सत्यमेव जयते

Competition Act, 2002

COMPLIANCE MANUAL FOR ENTERPRISES

Fair Competition
For Greater Good

भारतीय प्रतिस्पर्धा आयोग

COMPETITION COMMISSION OF INDIA

Competition Act, 2002

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Message from the Chairperson

The Competition Act, 2002 ('the Act') applies to all the enterprises irrespective of origin, form or ownership structure and, therefore, it is imperative for enterprises to comply with the Act.

Competition Compliance Programme (CCP) is primarily aimed at preventing the risk of violation of the Act, knowingly or unknowingly. Enterprises should not indulge in anti-competitive behaviour such as price fixing, deliberate reduction in output, creation of barriers to entry, allocation of markets, bid-rigging, tie-in sales, predatory pricing, discriminatory pricing etc., which cause consumer harm and reduce market efficiencies. Adoption of CCPs by enterprises ameliorates these risks and encourages good corporate governance.

The cost of non-compliance under the provisions of the Act is high. These include, inter alia, loss of business due to damage to reputation, significant monetary penalties and risk of directors' disqualification under the Companies Act, 2013. Clearly, benefits of putting in place a CCP will far outweigh the associated costs.

It is the endeavour of the Competition Commission of India ('the Commission') to couple effective enforcement with a culture of compliance. Being a new law, stakeholders have to be inspired to inculcate a culture of competition in their businesses and ensure that it permeates at all levels in the respective organizations. In a large economy like India, with dynamic markets and a growing private sector, thrust of regulatory action is towards advocacy, followed by legal remedies, wherever required. The Competition Compliance Manual ('Manual') supplements the advocacy efforts of the Commission and will serve as a ready reckoner to enterprises.

The Manual contains the basic principles of competition law that impact an enterprise's relationship with competitors, agents, suppliers, distributors, customers and other third parties. It also contains guidelines that are designed to help executives and employees of enterprise; to distinguish between permissible business conduct and illegal anti-competitive behaviour. With this initiative, we hope to take forward the cause of inculcating a culture of competition compliance in the economy at large.

It gives me great pleasure to present this Manual which is a joint effort of the Commission and the Competition Law Bar Association. I hope that it will prove to be useful for the enterprises, corporate professionals, advocates and academia.

Dated: 2nd May, 2017
Place: New Delhi

Devender K. Sikri
Chairperson

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INTRODUCTION

Competition is universally acknowledged as the best means of ensuring that consumers have access to the broadest range of goods and services at the most competitive prices and the producers have incentive to innovate, reduce costs and meet the demand of the consumers. Competition, thus, promotes allocative, productive and dynamic efficiency. Recognizing its importance, governments across the globe are increasingly trying to promote and sustain competition in the markets through appropriate regulations.

The Competition Act, 2002 ('the Act') was enacted to promote and sustain competition in the market and is enforced by the Competition Commission of India ('the Commission/CCI'). The provisions relating to prohibition of anti-competitive agreements and abuse of dominant position came into effect from May 20, 2009 and the merger regulation regime has been enforced with effect from June 1, 2011. Contravention of the provisions of the Act can lead to the imposition of sanctions including monetary penalties. This can also cause reputational damage and, possibly, result in directors' disqualification under the Companies Act, 2013.

The Commission recognizes that being a relatively new legislation, enterprises might not be quite familiar with this law. This Manual, therefore, is to help enterprises understand the law and comply with its various provisions. By developing and implementing competition compliance programmes (CCPs), enterprises can lower the risk of contravening the law and become competition compliant, thereby, fostering a culture of competition. Enterprises are expected to strive to attain growth and efficiency without resorting to anti-competitive practices by entering into anti-competitive agreements and/or abusing their position of dominance in the market. They should not adopt practices such as collusive price fixing, deliberate reduction in output, creation of barriers to entry, allocation of markets, tie-in sales, predatory pricing, discriminatory pricing etc. which make markets imperfect and cause consumer harm as also reduce market efficiencies.

Competition law compliance implies a systematic and active approach to run a business in compliance with the written legal and unwritten fair rules of competition and minimize the risk of infringement of law. A compliance program, which is clear and comprehensive and implemented by the senior business management, will go a long way in preventing the undesirable consequences of infringement of the law. An effective CCP should have the following three main objectives:

i. Promote a culture of compliance;

ii. Encourage good corporate citizenship; and

iii. Prevent violation of law, i.e. the Act and all Rules, Regulations & Orders made there-under.

Competition law has been in force in India for eight years. The Commission had published in 2008 an Advocacy Booklet on compliance. Now it is felt appropriate to come out with detailed guidance and advice to enterprises and assist them in creating and enhancing a competition culture in their organization. This Manual thus furthers such guidance and the efforts of Competition Advocacy mandated under the Act.

This Competition Law Compliance Manual contains the basic principles of competition law that impact an enterprise's relationship with competitors, agents, suppliers, distributors, customers and other third parties. It also contains guidelines that are designed to help executives and employees of the enterprise to distinguish between permissible business conduct and illegal anti-competitive behaviour.

This Manual is divided into five chapters. In Chapter 1, the provisions of the Act relating to the anti-competitive agreements and abuse of dominance are elucidated. This is supported by illustrative examples of what an enterprise should do if it is faced with situations, which can be construed as violation of the Act. The chapter also discusses the consequences of non-compliance with the provisions of the Act. Chapter 2 outlines the need for compliance during the inquiry and investigation by the Commission and the Director General (DG) respectively and provides information on the leniency program as regards cartels. In Chapter 3, compliance by enterprises and their officers, consequent upon passing of the final order by the Commission are given. Chapter 4 provides the broad contours of the provisions on combinations (mergers and acquisitions) and consequences of their non-compliance. Finally, Chapter 5 discusses the benefits and attributes of an effective compliance programme, besides an illustrative list of the dos and don'ts to be observed by enterprises (persons and associations of persons).

This Manual shall serve as a guide to all enterprises for becoming competition compliant. An enterprise might also consider taking legal or other professional advice, wherever necessary, in its endeavour to put in place a robust CCP.

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ANTI-TRUST PROVISIONS AND THEIR COMPLIANCE

ANTI-TRUST PROVISIONS AND THEIR COMPLIANCE

The Act prohibits anti-competitive agreements (Section 3) and abuse of dominant position (Section 4). Enterprises should not enter into agreements having anti-competitive effects on the markets in India. Further, an enterprise, which is dominant, has a special responsibility. It should be conscious of its acts and conduct and should not engage in anti-competitive practices by abusing its position of dominance in the market. This chapter guides the enterprises through the anti-trust provisions of the Act and discusses certain practices and behaviour, which are violative of such provisions. In addition, the chapter also outlines the consequences of non-compliance with these provisions.

1.1 Compliance with Provisions of Section 3 of the Act-Anti-Competitive Agreements

Section 3 of the Act explains the anti-competitive agreements and prohibits them. Anti-Competitiveness is with reference to appreciable adverse effect on competition (AAEC) in markets in India. Such agreements are declared to be void. An 'Agreement' under the Act includes any arrangement or understanding or action in concert whether or not such an agreement is formal or in writing or whether or not it is intended to be enforceable by legal proceedings. Agreements can be between enterprises operating at the same level of production or supply chain termed as 'Horizontal Agreements', defined in Section 3(3) of the Act. It can also be between enterprises operating at different level of value chain called 'Vertical Agreements', covered under Section 3(4) of the Act.

While dealing with competitors, an enterprise should take into consideration the following guidance:

1.1.1. *Avoid arrangements in respect of prices or quantities of goods or provision of services*

An enterprise should NOT discuss, enter into any agreement or indulge in any joint action with a competitor on any matter concerning the price or quantity of goods offered/supplied or the conditions on which they are offered. There is no exhaustive list on this aspect. However, to illustrate, one should not discuss or deal in the following, with its competitors:

a) Cost of manufacturing products or providing services;

b) Quantity proposed to be provided;

c) Credit/ Sale/ Purchase/ Billing terms;

d) Discounts;

e) Profits, margins, profitability;

f) Transportation/Cartage/ Freight/ Distribution charges (or any other charges incurred in the course of provision of services or production of goods);

g) Commissions/ Rebates/ Surcharges (or any other such monetary terms);

h) Fares, rates, tariffs or any other direct or indirect charges, and

i) Any other business sensitive information.

