

26. The Competition Act, 2002

Why MRTP Act, Needed a Fresh Look?

In the process of liberalisation and globalisation of Indian economy, the provisions of the MRTP act, 1969 became obsolete and therefore needed a fresh look and called for appropriate change due to the following reasons;

- To reflect post reforms scenario.
- To lay emphasis on substance of competition than on the size.
- To address abuse of dominant position in the market rather than dominance in terms of Size etc.
- To be protective to market competition rather than reactive.
- To provide for effective mechanism to promote competitive markets.
- To address unfair trade separately

Competition

Competition is a situation in a market in which firms or sellers independently strike for the buyers' patronage in order to achieve a particular business objective, for example profit, sales or market share.

Main ingredients of Competition Law

- a. **Prohibition on certain agreements, which are considered to be anti-competitive in nature.**
Example: tie in arrangements, exclusive dealings, refusal to deal and resale price maintenance
- b. **Abuse of dominant position** by imposing unfair discriminatory conditions or limiting and restricting production of goods or services or indulging in practices resulting in denial of market excess or thorough in any other mode are prohibited.
- c. **Regulation of combination** which cause or likely to cause an appreciable adverse effect on competition within the relevant market in India is also considered to be void.

Definitions

- **Acquisition** : means directly or indirectly, acquiring or agreeing to acquire –
 - ✓ Shares, voting rights, or assets of any enterprise; or
 - ✓ Control over management of control over assets of any enterprise.
- **Agreement** : includes any arrangement or understanding or action in concert –
 - ✓ Whether or not, such arrangement, understanding or action is formal or in writing;
 - ✓is intended to be enforceable by legal proceedings.

There are two types of agreement which are as follows:

Horizontal Agreements	Vertical Agreements
Among competitors	To an actual or potential relationship buying or selling each other
Its relates to price, quantities, bids and market sharing	Tie in arrangements, exclusive supply, refusal to deal
Here both the party in agreements are operating at the same level in the economic process	Here both the party are operating at different level of manufacturing and distribution process

- **Cartel:** includes an association of producers, sellers and distribution, 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 provisions of services;
- **Consumer:** means any person who-
 - ✓ Buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than person who buys such goods for consideration paid or promised or partly or partly promised, or under any system of deferred payment when such use is made with the approval of such person, whether such purchase of goods is for resale or for any commercial purpose or for personal use;
 - ✓ Hires or avails any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than person who buys such goods for consideration paid or promised or partly or partly promised, or under any system of deferred payment when such use is made with the approval of such person, whether such purchase of goods is for resale or for any commercial purpose or for personal use;
- **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 of goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, whether directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, **but does not include** any activity of the government relating to the sovereign functions of the government including all activities carried on by the departments of the CG dealing with atomic energy, currency, defence and space.
- **Goods:** as defined in the sale of goods act, 1930 and includes –
 - ✓ Products manufactured, processed or mined;
 - ✓ Debentures, stocks and shares after allotments;
 - ✓ In relation to goods supplied, distributed or controlled in India, goods imported into India.
- **Person:** includes-
 - ✓ An individual; a HUF, A company, a firm,
 - ✓ An AOP, BOI whether incorporated in India or outside India
 - ✓ Any established by central, state or provincial act
 - ✓ Any body corporate incorporated in India or Outside India.
 - ✓ A co-operative society registered under societies act.
 - ✓ A local authority
 - ✓ Every artificial person, not falling within any of the preceding sub-clauses.
- **Relevant Market:** means the market, which may be determined by the commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets.

- **Relevant geographic Market:** means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogeneous and can be distinguished from the conditions prevailing in the neighbouring areas.

Establishment of Competition commission of India (Section 7)

- By whom: CG by issuing a notification in the OG. Commission is on existence on such date as may be prescribed in notification.
- Offices
 - ✓ HO – CG may decide from time to time
 - ✓ The commission may establish other office in India.
- Characteristics
 - ✓ Shall be a body corporate having perpetual succession and a common seal.
 - ✓ It shall have the power to acquire, hold and dispose of property, both movable & immovable
 - ✓ Have the power to contract and sue on its own name.
 - ✓ May be sued in its on name.
 - ✓ Shall exercise its power subject to the provisions of the act.

