

THE COMPETITION ACT, 2002

Objective of the Competition Act, 2002

An Act, keeping in view of the economic development of the country, was laid down to provide for an establishment of a commission with the following object:

- to prevent practices having adverse effect on competition,
- to promote and sustain competition in markets,
- to protect the interests of consumers,
- to ensure freedom of trade carried on by other participants in markets in India and
- for matters connected therewith or incidental thereto.

Features of Competition Act, 2002

The focus of the new law is towards the following areas affecting competition namely:

- 1. Prohibition of certain agreements, which are considered to be anti-competitive in nature.** Such agreements [namely tie in arrangements, exclusive dealings (supply and distribution), refusal to deal and resale price maintenance] shall be presumed as anti- competitive if they cause or are likely to cause an appreciable adverse effect on competition within India.
- 2. Prohibition of Abuse of dominant position- If an enterprise** by imposing unfair or discriminatory conditions or limiting and restricting production of goods or services or indulging in practices resulting in denial of market access or through in any other mode are prohibited.
- 3. Regulation of combinations** which cause or are likely to cause an appreciable adverse affect on competition within the relevant market in India is also considered to be void.
- 4. Entrust** Competition Commission of India the responsibility of undertaking competition advocacy, awareness and training about competition issues.

Definitions

Acquisition [Section 2(a)]

"Acquisition" means, directly or indirectly, acquiring or agreeing to acquire—

- (i) shares, voting rights or assets of any enterprise; or
- (ii) control over management or control over assets of any enterprise;

Agreement [Section 2(b)]

"Agreement" includes any arrangement or understanding or action in concert,—

- (i) whether or not, such arrangement, understanding or action is formal or in writing; or
- (ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;

Cartel [Section 2(c)]

"Cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.

Enterprise [Section 2(h)]

"Enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services.

Goods [Section 2(i)]

"Goods" means goods as defined in the Sale of Goods Act, 1930 and includes—

- (A) products manufactured, processed or mined;
- (B) debentures, stocks and shares after allotment;
- (C) in relation to goods supplied, distributed or controlled in India, goods imported into India;

Person [Section 2(l)]

"Person" includes—

- (i) an individual;
- (ii) a Hindu undivided family;
- (iii) a company;
- (iv) a firm;
- (v) an association of persons or a body of individuals, whether incorporated or not, in India or outside India;
- (vi) any corporation established by or under any Central, State
- (vii) anybody corporate incorporated
- (viii) a co-operative society

PROHIBITION OF CERTAIN AGREEMENTS, ABUSE OF DOMINANT POSITION AND REGULATION OF COMBINATIONS

1. Anti competitive agreements (Section 3)

It shall not be lawful for any enterprise or association of enterprises or person or association of persons to 'enter' into an agreement in respect of production, supply of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. All such agreements entered into in contravention of the aforesaid prohibition shall be void.

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, shall be presumed to have an appreciable adverse effect on competition, 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.

However, any agreement entered into by way of joint ventures, if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services, shall not be considered to be an anti-competitive agreement.

Bid-rigging

"Bid rigging" means 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.

Agreement at different stages in different markets

Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services shall be a void agreement if it causes or is likely to cause an appreciable adverse effect on competition in India including—

- (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 - includes any agreement restricting in any manner the purchaser 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 agreement- includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;
- (d) refusal to deal - includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;
- (e) resale price maintenance - includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

2. Abuse of dominant position (Section 4)

Sub-section (1), prohibits abuse of dominant position by any enterprise or group. There shall be abuse of dominant position if an enterprise or a group, -

- (a) directly or indirectly, imposes unfair or discriminatory—
 - (i) condition in purchase or sale of goods or services; or
 - (ii) price in purchase or sale (including predatory price) of goods or service,
or

["**predatory price**" means 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 the competitors.]

