Overview of Competition Law and Recent Developments

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Talking Points

- Market/Economic Regulation: Pre and Post-liberalisation Era

- Economic Philosophy of Competition Regulation

- Market Power and Regulatory Approach

  - Anti-competitive Agreements
  - Unilateral Conduct – Abuse of Dominance
  - Combinations (Merger Control)

- Procedure and Jurisdiction of CCI

- Emerging Issues and Recent Developments in Competition Law

Economic Regulation and its Changing Dimensions

- Perspective of economic regulation
- Necessity of regulatory intervention:

- Prevention of market failures
- Removal of anti-competitive practices
- Promotion of public interest

- Regulatory intervention may differ, depending on model of economic development
- Pre and post liberalization regulatory structure

Economic Philosophy of Competition Regulation

Three Propositions:

- Competition is the first order importance in the theory of state in a liberal market economy

- There is a fundamental tension between economic stability and Schumpeterian theory of 'creative destruction'

- Align of policies with the principles of competition is desirable for optimum economic outcome

Efficiency in Competition

- Forms of economic efficiency:
- Allocative efficiency (Price = Marginal Cost)

- reduces the costs for end consumers

- Productive Efficiency (Cost = Minimum of Average Cost)

- reduces the cost for business consumers

- Dynamic Efficiency (Innovation and R & D)

- allow provision for future generations

Role of the Government

- To address market failure:
  - Externality
  - Information Asymmetry
  - Market Power
  - Public goods

Market Power

- **Market Power:** A firm's ability to profitably raise prices above marginal cost.
- Market power differ, depending on nature of market – '**No**' under perfect condition and '**Maximum**' under monopoly.
- High market power implies inefficiency and loss of welfare
- Market power/concentration increases due to:

- Anti-competitive Agreements
- Unilateral Conduct (Abuse of Dominant Position)
- Combinations (Merger, Amalgamation and Acquisition)

Competition Regulation under CA 02

Fair Competition For Greater Good

Enforcement Provisions:

Ex-post

- Prohibition of Anti-Competitive Agreements (**Sec 3**)
- Prohibition of Abuse of Dominant Position (**Sec 4**)

Ex-ante

- Regulation of Combinations (**Sec 5 & 6**)

Advocacy and Advisory Provisions:

- Competition Advocacy [**Sec 49(3)**
- Advisory Function **[Sec 49(1) & Sec 21]**

Two Modes of Analysis in Ex-Post Regulation

- ***Per se* analysis**
  – No need to prove anti-competitive effects

- **Rule of Reason (RoR) analysis**
  – Proof Chart
  – Evaluate pro and anti-competitive effects
  – Behaviour is a problem only if anti-competitive effects outweigh pro-competitive effects.

Anti-Competitive Agreements

Section 3:

- Prohibits anti-competitive agreements - both horizontal and vertical.

- **No enterprise** or associations of enterprises or person or associations of persons shall enter into any **agreement** in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services; which causes or is likely to cause an **appreciable adverse effect on competition (AAEC)** within India - **Section 3(1)**.

Assessment of AAEC [S.19(3)]

- **Ant-competitive Effects**
  - Creation of barriers to new entrants
  - Driving existing competitors out of market
  - Foreclosure of competition
- **Pro-competitive Effects**
  - Benefits to consumers
  - Improvement in production or distribution
  - Promotion of technical and economic development

Horizontal Agreement

Manufacturer 1 → Manufacturer 2 → Manufacturer 3

- **Section 3 (3):** Any **agreement** entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprises or practice carried on, or decisions taken by, any association of enterprises or association of persons, **including cartels**, engaged in **identical or similar trade** of goods or provision of services, shall be **presumed** to have AAEC ***(Per se rule)*** and therefore void; if it -

Horizontal Agreement

Contd..

- directly or indirectly determines purchase or sale prices - **Sec 3 (3) (a)**.

- limits or controls production, supply, markets, technical development, investment or provision of services - **Sec 3 (3) (b)**.

- shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way – **Sec 3 (3) (c)**.

- directly or indirectly results in bid rigging or collusive bidding - **Sec 3 (3) (d)**.

Cartel

- It includes an association of producers, sellers, distributors, 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 provision of services – **Section 2(c)**

- most pernicious form of anti competitive behaviour
- Bid-rigging or collusive bidding is a form of cartel

- However, export cartels are exempted under Section 3(5)(ii)

Leniency under CA 02

- The Act empowers the Commission to grant leniency by levying a lesser penalty on a member of the cartel who provides full, true and vital information regarding the cartel – **Sec (46)**
- Regulated through lesser penalty regulations 2024
- It seeks to regulate the leniency program allowing a party to a cartel to apply for leniency, thereby providing an incentive to the whistle blowers.

Vertical Agreement

Manufacturer

↓

Wholesaler

↓

Retailer

- **Section 3(4):** Any **agreement** amongst enterprises or persons at **different stages** or levels 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:

Vertical Agreement

- Tie-in arrangement
- Exclusive supply agreement
- Exclusive distribution agreement
- Refusal to deal
- Resale price maintenance

shall be anti-competitive if such agreement <u>causes or is likely to cause</u> an AAEC in India ***(rule of reason)***.

Abuse of Dominant Position

- Dominance is not unlawful; but abuse of dominance is prohibited
- **Why?**

- Compared to a firm under competition, a monopolist may reduce quantity, which in turn increase the prices and the level of profits. When profit is substantial, the costs to society may be substantial.
- The cost of monopoly/dominance position is allowed at the cost of output/economic growth. But, when a monopoly/dominant firm abuses its position, it can inflict more harm. Hence regulation.
- Non-dominant enterprises may not inflict such harm through their conducts because of presence of a dominant enterprise.

Provisions of Section 4

- **Section 4 (1):** Enterprises or groups are prohibited from abusing their dominant position.

- **Dominant Position:** A position of strength, enjoyed by an enterprise, in the relevant market in India, which enables it to; operate independently of the competitive forces prevailing in the relevant market and affect its competitors or consumers or the relevant market in its favour.

- Dominant position is always seen with context to the ***relevant market.***

- ***Relevant Product Market [S. 19(7)]***
- ***Relevant Geographic Market [S. 19(7)]***

Abusive Conducts

- There shall be an abuse of dominant position if an enterprise or group ;

- **Section 4 (2) (a):** Directly or indirectly, imposes unfair or discriminatory**: (i)** condition in purchase or sale of goods or services; or **(ii)** price in purchase or sale (including predatory price) of goods or services; or

- **Section 4 (2) (b):** Limits or restricts: production of goods or provision of services or market; or technical or scientific development relating to goods or services to the prejudice of customers; or

Abusive Conducts

- **Section 4 (2) (c):** Indulges in practice or practices resulting in denial of market access in any manner; or

- **Section 4 (2) (d):** Makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

- **Section 4 (2) (e):** Uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Types of Abusive Conduct

- **<u>Exploitative Practices</u>**

•Imposing unfair condition;

•Imposing unfair price;

•Limiting or restricting production

•Limiting or restricting technical or scientific development

Discriminatory Practices

- Imposing discriminatory price and condition

Exclusionary Practices

- Predatory Pricing
- Denial of market access in any manner
- Use of dominant position in one relevant market to enter into, or protect, other relevant market