The prohibition includes discussions on current, proposed or contemplated prices or price changes and discussions on pricing strategies, method or policies.

Illustration:

A company's personnel gets a call from one of its loyal customers stating that another manufacturer/service provider is offering the same product/service at a price which is 10 per cent lower than what the company is offering in open market. The company decides to check the veracity of the information. Should the company call the other manufacturer/service provider?

Response:

No, the company should not call the other manufacturer/service provider to discuss the price at which the company sells/provides services itself or inquire about the price at which the other manufacturer/service provider is selling/providing service. The company may confirm such information through its agents and/or open market sources and/or its marketing personnel. Thereafter, the company can independently price its product considering all factors including the market information that it procures from the above sources and other channels including independent market analysis.

"An enterprise should NOT discuss, enter into any agreement or indulge in any joint action with a competitor on any matter concerning the price or quantity of goods offered/supplied or the conditions on which they are offered."

By virtue of the provision contained in Section 3(3) of the Act, any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which–

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) 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;

(d) directly or indirectly results in bid rigging or collusive bidding,

shall be presumed to have an AAEC.

Illustration:

A company's functionary is invited for a dinner by one of its competitors' personnel to discuss business strategies and the future course of action with respect to certain buyers in the market. Should the company's functionary attend such a dinner?

Response:

No. The company's functionary should not attend such a dinner as any discussion between competitors in relation to business strategies including pricing and/or quantity allocation and/or territory allocation is prohibited under the Act. Such arrangements are considered anti-competitive. It is not relevant whether these arrangements are formal or informal, as the Competition Act, 2002 prohibits such agreements as well. Even if the stated purpose of the dinner is not to discuss business strategies, a company's personnel should be cautious to avoid any discussion on the above topics.

Explanation to Section 3(3) of the Act defines "bid rigging" as any agreement, between enterprises or persons engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

Thus, an enterprise should NOT enter into discussion/consultation with its competitors or rival bidders, while placing their bids for a tender floated by a third party. It is advisable for an enterprise not to enter into any form of discussions or consultations with its competitors/ rival bidders, as it may raise suspicion of co-ordination amongst them. No exhaustive list of Don'ts in this regard can be given. However, to illustrate, one should keep in mind the following during a tendering process:

a) Not to divulge the quantity, rate or terms of the tender the enterprise intends to bid for to any competitor or rival bidder;

b) Not to hold any discussions or consultations with the competitors or rival bidders prior to placing of bids;

c) Avoid all forms of communication with competitors or rival bidders, even in case the discussion is with respect to non-tender issues, prior to the closing of the tender;

d) Not to divulge sensitive information with respect to the tender business *i.e.* profit margins, cost of production, or any other pricing related issues;

e) Not to allocate the tender business by way of co-ordination amongst the competitors or rival bidders.

The prohibition against bid rigging covers all such current, proposed or contemplated information that may be considered to be relevant for the process of determining the bidding price for an upcoming tender.

Illustration:

A company's functionary gets an e-mail/phone call/WhatsApp message (social media) regarding a meeting amongst the bidders to discuss the terms of the tender floated by a third party. Should the company's functionary attend such a meeting?

Response:

No. The company functionary should not attend such a meeting as any discussion between bidders in relation to the tender floated by a third party is prohibited under the Act. Such discussions/consultations are presumed to be anti-competitive. Further, the company functionary must reply to such an e-mail categorically stating that he/she shall not be a party to any such discussions/consultations.

1.1.2. *Avoid arrangements in respect of production/development of goods or provision of services*

An enterprise should NOT discuss, agree on or take any joint action with a competitor on any matter relating to production/ provision of services, or extent of capacity utilization. Similar to an agreement to fix prices, such agreements are also presumed to have AAEC.

Illustration:

Company X and its competitors, on the sidelines of association meetings, provide the installed capacity details of their various plants, along with capacity utilisation details to other companies of the association. During such meetings, the companies exchange information regarding their proposed plant capacity utilization in the coming quarter. Would this fall foul of the Act?

Response:

Yes. Any discussion or exchange of information regarding production and distribution strategies should be strictly avoided. Any agreement to maintain a particular capacity of production is anti-competitive in nature and amounts to formation of a cartel. Further, it is not necessary whether the agreement is written or oral, formal or informal. In case such a subject come up for discussion the representative(s) of Company 'X' are expected to record their objection to such discussion and leave the meeting and also record their departure on the register.

1.1.3. *Avoid arrangements in respect of marketing/ distribution/ supply of goods or provision of services*

An enterprise should NOT enter into any arrangement with its competitors regarding distribution of the goods manufactured or services provided.

Illustration:

Company X and Company Y, which are competitors, collectively hold 50 per cent of the market share. In order to maintain their stronghold in the market, they jointly approach a third party customer, who has communicated its desire of procuring goods that are manufactured by Company X and Company Y, from the open market. Company X and Company Y, independently do not have the production capacity to meet the requirement of the customer. Therefore, they intimate to the customer that they shall jointly provide the goods to the customers at their cost of production, and in return request the customer to not entertain attempts made by the other competitors of Company X and Company Y to supply goods to it. Whether such an agreement will be considered as anti-competitive in nature?

Response:

Yes. Any agreement between competitors, which is entered into with the intention of ousting other entities who operate in the market, is presumed to have AAEC. In the instant case, Company X and Company Y, by imposing the condition foreclosed competitors to supply goods to the customer, are acting in violation of the Act. Had they entered into a joint venture agreement and then approached the customer to supply their products, whilst not restricting other competitors to approach the customer, the same may not have fallen foul of the provisions related to presumption of anti-competitiveness of the Act if it is established that such joint venture agreement increased efficiency.

1.1.4. *Avoid arrangement in respect of sharing of market or customers relating to goods or provision of services*

An enterprise should NOT agree (or act jointly) with competitor(s) to share/ allocate markets or customers. An enterprise should NOT discuss with a competitor any matter relating to whether or not, or to the extent to which, the enterprise will serve a particular territory/ area/ market or a particular customer or class of customers including, for example:

a) Commencement or continuation of supply in a particular geographical area;
b) Withdrawal of supply to such area; and
c) The extent to which the enterprise intends to bid for business from, or make offers to, specific customers or classes of customers, or customers located in particular geographic areas.

Indulging in discussions and negotiations of such nature wherein the competitors are allocating/ sharing and deciding upon the business opportunities with each other, would also lead to allocation of market. Such allocation/sharing is harmful to competition as it restricts the market in

which the other competitors may operate, to the detriment of the consumers, which is not in compliance with the law. In fact, such market sharing arrangements create dominant/monopoly positions in relevant geographic markets with likely abuse of such position.

Illustration:

Company X and its competitors, Y and Z, reach an agreement that while X would service customers in North Delhi, Y would service customers in East Delhi and Z in South Delhi. Would such an agreement raise any competition concerns?

Response:

Yes. Allocation of geographic markets is presumed under the Act to be an anti-competitive practice. Further, entry barriers, *qua* each company and each State may also be analysed and it may be concluded that the companies have mutually, informally or otherwise allocated geographical areas depot wise.

1.1.5. *Issues to be kept in mind when initiating a due diligence exercise on a competitor*

In the course of a major business transaction between two companies who are competitors, due diligence exercise is conducted to understand the operations of each other. These activities generally are designed in the early stages of negotiations to determine the feasibility of a transaction and at the later stages to determine the value of the transaction. Due diligence often requires an examination of the commercially sensitive information of a competitor. In cases where a company plans acquiring a stake in, control of, or entering into a joint venture agreement with its competitor, it should adhere to the following norms whilst conducting its due diligence in order to assess the viability of such an arrangement with its competitor:

a) Due diligence exercise on a competitor should be conducted *via* the Legal Department or a third party, and NOT by any member of the company who is associated with the day to day operations of the company;

b) Personnel on behalf of the Legal Department or the third party should be bound by a Confidentiality/Non-Disclosure Agreement, in order to ensure that the information/data so collected by him/her it must not be divulged to any other competitor operating in the same market or commercially used by the company itself which is conducting the due diligence;

c) Exchange or transfer of forward-looking planning documents or details of pipeline projects or strategic plans, between competitors can pose anti-competitive risks, as they are considered to be commercially sensitive;

d) Cost data, pricing and discount policies that are not publicly available should not to be exchanged in course of the due diligence.