The unfair or discriminatory condition in purchase or sale of goods or

service referred to in sub-clause (i) and *unfair or discriminatory price* in purchase or sale of goods (including predatory price) or *service* referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or

- (b) limits or restricts—
 - (i) production of goods or provision of services or market therefor; or
 - (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or
- (c) indulges in practice or practices resulting in denial of market access in any manner; or
- (d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or
- (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market. Dominant position means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

3. Combination (Section 5)

Section 5 deals with combination of enterprises and persons. The acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if—

- (a) any acquisition where—
 - (i) the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired jointly have,—
 - (A) either, in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or
 - (B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including atleast rupees fifteen hundred crores in India; or
 - (ii) the group, to which the enterprise whose control, shares, assets or voting rights have been acquired or are being acquired, would belong after the acquisition, jointly have or would jointly have,—
 - (A) either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or
 - (B) in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India or turnover more than six billion US

dollars including at least rupees fifteen hundred crores in India; or

- (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 service, if:-
 - (i) the enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control jointly have,-
 - (A) either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or
 - (B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars including at least rupees five hundred crores in India or turnover more than fifteen hundred million dollars, including at least rupees fifteen hundred crores in India; or
 - (ii) the group, to which enterprise whose control has been acquired, or is being acquired, would belong after the acquisition, jointly have or would jointly have,-
 - (A) either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or
 - (B) in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India; or
- (c) any merger or amalgamation in which—
 - (i) the enterprise remaining after merger or the enterprise created as a result of the amalgamation, as the case may be, have,—
 - (A) either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or
 - (B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or
 - (ii) the group, to which the enterprise remaining after the merger or the enterprise created as a result of the amalgamation, would belong after the merger or the amalgamation, as the case may be, have or would have,—
 - (A) either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or

- (B) in India or outside India, the assets of the value of more than two billion US dollars, including at least rupees fifteen hundred crores in India or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India.

4. Regulation of combinations (Section 6)

As per this section, no person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.

Competition Commission of India

Establishment of Commission (Section 7)

Section 7 provides for the establishment of the Competition Commission of India. The Commission shall be a body corporate by the aforesaid name having perpetual succession and a common seal with power to acquire, hold and dispose of property and to contract and shall sue or be sued. The place of head office of the Commission shall be decided by the Central Government. Further, the Commission may establishment offices at other places in India.

Composition of Commission (Section 8)

The Commission shall consist of the Chairperson and not less than two and not more than six other Members, to be appointed by the Central Government. The Chairperson and every other Member shall be a person of ability, integrity and standing and who has special knowledge of, and such professional experience of not less then 15 years in international trade, economics, business, commerce, law, finance, accounting, management, industry, public affairs or competition matters, including competition law and policy, which in the opinion of the Central Government, may be useful to the Commission. The Chairperson and other members shall be whole time members.

Selection Committee for Chairperson and other Members of the commission (Section 9)

The Chairperson and other Members of the Commission shall be appointed by the Central Government from a panel of names recommended by a Selection Committee consisting of –

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|-----|--|-----|--------------|
| (a) | the Chief Justice of India or his nominee | --- | Chairperson; |
| (b) | the Secretary in the Ministry of Corporate | - | Member; |
| (c) | Affairs the Secretary in the Ministry of | --- | Member; |
| (d) | Law and Justice | - | Members. |
| | two experts of repute who have special | --- | |
| | knowledge of, and professional | - | |
| | experience in international trade, | --- | |
| | economics, business, commerce, law, | - | |
| | finance, accountancy, management, | | |
| | industry, public affairs or competition | | |
| | matters including competition law | | |
| | and policy. | | |

The term of the Selection Committee and the manner of selection of panel of names shall be such as may be prescribed.

Term of office of Chairperson and other Members (Section 10)

The Chairperson and every other Member shall hold office for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment. However, no Chairperson or other Member shall hold office as such after he has attained the age of sixty-five years.

Resignation, removal and suspension of Chairperson and other members (Section 11)

The Chairperson or any other Member may, by notice in writing under his hand addressed to the Central Government, resign his office.

Restriction on employment of Chairperson and other Members in certain cases (Section 12)

The Chairperson and other Members shall not, for a period of two years from the date on which they cease to hold office, accept any employment in, or be connected with the management or administration of, any enterprise which has been a party to a proceeding before the Commission.