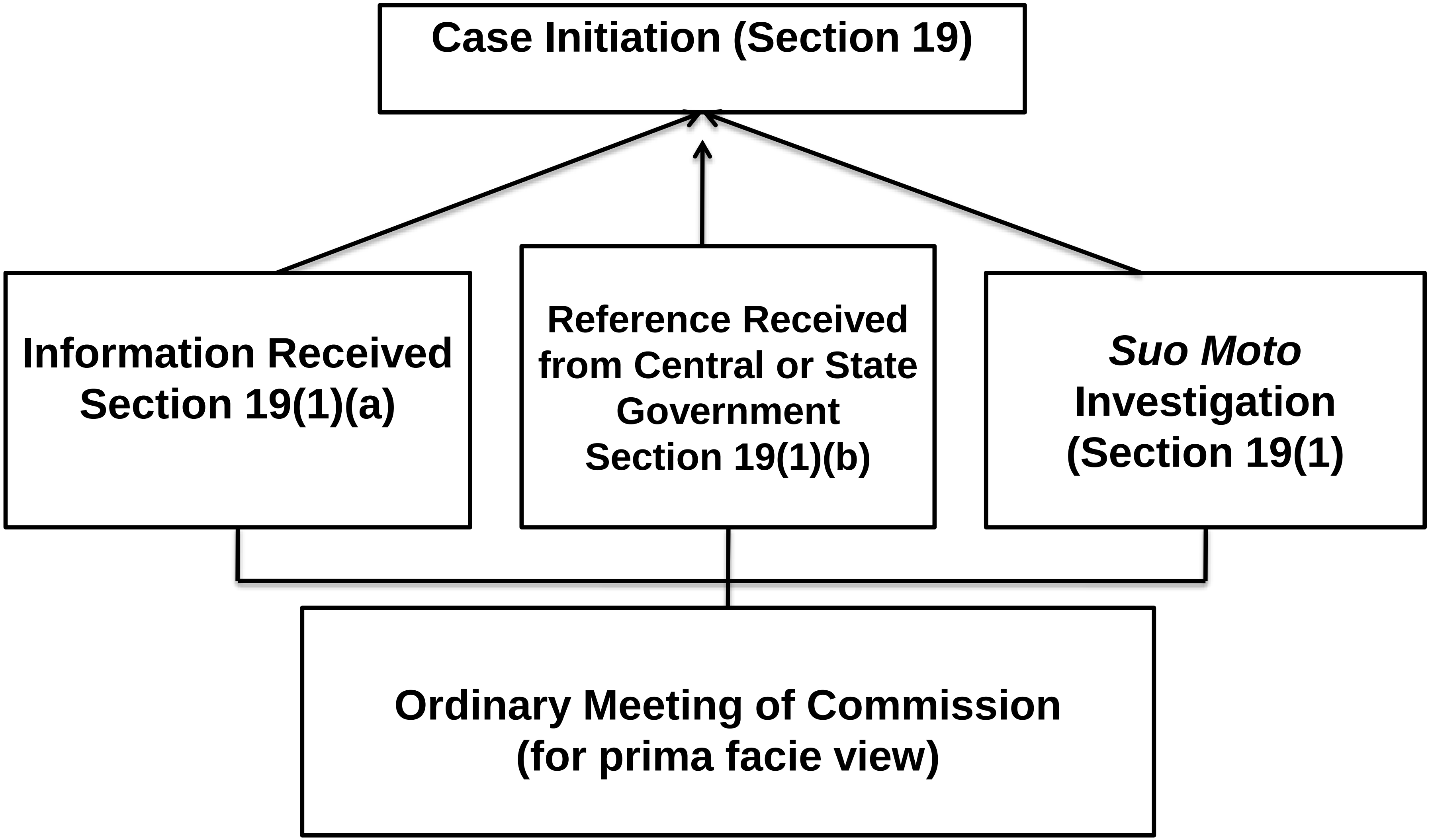
Abuse of Dominance: Glimpses

REAL ESTATE	• Dominant builder imposes unfair terms on buyers
BROADCASTING	• Dominant multi-system operator refuses to broadcast a news channel
STOCK EXCHANGE	• Dominant stock exchange indulges in predatory pricing to the detriment of competition