1.2 Enterprises and Trade Associations

Trade associations play an important role

in promoting the interests of their members and the industries they serve. These associations have their own contribution towards improving the quality, variety, and availability of products and services at the marketplace.

However, as the members of the associations typically can be competitors, varied activities that they conduct are subject to scrutiny under the law regulating competition. While participating in association activities or attending association meetings, an association member, an executive, a manager, or an employee, must be sensitive to the risks of violating any provisions of the competition law.

Trade Unions also act on behalf of its members in collective bargaining, which is a legitimate activity. However, the activities of the Trade Unions should remain within the confines of Trade Union Act, 1926 and should not transgress the provisions of the Act. Trade Unions should not be seen as backing the cause of its members, if they are engaged in carrying out economic activities, since many of them would be the competitors and in order to protect their commercial interests, might indulge in the activities, which are anti-competitive.

Trade Associations and their members must be fully aware of the types of conduct competition law proscribes while carrying out an association's programs and activities. The anti-trust problems that their activities may present relate to the agreements that fix prices or pricing terms, agreements to control or limit production or capacity, allocation of customers or markets, etc.

It is noticed that the incumbents tend to use collective power of associations to block a new entrant. This may fall foul of the provisions of law. Similarly, any agreement among competitors under the aegis of Trade Associations to jointly fix prices of their products or services to limit production or share markets is also a serious violation of the competition law.

An enterprise should not indulge in the activities which are violative of the provisions of the competition law at any association sponsored meetings.

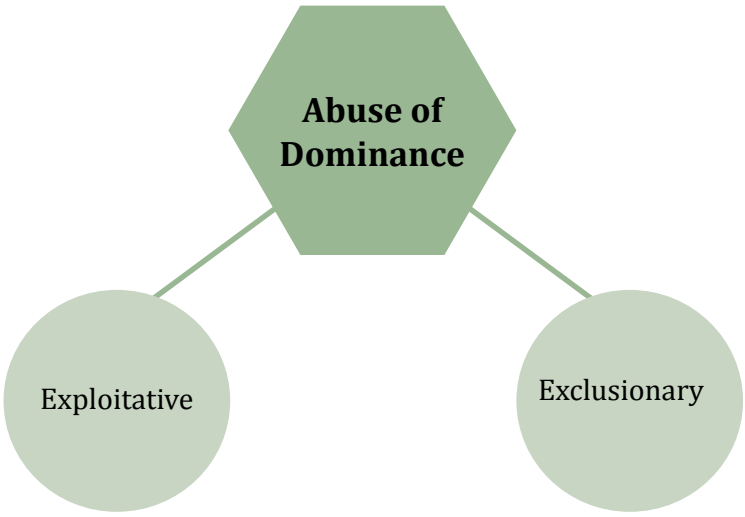

Illustration:

A company's employee has received information from its field sales person that its competitors are offering the same product/service at a price which is 10 per cent to 15 per cent lower than what the company is offering in the open market. Knowing that there is a trade association meeting scheduled later in the week, the company personnel decides to discuss the prices offered by the competitors who operate in the market, in order to assess whether it should itself lower its prices. Should the company's personnel raise such issues at the trade association meeting or on the sidelines of the meeting?

Response:

No. The employee cannot and should not raise such issues for discussion at the trade association meeting. Trade association meetings are convened to discuss broader market level issues such as government policies/ guidelines, regulatory changes/ compliances, information concerning new technology, industry lobbying *etc*. The company should not discuss enterprise specific information such as cost of production, distribution/ supply, customers and other such commercially sensitive information. Dissemination of such sensitive information may be treated as arrangement amongst competitors, and in contravention of the Act. Any such discussion on the sidelines of Associations meetings shall also be avoided.

An enterprise should, as a guidance, observe the following at the trade association meetings:

- ✓ Read the agenda circulated by the trade association carefully;
- ✓ Ensure full notes are made of the discussions at each meeting;
- ✓ Not engage in business related discussions at trade association meetings which go beyond the written agenda;
- ✓ Avoid discussion on any commercially sensitive information;
- ✓ Avoid attending association meetings organized at a competitor's premises;
- ✓ Avoid exchange of trade related information which includes the following;

  a) Pricing or other terms given to customers, including discounts;

  b) Price changes, credit terms or related financial information;

  c) Capacity utilization, production, or inventories;

  d) Bids for tenders floated by third parties and other commercial issues regarding such tender;

  e) Cost data, including but not limited to transportation/freight/ distribution charges;

  f) Any enterprise specific business plan, marketing initiatives; and

  g) Any other confidential information, including proposed territories or customers.

If any of these subjects is raised during a trade association meeting, one must leave the discussions immediately and inform its

Legal Department of the same. One should adhere to this conduct even in the case of social gatherings of the association.

1.2.1 Topics of discussion in Trade Association meetings

At any trade association meeting or during other discussion with competitors, following topics may be discussed which are illustrative and not exhaustive:

a) Regulatory changes and compliances;

b) Government/ Regulatory policy or guidelines;

c) Health and safety initiatives;

d) Industry employment and training issues; and

e) Issues in relation to skill development.

Enterprises should not discuss information concerning matters such as prices, capacity, production, investments, commercial strategy and views on the evolution of market conditions.

1.3 Vertical Agreements

Section 3(4) read with Sections 3(1) and 3(2) of the Act prohibits and declares void certain types of vertical agreements that cause or are likely to cause AAEC in India. Enterprises should, therefore, avoid having arrangements with manufacturers, suppliers, dealers, distributors and other third parties at different levels of the production or supply chain that could, directly or indirectly, result in:

a) Tie-in of products or services: Tying-in occurs when customers buy a product they want (the tying product) but are also required (forced) to buy a product (the tied product) belonging to a different market that they may not want. Tying-in would be anti-competitive as it would restrict access to the tied product market by the competitors.

b) Exclusive supply of goods or provision of services: Exclusive supply agreement includes any agreement restricting the purchaser in any manner in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person.

c) Exclusive distribution of goods or provision of services: In an exclusive distribution agreement, the supplier agrees to sell his products only to one distributor for resale in a particular territory. At the same time, the distributor is usually limited in his active selling into other exclusively allocated territories.

d) Refusal to deal with any enterprise: It means restricting by any method any person/classes of persons to whom goods are sold. Businesses have the right to use their discretion in choosing whom to do business with. However, if this choice is made through a conspiracy with another competitor, business, or individual, they will likely be in contravention of the law. A refusal to deal is a violation of competition law because it harms the boycotted business by cutting them off from a facility, product supply, or market. By harming the boycotted business in this way, the competing businesses controls or monopolizes the market by unreasonably restricting competition.

e) Resale price maintenance: It means selling goods with condition on resale at stipulated prices. It generally occurs when an upstream seller (producer) imposes a fixed or a minimum price that a downstream buyer (distributor or retailer) must resell. For example, a manufacturer sets the price on which its products are sold at the retail level. The result is that resellers (e.g. retailers) do not compete on price.

The list of anti-competitive vertical agreements provided under Section 3(4) of the Act is merely illustrative in nature. There could be other types of vertical agreements, which could violate the provisions of the Act. The question whether a vertical agreement would violate the provisions of the Act involves, among other things, a detailed assessment of the market involved and the position of the parties (to the agreement) in that market. There is no presumption of AAEC for vertical agreements. To determine whether an agreement causes AAEC, one or all of the factors mentioned in Section 19(3) of the Act are to be considered, viz;

a) creation of entry barriers
b) driving out competitors
c) foreclosure of competition
d) accrual of consumer benefits
e) improvements in manufacturing/ distribution of goods or provision of services, and
f) promotion of technical, scientific and economic development.

If the anti-competitive effects outweigh the pro-competitive effects, the vertical agreement is likely to be found anti-competitive.

