

## INDIAN COMPETITION LAW

The Monopolies & Restrictive Trade Practices Act, 1969 is the first enactment to deal with competition issues and came into effect on 1st June 1970. With the liberalization of the economy and the re-definition of the role of the State and of the private sector in the Indian economy, competition policy in India and its governing legal-regulatory framework needed revisiting. The MRTPA was limited in its efficacy and was found inadequate.

Consequently, a comprehensive competition legislation known as the Competition Act, 2002 came into being with the passage of the Competition Act by the Parliament and assented to by the President of India on 13th January, 2003. This Act seeks to replace the MRTP Act, 1969.

### MAIN OBJECTIVES:

The objectives of the Competition Act are to:

- prevent anti-competitive practices,
- promote and sustain competition in markets,
- protect the interests of the consumers and
- ensure freedom of trade carried on by other participants in markets.

### SUBSTANTIVE PROVISIONS:

The Competition Act contains substantive provisions dealing with:

- anti-competitive agreements;
- the abuse of dominance; and
- merger control.

The Act is extra-territorial and assumes jurisdiction over acts outside India that may affect a market within India.

## **REGULATORY STRUCTURE:**

### COMPETITION COMMISSION OF INDIA (CCI):

An authority called the 'Competition Commission of India' (CCI) has been constituted by the Central Government to enforce the provisions of the Competition Act.

The CCI will be a body corporate having perpetual succession and a common seal with power to acquire, hold and dispose of property, both movable and immovable and can contract in its own name.

In the discharge of its functions, the CCI shall be guided by the principles of natural justice, and has the power to regulate its own procedures.

The Commission shall consist of a Chairperson and not less than two and not more than ten other Members to be appointed by the Central Government from a panel of names recommended by a Selection Committee.

All meetings of the CCI require a quorum of a minimum of three members.

The Chairperson and members will be in office for a term of 5 years from the day of their entering such office in the said capacity and will be eligible for reappointment.

The CCI will appoint a Secretary and other officers for administration work.

### DIRECTOR GENERAL:

The CCI will be assisted by an investigative arm led by a Director General (DG).

The DG holds powers to:

- summon and examine persons on oath;
- require production of documents and receive evidence; and
- obtain warrants / authorization for search and seizure at offices and residences.

### COMPETITION APPELLATE TRIBUNAL (CAT):

An Appellate Tribunal known as the Competition Appellate Tribunal has been established by the Central Government:

- to hear and dispose of appeals against any direction issued or decision made or order passed by the CCI;
- to adjudicate on claim for compensation that may arise from the findings of the CCI.

The Competition Appellate Tribunal (CAT) shall consist of a chairperson and not more than two other members. The chairperson shall be a person, who is or has been a judge of the Supreme Court or the Chief Justice of a High Court.

The Competition Act excludes the jurisdiction of civil courts in respect of matters which the CCI or the CAT is empowered to determine under the Competition Act.

### **EXEMPTIONS:**

The following spheres of activity relating to the sovereign functions of the government may be exempted by it from the purview of the Competition Act:

- security;
- atomic energy;
- currency;
- defence;
- space;
- treaty obligations; and
- public interest.

The ambit of the Act encompasses every enterprise, other than those excepted, within its fold and enables the Commission to probe, investigate, inquire, regulate and adjudicate any activity /matter of any person or enterprise. All PSUs, Societies, Scientific Societies, Municipal Corporations etc., fall within the ambit of the Act.

## **ABUSE OF DOMINANT POSITION:**

The objective of the Competition Act is to eliminate the abuse of dominance through anti competitive trade agreements.

A position of strength, enjoyed by an enterprise in the relevant market is known as 'Dominant Position'. Such position of domination enables the enterprise to:

- operate independently of competitive forces prevailing in the relevant market or;
- affect its competitors or consumers or the relevant market in its favour.

The Competition Commission of India (CCI) determines the market as 'relevant market' on the basis of 'relevant product market' or 'relevant geographic market'.

Abuse of dominant position includes the following:

- imposing unfair conditions or price,
- predatory pricing,
- limiting production / market,
- creating barriers to entry and
- applying dissimilar conditions to similar transactions.

## **Factors to be considered while deciding 'Dominant Position':**

- market share of the enterprise;
- size and resources of the enterprise;
- size and importance of the competitors;
- economic power of the enterprise including commercial advantages over competitors;
- vertical integration of the enterprises or sale or service network of such enterprises;
- dependence of consumers on the enterprise;
- whether dominant position is acquired as a result of any statute or by virtue of being a Government company or a Public Sector Undertaking;
- entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
- countervailing buying power;

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- market structure and size of market;
- social obligations and social costs;
- relative advantages which could have appreciable adverse effect on competition.
- any other factor considered relevant by the CCI for inquiry.

