
Why you should be concerned about the Competition Act?

India's competition law

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Competition Act, 2002

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India's anti-trust law is embodied in the Competition Act, 2002 (amended by the Competition Amendment Act, 2007) and became fully operational from 1 June 2011 when the provisions regulating mergers and acquisitions were notified. While competition advocacy was notified in 2003, the provisions regulating anti-competitive agreements and abuse of dominance were notified with effect from 20 May 2009.

Both the Competition Commission of India (CCI) (which administers the law) and the Competition Appellate Tribunal (CAT) are operational.

Objectives of the act

- Establish a Commission to prevent practices having adverse effect on competition
- Promote and sustain competition in markets
- Protect the interests of consumers
- Ensure freedom of trade in the Indian markets

Ambit

- Regulates anti-competitive agreements – ex post facto; operational
- Regulates abuse of dominant position – ex post facto; operational
- Regulates combinations – ex ante; operational
- Repeals MRTP, 1969
- Has extra-territorial reach
- Covers both goods and provision of services

The Competition Law requires multi-disciplinary inputs in its implementation and enforcement and an intensive economic analysis that goes beyond just interpreting the language of the law. The concepts of abuse, dominance and appreciable adverse effect on competition are not defined quantitatively but are established based on the competition in the market. With a strong multidisciplinary team, PwC is uniquely placed to advise on all aspects of the Act.

Agreements

The Act has a wide and inclusive definition:

- An arrangement/understanding or action in concert
- Can be oral or in writing
- Need not be enforceable by law
- Even a ‘wink and nod’ can be construed as an agreement

Anti-competitive agreements

Any agreement with respect to production, supply, distribution, storage, acquisition or control of goods/provision of services which is anti-competitive is prohibited and void.

Such agreements must cause or be likely to cause appreciable adverse effect on competition (AAEC) in a relevant market in India.

The relevant market may be a geographical or a products market.

The Act distinguishes between horizontal and vertical agreements.

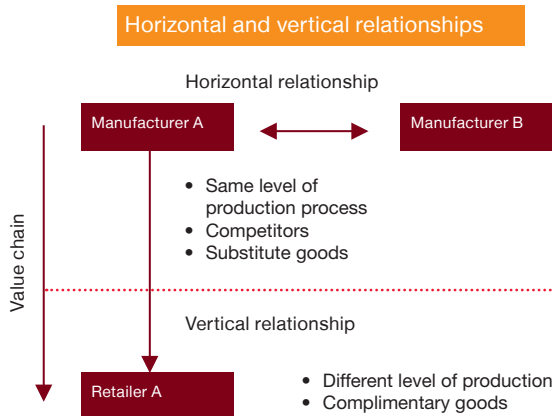
Horizontal agreements

Agreements between enterprises or persons engaged in trade of identical or similar goods or services are presumed to have AAEC if they:

- Directly or indirectly determine purchase or sale prices
- Limit or control output, technical development, services etc.
- Share or divide markets
- Indulge in rigging or collusive bidding

Cartels prohibited

- Inclusive definition
- Agree to limit, control or attempt to control production, distribution, sale or price



Vertical agreements

Agreements between enterprises or persons at different stages/levels of production chain in different markets are prohibited if such agreements cause or are likely to cause AAEC. Vertical agreements include:

- Tie-in arrangement (e.g. requiring a purchaser of goods to purchase some other goods as condition of such purchase)
- Exclusive supply arrangement (e.g. restricting a purchaser in course of his trade from dealing in any goods other than those of the seller)
- Exclusive distribution arrangement (e.g. limiting/restricting supply of goods or allocate any area or market for sale of goods)
- Refusal to deal (e.g. restricting by any method any person/classes of persons to whom goods are sold)
- Resale price maintenance (e.g. selling goods with condition on resale at stipulated prices)

Horizontal vs vertical agreements

Horizontal agreements are presumed to have AAEC whereas in vertical agreements, the onus of proving AAEC lies on the CCI.

Joint venture agreements are an exception to horizontal agreements, provided such agreements increases efficiency in production, supply, distribution, storage acquisition or control of goods or provisions of services.

Export agreements and agreements to protect intellectual property are allowed to have protective clauses.