1.4 Behaviour of a Dominant Enterprise - Section 4 of the Act

The Act defines dominance in terms of a position of strength enjoyed by an enterprise, which enables it to operate independently of the competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour. It is the ability of the enterprise to behave/act independently of the market forces that determines its dominant position. The relevant market means "the market that may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets". A dominant enterprise needs to be vigilant about its behaviour in the market as the law explicitly prohibits certain types of behaviour by dominant enterprises. It should:

1.4.1 *Avoid fixing unfair or discriminatory prices or condition of goods or provision of services in any manner*

Fair treatment should be accorded to all enterprises who are dependent on a dominant enterprise to run their own businesses. A dominant enterprise in exercise of its market power should not indulge in fixing unfair or discriminatory prices (including predatory pricing) or unfair conditions of goods or services which is harmful to competition in the market.

1.4.2 *Avoid limiting or restricting production/ development of goods or provision of services in any manner*

A dominant enterprise can unilaterally decide not to utilize its full production capacity with an intent to create an artificial deficit of supply in the relevant market. By resorting to this practice, the dominant enterprise may raise the price from the normal or immediate past market conditions and reap *supra*-normal profits to the detriment of the consumers. This kind of practice is prohibited under the Act. Further, a dominant enterprise should not behave in a manner that restricts technical or scientific development relating to the goods and services to the prejudice of consumers.

1.4.3 *Avoid denial of market access of goods or provision of services in any manner*

A dominant enterprise should not indulge in practices, which lead to denial of market access in any manner. Barrier to entry of new enterprises into the relevant market is a major restraint on the dynamics of competition. When a dominant enterprise in the relevant market controls an infrastructure or a facility that is necessary for accessing the market and which is neither easily reproducible at a reasonable cost in the short term nor interchangeable with other products/ services, the enterprise may not without sound justification refuse to share it with its competitors at a reasonable cost. This could be a serious concern for the enterprises being denied access.

Besides above, a dominant enterprise should also avoid:

i) entering into a contract relating to goods or provision of services whereas conclusion is subject to supplementary obligation which have no connection with the said goods or provision of services.

ii) use of dominant position relating to goods or provision of services in one relevant market to enter into or protect other relevant market.

1.5 Consequences of Non-Compliance

An enterprise may have to face penal consequences for not complying with the provisions of the Act. Non-compliance with the provisions of the Act can result in the following:

1.5.1 *Initiation of inquiry*

When an enterprise *prima facie* falls short of complying with the provisions of the Act, the Commission may inquire into such non-compliance. The purpose of such an inquiry is to ascertain if the enterprise has indulged in anti-competitive conduct in violation of the Act. The Commission is empowered to initiate inquiry under Section 26 read with Section 19 in matters relating to contravention of Section 3 and 4 of the Act.

1.5.2 *Cease & desist and Imposition of monetary penalty on the enterprise*

Contravention of Sections 3 and 4 of the Act can lead to an order for cease & desist and/ or imposition of penalty under Section 27 of the Act. The Act provides for penalty up to a maximum of 10 per cent of the average turnover of the last three financial years of the person or enterprise that is party to an anti-competitive agreement or guilty of abuse of its dominant position. With respect to cartels, the penalty provided in

the Act is greater of (i) up to three times the profit; or (ii) 10 per cent of turnover; for each year of the continuance of a cartel.

1.5.3 *Individual liability*

In addition to an enterprise, individuals who are in charge of the conduct of the business of the enterprise at the time of contravention of the provisions of the Act can also be held personally liable and proceeded against.

1.5.4 *Adverse reputational effect*

Apart from explicit legal sanctions, any adverse order of the Commission can also lead to market-imposed sanctions or "reputational penalties" which may cause decline in sales/consumer base.

1.5.5 *Aggrieved enterprise may file proceedings for seeking compensation which again involves huge cost*

In addition to the necessary consequences of being held accountable for anti-competitive conduct viz., directions of cease and desist and imposition of penalty, compensation can also be claimed by affected parties. As per Section 53N of the Act, compensation can be granted, on an application, by the Competition Appellate Tribunal (COMPAT) to any person for loss or damage, shown to have been suffered by such person as a result of a contravention of the provisions of the Act.

Considering the adverse consequences in case of non-compliance, it is advisable that there must be adequate awareness of the provisions of the Act at all levels in an enterprise. The senior management, executives and employees of an enterprise must be fully conversant with both the substantive and procedural provisions of the Act for effective compliance on their part.

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COMPLIANCE DURING INQUIRY AND INVESTIGATION

COMPLIANCE DURING INQUIRY AND INVESTIGATION

Once the Commission forms an opinion that there exists a *prima facie* case of contravention of the provisions of Section 3 and 4 of the Act, it orders investigation against an enterprise to be conducted by the DG. On submission of report of investigation by the DG, the Commission conducts inquiry. An enterprise has to comply with the notices and summons issued in the course of such investigation and inquiry. As inquiry and investigation is required to be completed within a reasonable time, the law provides for penal provisions in case of non-compliance of said notices and summons. Thus, an enterprise must be aware of the nature of compliances to be made by it. This chapter provides the details of compliance requirements during inquiry and investigation by the Commission and DG. Towards the end, provisions regarding Lesser Penalty are also discussed.

2.1 Compliance with Notices/Summons Issued

The inquiry by the Commission and investigation by the DG has to be conducted in a time bound manner. Therefore, it is incumbent upon the parties to the case or third parties to ensure compliance of the notices and summons issued to them within the prescribed time mentioned in such notices and summons and not to seek extension of time without suitable/valid reasons.

Type of Notice / Summon	***Issued by Whom***	***Purpose***
Notice/Summons under Section 36(2) of the Act Notice/Summons under Section 41(2) of the Act	Commission DG	For ; i. summoning and enforcing the attendance of any person and examining him on oath ii. requiring the discovery and production of documents; iii. receiving evidence on affidavit; iv. issuing commissions for the examination of witnesses or documents; v. requisitioning , subject to the provisions of Sections 123 and 124 of the Indian Evidence Act, 1872, any public record or document or copy of such record or document from any office.
Notice under Section 36(4) of the Act	Commission	For production of documents/information before DG, Secretary or other officer so authorised.

Type of Notice / Summon	Issued by Whom	Purpose
Show Cause Notice under Section 43 of the Act	Commission	For initiating penalty proceedings for non-compliance of directions issued by DG or Commission, as the case may be.
Show Cause Notice under Section 45 of the Act	Commission	For initiating penalty proceedings for furnishing false information, omission to state material facts, and alteration, suppression, distortion of documents sought by DG or Commission, as the case may be.

Under Section 41(2) of the Act, DG has been vested with the same powers, which are available with the Commission under Section 36(2) of the Act. Therefore, DG can also issue notices and act in accordance with the provisions of Section 36(2) of the Act.

The list above is not exhaustive. It is expected from the parties to whom such notices/summons are issued to comply with the same in its entirety and the parties should not intentionally hold back any relevant information/ documents.

In case summons are issued for personal deposition, the person summoned should be present before the DG or the Commission, as the case may be, on the date and time specified in the summons. During the examination on oath, it should always be the endeavour of the person to answer all questions fully and truly.

2.1.1 Consequence of Non-compliance to Notices/Summons or Furnishing False Information

It must be kept in mind that non-cooperation during inquiry or investigation is a serious violation inviting sanction under Sections 43 and 45 of the Act.

Under Section 43 of the Act, if any person (including third party) fails to comply with the directions given, then penalty of INR One Lakh per day during such non-compliance can be imposed on such person.

Further, in terms of Section 45 of the Act, if a person makes any statement or furnishes any document which he knows or has reason to believe to be false or omits to state any material fact or willfully alters, destroys or suppresses any document then penalty up to INR 1 Crore can be imposed on such person.

Non-compliance of notices/summons not only delays the process of inquiry but may also result into unnecessary litigation and/or financial burden on the persons concerned. Therefore, it should be ensured that the notices issued are always appropriately complied within the stipulated time period.

2.2 Compliance during Search and Seizure

The Act empowers the DG to conduct search and seizure operations, also called 'dawn raids'. Such an action is undertaken when it is suspected that the entities being

searched have committed anti-competitive acts and are in possession of documents vital to inquiry into such a conduct. Every search and seizure operation under the Act is carried out in accordance with the provisions concerning search or seizure under the Code of Criminal Procedure, 1973.

The search is conducted in the presence of two witnesses and during the search and seizure operations, the search team can take in their custody any books, documents, papers, computer, laptop, mobile or any other electronic gadgets etc. containing incriminating materials. The search team may also take copies of the records, including electronic records. Further, personal search of the individuals can also be taken.

