

Duties, Power and Functions of Competition authorities in India: DG, CCI and COMPAT

The Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, governs competition law in India. Competition Commission of India is the organ which prevents anti-competitive activities, abuse of dominance and anti-competitive combinations. Director General (DG) leads the investigation relating to anti-competitive activities. The Competition Appellate Tribunal (COMPAT) has the appellate jurisdiction against decisions of the CCI. Any appeal filed against the order of the COMPAT has to be filed before the Supreme Court of India. The modules deals with the duties, powers and functions of the competition authorities in India, DG, CCI and COMPAT.

- a) Understanding the functions and duties of DG in the context of investigation relating to anti-competitive activities.
- b) Understanding the role played by CCI in respect of anti-competitive activities, abuse of dominance positions and anti-competitive combinations.
- c) Getting an overview of appellate jurisdiction of COMPAT

Introduction: The Competition Act in India was enacted in 2002. But came into force from 2007. The Competition Commission of India had been empowered to address anti-competitive activities, abuse of dominance and anti-competitive combinations in India. The DG leads the investigation relating to anti-competitive activities in the country. Any order of CCI can be challenged in the Competition Appellate Tribunal (COMPAT).

There will be a prima-facie idea of how the DG carry out investigations in the cases relating to anti-competitive activities, especially those arising out of suo-motu jurisdiction. The role of CCI can be understood in India in the context anti-competitive practices. The appellate powers of COMPAT will be understood.

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Powers and duties of DG.

The Director General leads the investigation wing of the Competition Commission of India. Director General in India refers to the Director General appointed under sub-section 1 of

section 16 and includes any Additional, Joint, Deputy or Assistant Directors General appointed under the section. The Director General, is expected by the Commission, to assist the Commission in investigating into any contravention of the provisions of the Competition Act whenever required or investigate into contravention of any rules or regulations thereunder.(2) The Director General have all the powers conferred upon the Commission under sub-section (2) of section 36.(3)

Where the CCI upon private complaint or suo-motu consider that a prima facie case exists it shall ask the DG to investigate into the matter.³In respect of investigations whether carried out suo-motu or on complained filed by the aggrieved party DG submits investigation report to the CCI within a specific time period. CCI sends the DG Report to both the parties for inviting their comments and objections. After further hearing the CCI passes the appropriate orders.

The success stories of DG and the CCI in the last 5 years can be summarised as follows. In December 2010, CCI investigated the case of cartelisation among traders when onion prices touched 80 rupees. This was done anticipating that the actual cause of the increase of price of onions was secret pact between the traders. But the investigation was not successful to the extent that the onion traders could be booked.

In June 2012, CCI imposed a fine of 63.07 billion (US\$1.0 billion) 11 cement companies for cartelisation. CCI investigation was successful and the evidence suggested that the cement companies made secret pacts when they met at regular intervals. Their motive was to control market share and hold back supply. The profits that earned out of the cartelization was designated as illegal profits.

In January 2013, CCI made notable alterations and amendments in agreements between real estate company DLF Limited and apartment buyers. Some of the important modifications were: The Builder cannot undertake any additional construction beyond the approved building plan given to the buyers. The builder will not have complete ownership of open spaces within the residential project area not sold. Not just the buyer but the builder will be liable for any defaults. All payments made by the buyers must be based on construction milestones and not "on demand". The builder will not have the sole power to form the owner's association. It is not very clear whether the landmark fine in the DLF Case had created deterrence for high rise builders in India, but the landmark fines stand out as one of CCI's greatest success stories in carrying out investigations.

On 8 February 2013, CCI imposed a penalty of 522 million (US\$8.6 million) on the Board of Control for Cricket in India (BCCI) for misusing its dominant position. CCI's investigation revealed that IPL team ownership agreements were unfair and discriminatory, and that the terms of the IPL franchise agreements were heavy in favour of BCCI and franchises had no say in the

terms of the contract. The CCI ordered BCCI to "cease and desist" from any practice in future denying market access to potential competitors and not use its regulatory powers in deciding matters relating to its commercial activities.