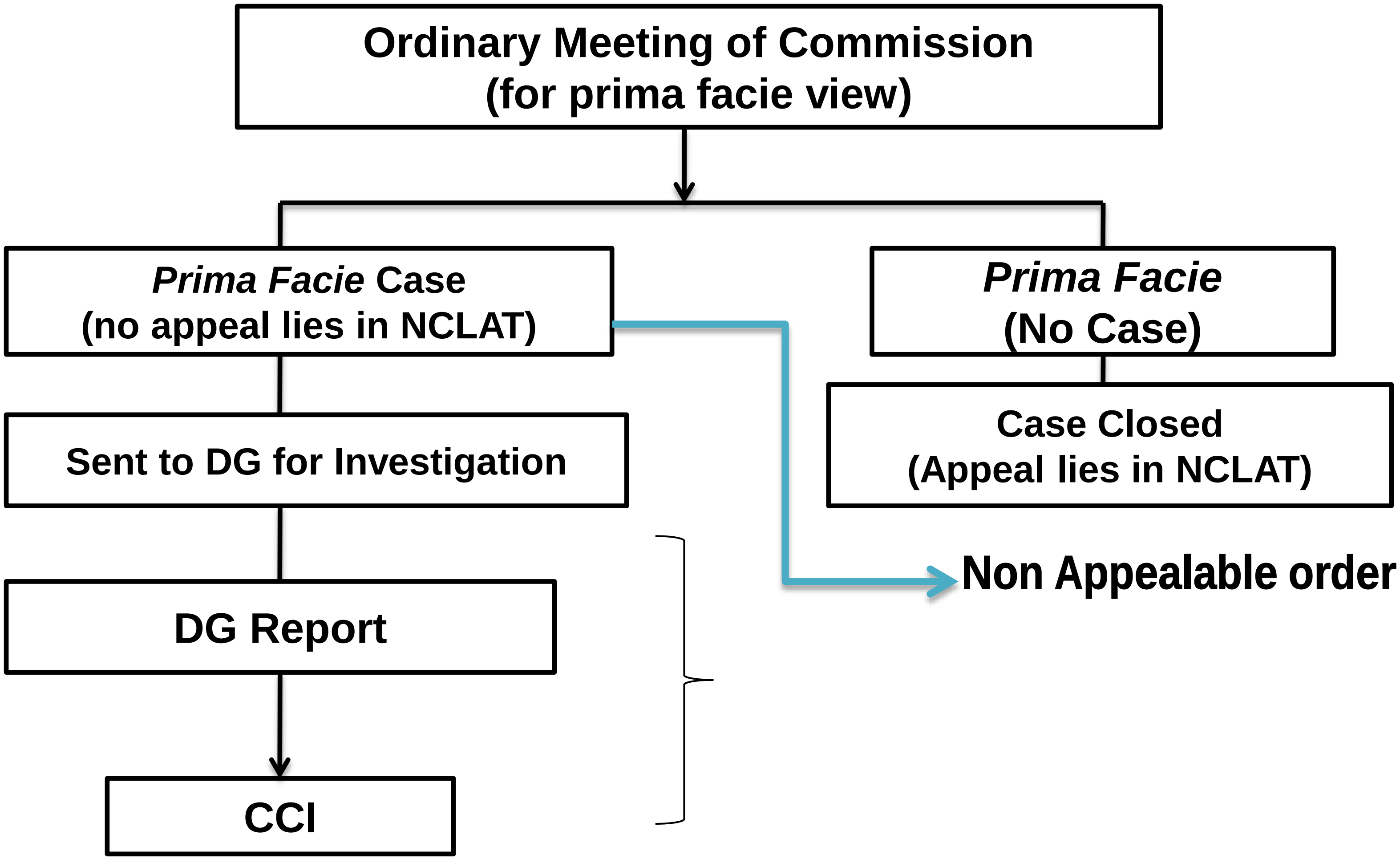
Abuse of Dominance: Glimpses

ONLINE APP STORE	• Dominant app store on android mobile ecosystem mandates compulsory use of its payment gateway for paid apps/in-app purchases
ONLINE TRAVEL AGENCY	• Dominant online travel agency enters into agreement with key franchise budget hotel chain excluding its closest competitors
ONLINE SEARCH	• Dominant online search engine indulges in search bias to attract user attention to its own vertical search pages