Dominance

A dominant position is a position of strength enjoyed by an enterprise in the relevant market in India, which enables it to:

- Operate independently of competitive forces
 - Impact its competitors, consumers, relevant market in its favour
- Factors for determining dominant position include market share, size and resources of the enterprise/competitors, economic power of enterprise, vertical integration, dependence of consumers etc.

Abuse of dominance

Not dominance but its abuse is prohibited

Abuse occurs when an enterprise uses its dominant position in the relevant market in an exclusionary and/or exploitative manner.

Relevant market

The Act lays down factors that may be taken into account while defining the relevant market. The CCI may determine this with reference to the following:

- Relevant product market comprises all interchangeable or substitutable products/services. It is the smallest set of goods/services that are substitutable among themselves, given a small but significant non-transitory increase in price; or

- Relevant geographic market comprises area in which conditions for competition for supply or demand of goods/services are homogenous and can be distinguished from the conditions prevailing in the neighbouring areas; or
- With reference to both

Deemed abuse

The Act gives an exhaustive list of practices deemed to be abuse of dominance:

Exploitative: Unfair/discriminatory

- Pricing (includes predatory pricing)
- Conditions on purchase/sale of goods and services

Exclusionary:

- Limited production of goods or provision of services or technical development
- Limited/Deny market access
- Conclusion of contracts subject to unconnected supplementary obligations
- Use of dominant position in one market to enter into or protect the other market

Combination

A Combination is an acquisition of one or more enterprises by one or more persons, merger or amalgamation of enterprises, if it meets the prescribed monetary thresholds and involves:

- Any acquisition of control, shares, voting rights or assets of any enterprise
- Any acquisition of control by a person over an enterprise, where such person already has direct/indirect control over another enterprise in a similar business
- Any merger or amalgamation of enterprises

Combinations above the defined monetary thresholds require filing and prior approval of the CCI before they can be made effective. CCI has powers to investigate combinations and modify/reject them.

Separate provisions exist in case of acquisitions pursuant to loan/ investment agreements of public financial institutions, FII, banks or VC funds.

The CCI must be notified within 30 days of the ‘trigger event’ of such combinations
‘Trigger event’ in a Combination

- Board approval of the enterprises in case of a proposed merger/ amalgamation; or
- Execution of any agreement or ‘other document’ in case of a proposed acquisition

Which Combinations require filing of notice effective 1 June 2011

Combinations which need to be notified to CCI for its evaluation and approval are:

- Mergers or amalgamations where the proposals have been approved by the board of directors on or after 1 June 2011
- Acquisitions where the binding documents are executed on or after 1 June 2011

Acquiring 'group' and target jointly have	
In India	In India or outside
Assets over INR1,500 crore	Assets over USD 750 million (of which at least INR 750 crore in India)
OR	
Turnover above INR 4,500 crore	Turnover above USD 2,250 million (of which at least INR 2,250 crore In India)
Parties to the combination jointly have	
In India	In India or outside
Assets over INR 6,000	Assets USD 3 billion (of which at least INR 750 crore In India)
OR	
Turnover above INR 18,000 crore	Turnover above USD 9 billion (of which at least INR 2,250 crore in India)

What is a 'Group'?

- To be considered a Group, two or more enterprises, directly or indirectly, must be in a position to either:
- exercise 26% or more (see special exemptions below) of the voting rights in the other enterprise; or
- appoint more than half the board of directors in the other enterprise; or
- control the management or affairs of the other enterprise

Special exemptions

For the first five years from 1 June 2011, the following have been exempted from combination regulations under the Act:

- Group exercising less than 50% of voting rights in other enterprise
- Enterprises whose control, shares, voting rights or assets are being acquired has either assets of the value not more than INR 250 crores in India or turnover not more than INR 750 crores in India

Process for filing notices with CCI

The notice must be filed in the prescribed form with the requisite filing fee within 30 days of the trigger event. Three forms are prescribed: :

- Form I (Short Form) with a filing fee of INR 50,000
- Form II (Long Form) with a filing fee of INR 10,00,000
- Form III (for public financial institution, foreign institutional investor, banks and VC funds) without any filing fee

Who is obliged to file the form with CCI

- In case of merger or amalgamation, parties to the combination are jointly responsible
- In case of acquisition, the obligation is of the acquirer
- In case of acquisitions without consent of the enterprise being acquired, the acquirer is to furnish only such information as is available and the CCI can direct the enterprise being acquired to furnish additional information

Parties are ordinarily required to file notices in Form I but may opt to file in Form II or the CCI may, during the course of inquiry seek information in Form II.

