

Law & Economics of Competition Law Indian Competition Law

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Avinash S. Ganu

Advocate

B.Sc. LL.M. (Pune), LL.M. In International Economic Law (Warwick, U.K.)

Inquiry procedure in Agreements & Abuse cases

1. Initiation
2. Prima facie case
3. DG investigation
4. CCI Inquiry
5. Decision and order

Initiation

- Initiation of Inquiry
 - Suo moto inquiry – on its own knowledge
 - Receipt of information – received from the Informant (Complaint)
 - Reference by - State Government
 - Central Government or
 - Statutory Authority

Prima facie case

- ▶ On initiation – CCI to form opinion as to ‘prima facie case’
- ▶ Administrative act as regulator
- ▶ It is not adjudicatory process
- ▶ No notice to other party required
- ▶ No need for reasoned order
- ▶ If material is not sufficient may call for preliminary conference
- ▶ If prima facie case, direct DG to investigate
- ▶ If no prima facie case, closure under S. 26 (2)
- ▶ Deeper determinative exercise nor required

DG Investigation

- ▶ If prima facie case – CCI to direct the DG to investigate
- ▶ DG to confine investigation as stipulated and directed by CCI
- ▶ DG files report to CCI
- ▶ CCI may again refer for further investigation
- ▶ In report – DG to submit its findings as to
 - ▶ Enterprise
 - ▶ Relevant product market
 - ▶ Relevant geographic market
 - ▶ Dominant position
 - ▶ Abuse
 - ▶ And Under S. 3 – about anticompetitive agreement

CCI Inquiry

- ▶ Adjudicatory function
- ▶ Principles of natural justice to be followed
- ▶ Effective opportunity to be given
- ▶ Though procedural rules of CPC and Evidence are not strictly applicable procedure is like civil court
- ▶ Reasoned order is to be passed
- ▶ Confidentiality requirements to be followed
- ▶ Scrutinize DG report, contentions of Informant & Opponents and decide
- ▶ Finding on all relevant points
- ▶ Order / penalty

Abuse inquiry

- Enterprise
- Relevant Market
 - Relevant product market
 - Relevant geographic market
- Dominant Position
- Abuse of Dominant Position
- Order and Penalty

Enterprise – S. 2(h)

- ▶ A person engaged in specified activity
- ▶ Relating to goods, services, investment or business
- ▶ Activities – production, storage, supply, distribution, acquisition or control of goods
- ▶ Person – S. 2 (I)
individual, HUF, company, Firm, Association, Statutory/
Government co., foreign co., Co-op. Soc., local authority
and artificial judicial person

Enterprise – S. 2(h) Contd.

- ▶ Rajat Verma v/s Haryana PWD
 - ▶ CCI majority – PWD rule limited to provide infrastructural facilities, without commercial consideration, therefore not enterprise
 - ▶ Minority – in definition economic activity and not commercial activity – need not be related to profit objective
 - ▶ Relatable to sovereign function – therefore enterprise
 - ▶ COMPAT – accepted minority interpretation
- ▶ BCCI case – CCI held it as enterprise considering the economic activities though there was no profit making

Relevant Product Market

- S. 2(t) – Definition
- S. 19 (7) – Factors
 - Substitutability
- Factors in S. 19(7)
 - Physical characteristics or end use
 - Price
 - Consumer preference
 - Exclusion of inhouse production
 - Existence of specialized procedure
 - Classification of industrial products

Relevant Geographic Market

- S. 2(s) – Definition
- S. 19 (6) - factors
- Factors
 - Regulatory trade barriers
 - Local specification requirement
 - National procurement policies
 - Adequate distribution facilities
 - Transport cost
 - Language
 - Consumer preference
 - Need for secure regular supplies or rapid after sales service

Dominant Position

- S. 4, Explanation (a) – Definition
- S. 19 (4) – 13 factors
 - Market share
 - Size and resources
 - Competitor's size and importance
 - Economic power
 - Vertical integration, sale – service network
 - Consumer's dependency
 - Regulatory monopoly
 - Entry barriers
 - Countervailing buying power
 - Market structure and size
 - Special obligations and costs
 - Relative advantages and adverse effects
 - Other factors

Abuse

- S. 4 (2)(a)(b)(c)(d)(e) – categories
- Imposing unfair or discriminatory conditions
- Imposing unfair or discriminatory price
- Predatory pricing
- Limiting or restricting productions
- Limiting or restricting market
- Denial of market
- Imposing unconnected supplementary obligations
- Leveraging

Orders and Penalty

- S. 27 (a) to (g)
 - a) Discontinue and not to re-enter
 - b) Penalty up to 10% of average turnover
 - c) Modification of Agreement
 - d) Cost
 - e) Any other orders
- Commission has discretion

Orders and Penalty Contd.

- ▶ BCCI case elaborated twin objectives
 - i. seriousness of contravention
 - ii. To deter other infringers

- ▶ CCI considers mitigating and aggravating circumstances

Orders and Penalty Contd.

- In Excel Crop v/s CCI
- COMPAT accepted the concept of “Relevant Turnover”
- SC endorsed that
- EU guidelines – basic and mitigating/ aggravating
 - repeating, non co-operation, obstruction,
negligent or intentional