Composition of Commission (Section 8)

- Chairperson and members
 - ✓ Chairperson and not less than 2 and not more than 6 members appointed by CG.
- Qualification an experience
 - ✓ Such professional experience of not less than 15 years in every aspects
- Terms of employment – whole time

Term of office and selection of chairperson and other members

- **selection committee (9)**
 - ✓ chairperson of committee – chief justice of India or his nominee
 - ✓ member – secretary in ministry of corporate affairs
 - ✓ member – secretary in the ministry of law and justice
 - ✓ two experts of repute who have special knowledge of, and professional experience in international trade, economics, business, commerce, law, finance, accountancy, management etc.
 - ✓ The term of the SC is as per prescribed
- **Term of office (10)**
 - ✓ For a term of 5 years
 - ✓ Eligible for reappointment
 - ✓ Not office after attained age of 65 years.
- Vacancies filled by fresh appointment. Until fresh appointment made senior most member act as a chairperson till fresh appointment.
- Oath by chairperson and members for secrecy

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

- Resignation
 - ✓ The right of resignation has been given to both
 - ✓ It must be in writing
 - ✓ Must be addressed to the CG
 - ✓ In spite of the fact that the chairperson or the member has resigned from his office, he shall continue in office until-
 - He is permitted by the CG to relinquish his office
 - 3 months have expired from the date of receipt of resignation
 - A person duly appointed as his successors enters upon his office
 - The expiry of term of office
 - *Whichever from the above is earliest*
- Removal: in following cases Practical question
 - a. He is adjudged as an insolvent
 - b. He is engaged at any time, during his term of office, in any paid employment
 - c. He is been convicted of an offence which, in the opinion of the CG, involves moral turpitude.
 - d. He has acquired such financial or other interest as is likely to affect prejudicial his functions as member
 - e. He is abused his possession as to render his continuance in office prejudicial to the public interest
 - f. He has become physically or mentally incapable of acting as a member.

However, a member may be removed under clause (d) to (e) only if the following procedure is adopted:

- ✓ The CG shall make a reference to the supreme court;
- ✓ The inquiry held by SC in accordance with the order of SC.
- ✓ The SC makes an order that the member ought to be removed.

Restriction on employment of certain person and other members in certain cases (section 12)

- The chairperson and other members shall not, for a period of 2 years from the date on which they cease to hold office, accept any employment in, or connected with the management and administration of, any enterprise which has been a party to a proceeding before the commission.
- **Exempted enterprise**
 - ✓ CG, SG, LA, SC
 - ✓ A corporation established by or under any central, state or provincial act
 - ✓ A government company defined under section 617 of the companies act, 1956.

Other provisions

- Administrative power of Chairperson (13)
 - ✓ Powers of general superintendence, direction and control in respect of all administrative matter of the commission
 - ✓ The chairperson may delegate such of his powers to administrative matters of the commission, as he may think fit.
- Salary and allowance and other terms: determined by rules prescribing (14)

- The salary, allowances and other terms and conditions of service of the chairperson or a member shall not be varied to his disadvantage after appointment.

Appointment of Director general

- Purpose of appointment:
 - ✓ Assisting the commission in conducting inquiry into contravention of any of the provisions of the act,
 - ✓ Performing such other functions as may be provided under the act.
- Appointment of other officers: the CG may also appoint
 - ✓ Additional, joint, deputy or assistants directors general
- For above officers Powers and duties are as per direction of the director general
- Salary and allowance for all is as per prescribed by CG
- Qualification is as per normal terms of employee of commission.

Appointment of secretary, experts, professionals and officers and other employees of commission (17)

- The commission may appoint as it may consider necessary for the efficient performance of the function under the act.
- Salary and terms of such person are as per rules prescribed by the CG.
- Engagement
 - ✓ The commission may engage such number of experts and professionals of integrity and outstanding ability, who have special knowledge of, and experience in, economics, law, business or such other disciplines related to competition, as it may necessary to assist the commission in the discharge of the function under the act.
 - ✓ While engaging such experts, the commission shall comply with the procedure specified in the regulation made in this behalf.

Inquiry into certain agreements and dominant position of enterprise (section 19)

- **Nature**
 - ✓ If section 3 and 4 contravened
- **When:** the commission may make an inquiry –
 - ✓ On its own motion;
 - ✓ On receipt of any information, in such manner and accompanied by such fees as may be determined by regulation, from any person, consumer or trade association.
 - ✓ If a reference is made to the commission by CG or SG or a statutory authority.
- The commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard in the following matters:
 - ✓ creation of barriers to new entrants in the market;
 - ✓ driving existing competitors of the market;
 - ✓ foreclosure of competition by hindering entry into the market;
 - ✓ accrual of benefits to consumers;
 - ✓ improvements in production or distribution of goods or provision of services; or
 - ✓ promotion of technical, scientific and economic development by means of production or distribution of goods or provisions of services.