Timeline and process for evaluation by CCI

The CCI must pass an order or issue directions with respect to a Combination notified for approval within a period of 210 days from the date of filing notice. Till CCI passes an order, the Combination cannot take effect. If CCI does not pass any order within the 210 days, the Combination shall be deemed to have been approved.

The review by CCI with respect to AAEC is conducted in two phases:

- CCI forms a prima facie opinion in 30 days of receipt of the notice;
- If such opinion confirms that there is likely to be an AAEC in India, then CCI undertakes a detailed investigation within 180 days thereafter

Nature of orders passed by CCI

The CCI may pass the following orders:

- Approve the combination
- In case it finds that a combination shall have or is likely to have AAEC in the relevant market, CCI may order:
 - that the combination should not be given effect to; or
 - suitable modifications to amend the transaction structure and based on the response of the parties, pass further orders

Any transaction found to be likely to cause or to have caused AAEC in the relevant market in India can be declared as void and of no effect by the CCI.

Confidentiality of information furnished by parties

Any party may submit a written request for confidentiality of information or documents submitted during investigation and such request shall be considered as per the procedure laid down in The Competition Commissions of India (General) Regulations, 2009. The request for confidentiality needs to be accompanied by a statement setting out cogent reasons (such as, making part or whole of the document public would result in disclosure of trade secrets, destruction or appreciable diminution of commercial value of any information or cause serious injury) for such treatment and to the extent possible, the date on which such confidential treatment shall expire. The CCI may determine if and to what extent and for what period the request should be granted and direct accordingly. Where request for confidentiality is rejected and the party is still unwilling to make the documents or part thereof public, such documents or parts thereof shall be returned to the party and the information contained therein shall be disregarded.

Any person, party or expert appointed or engaged by the CCI, who is privy to the confidential information shall be bound by confidentiality obligations and any breach thereof shall constitute ground for initiation of disciplinary proceedings or for termination of the engagement by the CCI. The right to seek confidentiality extends only to documents submitted and not to the transaction itself.

Filing may not be normally required for the following combinations (Schedule I)

In addition to monetary thresholds and special exemptions, the following transactions have been clarified as ‘ordinarily’ not likely to have cause an appreciable adverse effect on competition in India and hence notice need not “normally” be filed with CCI:

- Acquisition of not more than 15% of the shares or voting rights of the target, solely as investment or in the ordinary course of business, not leading to control;
- Acquisition of shares or voting rights of the target where the acquirer already has 50% or more shares or voting rights, except in cases where transaction results in transfer from joint control to sole control;
- Acquisition of assets not directly related to the business activity of the acquirer or made solely as investment or in the ordinary course of business. This should not lead to control of the enterprise except where the assets being acquired represent substantial business operations of the target in a particular location or for a particular product or services, irrespective of whether such assets are organised as a separate legal entity or not;

- Amended or renewed tender offer where notice has been filed by the party making the offer prior to such amendment or renewal of offer. Provided that prior intimation of such change has been duly made;
- Acquisition of stock-in-trade, raw materials, stores and spares in the ordinary course of business;
- Acquisition of shares or voting rights pursuant to a bonus issue or stock-splits or consolidation of face value of shares or subscription to rights issue (to extent of entitlement), not leading to acquisition of control;
- Acquisition of shares or voting rights by a securities underwriter or a registered stock broker on behalf of clients, in the ordinary course of their respective businesses;
- Acquisition of control, shares, voting rights or assets by one person or enterprise of another person or enterprise within the same group;
- Acquisition of current assets (i.e. interest accrued on investments, stores and spare parts, loose tools, stock-in-trade, works-in-progress, sundry debtors, cash balance on hand and bank balance) in the ordinary course of business;
- Combinations taking place entirely outside India with insignificant local nexus and effect on markets in India

Form I may be used for the following proposed combinations

Combinations where:

- none of the parties to the combination are engaged in production, supply, distribution, storage, sale or trade of similar, identical or substitutable goods or provision of similar, identical or substitutable services, or the parties to combination are not engaged at different stages or levels of the production chain in different markets in goods or provision of services in which another party to the combination is engaged;

