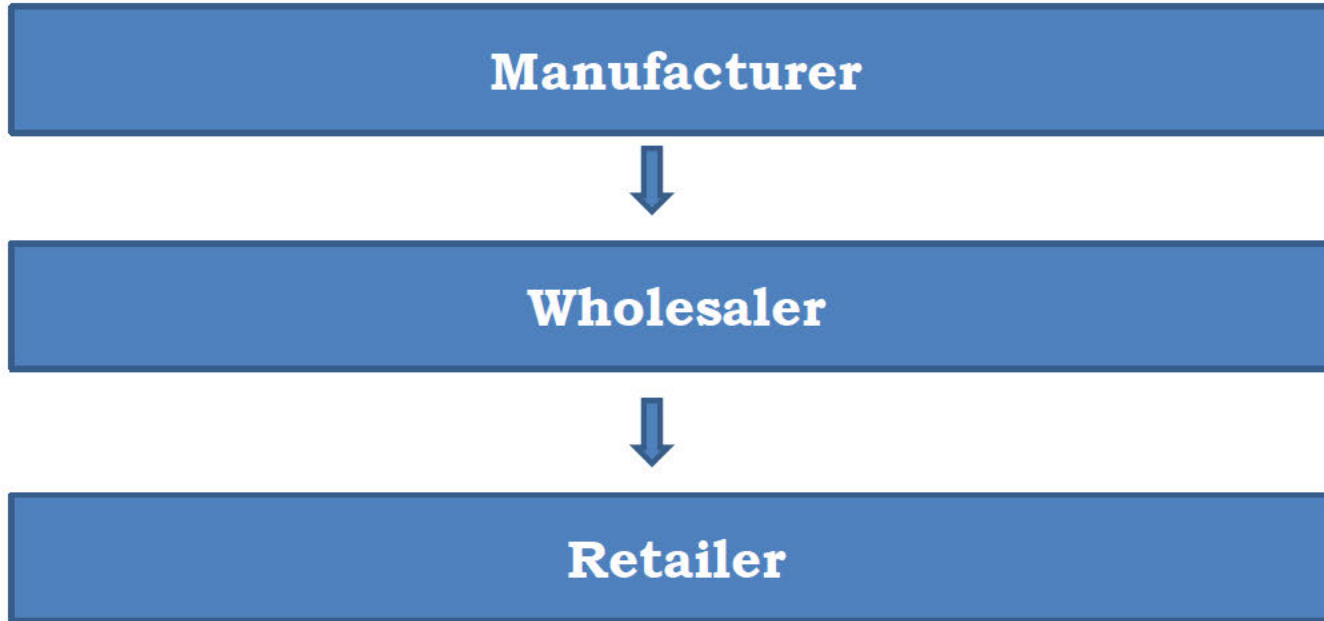
The Key Questions in ROR



- ❖ What is the nature of the restraint?
- ❖ What is the effect on price and output?
- ❖ Are there potential benefits or efficiencies?
- ❖ Does a comparison of the anti-competitive effects and efficiencies suggest a likely harm to competition?



Vertical Agreement



- ❖ **Section 3(4):** Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of **production, supply, distribution, storage, sale or price of, or trade in goods or provision of services**, including:



Vertical Agreement



- Tie-in arrangement
- Exclusive supply agreement
- Exclusive distribution agreement
- Refusal to deal
- Resale price maintenance

shall be anti-competitive if such agreement causes or is likely to cause an appreciable adverse effect on competition in India (*rule of reason*).



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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.



Provisions of Section 4



- ❖ **Section 4 (1)**: Enterprises or groups are prohibited from abusing their dominant position.
- ❖ **Dominant Position**: A position of strength, enjoyed by an enterprise, in the relevant market in India, which enables it to; operate independently of the competitive forces prevailing in the relevant market and affect its competitors or consumers or the relevant market in its favour.
- ❖ Dominance itself is not prohibited, but ***abuse of position by a dominant enterprise is prohibited***. Dominant position is always seen with context to the ***relevant market***.



