

CHAPTER 3

THE COMPETITION ACT, 2002

Question 1

How will the Chairperson and other members of the Competition Commission of India be appointed? State whether the Chairperson shall be only a person, who has been or is qualified to be, a Judge of a High Court. (November, 2003)

Answer

Competition Commission of India

The Competition Commission of India shall consist of a Chairperson and not less than two and not more than ten other members to be appointed by the Central Government (Section 8) while the appointment is made by the Central Government, the Chairperson and other members shall be selected in the manner as may be prescribed (Section 9). [The Government prescribed rules on 4.4.2003 in this regard]. But according to proviso to 8(1), the Central Government shall appoint the chairperson and a member during the first year of the establishment of commission.

The Chairperson and every other member shall be a person of ability, integrity and standing and who has been, or is qualified to be, a Judge of a High Court or has special knowledge of, and professional experience of not less than 15 years in international trade, economics, business, commerce, law, finance accountancy, management, industry, public affairs, administration or in any other matter which, on the opinion of the Central Government may be useful to the commission [Section 8(2)]. As the qualification prescribed in the Act is the same for chairperson and other members, chairperson of commission may or may not be a judicial person.

Question 2

An understanding has been reached among the manufacturers of cement to control the price of cement, but the understanding is not in writing and it is also not intended to be enforced by legal proceedings.

Examine whether the above understanding can be considered as an 'Agreement' with the meaning of Section 2(b) of the Competition Act, 2002. (May, 2004)

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Answer

Agreement

'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. [Section 2(b)].

In view of the above definition of 'agreement', an understanding reached by the cement manufacturers to control the price of cement will be an 'agreement' within the meaning of Section 2(b) of the Competition Act, 2002 even though the understanding is not in writing and it is not intended to be enforceable by legal proceedings.

Question 3

Poly Ltd., (hereinafter referred to as "Seller"), manufacturer of footwears entered into an agreement with City Traders (hereinafter referred to as "purchaser"), for sale of its products. The agreement includes, among others, the following clauses:

- (i) *That the Purchaser shall not deal with goods, products, articles, by whatever name called, manufactured by any person other than the Seller.*
- (ii) *That the Purchaser shall not sale the goods manufactured by the Seller outside the municipal limits of the city of Secunderabad.*
- (iii) *That the Purchaser shall sale the goods manufactured by the Seller at the price as embossed on the price label of the footwear. However, the purchaser is allowed to sale the footwear at prices lower than those embossed on the price label.*

You are required to examine with relevant provisions of the Competition Act 2002, the validity of the above clauses. (November, 2004)

Answer

Provisions of section 3(1) of the Competition Act, 2002 prohibits any agreement for goods and/or services that may have an appreciable adverse effect on competition in India.

Provisions of section 3(2) of the said Act states that any agreement entered into in contravention of provision of section 3(1) of the said Act shall be void.

Sections 3(3) and 3(4) of the said Act enumerates the types of the agreements which are to be treated as contravening the provisions of the said section 3(1). According to section 3(4) of the said Act, any agreement among enterprises or persons at different stages 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 including the following shall be treated as agreements in contravention of the said section 3(1):

- (a) tie-in-arrangement ;
- (b) exclusive supply agreement ;

- (c) exclusive distribution agreement ;
- (d) refusal to deal
- (e) re-sale price maintenance

The clauses of the agreement given in the question are covered by above mentioned provisions Clause at Sr. No.(i) comes under exclusive supply agreement; Clause at Sr. No.(ii) comes under exclusive distribution agreement and Clause at Sr. No.(iii) is covered by re-sale price maintenance.

Explanations to said section 3(4) explains the above terms.

According to Explanation (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.

According to Explanation (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.

According to Explanation (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 price stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

In view of the above provisions of the Competition Act, 2002, validity of the clauses of the agreement as given in the question can be determined as follows:

Clause (i) restricts the purchaser to deal in the goods of manufacturers other than the seller. Hence this is in contravention of the provisions of section 3(1) of the said Act.

Clause (ii) restricts the purchaser to sell the goods within a specified area. Hence this is in contravention of the provisions of section 3(1) of the said Act

Clause (iii) stipulates the resale price, but it allows the purchaser to sell the goods at lower prices than the stipulated prices. Hence this is a valid clause.

But, the law states that any such agreement containing any of the prohibited clause shall be void. Therefore, even if the agreement contains some valid clauses, it shall still be termed as void if it contains even one prohibited clause.