In 2014, CCI imposed a fine of Rs. 1 Crore upon Google for failure to abide by the binding directives given by the Director General (DG) seeking information and documents.

In August 2014, CCI imposed a fine of around 2,545 crores on 14 auto companies for indulging in anti-competitive trade agreements. CCI in its order has directed these companies to put in place an effective system for purchasing spare parts.

Duties, powers and functions of CCI.

CCI has a very important role to play in the context of addressing cartels, abuse of dominance and combinations. The Commission comprises of a Chairperson and six members. Ashok Chawla is the current Chairperson of the CCI. The MRTP Act, 1969 only required enterprises to "cease and desist" from anti-competitive activities. The Supreme Court in the case Union of India v Hindustan Development Corporation has also commented on the undesirability of cartels, and has lamented the inability of the MRTP Act to effectively deal with the problem of cartels, partly because of the lack of an effective definition of the same and partly because of the lack of effective powers to control cartels.

The provisions of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, which are relevant are mentioned below. A cartel is defined in Section 2(c) of the Competition Act, 2002, as "including associations of producers, sellers, distributors, traders or service providers who agree to limit control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services". Section 3 of the Act lays down a general prohibition against enterprises or association of enterprises and persons or association of persons entering into an agreement (horizontal or vertical) which causes or is likely to cause an appreciable adverse effect on competition. Section 3(3) provides an exhaustive list of prohibited horizontal agreements (for example, price-fixing, output restrictions, market sharing and bid rigging) which are presumed to cause an appreciable adverse effect on competition in India. In the proviso to the section there is an exemption for joint ventures entered into by competitors, which enhances efficiencies in production, supply, distribution, storage, acquisition or control of goods or provision of services. So save those types of joint ventures every other form of horizontal agreements having cartelization shall be considered by the CCI to have appreciable adverse effect on competition in India.

An enquiry into a violation of the Act can be triggered upon the receipt of a complaint by the Commission or upon its own motion which is also called *suo-motu* action. If the Commission is

convinced that a prima facie case exists, it proceeds to direct the Director General to commence an investigation. When the director general completes the investigation he submits a report to the Commission which then decided what action to take.

Section 46 of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, in India provides for such leniency as well, and the Act allows the Commission to draft regulations in connection with this. By the power vested in it through this provision, along with the power to make rules and regulations vested by s. 64 of the Act the Government of India brought out the Competition Commission of India (Lesser Penalty) Regulations, 2009 in August 2009.

These Regulations provide the framework in which the Competition Commission of India can give lower punishments than statutorily provided in the case of cartel membership. The Lesser Penalty Regulations have provided for the first informant from a cartel to receive a full amnesty from penalty.

One question that does arise with respect to the interpretation of section 46 is whether “lesser penalty” can be interpreted to mean a complete waiver of penalty. It clearly has been in the current regulations, but whether this is valid is yet to be seen. With the use of the amnesty program in India in future years, the efficacy of the program will be understood.

Abuse of dominance is the other infringement of law which CCI addresses under section 4 of the Competition Act, 2002. DLF Case is the most landmark case in India in the context of success of Competition Commission of India in addressing abuse of dominance. 21 The conditions that CCI found abusive in DLF’s Balaire Project agreement. Unilateral changes (changes as proposed or thought about by DLF only) can be made by the builder without the buyers’ consent. Buyer’s views did not matter at all in the context of decisions taken by DLF. DLF unilaterally decided to increase the size of the building from 19 floors to 29. The builder enjoys unilateral right to increase/decrease super area at his sole discretion without consulting allottees, who nevertheless are bound to pay additional amounts or accept a reduction in the area.

Allottees have no exit option except when builder fails to deliver possession within the agreed time, but even in this case they get refunds without interest, and that too only after the apartment is sold.22 So a buyer who was already staying in a rented house, did not have the scope of getting the earnest deposit back and negotiate with any other builder till all the flats were sold in the said complex in Gurgaon. Punitive penalties can be imposed if you default, but not if the builder defaults. DLF took crores of rupees from the allottees, even before the first brick was laid. CCI found the 16 conditions all, being unfair and abusive.