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



- ❖ There shall be an abuse of dominant position if an enterprise or group ;
- ✓ **Section 4 (2) (a):** Directly or indirectly, imposes unfair or discriminatory: **(i)** condition in purchase or sale of goods or services; or **(ii)** price in purchase or sale (including predatory price) of goods or services; or
- ✓ **Section 4 (2) (b):** Limits or restricts: production of goods or provision of services or market; or technical or scientific development relating to goods or services to the prejudice of customers; or



Abuse of Dominance



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- ✓ **Section 4 (2) (c):** Indulges in practice or practices resulting in denial of market access in any manner; or
- ✓ **Section 4 (2) (d):** Makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or
- ✓ **Section 4 (2) (e):** Uses its dominant position in one relevant market to enter into, or protect, other relevant market.



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Abuse of Dominance



❖ Exploitative Practices

- Imposing unfair or discriminatory condition;
- Imposing unfair or discriminatory pricing;
- Limiting or restricting production
- Limiting or restricting technical or scientific development
- making conclusion of contracts subject to acceptance of conditions having no connection with the subject of such contracts;

❖ Exploitative Practices

- denying market access in any manner;
- using its dominant position in one relevant market to enter into, or protect, other relevant market



Regulation of Combinations



- ❖ CCI regulates combinations (acquisitions, control and mergers) if certain turnover and asset thresholds are met **(Sec. 5)**.
- ❖ No persons or enterprise shall enter into a combination which causes or likely to cause appreciable adverse effect on competition within the relevant market in India and such a combination shall be void – **Sec. 6 (1)**
- ❖ If the combinations are causing or likely to cause an appreciable adverse effect on competition, the mergers can be blocked by CCI or approved with some remedies.



Competition Advocacy



- ❖ **Section 49 (3):** The Commission shall take suitable measures for the competition advocacy, creating awareness and imparting training about competition issues. Through:
- Seminars, Conferences, publishing literature, sensitizing the stakeholders
 - Pro-actively asking Govt. to take measures promoting competition



