

Quick Guide on Enforcement Provisions under Indian Competition Law

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ENFORCEMENT PROVISION UNDER INDIAN COMPETITION LAW

1. What are “anti-competitive agreements”?

Agreements in respect of production, supply, distribution, storage, acquisition, or control of goods or provision of services, which case or are likely to cause an appreciable adverse effect on competition (AAEC) in Indian are considered to be anti-competitive agreements. Such agreements could be horizontal agreements (i.e., agreements between enterprises which are engaged in the provision of identical or similar goods or services) or vertical agreements (i.e., agreements between enterprises or persons, or associations, which are engaged at different levels of the production or supply chain).

Agreements which cause or are likely to cause AAEC, in India are prohibited and void under the Competition Act, 2002 (as amended) (**Competition Act**).

2. What are the provisions governing cartels under the Competition Act?

Cartels are horizontal agreements which:

- directly or indirectly determine purchase or sale prices;
- limit or control production, supply, markets, technical development, investment or provision of services;
- share the market or source of production or provision of services by way of allocation of geographical area of market, type of goods or services, number of customers in the market, or any other similar way; and
- directly or indirectly result in bid rigging or collusive bidding.

Cartels are presumed to cause an AAEC in India and are void unless the parties to the agreement prove otherwise. Accordingly, the burden of proof lies on the alleged cartel participants to establish that their conduct did not result in an AAEC. It is not



necessary that any anti-competitive effect should have arisen from such an agreement, the mere existence and involvement of an enterprise in a cartel is sufficient to raise a presumption of AAEC.

3. Are there any exemptions under the Competition Act in relation to anti-competitive agreements?

Yes, an agreement entered into by any person for restraining any infringement or to impose reasonable conditions, as may be necessary for protecting any of his intellectual property rights guaranteed under the relevant Indian statutes, is exempt.

With respect to horizontal agreements, joint venture agreements among competitors may be exempt if it can be demonstrated that such arrangements result in accrual of benefits to consumers and/or efficiencies in the production, supply, distribution, storage, acquisition or control of goods or provision of services.

4. How are vertical agreements treated under the Competition Act?

Vertical agreements such as, tying, exclusivity in supply or distribution agreements, refusal to deal and resale price maintenance, which cause or are likely to cause an AAEC in India, are prohibited. In case of vertical agreements, there is no presumption of an AAEC and the rule of reason is applied to determine whether a vertical agreement causes an AAEC or not.

5. Is dominance or its abuse regulated under the Competition Act?

The Competition Act does not prohibit dominance *per se*, i.e., “big is not bad”. However, any abuse of such dominant position in a relevant market (further discussed at paragraph 6 below), by an enterprise or a group, is prohibited.

A “dominant position” is defined to mean a position of strength, enjoyed by an enterprise in the relevant market in India, which enables it to operate independently of competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour.



A “group” or an enterprise is held to be abusing its dominant position if it:

- directly or indirectly imposes unfair or discriminatory conditions or prices (including predatory prices);
- limits or restricts production of goods or the provision of services or the market thereof or technical or scientific development;
- indulges in practices resulting in denial of market access;
- engages in tying or bundling; or
- uses its dominant position in one relevant market to enter into or protect another relevant market.

6. What is a relevant market? Why is it important to define a relevant market in cases involving allegation of abuse of dominance?

The relevant market is a function of the relevant product market as well as the relevant geographic market. The “relevant product market” is a market comprising all those products or services which are regarded as inter-changeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use. The “relevant geographic market” refers to the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas.

Defining the relevant market is vital for abuse of dominance cases. Dominance can be determined only within the parameters of a correctly defined relevant market. Typically, economic analyses is required to arrive at an accurate definition of the relevant market.

7. What is the substantive test to evaluate anti-competitive agreements and dominance in India?

The substantive test under the Competition Act is to determine whether there is any an AAEC in India. The Competition Act provides several factors for determining an AAEC in relation to an agreement such as, creation of entry barriers, driving existing



competitors out of the market, foreclosure of competition, accrual of benefit to consumers, etc.

Similarly, the Competition Act lays down certain factors for determining “dominance”, such as market share of the enterprise, size and resources of the enterprise, size and importance of the competitors, dependence of consumers on the enterprise, countervailing buying power, entry barriers, etc.

8. Are there any sector specific exemptions?

Given that the Competition Act is sector agnostic, there are no sector-specific exemptions provided under the Competition Act besides the activities of the Government of India related to “sovereign functions”. As such, activities carried on by departments of the Government of India dealing with defence, space, atomic energy and currency, are outside the purview of the Competition Act.

However, the Ministry of Corporate Affairs, by way of a notification dated 2nd March, 2016, has exempted “Vessels Sharing Agreements” from the provisions dealing with anti-competitive agreements, for a period of one year, in respect of carriers of all nationalities operating ships of any nationality from any Indian port provided such agreements do not include concerted practices involving fixing of prices, limitation of capacity or sales and the allocation of markets or customers.

9. Does the Competition Commission of India (CCI) have extra-territorial power to investigate agreements or conduct of enterprises?

The CCI has the power to inquire into any agreement executed outside India or executed amongst foreign parties which causes or its likely to cause an AAEC in India. Further, the CCI is also empowered to investigate any conduct of a dominant enterprise which is causing any anti-competitive effects in India.

