

EVOLUTION OF COMPETITION LAW COMPLIANCE
PROGRAMME IN INDIA

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Report on the Evolution of Competition Law Compliance Programme in India

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.

The Preamble of the Act lays down the objective of the Act:

“ . . . 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, and for matters connected therewith or incidental thereto. . .”¹

Towards the above objective, the Act prohibits anti-competitive agreements & abuse of dominance, & regulates combinations (mergers, amalgamations & acquisitions). It also gives to the Competition Commission of India the mandate to undertake competition advocacy, awareness & training on competition issues.²

Further, S. 49(3) of the Act mandates the Commission to undertake Competition Advocacy measures to spread awareness and increase compliance with the provisions of the Competition Act, 2002.³

A legitimate question would arise regarding the meaning of ‘Competition Advocacy’. The advocacy working group defines ‘Competition advocacy’ as *‘those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanism, mainly through its relationship with other governmental entities by increasing public awareness of the benefits of competition’*⁴

Competition Advocacy is one of the main pillars of modern competition law which aims at creating, expanding and strengthening awareness of competition in the market. Competition advocacy has generally been understood in a broad sense throughout the world. The definition, as given above, gives an idea of the what forms part of Competition Advocacy. The first part of this definition refers to practically all activities of the competition authority that do not fall under the enforcement category. The second part defines two main branches of advocacy: (i) activities directed at other public authorities in charge of regulation or rule making and (ii) activities directed at all constituencies of the society with the aim of raising their awareness of the benefits of competition and of the role competition policy can play in the promotion and protection of competition.

The Competition Law Compliance Programme, as an initiative of all Competition Law enforcement agencies, has become synonymous with the Competition Advocacy. Compliance involves the active efforts on the part of an enterprise to comply with the provisions of the Act. When the enterprise takes certain necessary and concrete steps to ensure that knowingly or unknowingly the corporation, or its employees, do not infringe the provisions of the Act, it can be stated to maintain a ‘Competition Compliance Programme’.⁵

¹ Preamble to the Competition Act, 2002

² Advocacy Booklet on Competition Compliance Programme for Enterprises , June 2008, CCI. Pg. 3

³ S. 49(3) - The Commission shall take suitable measures, as may be prescribed, for the promotion of competition advocacy, creating awareness and imparting training about competition issues.

⁴ ADVOCACY AND COMPETITION POLICY: Report prepared by the Advocacy Working Group ICN’s Conference Naples, Italy, 2002.

⁵ Supra Note 2, at 14

In June, 2008, the CCI issued the first booklet to suggest a framework of Competition Compliance Programme for Enterprises. In an article published on Economic Times, Mr. Vinod Dhall, the then-Acting Chairman of CCI, said:

*“The book released by CCI is about telling the industry of having a compliance programme and since the programme has to be enterprise specific, each enterprise should draw its own compliance programme based on these parameters. Through this book we will be able to make the enterprises get an understanding about competition law that would help them to be on the right side of law.”*⁶

The Competition Compliance Programme, as suggested by the CCI, stems from the Preamble of the Competition Act, 2002.

Also, the draft guidelines prepared by the ICSI, on the basis of which the CCP was first issued in June 2008, and the [Economic Times](#) mention as to how a number of corporations in the developed world have adopted the CCP to enhance the compliance of respective competition/anti-trust laws.

Benefits of Competition Compliance Programme

The compliance of Competition Law benefits a corporation in a number of ways in its ordinary course of business. An effective compliance programme inculcates a culture of compliance within the organization. The detection of any prospective violation at an early stage provides a competitive advantage to the enterprise. Compliance programme further enhance build the goodwill of the organization among its competitors, suppliers, distributors and, eventually, customers.

An effective Competition Compliance Programme

The main principles of the compliance policy of every organization should be set out in simple and plain language that is easily understandable to its employees. Provisions, and implementations thereof, of disciplinary actions against those employees whose actions result in an infringement of law are recommended. Above all, there has to be an explicit statement of commitment from senior management of their intent to adopt a stringent competition compliance policy. Training of employees and making legal support available to them is an inherent aspect of an effective competition compliance policy. An effective compliance program with a bonafide intent on part of the corporation to ensure compliance of competition laws helps in taking advantage of leniency provisions of the Act in case of any violation of the same.

