# COMPETITION LAW IN INDIA : A PRELIMINARY OVERVIEW

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# What is Competition Law?

- The first legislation introduced in India in order to regulate competition was the Monopolies and Restrictive Trade Practices Act, 1969 (**MRTP Act**). The objective of the Act was to control monopolies, i.e., avoid the concentration of power in the hands of a few people/ market players.
- In the year 2002, the Competition Act was introduced by replacing the MRTP Act. This act along with a host of corresponding legislations intends to prevent market distortion caused by anti-competitive practices.
- The Competition Act, 2002 (**Act**) established the Competition Commission of India (**CCI**) in order to prevent anti-competitive practices and, promote and sustain competition in India.

# Why Competition Law?

- Highest economic penalties.
- Individual penalties.
- Manage disgruntled employees/partners.
- Competition law compliance makes good business sense - keeps you ahead of the game.

***"It takes 20 years to build a reputation and five minutes to ruin it. If you think about that, you'll do things differently."***
***– Warren Buffet***

# Competition Law in India

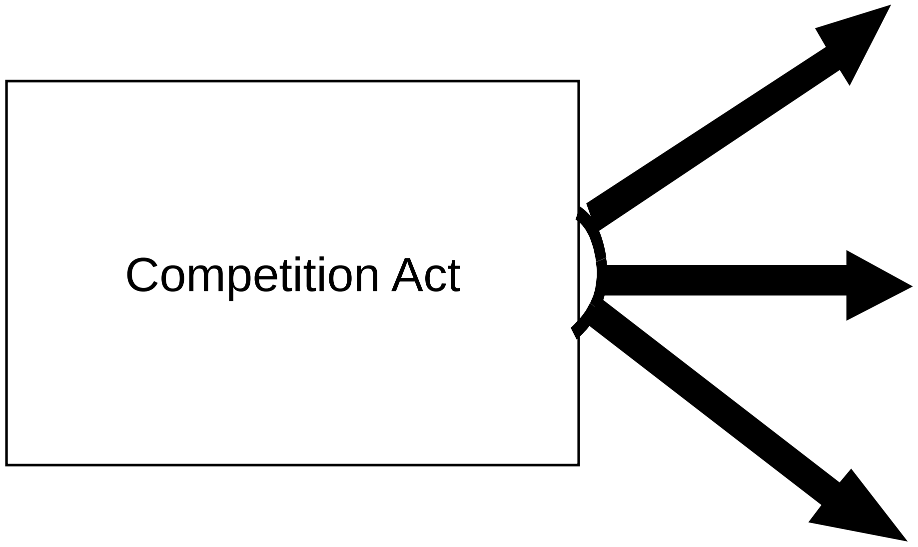
- **Adjudicating authority:** Competition Commission of India.

- **Investigating authority:** Director General (**DG**).

- **Appeals** from CCI decisions lie before the National Company Law Appellate Tribunal (**NCLAT**), within 60 days of such order from the CCI. Appeals from the NCLAT lie before the Supreme Court.

  - **Sections 3 and 4** (*Anti-competitive agreements & Abuse of Dominance*) — 20 May 2009
  - **Sections 5 and 6** (*Regulation of combinations*) — 1 June 2011

# Competition Act, 2002




- Prohibits Anti-Competitive Agreements (Section 3)
- Prohibits Abuse of Dominance (Section 4)
- Regulates Combinations (Sections 5 & 6)

# Focus Areas

- Cartels.
- Anti-competitive agreements/ information sharing.
- Vertical agreements.
- Abuse of dominance.
- Merger Control

# Anti-competitive Agreements

- Prohibition on agreements causing or likely to cause an appreciable adverse effect on competition (**AAEC**) in India

- **Two types**:
  - Horizontal Agreements:
    - Agreements amongst competitors.
    - Includes decisions/ practices of associations.

  - Vertical Agreements:
    - Agreements between enterprises operating at different levels of the production chain.

# Horizontal Agreements

- **Price fixing** – when competitors discuss prices they will charge their customers; any element of price (credit terms, rebates, surcharges, promotions, etc.).

- **Limit or control production/supply** - when competitors agree to limit production or output by closing or not expanding production facilities or by agreeing to limit production or store product rather than supplying it to the market.

