

Role of CAs in Implementation of Competition Law

India saw a paradigm shift in its economic policies in the 1990's moving from a command and control economy to a more free market economy. The results are visible in many sectors of the economy, apart from acceleration of economic growth. Sustenance of growth momentum, however, calls for more investment and innovation, prompted by vibrant, consumer-friendly and dynamic markets. Keeping these objectives in mind, the Competition Act, 2002 was enacted, paving the way for the establishment of the Competition Commission of India (CCI), the institutional framework to support healthy and fair competition. This Act moved away from the earlier emphasis of curbing monopolies to a more directed approach towards promoting competition and thereby increasing efficiency, innovation and competitiveness. Chartered Accountants, being specialists of accountancy and related areas, are important stakeholders in the sustainable development of Indian economy and likewise play a significant role in the implementation of competition law. Read on...



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The Competition Act provides a formal and legal framework for ensuring competition and preventing abuse of market power or dominance and regulating combinations in the Indian Economy. Competition Commission of India (CCI) was made functional on 20th May, 2009 with the notification of provisions relating to prohibition of anticompetitive agreements and abuse of dominant position. Chairperson and six members, constituting the Commission, were appointed for administration and enforcement of competition laws. The Competition Act became fully functional, with the notification of provisions relating to regulation of combinations from June 2011. Primarily and essentially, the Competition Act aims to eliminate practices having adverse effect on competition; promote and sustain competition; protect interests of consumers and to ensure freedom of trade in markets in India.

Chartered Accountants, being specialists of accountancy and related areas, are important stakeholders in the sustainable development of Indian economy. The winds of changes in the economic arena have also vastly changed the scope of CAs during the last two decades. Chartered Accountants contribute to the growth of the nation in numerous areas like accountancy, direct taxes, indirect taxes, company law matters, strategic decision making, international business and taxation, project finance and many more regulatory matters. These are all critical

areas to safeguard fair play in markets and to attain higher economic growth. The common denominator between CCI and Institute of Chartered Accountants of India (ICAI) is to ensure fairness in business. Broadly, CCI acts as a Competition watchdog while ICAI acts as an Accounting watchdog. The protection of the general public is one of the key objectives of both these organisations; one from anticompetitive practices and the other from accounting frauds respectively.

The Competition Act and Chartered Accountants

The competition law is an economic law. Every information filed with CCI is primarily analysed from financial and economic perspective by super-imposing the legal framework. The financial and economic analysis includes those job descriptions which are considered as forte of Chartered Accountants. The expertise which Institute of Chartered Accountant of India has been able to inculcate among its members through education, training and continuous updating of their knowledge has been recognised by the Parliament. This is reflected in Section 35 of the Competition Act, 2002, which specifically allows Chartered Accountants to represent an informant, defendant or Director General (DG) to present a case before the CCI¹. Besides this, Section 36(3) of the Act empowers the Commission to call upon the services of experts from various fields, including accountancy, to assist the Commission in conduct of any inquiry by it.

Role of Chartered Accountants in Enforcement of the Competition Act

Chartered Accountants undergo extensive training, besides written examinations, for acquiring necessary professional acumen which deservedly provide them opportunities to hold key positions in the corporate world. The skill and expertise attained by CAs is equally required in carrying financial analysis of a case filed in the CCI. Conversely, since the CAs are financial advisers to the corporate world, they can play a major role in developing a Competition Compliance Programme for their company/clients so that the businesses are not only perceived as ethical but also to prevent them from potentially high cost of non-compliance or inadvertent violation of the Competition Act, 2002.

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Chartered Accountants and Anti-Competitive Agreements

Chartered Accountants can appear for parties before CCI in cases relating to anti-competitive agreements like cartels; agreement to limit production and/or supply; agreement to allocate markets; agreement to fix price; bid rigging or collusive bidding; conditional purchase/sale (tie-in arrangement); exclusive supply/distribution arrangement; resale price maintenance; and refusal to deal. The analysis involved in determination of effect of these anti-competitive agreements may include price parallelism, determination of production and supply levels, technical development in terms of productivity, investment and profitability, bid analysis etc. These are the areas where expert inputs of Chartered Accountants will help in bringing forth the averments they want to put for the party they represent.