Competition Compliance Manual and its Contents

It is a general understanding that Competition Compliance Programme has to be tailored according to the needs of each organization adopting the same. The contents of the competition programme manual cannot be universal in their application to various organizations. An “off-the-shelf” programme is very unlikely to serve the purpose.⁷

⁶ <http://www.financialexpress.com/news/now-cci-brings-out-competition-laws-in-print/327039/0>

⁷ Supra Note 2, at 18

However, there are certain basic issues/concern areas that are likely to be an important part of a competition compliance manual. Some of such issues have been discussed below. Corporations, though their competition law compliance manual, are expected to make their employees aware about these issues:

(i) Relationships with Competitors- Illegal 'per se' are arrangements that are so clearly illegal that no circumstance or explanation can justify such conduct. Examples include competitors agreeing to fix prices, dividing territories, allocating customers, jointly boycotting customers or suppliers, limiting production or engaging in bid rigging. Compliance manuals issued by various corporations around the world include restrictions on such interactions with competitors.

(ii) Relationships with Suppliers, Distributors and Customers: When interacting with suppliers, distributors and customers, guidelines should be issued that care should be taken with regard to resale price maintenance, price discriminations, restriction on retail or use, price discrimination, bundling and long-term supply, etc.

(iii) Abuse of Dominant Position- An illegal restriction of competition may also occur when a company or group of companies abuses a dominant position or its substantial market power in a way that is detrimental to competition. Such prohibited activities include tying, discrimination on prices or other trading conditions, refusal to supply, et al.

(iv) Trade Association: Cartelization is prohibited under the Competition regime in India. A competition compliance manual generally includes guidelines on the information that can be legitimately exchanged and what constitutes confidential or commercially sensitive information. Individual company production and pricing, sources of supply, future plans of individual companies are matters which employees are generally prohibited from discussing in their respective Trade Associations.

Costs of Non-Compliance of Competition Law: Need for an effective Competition Compliance Programme

However, the costs of non-compliance of competition law, as one trade cartel recently found out, can be prohibitive. CCI recently fined certain stakeholders in the Cement Industry more than Rs. 6300 Crore for forming a 'trade cartel'.⁸ However, the costs of non-compliance of competition law, as one trade cartel recently found out, can be prohibitive. CCI recently fined certain stakeholders in the Cement Industry more than Rs. 6300 Crore for forming a 'trade cartel'.⁹ In 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 its continuance of such cartel or ten percent of its turnover for each year of the continuance of such cartel, whichever is higher.

⁸ http://articles.economictimes.indiatimes.com/2012-07-02/news/32508538_1_cartel-net-profit-leniency

⁹ http://articles.economictimes.indiatimes.com/2012-07-02/news/32508538_1_cartel-net-profit-leniency ;

Considering the above factors, prominent lawyers have advocated the adoption of CCP by corporations, as recommended by the CCI.¹⁰ Not surprisingly, looking at the high cost of non-compliance, a number of publications also advise corporations to adopt a stringent and effective CCP to ensure compliance with the Competition Act and CCI's regulations.¹¹

¹⁰ http://articles.economictimes.indiatimes.com/2012-07-16/news/32698360_1_competition-act-industry-bodies-abinash-verma ; see also Luthra and Luthra's publication on CCP http://www.luthra.com/admin/presentation_images/Comp%20Law%20Compliance%20&%20Due%20Diligence-ICSI%20&%20CCI-13.06.08.pdf

¹¹ <http://mobilepaper.timesofindia.com/mobile.aspx?article=yes&pageid=8§id=edid=&edlabel=ETM&mydateHid=16-08-2012&pubname=Economic+Times+-+Mumbai&edname=&articleid=Ar00800&publabel=ET>