

# COMPETITION LAWS IN INDIA

## AN OVERVIEW

### 1. OBJECTIVE BEHIND THE COMPETITION ACT, 2002

Competition is the act of the sellers individually seeking to acquire the patronage of buyers in order to achieve profits or market share. Competition law seek to prevent business from engaging in practices that are harmful to competition and consumer welfare. Competition laws are introduced to regulate the manner in which businesses are conducted in India, so as to create a level playing field with effective competition in the market. The Competition Act prohibits any business arrangements that could form a nexus within the chain of supply, distribution, storage, acquisition, control of goods or provisions of services. The Competition Act, 2002 repealed and replaced the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act). The preamble to the Competition Act, 2002 states that its objective as an Act, “to provide..., for the establishment of a Commission to prevent practises having adverse effect on competition, to promote and sustain competition in markets, to protect the interest of consumers and to ensure freedom of trade carried on by other participants in markets, in India..”.

Thus the main objective of the Competition Act, 2002 are:

- i. To provide the framework for the establishment of the Competition Commission.
- ii. To prevent monopolies and practices having adverse effect on competition.
- iii. To protect the freedom of trade for the participating individuals and entities in the market and hence promote and sustain competition in the market.
- iv. To protect the interest of the consumer.

### 2. SALIENT PROVISIONS OF THE ACT:

The Competition Act by it's very definition aims at regulating malpractices prevalent in the market in order to ensure free and fair play in the market amongst various players. Anti competitive activities

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are prohibited under the Act. The activities prohibited under the Act are thus:

- i. Prohibition of anti- competitive agreements
- ii. Prohibition of abuse of dominant position
- iii. Regulation of combinations among enterprises. Mergers and acquisitions that have an appreciable adverse effect on competition in India.

Each of these are detailed as here under:

### **i. Anti – competitive agreements**

Anti- competitive arrangements are those that have as their object to, or actually effect in preventing, restricting or distorting competition in any market in India. Anti-Competitive Agreements have been defined under Sec. 3 of the Competition Act. Section 3(1) of the Act provides a general prohibition on the following to enter into agreements which causes or is likely to cause an appreciable adverse effect on competition in India:

- a. Enterprise and enterprise
- b. Enterprise and association of enterprises
- c. Two associations of enterprises
- d. Two persons
- e. Persons and an association of persons
- f. Between two association of persons
- g. Person and an enterprise
- h. Person and an association of enterprise
- i. Association of persons and enterprises
- j. Association of persons and association of enterprises.

If an agreement is entered between any of the above, it would be void under the Act and while deciding so they will be examined under the rule of reason on a case to case basis. Section 3(2) of the Act further states that the key determinant of anti- competitive agreement is their appreciable adverse effect on competition in India.

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Anti- Competitive agreements can be classified mainly into two types:

- a. **Horizontal Agreements**, Section 3(3)- Cartel, bid rigging etc. between two or more enterprises operating at the same level.
- b. **Vertical Agreements**, Section 3(4)- exclusive supply/ distribution, tie in arrangement, Resale price maintenance, refusal to deal etc.

### a. **Horizontal Agreements?**

Horizontal Agreements can be termed as agreements that:

- Directly or indirectly determine purchase or sale price.
- Limit or control production, supply, market, technical development, investment or provision of services.
- 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;.
- Directly or indirectly results in Bid- rigging/ collusive bidding (effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding)

Burden of proof is on the person or enterprise. The section provides an exception to the joint ventures entered into by the parties if they increase the efficiency in production, supply, distribution, storage, acquisition or control of goods or provisions of services.