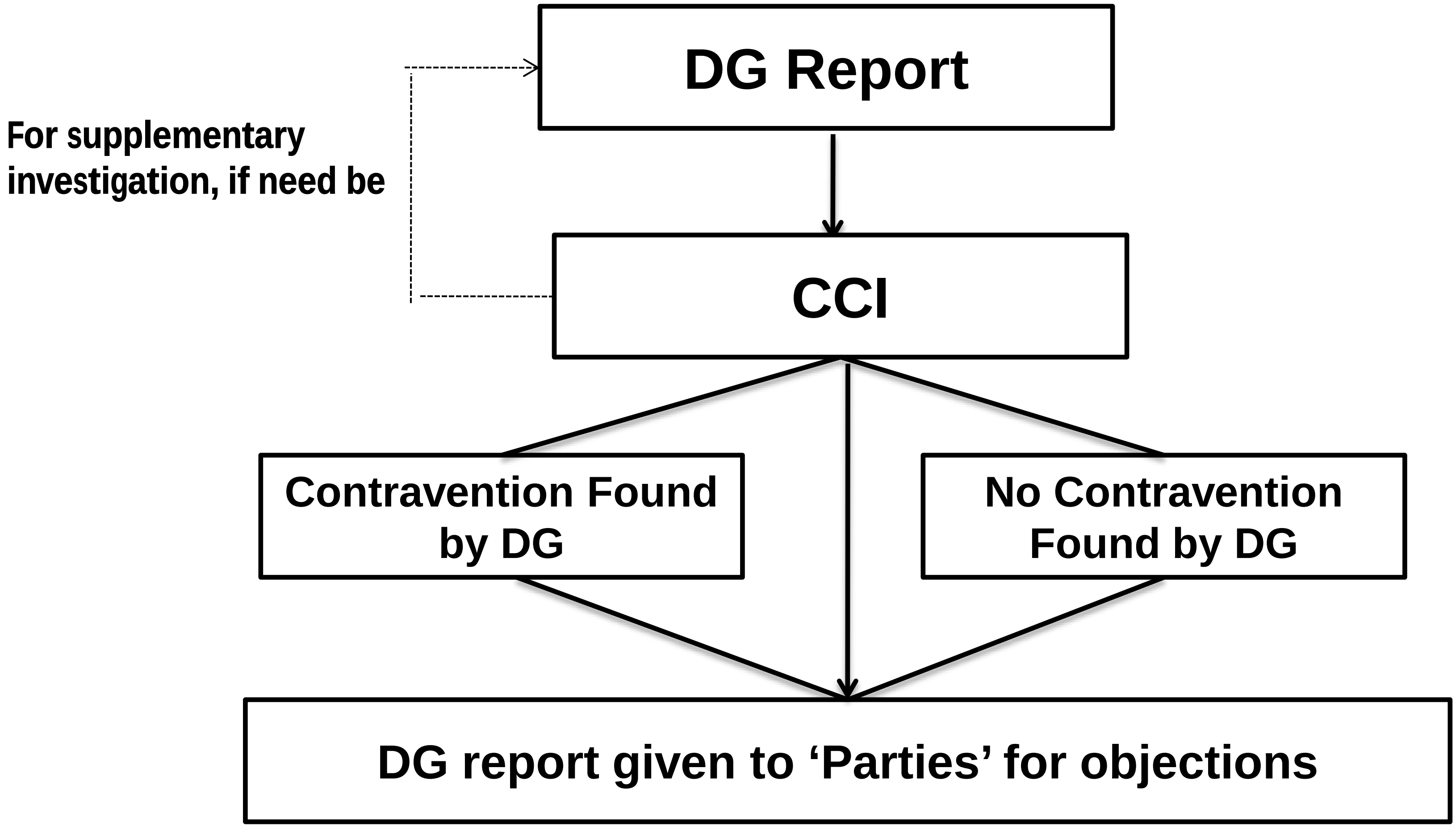
Process of Inquiry



Process of Inquiry



After Receipt of DG Report



Final Hearing

DG report given to 'Parties' for objections

Objections are received from parties

- Oral Submissions by Parties (Inquisitorial in nature)
- Parties or their authorized representatives;
- Confidentiality Issues;
- Issues regarding cross examination;
- Issues regarding submission of additional evidence etc.