**Practices Constituting Dominant Position:**

Abuse of 'Dominant Position' is strictly prohibited and no proof of any damage or loss is required if 'abuse of dominant position' is established. Following are the practices considered as 'abuse of Dominant Position':

Unfair / discriminatory conditions in purchase or sale of goods or services:

There shall be an abuse of dominant position if an enterprise or a group directly or indirectly imposes unfair or discriminatory:

- condition in purchase or sale of goods or services; or
- price in purchase or sale (including predatory price) of goods or service.

"Predatory price" means the sale of goods or provision of services, at a price which is below the cost. This may be determined by regulations, of production of the goods or provision of services, for reducing competition or eliminating the competitors.

Limiting or restricting production or development:

There shall be an abuse of dominant position if an enterprise or a group limits or restricts:

- production of goods or provision of services or market; or
- technical or scientific development relating to goods or services to the prejudice of consumers

Denial of market access:

Indulging in practices that denies other potential competitors market access in any manner is abuse of dominant position.

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Supplementary obligations unconnected to main contract:

Making conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject to such contracts, is abuse of dominant position.

Use of 'Dominant Position' to enter another market:

Using dominant position in one relevant market to enter into, or protect, other relevant market is abuse of dominant position.

**ANTI – COMPETITIVE AGREEMENTS:**

An agreement under the Competition Act includes any arrangement, understanding or concerted action entered into between parties. It need not be in writing or formal or intended to be enforceable in law.

An anti-competitive agreement is an agreement having appreciable adverse effect on competition. Anti-competitive agreements include:

- agreement to fix price
- bid rigging or collusive bidding
- conditional purchase/sale (tie-in arrangement)
- exclusive supply/distribution arrangement
- agreement to limit production & supply
- agreement to allocate markets
- resale price maintenance
- refusal to deal

The Competition Act declares illegal and void all agreements entered into by any enterprise / association of enterprises or person / association of persons for:

- production,
- supply,
- distribution,
- storage,
- acquisition or

- control of goods or services

which would cause or is likely to cause an 'appreciable adverse effect on competition' within India.

### **INQUIRY PROCEDURE: ANTI-COMPETITIVE AGREEMENTS / ABUSE OF DOMINANCE**

The Competition Commission of India (CCI) may initiate enquiry into anti-competitive agreements / abuse of dominance:

- i. On its own on the basis of information and knowledge in its possession, or
- ii. On receipt of a complaint from any person, or
- iii. On receipt of a reference by the Central or State government or a Statutory authority.

Any person, consumer, consumer association or trade association can make a complaint against anti-competitive agreements and abuse of dominant position.

A person includes an individual, Hindu Undivided Family (HUF), company, firm, association of persons (AOP), body of individuals (BOI), statutory corporation, statutory authority, artificial juridical person, local authority and body incorporated outside India.

A consumer is a person who buys for personal use or for other purposes.

#### Commission initiating enquiry on its own:

- The Commission can initiate enquiry on its own on the basis of information or knowledge in its possession.
- If the CCI is of the opinion that no prima facie case exists, it shall close the matter and pass necessary orders.
- On its own, or on receipt of complaint / reference, if the Commission is of the opinion that there is a prima facie case, it shall direct the Director General, appointed under the Act, to investigate the matter and report his findings.

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- After receipt of the investigation report from the Director General, the Commission shall adjudicate the matter after hearing the parties and pass orders as deemed fit.
- If the Director General reports that there has been no contravention, objections / suggestions from the party making the reference shall be invited.
- After review of the objections / suggestions, if the CCI opines that no contravention has occurred, it shall close the matter.
- If the Director General reports that there has been a contravention of the provisions of the Competition Act, or if upon review of the objections / suggestions received the CCI opines that a Contravention has occurred, a further investigation may be directed.

## **ORDERS OF THE CCI: ANTI COMPETITIVE AGREEMENTS**

The CCI may pass any or all of the following orders:

- Direct the enterprises to terminate the agreement and not re-enter into such an agreement;
- Impose penalties not exceeding 10% of the average turnover of the offender for the three preceding financial years;
- In case of a cartel, impose upon each member of the cartel a penalty of up to three times the profits for each year of the continuance of the agreement, or 10% of turnover for each year of continuance of the agreement, whichever is higher;
- Direct modification of the agreement.

The CCI may also issue appropriate *ex-parte* interim orders.



