

The Competition Act, 2002 and its Relevance to Chartered Accountants



The objectives of the Competition Act, 2002 are to prevent anti-competitive practices, promote and sustain competition, protect the interests of the consumers and ensure freedom of trade. In order to achieve its objectives, the Act keeps a check on anti-competitive agreements / practices, prohibits abuse of dominance, regulates combination and has established Competition Commission of India (CCI), a quasi judicial body to regulate the competition in Indian market. It has also set up Competition Appellate Tribunal (COMPAT) for dealing with appeals from the order of CCI. Competition law is an economic legislation and the persons who understand the commercial aspects are better equipped to deal with the competition concerns and matters arising there from. It is for this reason that the Chartered Accountants are also allowed to represent their clients before CCI as well as COMPAT. This is, therefore, an additional upcoming area of practice for Chartered Accountants. Read on to know more...



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I. Background and History

What if the doctors association in your city pass a resolution whereby all doctors charge a minimum hefty fee? What if all the airlines together decide the minimum price for certain sectors in certain months? What if after buying an electric car, you are asked to pay hefty amounts for supply of proprietary parts? And what if all the cab providers adopt surge pricing and you have no other options in odd-even era.

Corporate & Allied Laws

Adverse effect of concentration of economic power in the hands of a few persons, corporate or even with the State, is the genesis of development of competition laws. Economic reforms across the globe lay emphasis on competition driven wide based markets where all constituents have a fair role to play of not only in pricing of goods and services but even in the production, supply, distribution, innovation and other trade practices of such market. In a competitive environment, the market is dynamic which takes shape on the basis of tug of war amongst the market forces, rather than arbitrary mandated call of just one or few market constituents. In the economies under reforms, no one accepts even allocation of natural resources by the Government in any other manner than a competitive process. We have witnessed the debacle of spectrum as well as coal allocations and it is understandable as to why it is necessary to preserve the pluralism and devise a market framework where all market practices are competitive and there is no fear of concentration of economic power in the hands of a few market agents.

Our country started with an elementary competition law known as Monopolies and Restrictive Trade Practices Act, 1969 ("MRTP Act"), which tackled the disease of monopoly and restrictive trade practices. However, it was lately realised that our competition law need to be more proactive and have to focus on the preventive measures rather than just treating the disease. Consequently, it was thought that the competition law should be such which starts acting early and this could happen only when it seeks

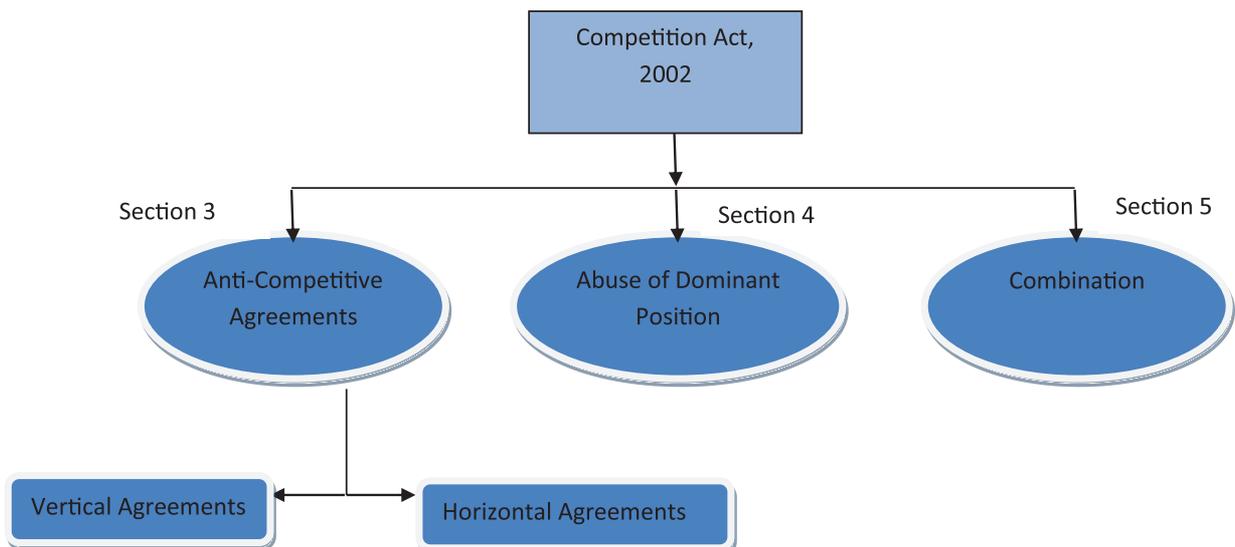
to promote competition, rather than just prohibiting monopolies. So, in 2002 our country changes the slogan from "*there should not be monopoly*" to a more proactive one "*there should be competition*". Hence, the Competition Act, 2002 was enacted to supersede the archaic MRTP Act.