- The commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard in the following matter:
 - ✓ market share of the enterprise;
 - ✓ size and resources of the enterprise;
 - ✓ size and importance of the competitors;
 - ✓ economic power of the enterprise including commercial advantage over competitors;
 - ✓ vertical integration of the enterprise or sale or service network of such enterprise;
 - ✓ dependence of consumers on the enterprise;
 - ✓ monopoly or dominant position whether acquired as result of any statute or by virtue of being a GC or public sector undertakings or otherwise;
 - ✓ entry barriers;
 - ✓ countervailing buying power;
 - ✓ market structure and size of market;
 - ✓ social obligation and social costs;
 - ✓ any other factor which the commission may consider relevant for the inquiry.
- For determining whether a market constitutes a relevant market for the purpose of this act, the commission shall have due regard to the 'relevant geographic' and 'product market' which are as follows;
- 'relevant geographic market'
 - ✓ regulatory trade barriers;
 - ✓ local specification requirements;
 - ✓ national procurement policies;
 - ✓ adequate distribution facilities;
 - ✓ transport costs;
 - ✓ language;
 - ✓ consumer preferences;
 - ✓ need for secure, regular suppliers or rapid after-sales services.
- 'relevant product market'
 - ✓ physical characteristics or end-use of goods;
 - ✓ price of goods or services;
 - ✓ consumer preferences;
 - ✓ exclusion of in-house production;
 - ✓ existence of specialised producers;
 - ✓ classification of industrial products.

Inquiry into combination by commission (section 20)

- nature
 - ✓ make an inquiry to determine as to whether a combination has caused or is likely to cause an appreciable adverse effect on competition in India.
- When
 - ✓ On its own knowledge
 - ✓ On receipt of notice u/s 6(2)
- Period
 - ✓ Before the expiry of 1 year from the date in which a combination has taken effect

- **Determining the effect of combination on a competition**
 - (a) actual and potential level of competition through imports in the market;
 - (b) extent of barriers to entry into the market;
 - (c) level of combination in the market;
 - (d) degree of countervailing power in the market;
 - (e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
 - (f) extent of effective competition likely to sustain in a market;
 - (g) extent to which substitutes are available or are likely to be available in the market;
 - (h) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
 - (i) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
 - (j) nature and extent of vertical integration in the market;
 - (k) possibility of a failing business;
 - (l) nature and extent of innovation;
 - (m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;
 - (n) whether the benefits of the combination outweigh the adverse impact of the combination, if any.

Meetings of the commission (Section 22)

- **Number**
 - ✓ As may be provided by the regulation
- **Effects on absence of chairperson (because of any reason)**
 - ✓ Senior-most member present at the meeting, shall preside at the meeting
- **Decision**
 - ✓ Majority of members present at the meeting and voting.
 - ✓ Equality of votes – casting vote by chairperson or who preside the meeting as the case
- **Quorum – 3 members**

Order by commission after inquiry into agreement or abuse of dominant position (27)

This process is relevant for while enterprise enter into anti-competitive agreement.

- **Nature of orders: may pass all or any of the following orders:**
 - ✓ It may direct any enterprise or person to discontinue.
 - ✓ It may direct any enterprise or person not to enter such agreement or continue such abuse of position.
 - ✓ It may impose such penalty, as it may deems fit.
 - ✓ It may direct that the agreements shall stand modified to the extent and in the manners as may be prescribed.
 - ✓ It may direct the enterprises concerned to abide by such other orders as the commission may pass and comply with its directions
 - ✓ It may order payment of costs, if any
 - ✓ It may pass such other order as it deems fit.

- Quantum of penalty
 - ✓ more than 10% of the avg. Turnover for the last 3 preceding FYs.
 - ✓ If any anti-competitive agreement has been entered-
 - Up to 3 times of its profit for each year of the continuance of such agreement;
 - 10% of its turnover for each year of the continuance of such agreement;
 - *Whichever is higher;*

Division of enterprise enjoying dominant position (Section 28)

- The commission may, by a written order, direct division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position.
- Nature of orders:
 - ✓ The transfer of vesting of property, rights, liabilities or obligation.
 - ✓ The adjustment of contracts either by discharge or reduction of liability or obligation or otherwise.
 - ✓ The creation, allotment, surrender or cancellation of any shares, stocks or securities
 - ✓ The creation, allotment, surrender or cancellation of any shares, stocks, or securities.
 - ✓ The amendment of the memorandum or articles or any other instrument
 - ✓ The extent to which, and the circumstances in which, provisions of the order affecting an enterprise may be altered by the enterprise.
 - ✓ Any other matter which may be necessary to give effect to the division of the enterprise.
- Prohibition of compensation to officers.