Administrative powers of Chairperson (Section 13)

The Chairperson shall have the powers of general superintendence, direction and control in respect of all administrative matters of the Commission. The Chairperson may also delegate such of his powers relating to administrative matters of the Commission, as he may think fit, to any other Member or officer of the Commission.

Salary and allowances and other terms and conditions of service of Chairperson and other Members

(Section 14)

The salary, and the other terms and conditions of service, of the Chairperson and other Members, including travelling expenses, house rent allowance and conveyance facilities, sumptuary allowance (expenses of living) and medical facilities.

Vacancy, etc. not to invalidate proceedings of Commission (Section 15)

Appointment of Director General, etc. (Section 16)

The Central Government may, by notification, appoint a Director General for the purposes of assisting the Commission in conducting inquiry into contravention of any of the provisions of this Act and for performing such other functions as are, or may be, provided by or under this Act.

The number of other Additional, Joint, Deputy or Assistant Directors General or such officers or other employees in the office of Director General and the manner of appointment of such Additional, Joint, Deputy or Assistant Directors General or such officers or other employees shall be such as may be prescribed.

Duties

Duties of Commission (Section 18)

This section provides that it shall be the duty of the Commission to eliminate

practices having adverse effect on competition, to promote and sustain competition in markets in India, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India. The Commission may for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement, with the prior approval of the Central Government, with any agency of any foreign country.

COMPETITION APPELLATE TRIBUNAL

The Tribunal is-

- to hear the appeals against any direction issued or decision made or order passed by the Commission;
- to adjudicate on claim for compensation that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against the finding of the Commission or and pass orders for the recovery of compensation under Section 53N of the Act.

COMPOSITION OF TRIBUNAL:

The Tribunal shall consist of a Chairperson and not more than two other members to be appointed by the Central Government.

Qualification:

The Chairperson of the Tribunal shall be a person, who is or has been a Judge of the Supreme Court or the Chief Justice of a High Court. A member of the Tribunal shall be a person of ability, integrity and standing having special knowledge of, and professional experience of not less than twenty five years in experience.

The Chairperson and members of the Tribunal shall be appointed by the Central Government from a panel of names recommended by the Selection Committee.

Tenure:

The Chairperson or a Member of the Tribunal shall hold office as such for a term of five years from the date on which he enters upon his office and shall be eligible for reappointment. No Chairperson or other member of the Tribunal shall hold office as such after he has attained-

- in the case of the Chairperson, the age of sixty eight years;
- in the case of any other member the age of sixty five years

Disqualification:

Sec. 53K of the Act deals with the disqualification of the Chairperson and the members. The Central Government may, in consultation with the Chief Justice of India, remove from office of the Chairperson or any other member of the Tribunal who-

- a) has been adjudged an insolvent; or
- b) has engaged at any time, during his term of office, in any paid employment; or

Penalty for contravention of orders of Competition Commission

Section 42 provides penalty for contravention of orders of Competition Commission. The Commission may cause an inquiry to be made into compliance of the orders or directions made in exercise of its powers under this Act. If any person fails to comply with the orders or directions of the Commission issued under-

- Section 27 – Orders by Commission after inquiry into agreements or abuse of dominant position;
- Section 28 – Division of enterprise enjoying dominant position;
- Section 31 – Orders of Commission on certain combinations;
- Section 32 – Acts take place outside India but having an effect on competition in India;
- Section 33 – Interim orders issued by Commission;
- Section 42A – Compensation in case of contravention of order of Commission;
- Section 43A – Order for penalty for non furnishing of information on combination.

of the Act, he shall be punishable with fine which may extend to ₹ 1 lakh for each day during which such non compliance occurs, subject to a maximum of ₹ 10 crore, as the Commission may determine.

If any person does not comply with the orders or directions issued, or fails to pay the fine imposed under this section, he shall be punishable with imprisonment for a term which will extend to three years, or with fine which may extend to ₹ 25 cores or with both, as the Chief Metropolitan Magistrate, Delhi may deem fit. This action is without prejudice to any proceedings to be taken under Section 39, which deals with execution of orders of Commission imposing monetary penalty.