- parties to the combination are predominantly engaged in exports of goods or services (i.e. at least 75% of the turnover of the party to the combination is derived from exports out of India) and continue to be predominantly engaged in exports of goods or services after the combination takes effect, provided that the market share of the combined entity is less than 15% in the relevant market in India;
- an acquisition or acquiring of control over an enterprise by a liquidator, administrator or receiver appointed through court proceedings or through any scheme approved under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 or under the Sick Industrial Companies (Special Provisions) Act, 1985 or any other modification or re-enactment of the law;
- an acquisition results from a gift or inheritance;
- an acquisition is of a trustee company or arises from a change of trustees of a mutual fund established under the Securities and Exchange Board of India (Mutual Fund) Regulations 1996, as amended from time to time;
- the parties to combination are engaged in production, supply, distribution, storage, sale or trade of similar or identical or substitutable goods or similar or identical or substitutable service and the combined market share after such combination is less than 15% in the relevant market;
- the parties to the combination are engaged at different stages or levels of the production chain in different markets in respect of production, supply, distribution, storage, sale or trade in goods or services, and their individual or combined market share is less than 25% in the relevant market

Contravention of Competition Act attracts severe consequences

Some examples

Infringement	Fine/Penalty	Who is liable?
Anti-competitive agreements	<ul style="list-style-type: none"> • Penalties of up to 10% of turnover (or 3x cartelised profits) 	<ul style="list-style-type: none"> • Enterprises who enter into an anti-competitive agreement • Directors/officials also liable
Abuse of dominance	<ul style="list-style-type: none"> • Penalties of up to 10% of turnover • Division of dominant enterprise 	<ul style="list-style-type: none"> • Enterprises abusing dominant position • Directors/officials also liable
Failure to notify a reportable combination	<ul style="list-style-type: none"> • Fine of up to 1% of combined turnover/assets 	<ul style="list-style-type: none"> • Person or enterprise • Directors/officials also liable
Failure to comply with directions of CCI	<ul style="list-style-type: none"> • Fines and/or imprisonment as prescribed • Compensation can also be awarded by Appellate Tribunal for loss/damage suffered by any person 	<ul style="list-style-type: none"> • Person failing to comply • Directors/officials also liable

How is appreciable effect on competition (AAEC) defined?

- Not defined in the Act
- Act indicates factors to be taken into account in determining AAEC:
 - Agreement: creating barriers to entry, driving competition out of market, foreclosing competition, potential benefits to consumers etc
 - Combination: entry barriers, degree of concentration and countervailing power, availability of substitutes etc

I am a member of a trade association. Can an association decision amount to a cartel agreement

- Yes. Cartel is widely defined and includes an association of producers, sellers, distributors, traders or service providers
- Competition affecting decisions taken, or practice carried on by the industry leaders or other members can tantamount to a cartel decision or action
- All members of a cartel are punishable but the leader is normally subject to the highest fines
- Cartels are regarded as the most pernicious

Distribution and supply agreements are included in vertical agreements

- Other examples include ‘tie-in arrangements’, refusal to deal and resale price maintenance
- They can be anti-competitive if they result in AAEC in a relevant market in India
- AAEC needs to be established by the CCI and is not presumed

I have 55% market share. Am I a dominant enterprise?

Dominance is not defined in terms of market share alone. Factors like size and resources of competitors, vertical integration, dependence of consumers etc. are considered in determining dominance

I am a CEO and a board member. Am I liable for the Company’s compliance with the Act and how do I mitigate my risk?

- You may be liable for all acts of the company and its personnel
- Mitigation through exercise of due diligence to prevent anti-competitive action
- Robust competition compliance initiatives like policy and procedures, education and training and competition compliance audit can to an extent mitigate the risk and also assist in taking timely actions in case of default

What is meant by 'relevant market' in India?

- Defined in terms of either a product or a geographic market.
- Any action/decision/agreement/combination, whether it takes place in India or abroad, that creates AAEC in the relevant market in India is subject to review under the Act

I am the victim of an anti-competitive practice

Any person can complain to the Competition Commission, be it a consumer, an enterprise, consumer or trade association.

Who can appear and present the case before the CCI?

- The person himself
- Authorised chartered accountant/company secretary/cost accountant/legal practitioner as prescribed in the Act

How is turnover defined?

- Under the Act, turnover includes value of sale of goods or services

PwC has wide experience in regulatory and competition cases internationally and has dealt with challenges facing varied businesses in India.

How is the value of assets determined?