During search proceedings, it is advisable that the management and employees of the entity being searched must fully cooperate with the search team. They should assist the search team in copying or seizure of electronic information/data so that it can be used efficiently at a later stage. Any obstruction in the duties of the search team may result into personal prosecution of persons present at the search premises.

2.3 Compliance with Interim Orders Passed during Inquiry

Interim orders are those orders, which are passed during pendency of proceedings against the parties to the case. Such orders are passed by the Commission under Section 33 of the Act, usually on an application of an applicant but can also be passed *suo-moto*. In these orders, Commission may direct the party concerned to do certain act or abstain from doing certain act or maintain *status quo*. These orders are based on following three principles;

a) existence of a *prima facie* case in favour of the applicant,

b) balance of convenience lies in favour of applicant, and

c) irreparable loss shall be caused to the applicant in case no interim order is passed.

Such an order issued by the Commission may remain in force till final order is passed in the case.

Any non-compliance of interim orders is punishable under Section 42 of the Act, which may attract fine extending up to INR One Lakh per day (for each day during which such non-compliance occurs), subject to a maximum of INR Ten Crore.

Therefore, till the final order is passed and inquiry or investigation proceedings are still underway, the parties must comply with the interim order.

2.4 Adoption of Lesser Penalty Programme

The Act provides for a Lesser Penalty program wherein a person, who is a member of a cartel and provides complete information of such a cartel along with all the relevant evidences to the Commission; gets immunity/reduction of penalty, which can be up to 100 per cent for the 1st applicant.

Business organizations should come forward and cooperate when they detect or become aware of their participation in a cartel.

1.1.1 *Conditions to Avail Benefits of Lesser Penalty Provisions*

An Applicant seeking benefit of lesser penalty shall:

(a) cease to further participate in the cartel from the time of its disclosure unless otherwise directed by the Commission;

(b) provide vital disclosure in respect of violation under Section 3(3) of the Act;

(c) provide all relevant information, documents and evidence as may be required by the Commission;

(d) co-operate genuinely, fully, continuously and expeditiously throughout the investigation and other proceedings before the Commission; and

(e) not conceal, destroy, manipulate or remove the relevant documents in any manner, which may contribute to the establishment of a cartel.

Determination of the reduction in monetary penalty under the Act will depend upon following factors:

- the stage at which the applicant comes forward with the disclosure;
- the evidence already in possession of the Commission; and
- the quality of the information provided by the applicant.

The entity that comes first with vital and true evidence of cartel may be granted up to 100 per cent reduction of penalty. The later applicants may be granted reduction in penalty up to 50 per cent or 30 per cent in order of succession, depending upon compliance to the conditions. An applicant shall not get the benefit of lesser penalty in cases where the Commission has received the report of investigation of the DG.

It must always be kept in mind that lack of continuous co-operation entitles the Commission to fully reject the Lesser Penalty applications. Therefore, continuous co-operation by the Lesser Penalty applicants till the end of inquiry proceedings is a *sine qua non* for grant of lesser penalty.


Leniency
Programme

03

COMPLIANCE POST ANTI-TRUST SANCTIONS

COMPLIANCE POST ANTI-TRUST SANCTIONS

As per the provisions of the Act, the DG, after conducting investigation submits a report containing his findings to the Commission. In case, the DG does not find any contravention on the part of the parties and after inviting objections and suggestions of the parties to the proceedings, the Commission arrives at a conclusion that no contravention is made out, order under Section 26(6) of the Act is passed. In case, the Commission finds that there is a contravention under the provisions of the Act, the Commission shall pass a final order under Section 27 of the Act. Under the provisions of the Section 27, the Commission shall pass following orders:

a. Order of Cease and desist;

b. Order for imposition of penalty: The Act provides for penalty up to a maximum of 10 per cent of the average turnover for the last three financial years of the person or enterprise that is party to an anti-competitive agreement or guilty of abuse of its dominant position. With respect to cartels, the penalty that can be imposed is greater of (i) up to three times the profit; or (ii) 10 per cent of turnover for each year of the continuance of a cartel;

c. Order for modification of the agreement to the extent and in the manner as may be specified in the order by the Commission;

d. Direction to comply with other orders of the Commission or directions, including payment of costs, if any;

e. Any other order the Commission deems fit.

In case of contravention by an enterprise, Section 48 of the Act also provides for orders against individuals who were responsible for specific conduct or were in charge of its affairs during the time when anti-competitive activities were carried out.

Division of dominant enterprise

Under Section 28, the Commission can also direct division of an enterprise, which is dominant to prevent abuse of dominant position.

3.1 Compliance by an Enterprise and its Officers

3.1.1 Recovery of Penalty Imposed in Contravention of the Act

As per the CCI (Manner of Recovery of Monetary Penalty) Regulations, 2011, a demand notice shall be issued in a prescribed form through the recovery officer to the enterprises and the officers on whom penalty is imposed. The demand notice provides the enterprise a period of thirty days from the date of service to deposit the penalty in the manner specified. The regulations also provide that period of thirty days may be reduced by the Commission, if it deems fit.

The party that is penalized has to make payments through a challan in favour of *Pay & Accounts Officer (PAO), Ministry of Corporate Affairs, Head No. 1475.00.105.05, Sub-Head-05 – 'Penalties imposed by Competition Commission of India'.* A copy of the challan is to be provided to the designated recovery officer as soon as possible and not more than week of the payment.

The penalized enterprise may seek extension of times in payment of penalties as well as may seek to make the payments by way of installments from the Commission. If the extension or the installments have not been adhered by the penalized party, it risks being deemed as being in default.

The amount of penalty that has not been paid in the demand notice shall also accrue simple interest, which is to be paid by the penalized party over the penalty amount.

In case of non-payment of penalty, when there is no stay of order of the Commission by any Court/Tribunal, the Commission shall proceed to recover such penalty in such manner as may be prescribed by the Recovery of Monetary Penalty Regulations.

The Secretary of the Commission shall issue a recovery certificate to be executed by the Recovery Officer.

The Commission can also make reference to the Income Tax Authority under Section 39(2) of the Act for recovery of penalty as 'tax due' under the Income Tax Act, 1961.

3.2 Additional Measures for Non-Payment of Penalties or Failure to Comply with the Orders of the Commission

Following additional measures are also provided in the Act, in case of non-payment of penalties or failure to comply with the orders of the Commission.

3.2.1 Imposition of Penalties and Award of Compensation in cases of failure to comply with the Final Orders of the Commission

i. Contravention of final orders of Commission (Section 42): In case of non-compliance with the orders or directions, the Commission is empowered to impose a penalty of INR One Lakh per day during the period of non-compliance subject to a maximum of INR Ten Crore.

ii. Compensation in case of contravention of orders of Commission (Section 42A): The Act empowers the COMPAT to order for recovery of compensation for loss or damage suffered by a person due to non-compliance by an enterprise with the orders or directions of the Commission.

3.2.2 Institution of Criminal Complaint before the Chief Metropolitan Magistrate, New Delhi

As per Section 42(3) of the Act, complaint can be filed with the Chief Metropolitan Magistrate, New Delhi. Such an action is undertaken by the Commission, if any person fails to comply with the orders or directions issued, or fails to pay the fine imposed. In such a scenario, the person is liable for imprisonment for a maximum of three years, or with fine up to INR 25 Crore or both.

04

COMBINATION PROVISIONS AND THEIR COMPLIANCE

COMBINATION PROVISIONS AND THEIR COMPLIANCE

The Act while prohibits anti-competitive agreements and abuse of dominant position, it also mandates the Commission to regulate combinations (mergers and acquisitions) with a view to ensure that there is no adverse effect on competition in India. The provisions of the Act relating to regulation of combinations have been enforced with effect from June 1, 2011.

The Indian combination regime is a mandatory notification regime, *i.e.*, a transaction (merger, acquisition or amalgamation) which meets any of the asset or turnover thresholds prescribed in Section 5 and is unable to take the benefit of any of the available exemptions, needs to be mandatorily notified to the Commission as per Section 6 of the Act. The regime is also a suspensory one i.e. a transaction which requires notification to the Commission cannot be consummated in whole or part prior to the Commission's clearance or before 210 days have passed from the date of filing of notice if no order is passed by the Commission during it. The Act covers the following categories of combinations;

a. Acquisition of control, shares, voting rights or assets of another enterprise - Section 5(a);

b. Acquisition of control over an enterprise when the acquirer has already direct or indirect control over another enterprise engaged in similar business as the proposed target - Section 5(b); and

c. Any merger or amalgamation - Section 5(c).