Advisory Functions



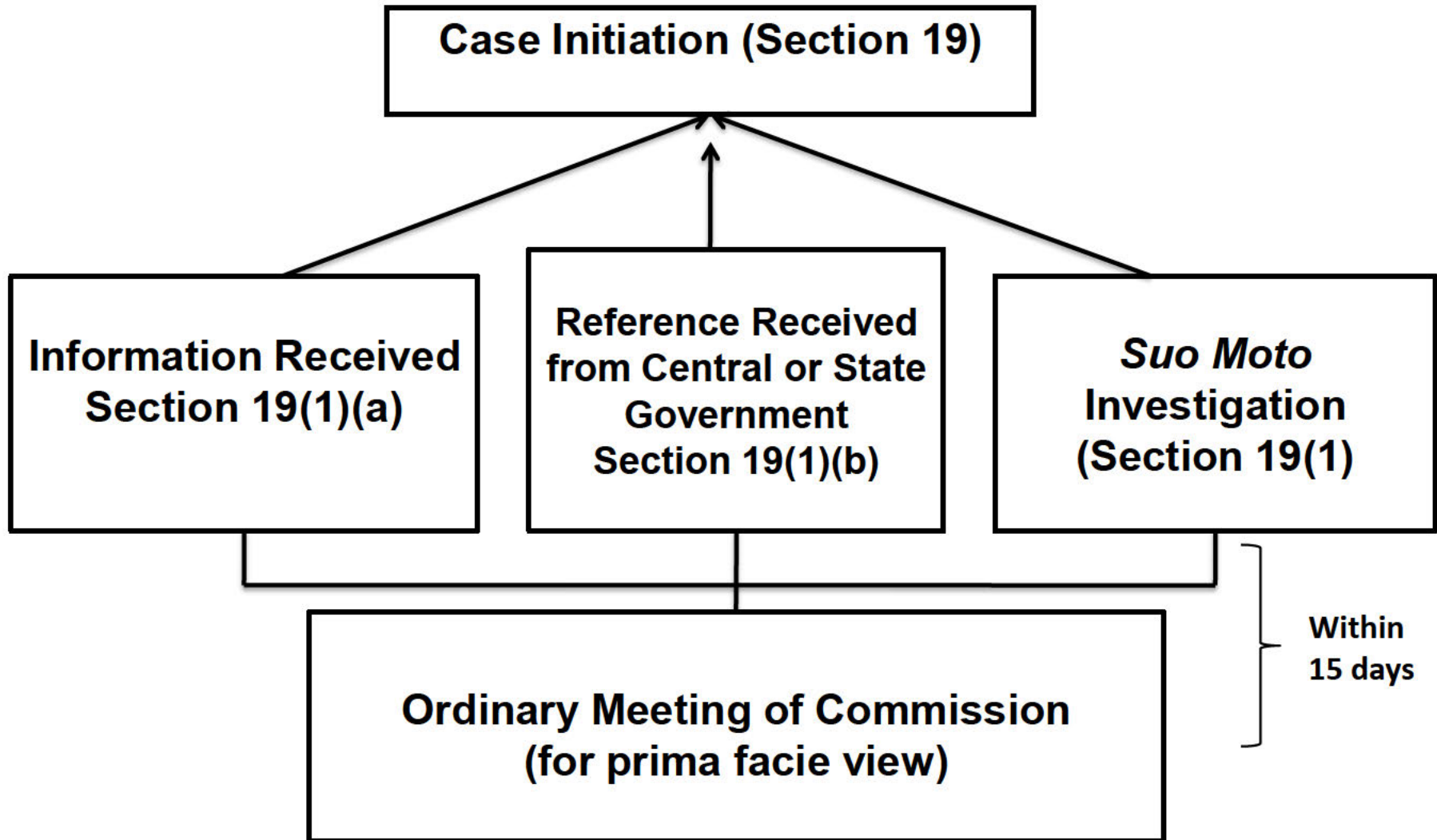
- The Central Government/ State Governments may, in formulating a policy on competition including review of laws related to competition or any other matter, make a reference to CCI for its opinion on possible effects of such policy on competition [**Section 49(1)**]
- CCI to give its opinion within sixty days of such reference
- The opinion of CCI *not binding* upon the Government
- The Commission shall give its opinion on a reference made by statutory authority [**Section 21**]