## **ORDERS OF THE CCI: ABUSE OF DOMINANCE**

The CCI may pass any or all of the following orders:

- Direct the enterprises involved to discontinue abusive activities;
- Impose penalties not exceeding 10% of the average turnover of the offender for the three preceding financial years;
- Direct the division of a dominant enterprise, and issue appropriate directions with regard to:
  - (a) the transfer of property, rights, liabilities or obligations;
  - (b) the modification of contracts and charter documents;
  - (c) the creation, allotment, surrender or cancellation of securities;
  - (d) the formation or winding up of the enterprise.

The CCI may also issue appropriate *ex-parte* interim orders.

## **REGULATION OF COMBINATIONS:**

Any arrangement of combination of trading firms is regulated under the Act.

A combination includes the acquisition of:

- control, shares, voting rights, or assets of one or more enterprises by one or more persons;
- control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in the production, distribution or trading of similar, identical or substitutable goods or service;

and includes the merger or amalgamation of enterprises.

### **Threshold Limits of Combinations:**

Any combination, that exceeds the threshold limits specified in the Act in terms of assets or turnover, which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India, can be scrutinized by the Commission.

The Commission has fixed the threshold limits of such combinations as follows:

#### **For acquisition:**

- Combined assets of the firms more than Rs 1000 cr or turnover more than Rs 3000 cr (these limits are US\$ 500 millions and 1500 millions in case one of the firms is situated outside India).
- The limits are more than Rs 4000 cr or Rs 12000 cr and US\$ 2 billion and 6 billions in case acquirer is a group in India or outside India respectively.

#### **For merger / amalgamation:**

- Assets of the merged / amalgamated entity more than Rs 1000 cr or turnover more than Rs 3000 cr (these limits are US\$ 500 millions and 1500 millions in case one of the firms is situated outside India).
- The limits are more than Rs 4000 cr or Rs 12000 cr and US\$ 2 billion and 6 billions in case merged / amalgamated entity belongs to a group in India or outside India respectively

'Group' would mean two enterprises that are directly or indirectly in a position to:

- Exercise 26% or more voting rights in the other enterprise; or
- Appoint more than 50% of the members of the board of directors in the other enterprise; or
- Control the management or affairs of the other enterprise.

### **Exceptions:**

The provisions for regulation of combinations shall not apply to share subscription or financing facility or any acquisition by:

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- a Public Financial Institution;
- a Foreign Institutional Investor;
- a Bank or Venture Capital Fund;

pursuant to any loan or investment agreement.

However, these institutions are required to file details of the acquisition (including details regarding control and default consequences) with the CCI within 7 days from the date of the acquisition.

### **INQUIRY PROCEDURE: REGULATION OF COMBINATIONS**

The CCI may inquire into a combination within one year from the date the combination has come into effect either:

- on its own on the basis of information and knowledge in its possession, or
- upon receipt of information from any person.

#### Notice to the CCI:

In order to proceed with a combination, prior approval of the CCI is required. Notice of intent to enter into a combination shall be given to the CCI in the prescribed forms within 30 days of:

- the approval of the proposal relating to merger and amalgamation by the boards of directors of the enterprises concerned; or
- the execution of any agreement for acquisition or acquiring control.

#### Failure to notify:

A failure to notify when required will attract penalties of up to 1% of the turnover or assets of the combination, whichever is higher.

#### Investigation:

On receipt of notification of a combination, the CCI is expected to form a *prima facie* opinion within a period of 30 days (where the notification has been filed in the prescribed Long Form) and within a period of 60 days (where the notification has been filed in the prescribed Short Form).

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If no notice or communication is received within these periods, the same constitutes a deemed approval.

Where the CCI is of the opinion that the combination does not cause or is not likely to cause appreciable adverse effect on competition in the relevant market, it shall approve the combination.

Where the CCI deems a further investigation desirable, it shall issue a show cause notice to the parties, which is required to be replied to within 30 days of receipt.

The CCI may then request the DG to provide a report, and the DG shall submit the same within 60 days of the CCI's request.

Within 3 working days of receipt of the DG's report, and where no report has been requested, within 3 working days of the receipt of the reply from the parties, the CCI shall form a *prima facie* opinion on whether the combination does cause or is likely to cause appreciable adverse effect on competition in the relevant market or not.

The CCI shall communicate its opinion to the parties within 4 working days of arriving at it, and in the case of an adverse opinion, require the parties to the combination to publish details of the combination within 10 working days.

Any person or member of the public may file objections within 15 days of the date of publication of the details.

The CCI may call for additional information or conduct hearings to assist it in reaching its decision.

Within a maximum period of 210 days from the date of notification, the CCI must pass its final order approving, modifying or rejecting the proposal.

If the CCI does not pass an order within this period, the combination shall be deemed to be approved by the CCI.