The CCI can regulate combinations that cross the threshold limit created by the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007; only if the notification is made mandatory. If it was voluntary, many companies could have escaped the review of the CCI inspite of crossing the threshold limit.

At the same time the CCI does not want any of these big companies to gain that amount of market share from where they can control the market and abuse their dominance. Neither the CCI want the giant companies in entering into combinations and get involved in predatory pricing and driving out the rest of the companies from the market.

The Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, had been enacted after examining the competition laws of most of the other countries of the world, like US, UK, Canada, etc. Most of the countries had mandatory notification and India is no exception to it.

The Competition Commission of India (Amendment Regulations) 2011 and (Amendment Regulations) 2013.

The CCI had brought in Amendment Regulations in 2011 and 2013 to amend the thresholds and process relating to combination review under the Competition Act. As the purchasing power of money had changed with passage of time, the thresholds required amendment. So they were changed. In 2011 the following asset and turnover threshold had been created.

According to that regulation the value of assets include the brand value, goodwill, value of intellectual property, but not the depreciation. Amendments of Schedule 1 of the Combination Regulations, 2013 were grossly highlighted which describes the different activities not likely to have appreciable adverse effect on competition in India. In the CII Press Release it was said that the exemption of intra-group Mergers and Acquisitions of two or more enterprises where more than 50% shares or voting rights of the other enterprise are held by enterprise(s) within the same group is very vital.

Powers and functions of COMPAT

The Competition Appellate Tribunal is the adjudicatory body which hears appeals from order passed by the CCI. The Competition Appellate Tribunal (COMPAT) is empowered for the purpose of hearing appeals and disposing of appeals against any directions issued by CCI or directions given by CCI under sub-section (2) and (6) of Section 26, section 27, section 28, section 31, section 32, section 38, section 39, section 43, section 43A, section 44, section 45, section 46 of The Competition Act, 2002. The Central Government has set up the Appellate Tribunal on 15th May, 2009 having its Headquarter at New Delhi. Hon'ble Dr. Justice Arijit Pasayat, former Judge

of Supreme Court, has been appointed as the First Chairperson of the Appellate Tribunal. As far as the composition of the Competition Appellate Tribunal is concerned, in addition to the Chairperson, there are two Members to be appointed by the Central Government.

The Chairperson of the Appellate Tribunal requires the following qualification. He has to be the Judge of the Supreme Court or the Chief Justice of a High Court. A Member of the Appellate Tribunal should have special knowledge of, and professional experience of not less than twenty-five years in, competition matters, including competition law and policy, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs, administration or in any other matter which in the opinion of the Central Government, may be useful to the Appellate Tribunal. The Chairperson and the members of the Appellate Tribunal can hold office for a term of five years and they are eligible for re-appointment. The Proviso says that no Chairperson or other Member of the Appellate Tribunal shall hold office after he has attained the age of sixty-eight years or sixty-five years respectively.

Every appeal shall be filed within a period of 60 days from the date on which a copy of the direction or decision or order made by the Competition Commission of India is received and it shall be in the prescribed form and be accompanied by the prescribed fees. The Appellate Tribunal may entertain an appeal after the expiry of the period of 60 days if it is satisfied that there was sufficient cause for not filing it within that period. This rule is similar to the power of other Tribunals in India.

The COMPAT is bound by procedure laid down by Civil Procedure Code, 1908. It is empowered to summon and enforce attendance of any person and examine him on oath, require discovery and production of documents, receiving evidence on affidavit, issue commission for examining of witnesses, dismiss a representation on default under the Competition Act, 2002. Although the powers are similar to Civil Court of original jurisdiction, the technical details are not expected in the Tribunal and strict adherence to Indian Evidence Act is also not required.

Conclusion.

In conclusion it can be said that the DG's office, CCI and COMPAT had started working from 2008 onwards. All these bodies are very new. It will take time to gather expertise to deal with complicated cases. Already CCI had shown huge success in investigating and proving the cement cartel and abuse of dominance in the DLF case. More number of penalties and better utilization of the corporate leniency policy can create more confidence on the CCI and the other bodies.