Procedure for investigation of combinations (section 29)

- Issue of show cause notice
 - ✓ Within 30 days on accruing or to be accrued of combination
- Direction by commission to publish the detail of combination
 - ✓ If combination have diversely effect of competition within 7 days; of
 - The receipt of notice about combination
 - Or report by director general, WEE
 - ✓ Direct the parties to publish the combination within 10 working days in manner which it may think fit.
- The commission may invite any person or member of the public affected or likely to be affected by the said combination, to file his written obligation, within 15 days from the date when combination is published.
- The commission may call other additional information also. And it shall be filed by parties within 15 days of such order
- After receipt of all information, commission shall proceed to deal with the case in accordance with section 31.

Orders of commission on certain combinations (Section 31)

- When combination not affects any competition than commission shall not disprove that combination.
- Combination not to take effect if it has nay adverse effect on competition
- Modification of combination to eliminate the adverse effect

- ✓ When modification proposed:
 - when opinion that combination likely affect competition
- ✓ Acceptance of modification
 - Within period specified by commission parties must modify the combination
- ✓ Failure to carry out modification
 - It deemed to be as a adverse effect on competition and deal with such case as per the provision of the act
- ✓ Refusal by parties for such modification
 - May not accept the modification,
 - It shall submit its own modification within 30 days
 - Or not submit copy of amended within 30 days, than it deemed as adverse effect on competition.
- ✓ If such modification by parties is in accordance with the act, the commission shall approve the combination.
- ✓ If commission not accept the amended modification than party shall give further 30 days for correct modification as per order

Power to grant interim orders (section 33)

- When
 - ✓ an inquiry is pending before the commission; and
 - ✓ the commission is satisfied that an act in contravention of section 3 or section 4 or section 6 has been committed and continues to be committed, or that such act is about to be committed.
- Nature of order
 - ✓ The commissioner may temporarily restrain any party from carrying in any act in contravention of section 3, 4 and 6 until the conclusion of such inquiry or orders.
 - ✓ The commission is empowered to issue interim order without giving notice to the opposite party, where it deems it necessary.

As per **section 35**, a person or the director general may either appear in person or authorise one or more CA or CS or cost accountants or legal practitioner or any of his or its officers to present his or its case before the commission.

Rectification of orders (section 38)

- **Conditions**
 - ✓ Only rectify the mistake only if its mistake is apparent from the records.
 - ✓ While making such rectification, the commission may amend any order passed by it previously. However, the commission shall not amend substantive part of its order passed under the provisions of the act.
- When can rectify
 - ✓ On its own motion;
 - ✓ On an application made by any party to the order.

Competition Advocacy (Section 49)

➤ Formulation of competition policy

- ✓ The CG and SG, as the case may be, make a reference to the commission for its opinion on possible effect of such policy on competition.
- ✓ The commission shall, within 60 days of receipt of such a reference, give its opinion to the CG or SG, as the case may be.
- ✓ The CG or SG may thereafter take such further action as it may deem fit
- ✓ The opinion given by the commission shall not be binding upon the CG and SG.

➤ Duties of commission

- ✓ the promotion of competition advocacy;
- ✓ creating awareness about competition issues;
- ✓ imparting training about competition issues.

Constitution of competition fund

➤ administration

- ✓ by a committee of such members of the commission as may be determined by chairperson.

➤ Credits of the fund

- ✓ All grants received by the commission.
- ✓ The fees received under this act.
- ✓ The interest accrued in the amounts of above.

➤ Utilisation of fund

- ✓ Payment of expenses on account of salaries and allowances of members.
- ✓ Payment of other expenses of the commission in connection with discharges of its function
- ✓ Spending monies for carrying out the objects for which the fund has been constituted.

Accounts and Audit (Section 52)

➤ Maintenance of accounts

- ✓ The chairperson shall maintain
- ✓ It shall prepare an annual statement of accounts in such form as may be prescribed by the CG in consultation with CAG.