The Chief Metropolitan Magistrate, Delhi shall not take cognizance of any offence under this section save on a complaint filed by the Commission or any of its officers authorized by it.

Compensation in case of contravention of orders of Commission

Section 42A of the Act provides that any person may file an application to the Appellate Tribunal for an order for the recovery of compensation from any enterprise for any loss or damage caused for the contravention of the orders of the Commission issued under Sections 27, 28, 31, 32 and 33 or any condition or restriction subject to which any approval, sanction, direction or exemption in relation to any matter has been accorded, given, made or granted under this Act or delaying in carrying out such orders or directions of the Commission.

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

Section 36 (2) provides that the Commission shall have, for the purposes of discharging its functions of this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 while trying a suit, in respect of the following matters, namely:-

- summoning and enforcing the attendance of any person and examining him on oath;
- requiring the discovery and production of documents;

- receiving evidence on affidavit;
- issuing commission for the examination of witnesses or documents;
- 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.

Section 36(4) provides that the Commission may direct any person-

- to produce before the Director General or the Secretary or an officer authorized by it, such books or other documents in the custody or under the control of such person so directed as may be specified or described in the direction, being documents relating to any trade, the examination of which may be required for the purpose of this Act;
- to furnish to the Director General or the Secretary or any other officer authorized by it, as respects the trade or such other information as may be in his possession in relation to the trade carried on by such person, as may be required for the purposes of this Act.

Section 41(2) provides that the Director General shall have all the powers as are conferred upon the Commission under Section 36(2) of the Act.

Section 43 provides that if any person fails to comply without reasonable cause, with a direction by the Commissioner under Section 36(2) and Section 36(4) and the directions of the Director General while exercising his powers under Section 41(2), such person shall be punishable with fine which may extend to ₹ 1 lakh for each day during which such failure continues subject to a maximum of ₹ 1 crore as may be determined by the Commission.

Penalty for non furnishing of information on combination

Section 43A provides that if any person or enterprise who fails to give notice to the Commission under Section 6(2) of the Act, the Commission shall impose on such person or enterprise a penalty which may extend to 1% of the total turnover or the assets, whichever is higher, of such a combination.

Penalty for making false statement or omission to furnish material information

Section 44 provides that 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 ₹ 50 lakhs but which may extend to ₹ 1 crore, as may be determined by the Commission.

Penalty for offences in relation to furnishing of information

Section 45 provides that without prejudice of the provisions of Section 44, if a person, who furnishes or required to furnish 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

- willfully alters, suppresses or destroys any document which is required to be furnished as aforesaid,

such person shall be punishable with fine up to ₹ 1 crore as may be determined by the Commission. Further the Commission pass such order as it deems fit.

Power to impose lesser penalty

Section 46 gives powers to the Commission to impose lesser penalty than specified in the provisions meant for imposing penalties. The said section provides that the Commission may, if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated Section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is a vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit, than leviable under this Act or rules or the regulation.

The lesser penalty shall not be imposed by the Commission in case where the report of investigation has been received before making such disclosure. The lesser penalty shall not be imposed if the person making the disclosure does not continue to co-operate with the Commission till the completion of the proceedings before the Commission.

The lesser penalty shall be imposed only in respect of a producer, seller, distributor, trader or service provider including in the cartel who has made the full, true and vital disclosures under this Section. If the Commission is satisfied that such producer, seller, distributor, trader or service provider included in the cartel had in the course of proceedings-

- not complied with the condition on which the lesser penalty was imposed by the Commission; or
- had given false evidence; or
- the disclosure made is not vital and thereupon such producer, seller, distributor, trader or service provider may be tried for the offence with respect to which the lesser penalty was imposed and shall also be liable to the imposition of penalty to which such person have been liable,

lesser penalty not been imposed.

Contravention by companies

Section 48 provides that where a person committing contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued there under is a company, every person who at the time of the contravention was committed, was in charge of and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. If such person proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention then he will not be punishable.