Any combination coming into effect in contravention of the above-mentioned time-lines shall be declared void by the CCI.

**Factors to be considered while deciding adverse effect on competition by a 'Combination':**

- the actual and potential level of competition through imports in the market;
- barriers to entry into the market;
- the degree of countervailing power in the market;
- the likelihood that the combination would be able to significantly increase price and profit margins;
- the extent of effective competition likely to sustain in the market;
- the market shares of the persons or enterprises in the combination, individually and as a combination;
- the nature and extent of vertical integration in the market;
- the failing business factor;
- the nature and extent of innovation;
- relative advantages and benefits.

**ORDERS OF THE CCI: REGULATION OF COMBINATIONS**

The CCI is empowered to:

- approve a combination;
- direct that a combination shall not take effect;
- propose a modification of a combination.

Where a modification is proposed, the modification may be effected within a specified time, failing which the combination shall be deemed to have an appreciable adverse effect on competition.

The parties to the combination may also submit a proposed amendment to the CCI within 30 days of a modification direction. The CCI may:

- agree to the amendment and approve the combination; or
- allow the parties a further 30 days to accept its modification. Failure to do so shall result in the combination being deemed to have an appreciable adverse effect on competition.

The CCI may also issue appropriate *ex-parte* interim orders.

## **PENALTIES: CONTRAVENTION OF ORDERS OF CCI**

If any person contravenes, without any reasonable ground, any order of the Commission, or any condition or restriction or fails to pay the penalty imposed under this Act:

- he shall be liable to be detained in civil prison for a term which may extend to one year, unless in the meantime the Commission directs his release and,
- he shall also be liable to a penalty not exceeding rupees ten lakhs.

### Penalty for failure to comply with directions of Commission and Director General:

If any person fails to comply with a direction given by the Commission or the Director General, the Commission shall impose on such person a penalty of rupees one lakh for each day during which such failure continues.

### Penalty for making false statement or omission to furnish material information:

If any person, being a party to a combination,

- makes a statement which is false in any material particular, or knowing it to be false; or
- omits to state any material particular knowing it to be material, such person shall be liable to a penalty which shall not be less than rupees fifty lakhs but which may extend to rupees one crore, as may be determined by the Commission.

### Penalty for offences in relation to furnishing of information:

If any person, who furnishes or is required to furnish under this Act any particulars, documents or any information:

- makes any statement or furnishes any document which he knows or has reason to believe to be false in any material particular; or
- omits to state any material fact knowing it to be material; or

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- wilfully alters, suppresses or destroys any document which is required to be furnished as aforesaid, the Commission shall impose on such person a penalty which may extend to rupees ten lakhs.

Power to impose lesser penalty:

If the Commission is satisfied that the producer, seller, distributor, trader or service provider included in any cartel, which is illegal has made true and full disclosure of such illegal violation, and such disclosure is vital, the commission may impose lesser penalty on such a person.

**APPELLATE MECHANISM:**

Competition Appellate Tribunal (CAT):

All appeals against the order of the CCI have to be made to the Competition Appellate Tribunal (CAT). The CAT will consist of a Chairperson and not more than 2 other members to be appointed by the Central Government.

The Central or a State Government, a local authority, an enterprise or any person aggrieved by any direction, decision or order of the CCI may prefer an appeal before the CAT within a period of 60 days from the date of receipt of an order of the CCI.

The CAT has to expedite the disposal of such appeals and should not take more than 6 months.

The CAT shall not be bound by the Code of Civil Procedure, 1908 but by the principles of natural justice and any rules made by the Central Government. However, CAT will have all the powers of a civil court.

Compensation claims:

The CAT is empowered to hear compensation claims for damages or loss arising out of findings of the CCI or the CAT regarding anti-competitive practices.

Execution and observance of orders:

Every order made by the CAT shall be enforced in the same manner as if it were a decree of a court in a suit.



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Contravention of an order of the CAT without good explanation shall render the offender liable to penalty not exceeding Rs. 1 crore (\$200,000 approx.) or imprisonment for a term of up to 3 years, or both.

### Appeal to Supreme Court:

The Central or a State Government, a local authority, an enterprise or any person aggrieved by any direction, decision or order of the CAT may file an appeal to the Supreme Court within a period of 60 days from the date of receipt of an order of the CAT.

### **TRANSFER OF PENDING INVESTIGATIONS:**

With effect from 1 September 2009, all pending investigations and proceedings by the Director General relating to:

- Monopolistic / restrictive trade practices will be transferred to the Competition Commission of India (CCI), which may conduct such investigations / proceedings in any manner it deems appropriate;
- Unfair trade practices will be transferred to the National Commission under the Consumer Protection) Act 1986.