



Competition Commission of India

OVERVIEW OF COMPETITION POLICY AND LAW IN INDIA

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EXAMPLES-I

- Neighborhood examples

- Some comparisons

■ Newspaper	1978	---	2008
■ Aviation	1990s	---	2008
■ Telecom	1996	---	2008 (Virgin)
■ Milk	1970/80's	---	2008
■ Electronic Goods	1970/80's	---	2008
■ Two Wheelers	1980's	---	2008



EXAMPLE-II

■ Dominance

■ Tooth paste	-----	Colgate
■ Washing Soap	-----	Rin
■ Washing Powder	-----	Surf
■ Vegetable Oil/Ghee	-----	Dalda
■ Free flow Pen	-----	Add Gel
■ Mineral Water	-----	Bisleri
■ Soft Drink	-----	Coca Cola

■ Anti competitive agreements

■ Sale of a soft drink major	non-compete clause
■ Family settlements	non-compete clause



WHAT IS ‘COMPETITION’

- ‘effective competition’ Vs ‘perfect competition’
- Effective Competition is seen in terms of:
 - Rivalry among firms
 - Absence of restraints
 - Where no firm can influence the market place
- ‘effective competition’ has to be defined in terms of outcomes or the effects for/on the consumers/competition
- Absence or lessening of ‘effective competition’ results in ‘market power’ - likely to be abused to the detriment of consumer



EVOLUTION-I

- 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
 - High level of protection to domestic industry – a number of products under price and distribution controls.
- Despite industrial growth/diversification – complex network of controls/regulations fettered freedom of enterprises



EVOLUTION-II

- Industrial policy statement of 1980

- focused attention on need for promoting competition in domestic market, technological up gradation and modernization

- 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



EVOLUTION-III

- 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



EVOLUTION-IV

- 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.



EVOLUTION-V

- 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 identify areas that may merit consideration WTO framework
- Expert group, in Jan. 1999 report, suggested enactment of new Competition Law



EVOLUTION-VI

- 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



EVOLUTION-VII

- 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



EVOLUTION-VIII

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



Status of Indian Competition Law

- Competition Act, 2002 passed in January 2003
- Competition Commission of India established in October, 2003 with one Member resigned in July 2008
- 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 October 2007
- Process for full constitution of the Commission set in motion



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)*



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]



Four Corners

CA 02 contains the standard provisions:

- Prohibits anti-competitive agreements (S 3)
- Prohibits abuse of dominant position (S 4)
- Regulates combinations (S 6)
- Mandates competition advocacy and awareness (S 49)



Reach of the Commission

- All enterprises, whether public or private [S 2(h)/expln (l)]
- 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 with foreign competition authorities (S 18)



BASIC CONCEPTS-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



BASIC CONCEPTS-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



Anti-competitive Agreements-I

- Hard core horizontal agreements '*presumed*' anti-competitive (Price fixing, Quantity/supply limiting, Market sharing, Bid rigging/collusive bid) (S 3(3))
- Other horizontal agreements and vertical agreements-based on '*rule of reason*' (S 3 (1)/(2))
- Exempted from these provisions:
 - *Agreement imposing reasonable conditions for protecting IPRs (S 3(5)(i))*
 - *Agreements for exports (S 3(5)(ii))*
 - *Efficiency enhancing JVs exempted from presumptive rule (S 3(3) proviso)*



Anti-competitive Agreements-II

- Other horizontal and Vertical Agreements
 - **Assessed based on *'rule of reason'***
- Vertical agreements include:
 - Tie in sale
 - Refusal to deal
 - Exclusive supply arrangement
 - Exclusive distribution arrangement,
 - Resale price maintenance,



Anti-competitive Agreements-III

- **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*



Anti-competitive Agreements-IV

DETECTION : CCI POWERS

- CCI has powers of a civil court
- After *prima facie* determination CCI shall direct DG to investigate (S 26(1))
- Director General is empowered to investigate into cartels and has the powers of a civil court for 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. {Section 41(1) & (2)}



Anti-competitive Agreements-V

- 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))



Anti-competitive Agreements-VI

DETERRENCE & PENALTY

- 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)



Anti-competitive Agreements-VII

- Modification of agreement - directing parties to modify the agreements to the extent and in the manner as may be specified in the order (S 27 (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))



EXEMPTIONS

- Joint Ventures (JVs)
 - Efficiency enhancing joint ventures to be examined based on '*rule of reason*'
 - Intellectual Property Rights (IPRs)
 - Copyright
 - Patent
 - Trade mark
 - Geographical indicators
 - Industrial designs
 - Semi-conductor Integrated Circuits Layout Designs
- Nothing in sec. 3 would restrain an IPR holder from imposing reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under the above IPRs



Abuse of Dominant Position-I

- 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))



Abuse of Dominant Position-II

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



Abuse of Dominant Position-III

- Factors (S 19(4))
 - Market share of enterprise
 - Size and resources of enterprise
 - Size and importance of competitors
 - Commercial advantage of enterprise over competitors
 - Vertical integration
 - Dependence of consumers
 - Dominant position as a result of a statute
 - Entry barriers
 - Countervailing buying power
 - Market structure and size of market
 - Social obligations and costs
 - Contribution to economic development
 - Any other factor



Abuse of Dominant Position-IV

DEFINITION

- 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



Abuse of Dominant Position-V

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



Abuse of Dominant Position-VI

REMEDIES

- 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-I

- Combination defined, included mergers & amalgamation, acquisition of shares, assets (S 5)
- Combination must be above thresholds and domestic nexus (S 5)
- 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))



Regulation of Combination- II

(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)