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II. Substantive Provisions of the Competition Law

The objective of competition law is to promote efficiency, curb anti-competitive practices and maximise welfare and, thus, to create a conducive business environment in which the abuse of the market power is prevented mainly through competition. The focus of competition law is on preventing anti-competitive behaviour of the enterprise and protecting the market from abuse. The competition law, therefore, targets and prohibits anti-competitive agreements, abuse of dominance and monopolistic mergers.

Figure: Competition Act, 2002 overview



A. Anti-Competitive Agreements (Section 3)

An 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*” within India, is defined to be an Anti -Competitive Agreement (“Agreement”). Such agreements as per section 3 of the Act are considered to be void. The term “*adverse effect on competition*” is very wide and doesn’t refer to a particular type of consequence rather it targets all agreements that might hamper competition in the market. Further, the term ‘agreement’ is defined in the Competition Act, 2002, to include any arrangement, understanding or action in concert, (i) whether or not, such arrangement, understanding or action is formal or in writing; or (ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings.

The basic idea behind the section is to prohibit the arrangements or agreements that control and dominate trade and commerce in a commodity/ service because such arrangements or agreements are executed with the intent to exclude competitors to a substantial extent and thereby gain power in the market. Such agreements are divided into two broad categories, viz., horizontal agreements and vertical agreements.

Horizontal Agreements

Agreements which are entered between enterprises/ associations/persons who are engaged in similar products or services and are at the same level of supply chain are considered to be horizontal agreements. Hence, agreements between manufacturers of same products like cars, medicines, or the resolutions of trade, or the professional bodies/associations etc. are horizontal agreements. Since the horizontal agreements are entered amongst the enterprises at same level in economic process, they also cover cartels. Under this category following agreements or arrangements are covered:

- a. Agreement to fix prices
- b. Agreement to limit production, supply market, technical developments, investment or provision of services
- c. Agreements to allocate the markets/source of production/provision of services by geographically allocating the market or type of goods/services or number of customers.
- d. Bid rigging or collusive bidding: Agreements

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which adversely effects or manipulates the bidding process are bid rigging agreements.

Usually, it is the horizontal agreements that cause greatest concerns to the competition authorities and cartels are globally regarded as the most malicious form of violation of competitive laws since it undeniably damage competition and causes loss to the economy and to the consumers, thus, such agreements are presumed to have appreciable adverse effect on competition and are anti-competitive in nature. While discussing the above category of agreements, the law excludes agreements entered into by the joint ventures whereby there is increase in the efficiency in the production, supply, distribution, supply, storage, acquisition or control of goods or provision of services.

Vertical Agreements

Agreements which are entered between enterprises/ associations/persons at the different stages of supply chain are vertical agreements. Hence an agreement between the manufacturer and a distributor or retailer is a vertical agreement. Under this category following agreements are covered:

- a. Tie-in arrangement, i.e., any agreement which requires the purchaser of goods, as a condition of such purchase to purchase some other goods;
- b. Exclusive supply agreement, i.e., any agreement which restricts the purchaser to deal in any goods other than the goods of the seller or any other person while practicing his trade;
- c. Exclusive distribution agreement, i.e., any agreement which limits the output or supply of any goods or allocates any area / market for the disposal or sale of goods;
- d. Refusal to deal, i.e., any agreement that restricts or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;
- e. Resale price maintenance, i.e., any agreement to sell on condition that the prices to be charged on the resale by the purchaser shall be the prices

Corporate & Allied Laws

During the course of carrying out of various kinds of professional assignments, Chartered Accountants come across agreements, market practices, pricing mechanisms and such other things which give them insight into the potential competition concerns. They can use the same for advising their clients whether it is for correcting the client's affair or for taking the action against the counter-parties wherever the interest of their clients are prejudiced.

stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

However, the above agreements shall not restrict the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his intellectual property rights available under the IPR laws. Also, above mentioned agreements will not affect the right of any person to export goods or services outside India. Vertical agreements may lead to an integration of distinct businesses, a kind of loose vertical merger of businesses without creating a single legal entity. Hence, not all vertical agreements are anti-competitive, rather only those which cause or are likely to cause an appreciable adverse effect on the competition are anti-competitive as per the law.