The time line involved in the processing of combination matters is provided in the Act and regulations framed thereunder.

4.1 Trigger Event and Timelines for Filing

Section 6(2) of the Act mandates that a notification is required to be filed with the Commission within 30 calendar days of the occurrence of a 'trigger event'. The 'trigger event' includes the following;

a) In case of acquisitions, any execution of agreement such as share purchase agreements, business transfer agreements, etc. or execution of any other binding document that conveys an agreement/decision to acquire control, shares, voting rights or assets. This includes public announcements under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (as amended) and unilateral decisions to acquire shares/voting rights/control in case of hostile takeovers.

b) In case of a merger, the date of approval of such merger by the boards of the merging enterprises.

4.2 Thresholds under Section 5 of the Act

The Act provides for certain asset/turnover thresholds which are subject to revision by the Central Government. At present, these thresholds are as follows:

a) *Parties Test*: The acquirer and target enterprise, jointly in the case of an acquisition or the merged entity, post-merger has either: (i) assets in excess of INR 2,000 crore in India or turnover in excess of INR 6,000 crore in India; or (ii) worldwide assets in excess of USD 1 billion, including at least INR 1,000 crore in India or worldwide turnover in excess of USD 3 billion, including at least INR 3,000 crore in India; or

b) *Group Test*: The group to which the target entity will belong post-acquisition or the group to which the merged entity would belong post-merger, has either: (i) assets in excess of INR 8,000 crore in India or turnover in excess of INR 24,000 crore in India; or (ii) worldwide assets in excess of USD 4 billion, including at least INR 1,000 crore in India or worldwide turnover in excess of USD 12 billion, including at least INR 3,000 crore in India.

Further, in terms of Regulation 5(9) of the Combination Regulations, in combinations involving a series of inter-related steps/ transactions, where assets are transferred to an enterprise for the purpose of such enterprise entering into an agreement relating to an acquisition/merger/ amalgamation with another person or enterprise, the value of assets and turnover of the transferor enterprise shall be attributed to the value of assets and turnover of the transferee enterprise for the purpose of calculation of thresholds under Section 5 of the Act.

Where a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise, the value of assets of the said portion or division or business and or attributable to it shall be the relevant assets and relevant turnover to be taken into account, for the purpose of calculating the thresholds under Section 5 of the Act.

4.3 Available Exemptions

a) *Small Target or the 'De Minimis' Exemption:* The Central Government vide notification dated 29th March 2017, has exempted the enterprises being parties to – (a) any acquisition referred to in clause (a) of Section 5 of the Competition Act; (b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, referred to in clause (b) of Section 5 of the Competition Act; and (c) any merger or amalgamation, referred to in clause (c) of Section 5 of the Competition Act, where the value of assets being acquired, taken control of, merged or amalgamated is not more than rupees three hundred and fifty crores in India or turnover of not more than rupees one thousand crores in India, from the provisions of Section 5 of the said Act for a period of five years from the date of publication of this notification.

Anti-Circumvention Rule:

The *de minimis* exemption is qualified by the 'anti-circumvention rule' contained in Regulation 5(9) of the Combination Regulations which states that in the event that any assets are being transferred to the target enterprise for the purpose of the proposed combination, then the value of assets and turnover of the transferor enterprise(s) will be attributed to that of the transferee enterprise.

b) Schedule I: Schedule I of the Combination Regulations provides that certain types of transactions such as some minority non-controlling acquisitions, intra-group transactions, etc. need not ordinarily be filed.

c) Banking companies in respect of which a notification has been issued by GOI under Section 45 of the Banking Regulation Act, 1945: These transactions are exempt from the purview of the Act for a period of five years since the date of notification issued on 08.01.2013.

d) Post Facto Filing: Section 6(4) of the Competition Act does away with the prior notification filing requirement for share subscription/ financing facility/acquisition by a public financial institution, registered foreign institutional investor, bank or registered venture capital fund, pursuant to any covenant of a loan agreement or investment agreement. Such transaction needs to be notified within 7 (seven) days from the date of the completion of the transaction.

4.4 Pre-filing Consultation

Pre-filing consultation ("PFC") is an informal, non-binding, oral consultation with the staff of the Commission seeking their opinion in relation to substantive and/or procedural aspects concerning the notifiability of a combination under the Competition Act. The salient features of a PFC are as follows:

a) A written request for a PFC is required to be submitted;

b) The written request should contain information relating to (a) basic description of the combination; (b) brief description of the sector in which the parties to the combination operate; and (c) the issue(s) in relation to which the Commission's opinion is sought;

c) Given that the PFC is an informal consultation, the parties' identity or any other confidential aspect concerning the transaction is not required to be disclosed;

d) The Commission usually takes 4-7 days to grant an appointment;

e) The PFC is generally attended by the Adviser of the Combination Division of the Commission along with some other officers; and

f) Typically, the Commission instantly communicates its opinion in relation to the issues at hand, however, in certain cases; the views may be communicated subsequently.

4.5 Form of Notifications

The Act provides for a self-assessment regime to determine the form of merger notification to be filed with the Commission on the basis of market shares of the transacting parties. There are 3 types of forms for notification of the combination:

a) Form I – It is the short form which requires information pertaining to the combination, with a filing fee of INR 15 lakh;

b) Form II – It is a more detailed, technical form which parties can opt to file, along with a filing fee of INR 50 lakh. The Combination Regulations recommend that Form II should be "preferably" filed when:

   i. The combined market shares of the parties to the proposed transaction, who are competitors (i.e., horizontal combinations), is more than 15 per cent in the relevant market; or

   ii. The combined market share of the parties to the proposed transaction, who operate in vertically linked markets (i.e., upstream and downstream markets), is more than 25 per cent in the relevant market.

   iii. In appropriate cases, the Commission may require the parties to notify in Form - II. If the notice was already filed in Form - I, in such cases, only difference in filing fee is required to be paid.

c) Form - III – It is a post-completion intimation form, which is to be filed within 7 (seven) days of an acquisition, share subscription or financing facility entered into by a PFI, registered FII, bank or registered VCF, under a covenant of a loan agreement or an investment agreement. No fee is charged while filing notice in Form - III.

4.6 Intimation of Change in Information

Once a notification has been made, any change in the information provided therein needs to be intimated to the Commission at the earliest. Parties may make an application under Regulation 16 of the Combination Regulations for this purpose.

Once such an application has been made, the Commission is required to assess the significance of the new/additional information received, within three days and accordingly admit or dismiss the information. In the event, the Commission is of the opinion that the information received is likely to significantly affect a determination regarding the AAEC that is likely to result from the combination, it may grant an opportunity for a hearing and accordingly arrive at a conclusion in relation to the validity of the notice filed. Further, the Commission is required to communicate its decision invalidating a notice to the parties within seven days of forming such an opinion. The parties can re-file the notice at the earliest when complete information is available with the parties, without payment of any additional fee.

4.7 Review by the Commission

The Commission is required to form a *prima facie* opinion on whether a

combination is likely to cause an AAEC within the relevant market in India within a period of 30 working days from the receipt of the notification. The 30 working day timeline, which constitutes Phase I, is not absolute as the Commission can "stop the clock" for seeking further information and the time taken by the parties to submit further information is excluded from the 30 working day computation.

At the end of Phase I, the Commission may either approve the transaction, or order a Phase II investigation. The transacting parties cannot complete the transaction until the earlier of: (i) a final decision by the Commission; or (ii) lapse of 210 days from the date of notification to the Commission.

Phase II investigation entails an in-depth investigation, if the Commission, at the end of the Phase I review period, forms a *prima facie* view that a combination causes or is likely to cause an AAEC. After investigation if the Commission arrives at a conclusion that a combination causes or is likely to cause an AAEC, it can block the combination. The Commission can also propose modifications /remedies to the parties to address the competition concerns. The parties get an opportunity to propose their own sets of amendments to the proposed modifications.