Chartered Accountants and Abuse of Dominant Position

Chartered Accountants can appear for parties before CCI in cases relating to abuse of dominant position in the markets. Unfair and discriminatory purchase and price levels, predatory pricing, conclusion of contract with supplementary obligations having no connection with the subject of contracts, entering or protecting other relevant market have high accounting overtones and dimensions. Chartered Accountants by virtue of their extensive training have attained expertise in determination of these factors.

¹ Section 35.A [person or an enterprise] or the Director General may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of his or its officers to present his or its case before the Commission. Explanation.—For the purposes of this section,—

(a) "chartered accountant" means a chartered accountant as defined in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 (38 of 1949) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;

Chartered Accountants and Regulation of Combinations

Chartered Accountants can appear for parties before CCI in cases relating to regulation of combinations. Knowledge of CAs are needed for threshold analysis; value of asset determination; value of turnover determination; market share analysis; level of competition analysis; group impact; control impact; failing business costing and impact; and weighing benefits of combination against adverse impact of combination. Expertise of Chartered Accountants in analysis of various financial reports of the merging companies and in forecasting their impact on the market may provide fillip to CCI in regulation of mergers & acquisitions.

Chartered Accountants and Competition Compliance Programme

Chartered Accountants, while advising on different compliances that a company has to undertake, should also help in devising a suitable Competition Compliance Programme (CCP) for the company/enterprise as CCP would reduce the risk of contraventions of the Act and its consequences. This will help to promote a culture of compliance and encourage good corporate citizenship. Being in possession of real economic information of various companies, they can facilitate bringing any anti-competitive conduct of an enterprise to the notice of the Commission in the overall interest of the society.

Chartered Accountants can advise their clients that non-compliance of competition law can be very costly. The law vests the Competition Commission of India with adequate powers of investigation. The chances of conviction are, therefore, high for non-compliant enterprises. The consequent cost to such enterprise could be very high not only in terms of heavy penalty but also damage to reputation that has been built at very high cost over the years. The quantum of penalty can go up to 10% of the average of

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the turnover for the last three preceding financial years for entering into anti-competitive agreements and abuse of dominance. In the case of a cartel, there are provisions for imposing on each member of the cartel a monetary penalty of up to three times of its profit for each year of the continuance of such cartel or ten per cent of its turnover for each year of the continuance of such cartel, whichever is higher. Powers have also been vested with the Commission to order division of the dominant enterprise for abuse of dominant position. Besides, in case of a violation, determined by the Commission, affected parties can approach the Competition Appellate Tribunal (COMPAT) for compensation, which can be a further drain of resources in competition law infringement cases.

Suggest Leniency Provisions

The use of transparent financial accounting information under the supervision of Chartered Accountants enhances the effectiveness of the governance process which in turn prevents anti-competitive practices. Chartered Accountants can undertake competition audit of their clients for early detection of contravention for the Competition Act.

Especially, in relation to a 'cartels', CAs can advise their clients about the leniency provisions in the Act if they disclose relevant information before the Commission. By doing this, CAs would be doing the larger duty of protection of public from an illegal activity and also its professional duty of helping its client come out of an illegality. This can be an effective role played by CAs in implementation of the competition law.

Conclusion

In today's economic scenario, the remit and responsibilities of Chartered Accountants have grown manifold beyond the narrow boundaries of accounts and audit. It is now imperative for Chartered Accountants to be well versed in Competition Law so as to enhance their professionalism in contributing to the enterprise and to the economic environment of the country. Chartered Accountants are bound by rules of their professional conduct which includes the aspect of 'integrity and due care'; they are expected to be honest and fair in their professional dealings; and to act diligently in accordance with the applicable technical and professional standards. Thus the role played by CAs in implementation of new areas such as competition law is significant. It also provides hitherto unknown opportunities from the professional and material perspective. ■