



सत्यमेव जयते

Government of India



Investigation Procedure Framework

Office Of Director General
Competition Commission of India
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Presentation Content



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Overview of:

- **Competition Law in India with main provisions of the Competition Act**
- **Investigative Procedure Framework**
- **Prioritization**
- **Internal Checks and balances**
- **Responding to Criticism**
- **Judicial Review and Implications for exercise of authority's powers**
- **Proposals from India's Competition Law Review – Implications for Investigative Procedures**

Competition Law in India

Main provisions of the Act

Preamble of the Competition Act for establishment of Commission:

- To Prevent practices having adverse effect on competition
- To Promote and sustain competition in markets
- To Protect the interests of consumers and,
- To Ensure freedom of trade carried on by other participants in markets, in India

Overview of the Competition Act:

- Competition Act, 2002 passed in January 2003
- Commission established in October, 2003
- Anti-trust provisions effective from May 20th, 2009.
- Merger provisions effective from June 1st, 2011.



Competition Law in India with main provisions of the Competition Act

Some of the Main Provisions of the Competition Act:

- **Section 3** (prohibiting anti-competitive agreements) and **Section 4** (prohibiting abuse of dominant position).
- **Sections 5 and 6** (regulation of combinations)
- **Section 19:** Inquiry into certain agreements and dominant position of enterprise
- **Section 26:** Procedure for inquiry under Section 19
- **Section 32:** Acts taking place outside India but having an effect on competition in India
- **Sections 36 and 41:** Power of Commission and Director General
- **Section 48:** Individual liability
- **Section 49:** Competition advocacy



Investigative Procedure Framework

Receipt of Information by Commission or Suo-moto or Reference



Preliminary Analysis by Commission, if results in opinion that there is a Prima Facie Case



Commission directs Director General (DG) for detailed investigation



**DG submits investigation report to the Commission within specified time;
If Commission feels, it may ask DG to carry out further investigation**



Commission sends DG report to parties inviting their objections/suggestions



Commission passes appropriate orders after analysis and hearing the parties

Legal Framework

Sec 36 (2) of the Act:

The Commission shall have, for the purpose of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters:

- (a) Summoning and enforcing the attendance of any person and examining him on oath;*
- (b) Requiring the discovery and production of documents;*
- (c) Receiving evidence on affidavit;*
- (d) Issuing commissions for examination of witnesses or documents;*
- (e) requisitioning, subject to the provisions of section 123* and 124* of the Indian Evidence Act, 1872, any public record or documents or copy of such record or documents from any office*

*(*relating to unpublished documents on affairs of State / official communications which if disclosed would be against public interest)*



Legal Framework

- ❑ *“The Director General shall, when directed by the Commission, assist the Commission in investigating into any contravention of the provisions of this Act (The Competition Act, 2002) or any rules or regulations made thereunder.”*
- ❑ *“The Director General shall have all the powers as are conferred upon the Commission under sub-section 2 of section 36.”*

[Sec 41 of the Act]

- ❑ DG does not have suo moto powers to initiate investigation into a case.
- ❑ DG commences investigation only after a direction of the Commission u/s 26(1) of the Act, when the Commission is of the opinion that there exists a *prima facie* case.



Scope of Investigation

Judicial Review

DG empowered to decide the **period** of investigation and **add new Opposite Parties** during investigation

[Supreme Court- Excel Crop case –CA No.2480 of 2014]



Planning of Investigation

- What are the type of allegations?
- What is the material available ?*
- What is the opinion of the Commission u/s 26(1) of the Act?*
- What type of evidence are required to be gathered? This would depend upon nature of violation such as*
 - *Cartel (price fixing, market allocation, Bid Rigging),*
 - *Vertical restraint, and*
 - *Abuse of dominance*
- What can be the source of evidence- Opposite Parties, third parties, trade association, competitors, suppliers, customers etc.*
- Publicly available information from annual reports. Market study reports to understand the product and market, market structure, demand and capacity, profitability trends etc.*

- ❑ *CCI/DG may determine the manner in which evidence may be adduced.*
- ❑ *DG may admit-verifiable transcript of tape recordings, video recording, email, telephone records, written & signed statement, opinion or analysis of experts based upon market survey or economic studies*
 - *Certified copy of documents*
 - *Entries in books of account, including in electronic form regularly kept in ordinary course of business*
 - *Electronic evidence- admissibility of electronic records*
 - *Evidence by way of affidavit or oral evidence*
 - *Opportunity of cross examination if considered necessary or expedient*



Investigation...