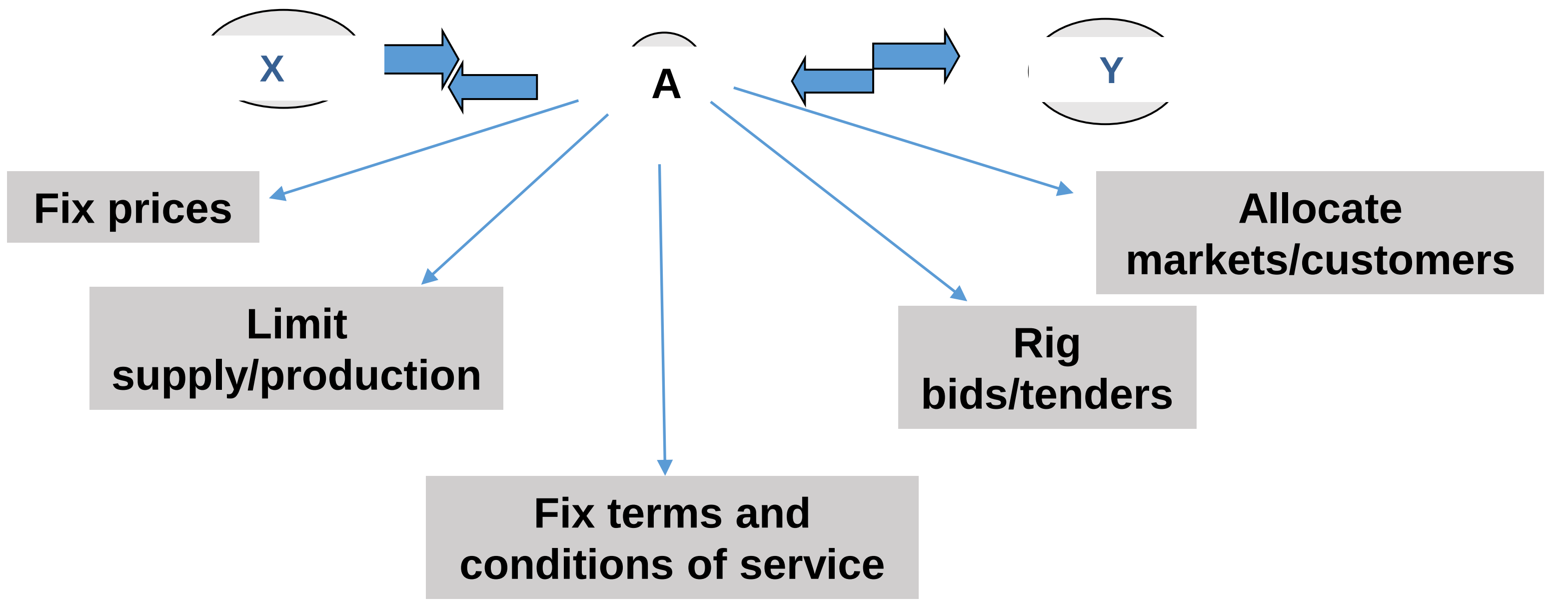
- **Market/ customer allocation** – when competitors agree not to compete in certain geographic areas or for certain customers.

- **Bid rigging** – when competitors agree to alter the outcome of certain bids or tenders. (E.g. by taking turns to offer high or low bids, agreeing not to bid, or agreeing to withdraw a bid.)

# Cartels: Possible Infringement

Purely Illustrative

**Cartels**



# Cartel Penalties

- Up to 10% of average turnover for the preceding 3 years.
- Increased penalties for Cartels: Up to 3 times the profit or 10% of turnover for every year of continuance of the cartel, whichever is higher.

- **Highest penalty on companies** - INR 6,714 crores in Builders Association of India v. Cement Manufacturers' Association & Ors.

- **Highest penalty on individuals** – INR 4,04,63,747 in In Re: Bengal Chemist and Druggist Association.

# Vertical Agreements

- Entered into by enterprises operating at different levels of the production chain in different markets.

- Agreements with distributors/ retailers/ dealers/ suppliers, which includes:
  - Exclusivity obligations.
  - Refusal to deal.
  - Tying and bundling offers.
  - Resale price maintenance (**RPM**).

# Penalties for vertical agreements

- RPM, tying:

  INR 87 crores in *Fx Enterprise Solutions India Pvt. Ltd. v. Hyundai Motor India Ltd*.

- Refusal to deal, Exclusive Agreements:

  INR 2,544 crores in *Toyota & Ors. v. Competition Commission of India*.