4.8 Gun-jumping Concerns

Since the Indian combination regime is a suspensory one (i.e. the parties to a notifiable combination are not allowed to consummate the transaction in any manner before the Commission grants formal approval), apart from the failure to file a notification within the prescribed 30 days period, any action in furtherance of the transaction, including sharing of commercially sensitive information before such approval is granted, is likely to be seen as an instance of 'gun jumping' and may attract penalties under the Act.

Given that most transactions, especially mergers/amalgamations, require a pre-transaction due diligence as well as a certain level of post-signing integration planning, parties need to be extremely cautious that such actions are not seen as substantive 'gun-jumping'.

To mitigate such risks, it is recommended that while conducting due diligence / integration planning, parties constitute a limited team of individuals, comprising preferably members of the senior management, internal legal team as well as external legal counsel ("Clean Team"). Commercially sensitive information of the other party should only be accessible to such Clean Teams. The Clean Teams should not include personnel who are involved in pricing, marketing, sales, etc. in order to ensure that such personnel are not (consciously or unconsciously) influenced by any competitively sensitive information in the course of the day-to-day operations of the business (such as determining pricing, pricing strategy, sales quantity, marketing strategy, terms of consumer contracts, etc.).

4.9 Penalty for non-filing of mandatory notice

Failure to file mandatory notice in combination can result in imposition of penalty under Section 43A of the Act, which provides that the Commission shall impose penalty which may extend up to 1 per cent of the total turnover or assets of the combination, whichever is higher.

Both parties to a merger, and the acquirer in case of an acquisition, face a significant risk if they:

a) Fail to file the mandatory notice and consummate the transaction;

b) File the notice after the prescribed period of 30 days under Section 6 of the Act; and

c) File the notice, but consummate or give effect to, the transaction or parts of the transaction, prior to obtaining an approval from the Commission or before the 210 days period prescribed in Section 6(2A) of the Competition Act.

4.10 Penalty for not following orders, directions and furnishing false information

Non-compliance of orders and directions of the Commission may also attract fine under Section 42 of the Act, which may extend up to INR One Lakh per day (for each day during which such non-compliance occurs), subject to a maximum of INR Ten Crore. A complaint can also be filed with the Chief Metropolitan Magistrate, New Delhi under Section 42(3) of the Act. Such an action is undertaken by the Commission, if any person fails to comply with the orders or directions issued, or fails to pay the fine imposed. In such a scenario, the person is liable for imprisonment for a maximum of three years, or with fine up to INR Twenty Five Crore or both.

Under Section 43 of the Act, if a person under inquiry and investigation, fails to comply with the directions given by the Commission or the DG, penalty of INR One Lakh per day during such non-compliance can be imposed on such a person. Further, in terms of Section 44, penalty between INR Fifty Lakh and INR One Crore may be imposed for making false statement or omission to furnish material information. Under Section 45 of the Act, if a person makes any statement or furnishes any document which he knows or has reason to believe to be false or omits to state any material fact or willfully alters, destroys or suppresses any document then penalty up to INR One Crore can be imposed on such person.

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05

BUILDING A COMPLIANCE FRAMEWORK

BUILDING A COMPLIANCE FRAMEWORK

Since there are serious consequences of non-compliance, it is in the interest of an enterprise that the provisions of the Act are followed and it becomes fully compliant with the competition law to demonstrate good corporate citizenship. Every enterprise should put in place a CCP with an aim to promote a culture of competition within the organization. This chapter brings out the benefits that may accrue to an enterprise which is competition compliant and gives broad contours of an effective CCP.

5.1 Benefits of Competition Compliance

Competition compliance ensures that an enterprise competes in a fair and transparent manner, thus, leading to greater choice and lower prices for consumers. Compliance has the following benefits:

a) It inculcates a culture of compliance throughout the organization which in turn can be a business enhancer offering positive benefits to a business;

b) It provides enterprises with a competitive advantage by enabling them to detect any violation at an early stage and take corrective measures to their advantage;

c) It assists enterprises to enhance reputation and build goodwill;

d) It reduces the costs and negative effects of litigation and regulatory intervention; and

e) It establishes enterprises as having social conscience, economic ethics and national interest at heart.

Looking at the benefits of compliance, it is advisable that every enterprise should implement a CCP.

5.2 Implementation of CCP by an Enterprise

As an enterprise has the responsibility to self-assess whether its conduct poses concerns under competition law, it is encouraged to develop and implement a CCP to ensure there is adequate awareness of risks and an understanding of how they should be managed at an organizational level. The compliance programme by an enterprise should focus on:

a) evaluating all its agreements, market conduct and proposed schemes in the context of compliance with the Act;

b) putting in place a rigorous and suitably specific competition compliance system; and

c) conducting periodic training programmes for employees and senior management.

Depending on the market position and the nature of the industry in which a particular enterprise is operating, nature and focus

of the compliance programme may vary. An enterprise can put in place a basic, yet effective compliance programme with the following elements:

5.2.1 Commitment of Senior Management

The support of senior management should be visible, active and regularly reinforced in implementation of compliance programme within an enterprise. Commitment of senior management must be driven from the topmost level to take responsibility for its implementation. The element of commitment can best be achieved in a number of ways, including:

- A personal message to staff from the senior most official in the enterprise stating their commitment to the compliance programme;
- Referring to the compliance policy in the company's 'Mission Statement' or Code of Conduct;
- Making adherence to the programme one of the overall objectives of the enterprise;
- Linking Competition Compliance Policy to an enterprise's Human Resource (HR) policy which would prompt employees to attach seriousness to the compliance issues;
- Enterprises are further recommended to take proactive second generational steps in competition compliance to conduct their businesses in light of new statutory architecture governing competition regulation. This may be achieved through a dedicated compliance officer, who is well versed in competition law and policy, to oversee the affairs of undertaking through the prism of anti-regulation.

5.2.2 Constituting a "Competition Compliance Committee" to Drive the Compliance Agenda in the Company

In order to be effective, CCP needs to be part of overarching compliance framework of an enterprise. To ensure that the CCP is intertwined with the overall compliance policy of the company, as a first step, the company can constitute a "Competition Compliance Committee", with the ability to:

(i) to develop a company-specific compliance programme;

(ii) ensure periodic training sessions, the content of which will depend on the employees participating in that session;

(iii) enforce disciplinary measures for non-compliance by employees; and

(iv) most importantly promote a culture of competition compliance within the organization.

Senior corporate officers, with an adequate level of autonomy from management, resources and authority should ideally be members of such a Committee.

5.2.3 Active Risk Management

It is essential that a well formulated compliance programme contains current best practices, remains relevant, comprehensive and effective. Therefore, as part of an effective compliance programme, an enterprise must actively identify its compliance risks and reassess those risks at regular intervals as part of entering into

new business areas or activities. Specific compliance risks that may arise within each business unit or sphere of operations should also be considered.

Under an active risk management programme, the enterprise must review its operations and activities to understand areas of risk and to initiate, if necessary, appropriate mitigation measures. Following activities could be used to carry out active risk management in an enterprise:

(i) Internal Audit of procedures and documents

One way of carrying out active risk management is ensuring a system of internal audit of procedures and documents. The enterprise should carry out regular internal audit of procedures and documents, including email communications. The nature of the audit may be tailored to suit the enterprise concerned.

(ii) Internal Audit of commercial agreements

Enterprise that has entered into commercial agreements or is in the process of negotiating commercial agreements, especially agreements with competitors, should take suitable precautions to ensure that it complies with the provisions of the Act. Competition law risks associated with commercial agreements may be mitigated through a legal review of the draft terms of the commercial agreement from a competition law perspective.

(iii) Whistleblower policy to ensure escalation of competition law breaches

While compliance programmes are aimed at being preventative in nature, they are also useful in identifying and responding to competition law violations. A tried and tested way of achieving this is by incentivizing employees to come forward to report any possible contravention of the Act. Though regular internal audits may also be an effective way of identifying a violation, a whistleblower policy, without fear of retribution, offers the enterprise an opportunity to address any concerns of violation of the Act at a very early stage. An effective whistleblower policy should have an incentive programme, including possible positive appraisal and offer to protect the anonymity of the whistleblower.