Question 4

Mr. MKP was a member of the Competition Commission of India. He ceased to be such member on 31st March, 2005. Thereafter, he was offered the post of Executive Director with appropriate remuneration and perquisites in the following organisations to join his duties on and from 1st July, 2005:

- (i) *HLL Ltd., a private sector public limited company, whose case was disposed off by the Competition Commission under the provisions of the Competition Act, 2005 in the month of February, 2005.*

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(ii) *Life Insurance Corporation of India.*

You are required to state with relevant provisions of the Competition Act, 2002 the option available to Mr. MKP in respect of accepting the above offers. (May 2005)

Answer

The Chairperson and other Members shall not, for a period of one year from the date on which they cease to hold office, accept any employment in, or connected with the management or administration of, any enterprise which has been a party to a proceeding before the Commission under this Act. (Section 12 of the Competition Act, 2002)

Provided that nothing contained in this section shall apply to any employment under the Central Government or a State Government or local authority or in any statutory authority or any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956).

Based on the above provisions of the Competition Act, 2002, Mr. MKP will not be able to accept the offer of HLL Ltd. for one year from the date of his cessation as a member of the Competition Commission since the said company was a party to the proceedings before the Commission.

However, since Life Insurance Corporation of India is a Corporation established under the Central Act, the above restriction does not apply and Mr. MKP can accept the offer to join as the Executive Director of the said corporation with effect from 1st July, 2005.

Question 5

- (i) *In a proceeding before the Competition Commission of India involving two pharmaceutical companies, the plaintiff requested the presiding officer to call upon the services of experts from the pharmaceutical sector to determine the truth of the allegations leveled by it against the respondent. The respondent opposed the request on the ground that such action can not be taken by the Competition Commission. You are required to state with reference to the provisions of the Competition Act, 2002, whether the contention of the respondent is tenable.*
- (ii) *The Central Government has formed an opinion that Mr. CBM (a member of the Competition Commission of India) has acquired such financial interest that it may affect prejudicially his functions as a member of the Competition Commission and it wants to remove him from his office. You are required to state with reference to the provisions of the Competition Act, 2002, whether the Central Government can do so and if yes, how?*

(November 2005)

Answer

- (i) As per provisions of Section 36(4) of the Competition Act, 2002, the Competition Commission may call upon such experts from the fields of economics, commerce, accountancy, international trade or other disciplines as it deems necessary, to assist the Commission in the conduct of any enquiry or proceeding before it. As per Regulation 54

of the Competition Commission (General) Regulations, 2004 made by the Commission under Section 64 of the Competition Act, 2002, it may draw up a panel of such experts.

In view of the above stated specific powers given to the Competition Commission, it can call upon the services of an expert from the pharmaceutical sector to determine the truth of the allegations levelled by the plaintiff against the respondent. Hence, the contention of the respondent is not tenable.

- (ii) Section 11(2) of the Competition Act, 2002 empower the Central Government to remove, by an order, a member of the Competition Commission of India from his office if such member has acquired such financial interest as is likely to affect prejudicially his functions as a Member of the Competition Commission. However, provisions of Section 11(3) of the said Act puts some restrictions on such powers of the Central Government. According to this section, in case as stated in the question, the Central Government wants to remove a member of the Competition Commission from his office on the above ground it has to make a reference to the Supreme Court. The Supreme Court shall hold an enquiry in accordance with the procedure formulated by it and then report that the member in question ought to be removed from his office on such ground.

Thus, the Central Government can remove a member of Competition from his office by following the above procedure.

Question 6

Examine with reference to the relevant provisions of the Competition Act, 2002 the following:

- (i) *Whether a Government Department supplying water for irrigation to the Agriculturists after levying charges for water supplied (and not a water tax) can be considered as an 'Enterprise'.*
- (ii) *Whether a person purchasing goods not for personal use, but for resale can be considered as a 'consumer.'*
- (May 2006)*

Answer

Enterprise: The term 'enterprise' is defined in Section 2(h) of Competition Act, 2002. Accordingly 'enterprise' means a person or a department of the Government, who or which is engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services of any kind. But the term does not include any activity of the Government relating to sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

Certain specific activities of Government departments like dealing with atomic energy, etc., and sovereign functions of the Government (like police, defence, etc.) are excluded from the purview of the said terms. Hence, a Government department engaged in the activity of providing service in the form of supply of water for irrigation to the agriculturists after levying charges can be considered as an 'enterprise' within the meaning of Section 2(h) of Competition Act, 2002.

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Consumer: The term 'consumer' is defined in Section 2(f) of Competition Act, 2002. Accordingly 'consumer' means any person who buys any goods for a consideration, which has been paid or promised or partly paid and partly promised, whether such purchase of goods is for resale or for any commercial purpose or for personal use.

Hence, it is not necessary that a person must purchase the goods for personal use in order to be considered as a 'consumer' under Competition Act, 2002. Even a person purchasing goods for resale or for any commercial purpose will also be considered as a 'Consumer' within the meaning of Section 2(f) of Competition Act, 2002.