# What is Dominant Position?

- Dominant company has economic strength to **behave independently of its competitors, customers and consumers.**
- Economic tools used in defining relevant markets.
- No specified market share threshold to determine dominance.
- Dominance per se is not prohibited. Abuse of such dominance is prohibited.

**Not BAD to be BIG!**

# Abuse of Dominant Position

2 categories of abuse:

- **Exploitative** (unfair conditions or excessive/ discriminatory pricing);
- **Exclusionary** (denial of market access and leveraging).

Abusive Conduct:

- Unfair or discriminatory conditions or prices (including predatory pricing).
- Limiting production or scientific/ technical development.
- Denial of market access.
- Tying of products/ services.
- Leveraging dominant position in one relevant market to enter into or protect position in another relevant market.

# Penalties for Abuse of Dominance

- INR 630 crores in *Belaire Owners Association v. DLF Ltd.*
- INR 591 crores in *Maharashtra State Power Generation Company Ltd. & Ors. v. Mahanadi Coalfields Ltd. and Ors*.
- INR 302 crores in *XYZ v. Grasim Industries Limited & Ors.* (Most recent)
- INR 52.24 crores in *Surinder Singh Barmi v. Board of Control for Cricket in India*.
- INR 19.20 Crores in *South Asia LPG Co. Pvt. Ltd. v. CCI*.
- INR 5.66 crores in *Kapoor Glass Pvt. Ltd. v. Schott Glass India Pvt. Ltd.*

# Dawn Raids

- Unannounced raids by CCI officials.
- 6 dawn raids across several sectors (**construction, batteries, breweries, food and pulses and product and tarpaulin manufacturing**).
- Supreme Court upheld the CCI's powers to '**search <u>and</u> seize**' evidence during a dawn raid.

# Dawn Raids - Documents

If CCI officials request **privileged documents:**

- Refuse to provide documents based on **attorney-client privilege**.
- If officials insist, request that documents be placed in **sealed envelope** until legal status can be ascertained.
- Communication with external legal counsel – **protected by legal privilege**.

**Survival Tips**:

- Cooperate, be friendly and stay alert.
- Inform management, Legal Department and external counsel.
- Ensure that search stays within its scope.
- **Don't destroy documents while investigation is going on.**
- Keep accurate minutes.

# Merger Control – An Overview

- **Who should notify:** Acquirer in acquisition; merging parties in merger or amalgamation.
- **How to notify:** Different forms provided in the Combination Regulations, depending on market shares and nature of transaction:
  - Form I (short form);
  - Form II (long form); and
  - Form III (post-facto).

- Mandatory and suspensory regime.
- Combinations causing or likely to cause AAEC in India will be void.
- Pre-filing consultation – oral, non-binding and informal.

# Test for Notifiability

Is it an Acquisition, Merger or Amalgamation?

YES

Is it excluded or exempted?

NO

Are the Notification Thresholds exceeded?

YES

Transaction is notifiable

# Remedies/ Commitments

Competitively significant transactions may require remedies/ commitments, as a pre-condition for approval from the CCI:

- **Structural remedies** which cause a permanent change in the structure of the concerned parties, such as divestitures.
- **Behavioural remedies** which require a commitment by the parties, such as modifications to non-compete restrictions, rule of information control or price caps.
- **Hybrid remedies** consist of both structural as well as behavioural remedies.

# Gun Jumping Penalties

- INR 5 crore in Piramal Enterprises Ltd. /Shriram.
- INR 3 crore in Zuari Fertilisers & Chemicals Ltd. and Zuari Agro Chemicals Limited.
- INR 2 crore in SCM Soilfert Ltd.
- INR 1 crore in Eli Lilly and Company.
- INR 1 crore in Baxalta incorporated.
- INR 50 lakhs in Canada Pension Plan Investment Board.

# Competition Law for Company Secretaries in India

- Far reaching consequence of non-compliance – Company Secretary is responsible for ensuring all legal compliances are in place.
- It becomes a duty of the Company Secretary to advise the company to comply with the provisions of the Act.
- Section 35 of the Act authorizes a Company Secretary holding a certificate of practice under Section 6(1) of the Company Secretaries Act, 1980 to appear before the CCI.
- Potential concerns from individual penalty perspective.

# When to knock the doors of CCI?

- Potential M&A.
- Complaint by third parties.
- Alleged participation in cartel.
- Vertical Restraints.
- Abusive/unfair conduct.

# Thank you

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