Merger Control

- Combinations may lead to increase in market concentration and exercise of market power. Hence, ex-ante regulation.
- **Notification Thresholds:**

- In terms of value of assets/turnover of parties/groups, in India/global
- Value of Transaction *i.e.*, Deal Value Threshold (DVT)

Nature of Merger Regime

- Mandatory to file notice – prescribed form & fees **[Section 6(2)]**

- Combinations which cause or are likely to cause an AAEC within the relevant market in India shall be void **[Section 6 (1)]**

- No combination shall come into effect until 150 days have passed from the day of filing the notice or the Commission has passed orders under Section 31, whichever is earlier.

Level	Geography	Combined Assets		Combined Turnover
Enterprise Level	India	More than INR 2500 Crore	OR	More than INR 7500 Crore
	Worldwide (with India Component)	More than USD 1.25 billion with at least INR 1250 crore in India		More than USD 3.75 billion with at least INR 3750 crore in India
OR				
Group Level	India	More than INR 10000 Crore	OR	More than INR 30000 Crore
	Worldwide (with India Component)	More than USD 5 billion with at least INR 1250 crore in India		More than USD 15 billion with at least INR 3750 crore in India
OR				
Value of Transaction	More than INR 2000 Crore. Provided that the target, in case of Acquisition, and Merging or Amalgamating entities in case of merger or amalgamation, have substantial business operations in India (SBOI).			

Exemptions

- ***De minimis*** (Small Target) Exemption through Competition (minimum value of assets or turnover value), Rules, 2024) u/s 5 (e).

- ***Notifiable but, not causes AAEC***: Exemption by way of provisions of Competition (Criteria for Exemption of Combinations) Rules, 2024 u/s 6 (7)

- Other classes of exemptions - by way of notification u/s 54

Green Channel

- Green Channel (GC) is a system of filing where a combination is deemed to be approved upon filing of notice.

- Category of combinations eligible for GC included combinations which do not involve any horizontal overlaps or vertical/complementary linkages between the 'parties to the combination'.

Jurisdiction of CCI

- **All enterprises**

  - Including Government Departments - except when discharging sovereign functions: Atomic energy, Currency, Defense and Space

- **Level Playing Field**

  - Domestic or foreign
  - Public or private sector
  - Small or large enterprises

Powers of CCI

- Cease and desist order
- Imposition of Penalty (up to 10% of global turnover)
- Modification of anti-competitive agreements
- In case of abuse of dominant position, the Commission can order for division of enterprise
- In case of combination having AAEC, it can be approved with modification or disallowed.
- Penalty up to 1 % of turnover or assets, in case of non-filing of a notifiable transaction/gun jumping

Powers of CCI

- Extra Territorial jurisdiction(Section 32)
- Interim Orders(Section 33)
- Appearance before the Commission (Section 35)
- Rectification of Orders (Section 38)
- Execution of Orders (Section 39) – Through Regulations or through Reference to Income Tax Authority.
- Contravention of Directions and Orders of Commission (Section 42)
- Penalties for false and misleading or non-furnishing of information (Sections 44 and 45)

- **Appeal Mechanism:** ***CCI – NCLAT – Supreme Court***

  Writ : High Courts and Supreme Court

Recent Developments

Competition (Amendment) Act, 2023: faster market correction, regulatory certainty, trust-based business environment, and to reduce litigation

- Anti-trust:
  - Hub and Spoke cartel (Inclusion of facilitators of certain anti-competitive agreements)
  - Commitment and Settlement
  - Leniency plus
  - Penalty based on global turnover, 25% deposit for penalty for appeals
  - Limitation period of filing an information/ reference

- **Combination:**
  - Deal Value Threshold
  - Review period has been reduced from 210 to 150 calendar days
  - expanded the definition of control
  - open market transactions are exempted from the standstill obligation