- Book value as reduced by depreciation
- Value of assets includes the following:
 - Brand value, value of goodwill, value of copyright, patent, permitted use
 - Collective mark, registered proprietor, registered trade mark, registered user
 - Homonymous geographical indication, geographical indications
 - Design or layout-design or similar other commercial rights

What are the powers of the CCI?

The CCI can:

- Issue cease and desist orders
- Impose fines and penalties
- Declare agreement having AAEC void
- Pass orders modifying agreement
- In case of abuse of dominance, order for division of dominant enterprise
- In case of combinations:
 - Approve
 - Approve with modifications
 - Direct that combinations shall not take effect
- In case of companies, individuals may also be held liable if consent, connivance or neglect is proved
- CCI has extra-territorial reach

Is there a leniency programme for cartel members?

- The CCI has notified regulations on leniency which permit lesser penalty subject to certain conditions, which are non-exhaustive, i.e., applicant may be subjected to further restrictions or conditions at the discretion of CCI.
- Application for leniency may be made orally, through email or fax. Priority status must be communicated to the applicant by CCI. Written application containing all material information must be submitted with the CCI within 15 days thereof
- Full, true and vital disclosure and continued co-operation: at the discretion of the CCI
- Limited to three applicants only: first applicant is entitled to waiver of penalty equal or upto 100%, subsequent to lesser on a graded scale: discretionary powers with the CCI
- Identity is kept confidential

PwC can help you manage risk

- Strategic Advice and support in responding to any investigations

Combinations

- Review of proposed combination
- Regulatory filing
- Transaction support (economic, accounting, tax and legal)

PwC has local and international capability to understand, deal with and advise on the gamut of competition law issues covering both regulations and economic/market analysis.

Compliance is better than cure

Competition compliance statement and policy

- Outlines company's approach to compliance
- Vision/mission statement
- Compliance officer – senior management

Competition compliance programme

- Sets out the practical challenges and how to deal with them

Competition compliance procedures

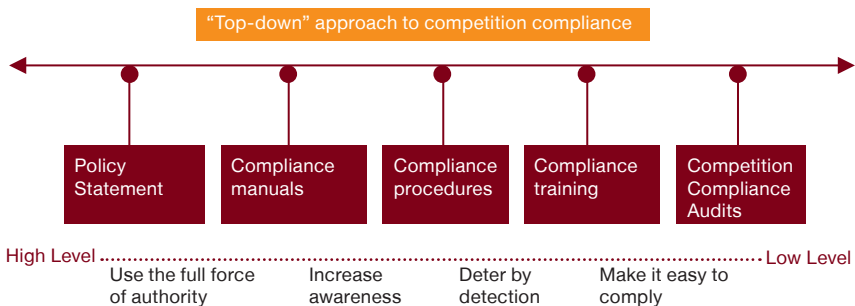
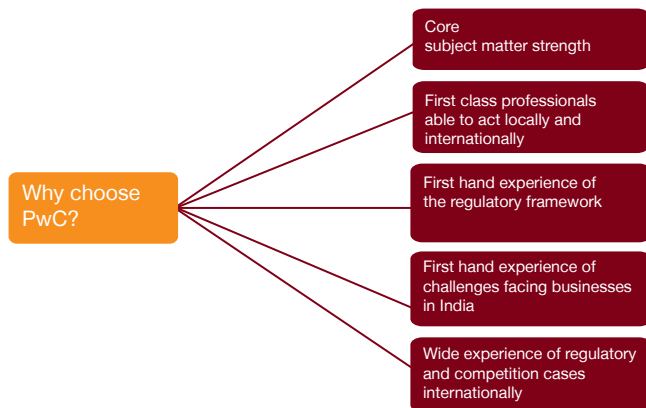
- For review of contracts/agreements/mergers
- Document creation guidelines
- Compliance manual

Education and training

- Make it easier for employees to comply with focussed workshops and practical scenarios

Competition Compliance Audits

- Initial and periodic review of existing contracts, practices and other procedures to assess risk



Contacts

Deepak Gupta

Executive Director

Phone: + (91) 124 3306507

Mobile: + (91) 99 101 66323

Email: deepak.a.gupta@in.pwc.com

Bhavna Kohli

Associate Director

Phone: + (91) 124 3306522

Mobile: + (91) 95 601 02258

Email: bhavna.kohli@in.pwc.com

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