B. Abuse of Dominant Position (Section 4)

The 1969 Act had a restrain on creation of Monopoly in the market except for the government created monopoly. However, the 2002 Act eliminated that theory and stabled the principle that Monopoly in itself is not bad, abuse of that monopoly is bad in law and would be inconsistent with the provisions of the act. In simple words, Dominant position held by an enterprise or a group per se is not prohibited. The Act prohibits the abuse of that dominance by an enterprise or a group. Dominant Position as defined under the provision of the Act means a 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.

Pursuant to Section 4, the following acts which if found to be practiced by an enterprise or a group, holding a dominant position will certainly lead to the abuse of dominant position by that enterprise or group:

- Unfair or discriminatory condition or pricing including predatory pricing on purchase or sale of goods or services;
- Limiting or restricting production of goods or provision of services;
- Limiting or restricting technical or scientific development relating to goods or services to the prejudice of consumers;
- Denying market access in any manner;
- Making conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or commercial usage, have no connection with the subject of such contracts;
- Using its dominant position in one relevant market to enter into or protect other relevant markets.

C. Combination (Section 5)

Combination means:

- The acquisition of control, shares, voting rights or assets of an enterprise by one or more persons, or
- The acquisition of control by a person over an enterprise where the person already have direct/indirect control over another enterprise engaged in the business of similar/identical/substitutable goods/services, or
- Merger/amalgamation of the enterprises, Provided the resultant entities/group exceeds the below mentioned thresholds:

	In India		In India and outside India			
	Assets	Turnover	Assets		Turnover	
			Total	In India	Total	In India
Resultant Entity	₹ 1000 Cr.	₹ 3000 Cr.	\$ 500m.	₹ 500 Cr.	\$ 1500 m.	₹ 1500 Cr.
Resultant Group	₹ 4000 Cr.	₹ 12000 Cr.	\$ 2 bn.	₹ 500 Cr.	\$ 6 bn.	₹ 1500 Cr.

Combinations are not per se prohibited but any combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India shall be void. Thus, in case where any person or enterprise enters into any combination, which crossed the above mentioned thresholds under section 5 of the Act, are mandatorily required to give notice to the CCI of such merger, acquisition or amalgamation and no combination shall come into effect without the consent of the CCI.

III. Consequence of Violation of Competition Law

While the breach of section 3 of the competition Act, 2002 results in making the transaction itself void, other penal consequences for the breach of competition law are listed below:-

- a. Direction to discontinue or not to re-enter such agreements;
- b. Penalty:-
 - In case of Cartels: Up to 3 times of the profit for each year of the continuance of such agreements or 10% of the turnover for each year of the continuance, whichever is higher;
 - Other than cartel: up to 10% of the average turnover of three preceding financial years;
- c. Direction to modify the agreements;
- d. Divide the enterprise enjoying dominant position;
- e. Direction that a combination having or is likely to have an appreciable adverse effect on competition shall not take effect;
- f. Order for payment of costs, if any;
- g. Any other order or direction as the CCI deems fit.

IV. Significance of Competition law to Chartered Accountants

Competition law is an economic legislation and the persons who understand the commercial aspects

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During the course of carrying out of various kinds of professional assignments, Chartered Accountants come across agreements, market practices, pricing mechanisms and such other things which give them insight into the potential competition concerns. They can use the same for advising their clients whether it is for correcting the client's affair or for taking the action against the counter-parties wherever the interest of their clients are prejudiced.

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In internal and management audits, it should be advised to the clients to enlarge the scope of professional services to cover the reporting on competition concerns in the affairs of the enterprise so that the timely detection may save the enterprise from unwarranted consequences under competition law. It is therefore evident that competition law is going to provide additional opportunities to the Chartered Accountants. The management would like to involve them in major decisions like negotiations, finalising the long term contracts, taking policy decisions, pricing, innovation, acquisitions, marketing policies, etc. ■