10. Who can file a complaint/information under the Competition Act?

Any person, consumer or their association or trade association can file an information with the CCI for alleged violation of the



provisions of the Competition Act. The CCI also has the power to investigate an alleged violation of the provisions of the Act, *suo moto* or by way of references made by the Central/State Government or a statutory authority. The filing fees are as follows:

- (a) INR 5,000 (approximately USD 74 / EUR 68.9 / GBP 58.5 / JPY 8,567.7) in case of an individual, Hindu Undivided Family, non-governmental organisation, consumer association, co-operative society or trust;
- (b) INR 20,000 (approximately USD 296.6 / EUR 279.5 / GBP 233.9 / JPY 34,267.3) in case of a firm or company having turnover in the preceding year up to INR 1 crore (approximately USD 148,300.3 / EUR 139,749.2 / GBP 116,944.03 / JPY 17,120,685.5); and
- (c) INR 50,000 (approximately USD 741.5 / EUR 698.9 / GBP 584.8 / JPY 86,206.9) in cases not covered in (a) or (b) above.

11. Is there any procedure for settlement of cases or withdrawal of an information filed with the CCI?

Once an information has been filed, there is no mechanism for its withdrawal. Further, the Competition Act does not set out any procedure for settlement *inter se* parties or between the parties and the CCI.

12. Is there a provision for interim relief under the Competition Act?

The CCI may temporarily restrain an enterprise under inquiry from engaging in anti-competitive conduct, until the conclusion of its inquiry or further order of the CCI. In order to be granted interim relief, one must establish a strong *prima facie* case, balance of convenience and irreparable injury/harm.

13. How is the procedure of the CCI and the Competition Appellate Tribunal (COMPAT) regulated?

- While discharging their functions, the CCI and the COMPAT are guided by the principles of natural justice



and have the power to regulate their own procedure. Both have the same powers as vested in a civil court under the Code of Civil Procedure, 1908.

- The determination of key concepts under the Competition Act such as “dominant position”, “relevant market”, etc. are questions of fact. The standard of proof in enforcement cases is the “preponderance of probabilities”. Circumstantial evidence alone has been found to be sufficient for the CCI to find a contravention of the provisions of the Competition Act.
- Appeals against certain orders of the CCI lie with the COMPAT. Appeals against orders of the COMPAT lie with the Supreme Court of India.

14. Are damage claims available under the Competition Act?

The COMPAT has the power to adjudicate compensation claims that may arise from the findings of the CCI or the orders of the COMPAT for any loss or damage shown to have been suffered by any person. As on date, there is no established jurisprudence in relation to compensation claims. However, it should be noted that with respect to a few cases that have been concluded effectively, the proceedings in relation to compensation claims are currently underway.

15. What are the penal consequences for contravention of the provisions pertain to anti-competitive agreements and abuse of dominance provisions under the Competition Act?

The sanctions imposed under the Competition Act are civil in nature and the proceedings are civil proceedings. In cases of anti-competitive agreements, the CCI may order the enterprises to discontinue and/or modify the agreement and/or impose a penalty which may be up to 10% (ten per cent.) of the average turnover for the last 3 (three) financial years.

However, specifically in the case of cartels, the CCI may impose upon each enterprise or person which is included in the cartel, a penalty of up to 3 (three) times of its profit for each year of continuance of such agreement or 10% (ten per cent.) of its turnover for each year of the continuance of such agreement,



whichever is higher. No imprisonment is provided for under the Competition Act for cartel conduct.

In cases of abuse of dominance, the CCI may order:

- discontinuation of such an abuse; and/or
- impose a penalty which may be up to 10% (ten per cent.) of the average turnover for the last 3 (three) financial years.

Additionally, the CCI may order division of an enterprise enjoying a dominant position to ensure that such an enterprise does not abuse its dominant position.

16. Are directors or officers of an enterprise subject to any penal risks under the Competition Act?

Yes, the Competition Act is a civil statute and director, and officers of an enterprise are not subject to any penal risks. However, individuals who are responsible for the conduct of an enterprise's business (such as directors, managers, company secretaries and other officers) may be held liable for contraventions of the Competition Act, committed by the enterprise, and penalized accordingly. Further, the director(s), manager(s), secretaries or other officers of the company, with whose consent or connivance or due to whose negligence the contravention was caused, would also be liable to be proceeded against and penalized.

Having said that, in case of non-compliance with the CCI's orders, such as one imposing a penalty or requiring cartel participants to cease and desist from cartel conduct, the provisions of the Competition Act stipulate (apart from a significant monetary penalty), an imprisonment for a term which may extend to three years. This provision has not been invoked till date.

Lastly, there are no express provisions in the Competition Act which give the CCI the power to disqualify directors. However, it is not clear whether such powers of disqualification of directors of a company lies with the CCI. The COMPAT has recently held that the CCI does not have the power to curtail the tenure of duly elected office bearers of a trade association, who had been elected under the provisions of other statutes.



17. What is a competition compliance programme (CCP)?

Compliance involves active effort on the part of an enterprise to comply with the provisions of the Competition Act, as laid out in a well-defined programme. A CCP is aimed at inculcating a culture of compliance throughout the organization. A well formulated and implemented CCP could greatly mitigate the risk of potential contravention of the Competition Act, thereby limiting consequences and reputational loss.

18. What should a CCP cover?

Some of the aspects that may be covered in a CCP include, external communication, (particularly with competitors, suppliers, customers, etc.) exchange of confidential or commercially sensitive information with competitors, guidance on conduct in trade association meetings, guidance on direct and indirect price fixing, guidance for dominant companies, etc.



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