Regulation of Digital Markets

- **Issues:** Fast change in market dynamics, pricing algorithm determining the price, creation of huge data bank may distort market dynamics, Big Data and computing power with emergence of artificial Intelligence may distort market competition

- CCI Approach:

- Cautious and Nuanced
- Not a homogenous application of law but case by case examination
- Novel theories of harm guided by the economics of multisided markets
- Follow best global practices with suitable modifications to account for local factors

Important Cases

Penalty of Rs. 213.14 crore on Meta for anti-competitive practices

- Issue: WhatsApp's 2021 privacy policy forced users to share data with Meta entities without an opt-out option.
- Finding: CCI held this as abuse of dominance under Sections 4(2)(a)(i), 4(2)(c), and 4(2)(e) of the Act.
- Order: Stop sharing WhatsApp user data with Meta for ads for 5 years. Introduce user opt-out by 2029.

Monetary and non-monetary sanctions on Online Travel Agencies

- Deep discounts, exclusivity conditions and parity conditions by MMT-Go (OTA) found to be in contravention of various provisions of the Competition Act.
- Beside imposing monetary penalty, CCI also directed MMT-Go to modify its agreements by removing/abandoning the (a) price and room availability parity obligations and (b) exclusivity conditions also to provide providing access to the MMT-Go platform on a fair, transparent and non-discriminatory basis to hotels/chain hotels

Important Cases

Google's Settlement Proposal in Android TV Case

- Allegations: Abuse of dominance by way of compulsory Play Store bundling, anti-fragmentation restrictions, blocking rival Android forks
- DG Findings: Google is dominant in Smart TV OS & App Store markets in India
- Agreements (TADA & ACC) imposed unfair conditions
- Settlement (New India Agreement): Standalone Play Store & Play Services license, and OEMs are free to develop/sell incompatible Android devices.
- Final Settlement Amount: ₹20.24 crore (after 15% discount)

Google abusive conduct in the Android mobile device ecosystem

- CCI Finding: the requirement of pre-installing the entire Google Mobile Suite (GMS) under the Mobile Application Distribution Agreement (MADA), without the ability to remove it, and its prominent placement imposes an unfair condition on the device manufacturers and is therefore in contravention of competition law.
- Penalty of Rs. 1337.76 crore on Google
- Google to modify its conduct within a defined timeline

Important Cases

Google for anti-competitive practices in relation to its Play Store Policies

- Findings:
  - Google dominant in markets for mobile OS & app stores (Android) in India,
  - Play Store Policies forced developers to use Google Play Billing System (GPBS) for paid apps & in-app purchases,
  - Follow anti-steering provisions (blocking links to alternate payments),
  - discriminated by exempting its own apps (e.g., YouTube) from GPBS fees
- Penalty: Rs 936.44 crore
- Google to modify its conduct within a defined timeline

Policy Issues

- Does CA 02 adequately safeguard the New Age market Issues?
- Need for a digital Competition Law?
- Parliamentary Standing Committee on Finance Identified 10 Anti-Competitive Practices of big Tech companies identified which stifle competition, limit market access, and undermine fair business growth for smaller players.
- Advocated for Ex Ante Regulation in Digital Markets
- Committee on Digital Competition Law (CDCL)
- Under Consideration

Digital Market Regulatory Landscape

- Competition Act, 2002 and proposed Digital Competition Law
- Digital India Bill
- The Digital Personal Data Protection Act 2023
- Draft E-Commerce Policy
- Consumer Protection (E-Commerce) Rules, 2020
- The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021/ Amendments for Online Gaming

Advisory Functions

- The Central Government/ State Governments may, in formulating a policy on competition including review of laws related to competition or any other matter, make a reference to CCI for its opinion on possible effects of such policy on competition [**Section 49(1)**]
- CCI to give its opinion within sixty days of such reference
- The opinion of CCI *not binding* upon the Government
- The Commission shall give its opinion on a reference made by statutory authority [**Section 21**]

THANK YOU