Jurisdiction and Procedure



Process Followed at CCI

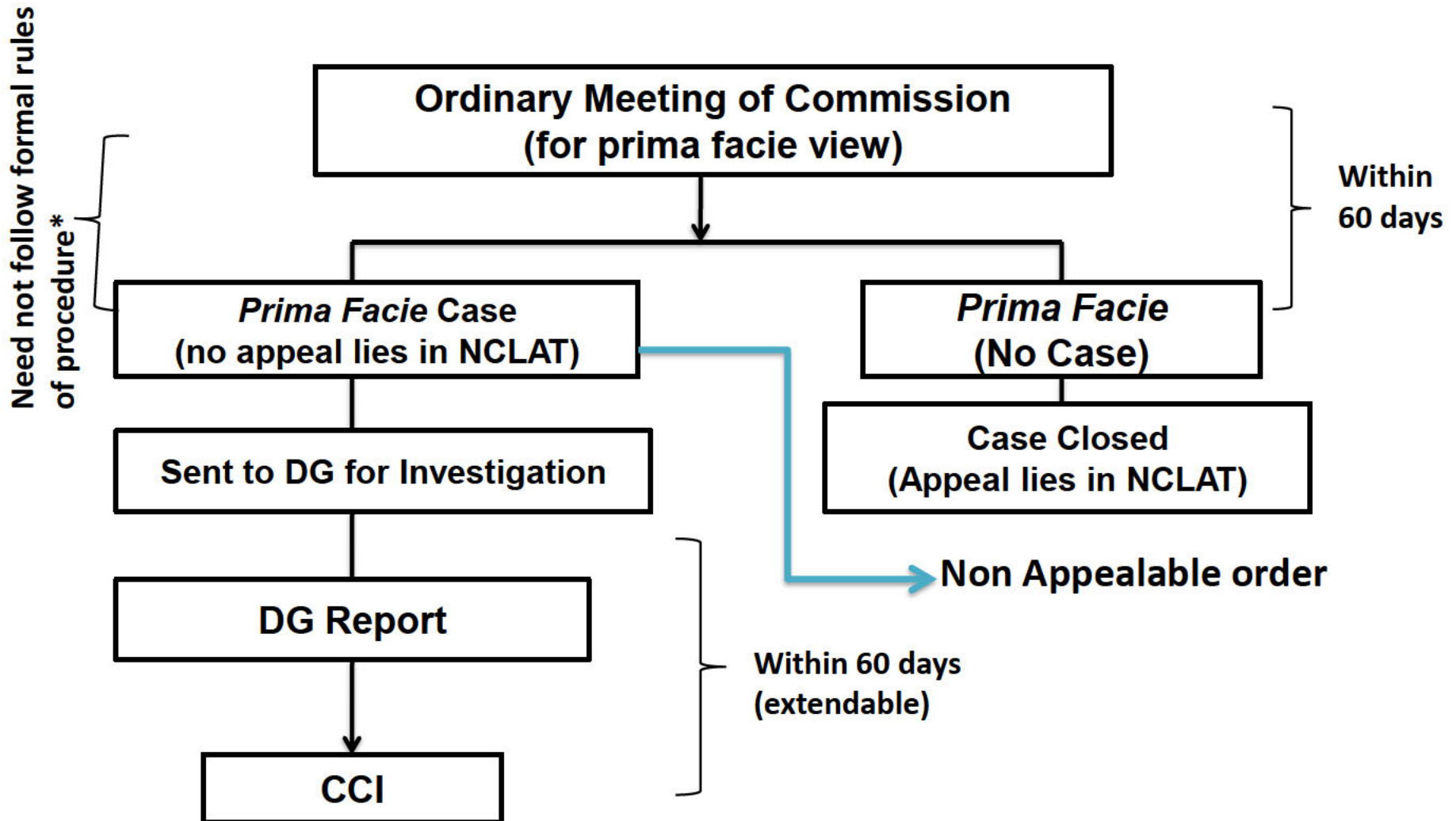




Process



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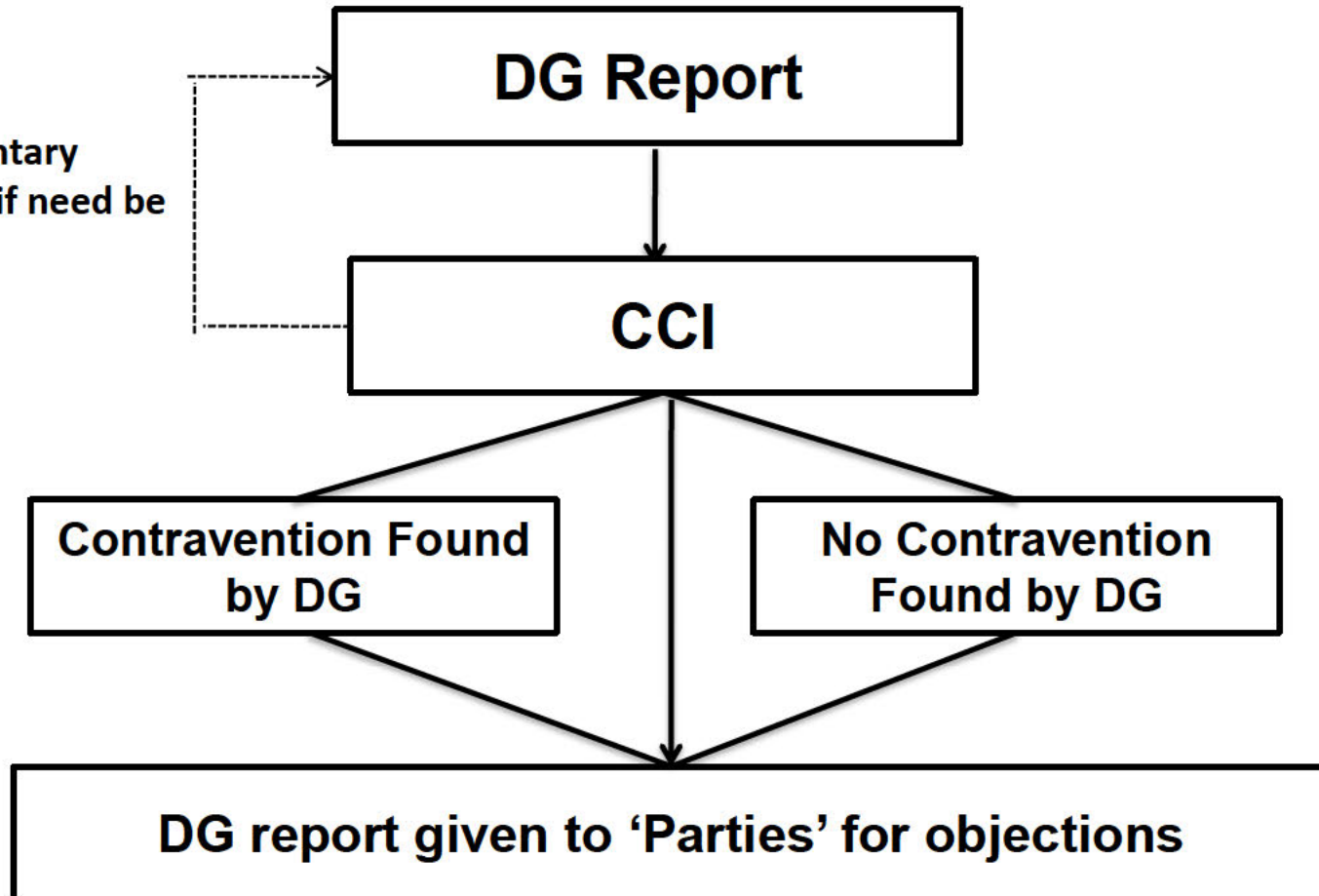




After Receipt of DG Report



For supplementary investigation, if need be





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.



Penalty Provisions



- ❖ Cease and desist order
- ❖ Penalty up to 10% of average relevant turnover for last three preceding financial years
- ❖ In case of cartels, penalty up to 10% of average relevant 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
- ❖ In case of combination-can be approved, approved with modification or refused approval.



IP and Competition Law



- ❖ CA, 2002 has not fully exempted IPR holders, exemption has been granted to a reasonable extent.
- ❖ Competition Law does not interfere when there is reasonable use of IP rights by the holders.
- ❖ The extent of reasonableness is to be assessed by CCI, without any prejudice.
- ❖ If CCI is of the view that an enterprise in question has used IPR granted to it in an unreasonable manner with view to distort competition in the market, it can initiate investigation.



IP and Competition Law



- ❖ The limited monopoly granted to IP holders are not *per se* anti-competitive, unless they extend those rights beyond the scope granted to them.
- ❖ Competition Law does not encroach on IPR holders, however it checks their conduct in case there is an attempt to exploit the market and the consumers.
- ❖ It seeks to draw a line between permissible business practices and abuse of IPR.



Cases Related to IPRs



- ❖ Micromax Informatics Limited v Telefonaktiebolaget LM Ericsson (Publ)
- ❖ Financial Software and Systems Private Limited v M/s ACI Worldwide Solutions Private Limited & Ors.
- ❖ M/s Three D Integrated Solutions Ltd. V M/s VeriFone India Sales Pvt. Ltd.
- ❖ H T Media v Super Cassettes Industries



THANK YOU

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