### b. **Vertical agreements:**

Vertical agreements are between enterprises at different stages of production chain, like an arrangement between the manufacturer and distributor. The rule of presumption does not apply to vertical agreements. In order to determine whether any agreement is in contravention of Section 3(4)

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read with Section 3(1) of the Act, the following five essential ingredients of Section 3(4) have to be satisfied:

- There must be an agreement amongst enterprises or persons
- The parties to such agreement must be at different stages or levels of production chain, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services;
- The agreeing parties must be in different markets;
- The agreement should cause or should be likely to cause appreciable adverse effect on competition.
- The agreement should be of one of the following nature as illustrated in Section 3(4) of the Act:
  - a. Tie-in arrangement (includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods);
  - b. Exclusive supply agreement
  - c. Exclusive distribution agreement
  - d. Refusal to deal
  - e. Resale price maintenance

### **ii. Prohibition on abuse of dominant position.**

The Act prohibits any conduct which amounts to the abuse of a dominant position which may have, as its object or effect, an appreciable adverse effect on competition in any market in India. Dominant position has been explained under Explanation to Section 4 of the Act. The Act defined “dominant position” is a position of strength enjoyed by enterprise which enable it to:

- Operate independently of competitive forces prevailing in the relevant market
- Affects its competitors and/ or consumers or the relevant market in its favour.

Dominance itself is not prohibited, its abuse is, and Dominant position is always defined with context to the relevant market. The Act further prescribes certain forms of conduct likely to be amounting to an “abuse” of dominant position:

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- Engaging in predatory pricing or any other form of predatory behaviour. Predatory pricing has been further defined to mean the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate competitors.
- Limits or restricts production of goods or provisions of services
- Limits or restrict technical or scientific development relating to goods or services to the prejudice of consumers
- Indulge in practise or practises that result in denial of market access in any manner
- Make conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contract; or
- Uses its dominant position in one relevant market to enter into, or protect other relevant market.

### **iii. What is Cartel under the Act?**

Cartel has been defined U/S. 2(c ) of the Act to include association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or trade in goods or provision of services.

### **iv. Combination under the Act**

Broadly, combination under the Act means acquisition of control, shares, voting rights or assets, acquisition of control by a person over an enterprise where such person has direct control over another enterprise engaged in competing businesses, and mergers and amalgamations between or amongst enterprises when the combining parties exceed the thresholds set in the Act. The thresholds are specified in the Act in terms of assets or turnover in India or abroad.

### **Regulations of Combinations**

- Section 5 & 6 of the Act deal with Regulation of Combinations.
- Merger review is necessary to prevent:
  - Enterprises from acquiring dominant position which can be abused.
  - Concentration of market power that can reduce competition and diminish product quality and/ or availability.
- The major concerns are increase in prices of goods, innovation and the impact on consumer choice.
- All combinations meeting the threshold limits as prescribed need pre approval of CCI.
- Any person/ Enterprise who/ which proposes to enter into a combination, shall give notice to the commission within 30 days.
- Act provides 210 days for the Commission to decide.
- Deeming provision- on expiry of the prescribed period if no order is passed, the combination is deemed to be approved.

### **3. COMPLIANCE AND ENFORCEMENT UNDER THE ACT:**

The Competition Commission of India (“CCI”) has been entrusted with the task of ensuring compliance under the Act in India. On agreements having Appreciable Adverse Effect on Competition (AAEC), and/ or on allegations of abuse of dominant position, upon a review and enquiry into the alleged practices the Competition Commission may pass the following orders:

- Order of Cease and desist directing the discontinuance of such practise.
- Impose a penalty of up to 10% of the average turnover of the enterprise for the preceding 3 financial years;
- In case of cartel, the CCI may impose a penalty of up to 3 times its profits, or up to 10% of its turnover, which ever is higher, for each year during which the agreement was in force.

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- Direct the modification of such an agreement or abuse so as to curtail its adverse effect upon the competition in the market.
- Issue any directions in addition to the above as it may deem fit.

In the event of a “Combination”. Where the CCI opines that any combination does, or is likely to have an appreciable adverse effect on competition, the CCI may:

- Direct that such a combination shall not take effect; or
- Propose suitable modification

The Act also prescribes for a jail term of up to three years, in the event of a person not complying with the order or directions issued by the CCI, or where a person fails to pay the fine imposed by the CCI within the stipulated time period.