- In a typical Leniency case where dawn raid is contemplated, maximum information /evidence is gathered from the LP applicant.
- Discreet enquiry continues till dawn raid as no notice is issued to the OPs and third parties.
- Open investigation by issuing notice to OPs and third parties. Time and sequence of notice to the parties depend on the facts of the case.

Process in dawn raids is detailed in separate presentation.



Investigation...

- Standard of proof– “preponderance of probability” and not “beyond reasonable doubt”
- AAEC presumed in Sec 3(3) cases of horizontal agreements
- Evidence may be either oral or documentary
- Direct or smoking gun evidence – written agreements, email communication, minutes of meeting, handwritten notes.
- Circumstantial evidence- economic evidences (price parallelism) and communication evidence (email/CDRs).
- In bid rigging cases, bidding in the past and bidding pattern crucial to ascertain various types of bid rigging.
- Tender procedure and conditions



Investigation...



- Price movements/trends, cost, margins, PAT/EBIDTA, analysis of market before, during and after the cartel
- Presence of industry association- type of information shared among the parties
- Financial transactions among the parties



Investigation...

- ❑ Vertical restraint u/s 3(4) relates to one or more of the following - Tie in arrangement, Exclusive supply agreement, exclusive distribution agreement, refusal to deal and resale price maintenance.
- ❑ Analysis of market power
- ❑ Need to establish AAEC in view of factors u/s 19(3) –
creation of entry barrier, driving existing competitors out of market, foreclosure of competition, accrual of benefits to consumers, improvements in production or distribution of goods or provision promotion of technical, scientific & economic development by means of production of goods or provision of services

Dominance

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*

Abuse of dominant position

- Imposing unfair or discriminatory price/conditions
(allowed if done to meet competition)*
- Restricting production or services or technical development*
- Denial of market access in any manner*
- Unrelated conditions*
- Leveraging*



Investigation...

■ Factors for dominance of an enterprise - Sec 19(4)

- (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 network of such enterprises;*
- (f) dependence of consumers on the enterprise;*
- (g) monopoly or dominant position whether acquired as a 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 service for consumers;*
- (i) Countervailing buying power;*
- (j) Market structure and size of market;*
- (k) social obligations and social costs;*
- (l) relative advantage, by way of the 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.*



Proposed changes in competition law



- Definition of Cartel to expressly include *buyer's cartel*
- Relevant Product Market to include *supply side substitutability*
- Hub & Spoke cartel (*'spoke' must have a third party platform (hub) to exchange sensitive information and a conspiracy to fix price- facilitating role*)
- Tie in arrangements (*express provision that 'tied' and 'tying' products in a tie-in arrangement are distinct or separate goods and service*)
- Resale Price Maintenance (*by both direct and indirect means like threat, sanctions, penalty, promotional offer etc.*)
- AAEC factors u/s 19(3) to be inclusive to include new factors-
 - *'Foreclosure of competition' (broad definition to cover restriction on competition)*
 - *"Consumer harm"*



Proposed changes in competition law

- Relevant Geographic market- (*incorporation of “characteristics of goods & services” and cost associated with switching supply/demand to other areas”*)
- Relevant Product market- (*“switching cost” and “categories of customers” as relevant factors*)
- *Price includes every valuable consideration whether direct or indirect consideration in the form of data in digital market*
- *Resources of the enterprise (includes network effect)*



Investigative Procedure Framework



Evidence collection by DG in Investigation:

- Material available/enclosed with investigation order of the Commission
- Pre-existing materials in public domain, industry surveys, market studies etc.
- Pre-existing documentary evidence available with parties - corporate strategy documents, audit reports, board decisions, circulars, sales reports etc.
- Information request to parties - written questionnaires, telephone interviews, oral inquiries, presentations etc.
- Descriptive evidence from market participants such as from customers, suppliers, competitors, etc.
- Expert and quantitative evidence, including economic analysis and expert testimony
- Digital evidence - phone records, emails, digital records etc.
- Evidence gathered through search & seizure



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THANK YOU

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