Question 7

- (i) *Mr. ZPM was appointed as a Member of the Competition Commission of India by Central Government. He has a professional experience in international business for a period of 12 years, which is not a proper qualification for appointment of a person as member. Pointing out this defect in the Constitution of Commission, Mr. YKJ, against whom the commission gave a decision, wants to invalidate the proceedings of the commission. Examine with reference to the provisions of the Competition Act, 2002 whether Mr. YKJ will succeed.*
- (ii) *ABC Ltd. made an initial public offer of certain number of equity shares. Examine whether these shares can be considered as 'Goods' under the Competition Act, 2002 before allotment.*
(November 2006)

Answer

- (i) As per section 15 of Competition Act 2002 any act or proceeding of the Commission shall not be invalidated merely on the ground of:
 - (a) any vacancy in, or any defect in the constitution of the Commission; or
 - (b) any defect in the appointment of a person acting as a Chairperson or as a member; or
 - (c) any irregularity in the procedure of the Commission not affecting the merits of the case.

Here in this case Mr. ZPM should have professional qualification of not less than 15 years as per section 8 of the Act but this disqualification will not invalidate the proceeding of the Commission.

- (ii) Section 2(i) of Competition Act, 2002 defines 'goods' as follows:

'Goods' means goods as defined the Sale of Goods Act, 1930 and includes –

- (a) products manufactured, processed or mined;
- (b) debentures, stock and shares after allotment
- (c) in relation to goods supplied, distributed or controlled in India, goods imported into India.

Hence, debentures and shares can be considered as 'goods' within the meaning of section 2(i) of Competition Act, 2002 only after allotment and not before allotment.

Question 8

- (i) *Hon'ble Justice Mr. HCJ, a retired High Court Judge, attained the Age 61 years on 31st December, 2004. The Central Government appointed him as the Chairperson of the Competition Commission of India with effect from 1st January, 2005. You are required to state, with reference to the provisions of the Competition Act, 2002, the term for which he may be appointed as Chairperson of the Competition Commission of India. Whether he can be reappointed as such and till when he can remain as Chairperson of the Competition Commission of India ?*
- (ii) *After ceasing to be a member of the Competition Commission of India with effect from 31st March, 2007, Mr. MKP was offered the post of Executive Director with appropriate remuneration and perquisites in the following organizations with effect from 1st April, 2007:*
- (a) *HLL Ltd. a private sector public limited company, whose case was disposed off by the Competition Commission under the provisions of the Competition Act, 2002 in the month of February, 2007.*
- (b) *Life Insurance Corporation of India.*

You are required to state with relevant provisions of the Competition Act, 2002, the option available to Mr. MKP in respect of accepting the offers. (May 2007)

Answer

- (i) According to Section 10(1) of the Competition Act, 2002, the Chairperson and every other Member 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 re-appointment.

Provided that no Chairperson or other Member shall hold office as such after he has attained, -

- (a) in the case of the Chairperson, the age of sixty-seven years;
- (b) in the case of any other Member, the age of sixty-five years.

Based on the above provisions of the Competition Act, 2002, it can be concluded that Hon'ble retired Justice Mr. HCJ can be appointed as the Chairperson of the Competition Commission of India by the Central Government initially for a period of five years and he can also be re-appointed after his initial term of five years is over. But since he shall be attaining the age of 67 years as on 31st December, 2010, he will have to step down from the post on his attaining the age of 67 years.

- (ii) In accordance with the provisions of the Competition Act, 2002 as contained in Section 12, the Chairperson and other Members shall not, for a period of one year from the date on which they ceased to hold office, accept any employment in, or connected with the management or administration of, any enterprise which has been a party to a proceeding before the Commission under this Act:

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Provided that nothing contained in this section shall apply to any employment under the Central Government or a State Government or local authority or in any statutory authority or any corporation established by or under any Central, State or Provincial Act or a Government company as declined in section 617 of the Companies Act, 1956 (1 of 1956).

Based on the above provisions of the Competition Act, 2002, Mr. MKP will not be able to accept the offer of HLL Ltd. for one year from the date of his cessation as a member of the Competition Commission since in a case of the said company, it was a party to the proceedings before the Commission.

However, since Life Insurance Corporation of India is a Corporation established under the Central Act, the above restriction does not apply and Mr. MKP can accept the offer to join as the Executive Director of the said corporation with effect from 1st April, 2007.