➤ Audit

- ✓ Audited by CAG. However, the orders of the commission, being matters appealable to the AT or the SC, shall not be subject to audit.
- ✓ Audit carried out at such interval as may be specified by the CAG.
- ✓ Any expenses of auditor are payable by the commission
- ✓ Same right of CAG which privilege in other government company. Such right also available to the person who is appointed by CAG.

- the accounts of the commission as certified by CAG with the audit report thereon shall be forwarded annually to the CG. CG shall cause the accounts and the audit report to be laid before each house of parliament.

Power to exempt (section 54)

➤ **manner**

- ✓ the CG may give exemption by issuing a notification in OG
- ✓ exemption may be from the application of the act, or from any provision of the act.
- ✓ It shall be full or part
- ✓ For such period which specified in such notification.

➤ **To whom?**

- ✓ any class of enterprises if such exemption is necessary in the interest of security of the state or public interest;
- ✓ any practice or agreements arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries.
- ✓ Any enterprise which performs a sovereign function on behalf of CG or a SG. (only to such activity which is sovereign of SG or CG)

Power of CG to issue direction (Section 55)

➤ **Nature**

- ✓ To issue direction in question of policy to the commission. However, CG not issue direction on technical or administrative matter.
- ✓ The commission, shall be given, as far as possible, an opportunity to express its views before any such direction is given.
- Direction shall be binding on the commission; accordingly commission shall comply with the direction.
- The decision of the CG, whether a question is one policy or not, shall be final.

Powers of CG to Supersede commission (Section 56)

➤ **Reasons**

- ✓ Where the CG is of the opinion that on account of circumstances beyond the control of the commission, the commission is unable to discharge the function or perform the duties imposed on it.
- ✓ Opinion that the commission has persistently made default in-
 - Complying with any direction given by the CG; or
 - Discharge of function or performance of the duties imposed on it, and due to this financial position of the commission is suffered
- ✓ CG has opinion to do so in public interest
- **Condition for making order**
 - ✓ The CG shall give opportunity to make representation against the proposed supersession.
 - ✓ The CG shall be required to issue a notification in the OG stating therein the reasons for supersession of the commission.
 - ✓ The time period for which the CG has superseded the commission shall be specified in the notification. It shall not exceed 6 months.

- Effects
 - ✓ The chairperson and other members shall vacate their office
 - ✓ All the powers function and duties which discharge by the CG or such authority as the CG may specify.
 - ✓ All properties are vested to the CG.
- Reconstitution
 - ✓ It shall be obligatory for the CG to reconstitute before the expiration of period
 - ✓ Fresh appointment of chairperson and other member
 - ✓ The person who had vacated office due to suppression of the commission by the CG shall not be deemed to be disqualified for reconstitution.
- Laying of documents before the parliament
 - ✓ The circumstance leading to supersession
 - ✓ The notification issued by the CG.
 - ✓ A full report of action taken by CG.

Anti-competitive agreements (Section 3)

- Prohibition of A-CA
 - ✓ Not any one can enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which cause or likely to cause an appreciable adverse effect in competition within India.
- Effect of A-CA
 - ✓ Void
- Per se A-CA
 - ✓ An agreement shall not be deemed to be A-CA, if it is entered into by way of joint venture and it increases the efficiency in production, supply, distribution, storages, acquisition or control of goods or provisions of service.
- Other A-CA
 - ✓ tie-in agreement
 - ✓ exclusively supply agreement
 - ✓ exclusive distribution agreement
 - ✓ refusal to deal
 - ✓ resale price maintenance
- exemptions
 - ✓ the right of any person to restrain any infringement of, or to impose reasonable condition, as may be necessary for protecting any of his rights which have been or may be conferred upon him under –
 - the copyright act, 1957
 - the patents act, 1970
 - the trade marks act, 1999
 - the geographical indication of goods act, 1999
 - the designs act, 2000
 - The semi-conductor integrated circuits layout design act, 2000.
 - ✓ The right of any person or export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provisions of services for such export.

Execution of orders or commission imposing monetary penalty (section 39)

- If a person fails to pay any monetary penalty imposed on him under this act, the commission shall proceed to recover such penalty, in such manner as may be specified by regulation.
- If the commission is of the opinion that it would be practical to recover the penalty imposed under this act in accordance with the provisions of Income Tax Act, 1961, it may make a reference to this effect to concerned Income Tax Authority for recover of the penalty as tax due under the Income tax Act, 1961.