5.2.4 Evaluating/Reviewing Competition Law Compliance Regularly

An enterprise should also ensure that its compliance training programmes remain current and comprehensive. Therefore, such programmes should be revised regularly to account for amendments in the law and global best practices. The periodic evaluation of the programme should assess and re-evaluate:

a) compliance with policies, procedures, and guidelines through internal and external audits, as well as periodic self-assessments;

b) risk assessment processes as may be applicable to new/growing business divisions and/or emerging areas of competition law risk;

c) effectiveness of the compliance programme (the expected results)

through on-going interactions with personnel and lawyers of the enterprise, especially during antitrust training and special assessments.

One method for an enterprise to ensure that its employees stay up to date with the programme is by running mock drills and gauging the responsiveness of the employees. Based on the findings of the evaluation, the enterprise can appropriately review the programme or conduct further trainings, if required. Enterprise can also encourage adherence to compliance policies by including this as one of the criteria in the yearly employee performance appraisal. However, it is important to ensure that the evaluation process remains as transparent and open as possible.

5.2.5 Training and Education Programme

An essential part of any effective competition compliance policy or programme is to ensure that employees of the organization are properly trained. An enterprise should consider having an active training programme conducted by professionals from the legal and management teams.

A compliance exercise enables the employees of an enterprise to identify actions that may constitute a violation of the Act, and to respond to them appropriately. Further, enterprise must make competition compliance training mandatory for all new employees. This should be regardless of the training that an employee has undergone with their previous employer.

The competition compliance training programme must:

a) require each employee, including new employees, to participate in the training provided;

b) cover all compliance issues a business may face;

c) highlight the general legal principles under the Act;

d) provide employees that face particular exposure to the Act with more in-depth training, for example sales representatives and employees who attend trade fairs and/or participate in trade associate meetings;

e) provide guidance on specific business conduct that should be avoided;

f) ensure that all relevant training materials are available to employees;

g) inform employees of the appropriate protocol to report an infringement or suspected infringement of the Act;

h) use examples and hypothetical case scenarios to effectively communicate the nature of competition law issues to employees; and

i) provide guidance for a 'Proper Business and Corporate Communication' since sometimes ambiguity in the language or exaggeration in internal or external memos, e-mails and correspondences may give rise to suspicion of an anti-competitive practice.

5.2.6 Competition Compliance Manual

For an effective compliance programme, the Commission recognizes that an enterprise should also have its own Competition Compliance Manual that should relate to specific business, commercial functions that it is performing, and anticipated

areas where competition law concerns may emanate. A Competition Compliance Manual has the following benefits:

5.2.6.1 Benefits of Competition Compliance Manual

a) Helps early detection of violations and the ability to take corrective measures

A manual of competition compliance helps in educating the employees and management and equips them with the necessary tools to identify any potential competition violations and other competition law risks. It provides the members of an organization with a working knowledge of the principles and rules of competition law, as well as establish a clear reporting mechanism. This way, any employee who suspects that (s)he may have participated in, or are aware of any potential competition law violations, may report it to the concerned person(s) at the earliest.

In turn, the enterprise is enabled to detect any violation at an early stage and take necessary preventative and/or mitigating measures.

b) Helps educate employees on handling competition sensitive business information

Employees will be better equipped to act in accordance with provisions of the Act. It ensures employees are confident in handling competition related sensitive business information and are able to compete vigorously for business without fear of infringing competition law. It also helps employees recognize when they should seek legal advice in certain scenarios and also to assess whether the issue at hand involves discussions with competitors, or commercial negotiations with suppliers/distributors.

Employees shall also be better equipped to interact with employees of competing enterprises, whether at trade association meetings or otherwise, with dealers, distributors, suppliers and customers in a manner that is compliant with the provisions of the Competition Act.

An effective Compliance Manual should contain following illustrative Dos and Don’ts for employees and executives of an enterprise.

Illustrative Dos

Executives/employees of an enterprise should strictly observe the followings while dealing with competitors/and or trade associations:

- Make independent decisions - including those relating to pricing, strategy and which customers or suppliers to deal with;
- Remember that even informal discussions or agreements with third parties can give rise to competition issues;
- Keep commercially sensitive information confidential and take care not to share such information with the competitors;
- Take care that any discussions with competitors do not lead to anti-competitive arrangements or exchanges of confidential information;
- Keep clear records of any discussions with competitors;
- Ensure that contract terms and conditions with the competitors are clear, easily understood, in plain language and fair to consumers;
- Read the agenda circulated by the trade associations and take accurate, detailed notes of the meeting and, in case of any doubt, a copy of the draft notes must be provided to in-house legal counsel;
- Every employee must be vigilant of the matters being discussed in meetings with competitors or in meeting of a trade association;
- If in such meetings a discussion is initiated on areas prohibited under the competition law, objections should be made by pointing out that it is company's policy not to discuss such topics. If such a person persists, withdraw from the meeting;
- Take care with the language used in all communications (including emails and instant messages) to avoid words being misinterpreted;
- Seek advice immediately from in-house legal counsel if not sure as to whether a particular course of action complies with competition law.

Illustrative Don'ts

Executives/employees of an enterprise should avoid discussing the following topics while dealing with competitors and/or trade associations:

- Past, current or future prices;
- What constitutes a 'fair profit level';
- Margins or profitability;
- Pricing policy and actual costs of an individual enterprise;
- Possible increase or decrease in prices;
- Standardization or stabilization of prices;
- Bidding prices for projects;
- Collusive tendering in terms of divulging the quantity, rate or terms of tender;
- Standardization of credit and trade terms;
- Control of production;
- Control of supply in the market;
- Territorial restrictions, allocation of customers, restrictions on types of products, or any other kind of market division;
- Individual company prices, price changes, conditions of sale (including payment terms and periods of guarantee), price differentials, discounts, commissions, rebates;
- Individual production or distribution costs, transportation, cartage, freight, distribution charges, cost accounting formulas, methods of computing costs;
- Individual company figures on market shares, sources of supply, production;
- Information as to future plans of individual companies concerning technology, production, marketing and sales;
- Matters relating to individual suppliers, distributors or customers or any other business sensitive information;
- Stay in the same hotel as the other competitors and attend social gatherings hosted during Trade Association meetings.

The list is only indicative and not exhaustive. There can be many other instances which may lead to violation of competition law.

Compliance with competition laws minimizes the costs of litigation and regulatory intervention, enhances reputation of an enterprise and provides it with competitive advantage. Looking at the benefits of compliance, it is expected that an enterprise shall implement a CCP, which is not only effective but also dynamic considering all the changes taking place in the regulatory landscape.

This manual shall serve as a guide in this endeavour. However, it must be noted that the manual describes only broad guidelines and general principles on competition law. The users of this manual are advised to carefully study the Competition Act, 2002, and allied regulations, wherever necessary. Reference can also be made to the FAQs and advocacy booklets available on the website- www.cci.gov.in for any clarification.

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GLOSSARY

AAEC means appreciable adverse effect on competition;

Act means Competition Act, 2002 (as amended);

Combination Regulations means Competition Commission of India (Procedure in Regard to the Transaction of Business relating to Combinations) Regulations, 2011;

Commission/CCI means Competition Commission of India;

COMPAT means Competition Appellate Tribunal;

Companies Act means the (Indian) Companies Act, 2013 as amended from time to time and shall include any statutory replacement or modification or re-enactment thereof, and the (Indian) Companies Act, 1956 only to the extent not replaced or modified by the (Indian) Companies Act, 2013;

CCP means Competition Compliance Programme;

DG means the Office of the Director General, Competition Commission of India;

Employee include officer or official of an enterprise;

Enterprise includes company and government enterprises;

General Regulations means Competition Commission of India (General) Regulations, 2009;

INR means the lawful currency of the Republic of India;

Lesser Penalties Regulation means Competition Commission of India (Lesser Penalties) Regulations, 2009;

Penalty Recovery Regulations means Competition Commission of India (Manner of Recovery of Monetary Penalty) Regulations, 2011;

Secretary means the Secretary, Competition Commission of India, appointed under Section 17 of the Competition Act;

USD means the lawful currency of the United States of America.

THE COMPETITION ACT, 2002

An 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 interests of consumers and*
- *to ensure freedom of trade carried on by other participants in markets, in India, and*

for matters connected therewith or incidental thereto.

Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

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