Regulation of Combination- III

(Review Comparison)



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



Regulation of Combination-IV

■ Factors (S 20(4)):

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



Regulation of Combination-V

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



Regulation of Combination-VI

REMEDY AND ORDER OF THE COMMISSION

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
- Only 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



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) 60days



DETECTING CARTEL

LENIENCY PROVISION

- Cartels are conspiracies (generally entered into in secrecy) and to destabilize them, Competition Authorities need to heavily bank upon “Leniency Programme”
- When a member of a Cartel breaks the rank and makes full, true and vital disclosures which results in bursting the ‘Cartel’, the Commission has been empowered to levy lesser penalty.
- The scheme is designed to induce member(s) of a Cartel to defect from the cartel agreement.
- 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. {Section 46}



EFFECTIVENESS OF CCI-I

CCI will be effective at addressing the cartel menace because of:

- 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



EFFECTIVENESS OF CCI-II

- Effective extra-territorial reach: Explicit provisions to exercise jurisdiction in respect of overseas acts having adverse effects on competition in India, coupled with provisions to enter into cooperation agreement with contemporary overseas competition agencies
- Efforts to build strong competition culture including encouragement to public to submit information by ensuring confidentiality



Other Principles in Act

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



Powers of the Commission

May inquire into :

- Any anti-competitive agreement, including cartels (S 3(3), 19, 26, & 36(2))
- Abuse of dominant position (S 4, 19 & 27)
- Regulation of combinations (S 5, 6, 29, 30 and 31)

Commission/DG have :

- Powers of a Civil Court (S 36(2), 41(1) & (2))



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)



Some Examples

- BA faced a fine close to US \$ 900 m (Rs. 3600 cr). Actually fined US \$ 300 million (Rs. 1200 cr) for co-operating in the case – for fixing some prices on International flights (US)
- Lufthansa fined SA R 8.5 m for colluding with SA Airways to fix the price of air tickets to Frankfurt by CC South Africa (SA Airways filed consent terms for R 55 m)
- EC imposed a penalty of Euro 899 m (Rs 5394 cr) on Microsoft for non compliance with March 2004 decision of EC in AOD case for disclosing interface documentation for achieving full interoperability with non Microsoft servers at a reasonable price (27.2.2008)



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

- 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_
- 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_



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



COMPLIANCE PROGRAMME -I

■ Why necessary ?

- Ignorance of law cannot be an excuse
- Compliance is the best policy for the enterprise
- Compliance of law results in social welfare enhancement

■ Non compliance costly for enterprises

- Inquiry by Competition Commission of India
- Financial penalties
- Diversion of time and energy while facing inquiry
- Agreements become unenforceable, and void
- Adverse publicity
- Possibility of being sued for Compensation.

■ Need for Compliance Programme



COMPLIANCE PROGRAMME -II

CHECK LIST

- Should be tailored to suit the business needs of the organization
- A Senior management personnel as compliance officer
- Regular and adequate training in identifying potential anti competition issues and developments in the industry environment.
- Prepare and make available a comprehensive compliance Manual for reference.
- Illustrations of likely violations
- Adopt guidance or clearance procedure for situations where there may be a problem.



COMPLIANCE PROGRAMME -II

- Adopt a clearance procedure for all agreements from the legal department to ensure compliance.
- Integrate a competition compliant information management system into the overall document management system of the company.
- Make provision for a possible surprise investigation/checks / dawn raids by the Competition Commission.
- Ensure a proper recording system for all documents, minutes of meetings, and other events which may provide useful evidence of non participation in anti-competitive practices.



COMPLIANCE PROGRAMME -III

ASSOCIATIONS

- Associations of enterprises serve a number of benign and useful objectives
- However, there is tendency for such associations to be used as a platform for anti-competitive activities: sometimes this could be unintentional.
- However, intent is not always a pre-condition for infringement



COMPLIANCE PROGRAMME -IV

General Operational Procedure

- Issue a statement of the association's intention to comply with CA, 2002
- All office bearers of the Association to have Compliance Guide with 'do's and don'ts'
- Have a an 'Association's compliance programme'
- Association's meetings are regularly held, with agenda prepared in advance and, if necessary, in consultation with legal experts
- Minutes of meetings of Board of Directors should reflect the association's guideline of complying with CA, 2002



COMPLIANCE PROGRAMME -V

Membership Policy

- Should not exclude certain competitors from membership, when the applicant meets all the required conditions
- Should not restrict Members from dealing with non Members
- Should not prevent non members from obtaining access to information which, if denied would limit latter's ability to compete effectively with members of the association



COMPLIANCE PROGRAMME -VI

(List of topics for discussion to be avoided: (Non exhaustive))

- Past current or future price
- What constitutes a 'fair profit level'
- Pricing policy and actual costs of individual enterprises
- Possible increase or decrease in prices
- Bidding prices for projects
- Standardization or stabilization of prices
- Collusive tendering (bid rigging)
- Standardization of credit and trade terms
- Control of production
- Division or allocation of markets
- Select customers to deal or not to deal because of the above reasons



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



Combination Regulations:

Main features-I

- *Some relaxation for marginal combination (R 5)*
- *Special provisions for hostile takeover (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:

Main features -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)*



Leniency Regulations:

Main features

- *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))*



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:

Main features

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



CONCLUSIONS

- **Competition policy and law are beneficial for business**
- **Benefits consumers**
- **Compliance best policy**
- **CCI has sufficient powers to crack on cartels and other anti-competitive offences**
- **A well thought out compliance programme has to be in place at each enterprise**
- **Industry bodies be 'ambassadors' of competition policy and law and not allow to be used as platforms for anti-competitive activities**