Question 9

- (i) *An arrangement has been made among the Cotton producers that the cotton produced by them will not be sold to mills below a certain price. The arrangement was in writing but it was not intended to be enforced by legal proceeding. Examine whether the above arrangement can be considered as an agreement within the meaning of Section 2(b) of the Competition Act, 2002.*
- (ii) *The Central Government has formed the opinion that Mr. CBM (A member of the Competition Commission of India) has abused his position which may be prejudicial to public interest as a member of the commission. Examine the powers of the Central Government in this regard*
(November 2007)

Answer

- (i) As per Section 2(b) of Competition Act, 2002 an 'agreement' includes any arrangement or understanding or action in concert, -
- Whether or not, such a arrangement or understanding or action is formal or in writing; or
 - Whether or not, such a arrangement or understanding or action is intended to be enforceable by legal proceedings.

In the given case the understanding reached among the cotton produces not to sell below a certain price shall amount to an agreement as defined under Section 2(b) notwithstanding the fact that arrangement is writing but no intended to enforce by legal proceeding.

- (ii) Section 11(2) (e) of the Competition Act, 2002 empowers the Central Government to remove by an order, a member of the Competition Commission of India from his office if such member has abused his position as to render his continuance in office prejudicial as a member of competition commission. However provision of Section 11(3) of the said act puts some restrictions on such powers of the Central Government. According to this section, in case as stated in the question, Central Government wants to remove a

member or the Competition Commission from his office on the above ground, it has to make a reference to the Supreme Court. The Supreme Court shall hold an enquiry in accordance with the procedure formulated by it and then report that the member in question ought to be removed from his office on such ground. Thus the Central Government can remove a member of Competition Commission from his office by following the above procedure.

Question 10

- (i) *In a proceeding before the Competition Commission of India involving two Pharmaceutical companies, the plaintiff requested the presiding officer to call upon the services of experts from the pharmaceutical sector to determine the truth of the allegations leveled by it against the respondent. The respondent opposed the request on the ground that such action cannot be taken by the Competition Commission. You are required to state with reference to the provisions of the Competition Act, 2002, whether the contention of the respondent is tenable.*
- (ii) *The Central Government has formed an opinion that Mr. CBM (a member of the Competition Commission of India) has acquired such financial interest that it may affect prejudicially his functions as a member of the Competition Commission and it wants to remove him from his office. You are required to state with reference to the provisions of the Competition Act, 2002, whether the Central Government can do so and if yes, how?*

(May 2008)

Answer

- (i) As per provisions of Section 36(4) of the Competition Act, 2002 the Competition Commission may call upon such experts from the fields of economics, commerce, accountancy, international trade or other disciplines as it deems necessary, to assist the Commission in the conduct of any enquiry or proceeding before it. As per Regulation 54 of the Competition Commission (General) Regulations, 2004 made by the Commission under Section 64 of the Competition Act, 2002, it may draw up a panel of such experts.

In view of the above stated specific powers given to the Competition Commission, it can call upon the services of an expert from the pharmaceutical sector to determine the truth of the allegations leveled by the plaintiff against the respondent. Hence, the contention of the respondent is not tenable.

- (ii) Provisions of Section 11(2) of the Competition Act, 2002 empower the Central Government to remove, by an order, a member of the Competition Commission of India from his office if such member has acquired such financial interest as is likely to affect prejudicially his functions as a Member of the Competition Commission. However, provisions of Section 11(3) of the said Act put some restrictions on such powers of the Central Government. According to this section, in case as stated in the question, the Central Government wants to remove a member of the Competition Commission from his office, it has to make a reference to the Supreme Court. The Supreme Court shall hold

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an enquiry in accordance with the procedure formulated by it and then report that the member in question ought to be removed from his office.

Thus, the Central Government can remove a member of Competition Commission from his office by following the above procedure.

Question 11

The Competition Commission of India has received a complaint that M/s. XYZ company has been abusing its dominant position in the food processing industry. Explain briefly the factors that will be considered by the commission to ascertain whether M/s. XYZ company enjoys a dominant position in the industry.
(November 2008)

Answer

The Competition Commission while inquiring whether the enterprise XYZ Company enjoys a dominant position or not under Section 4 of the Competition Act, 2002 will take the following factors into account:

- (a) market share of the enterprise
- (b) size and resources of the enterprise
- (c) size and importance of the competitors
- (d) economic power of the enterprise including commercial advantages over competitors.
- (e) vertical integration of the enterprises or sale or service net work of such enterprises.
- (f) dependence of consumers on the enterprise.
- (g) monopoly or dominant position whether acquired as result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise.
- (h) 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 services for consumers.
- (i) countervailing buying power.
- (j) market structure and size of market .
- (k) social obligations and size of market.
- (l) relative advantage, by way of contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition.
- (m) any other factor which the commission may consider relevant for the inquiry.