

# PROCEDURE IN CASE OF ANTI-COMPETITIVE AGREEMENTS OR ABUSE OF DOMINANT POSITION

## **5.1 Enquiry by CCI on information, reference or even *suo motu***

The Competition Commission of India (CCI) may inquire into any alleged contravention of the provisions contained in section 3(1) of Competition Act [Anti-competitive Agreements] or section 4(1) of Competition Act [Abuse of dominant position] either on its own motion or –

- (a) on receipt of any information, in such manner and accompanied by such fee as may be determined by regulations from any person, consumer or their association or trade association; or
- (b) on a reference made to it by the Central Government or a State Government or a statutory authority [section 19(1) of Competition Act].

Thus, Director General has no powers to make inquiry on his own [This power was available to Director General under MRTP Act].

Provisions relating to reference by 'statutory authority' have been discussed at another place in this book.

### **5.1.1 CCI to make inquiry into anti-competitive agreements or dominant position**

The Commission may inquire into any alleged contravention of the provisions contained in section 3(1) or section 4(1) of Competition Act, either on its own motion or on— (a) receipt of any information, in such manner

and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or (b) a reference made to it by the Central Government or a State Government or a statutory authority [section 19(1) of Competition Act].

***Powers and functions specified in section 19(3) to 19(7) also included -*** Powers and functions specified in section 19(3) to 19(7) of Competition Act are also included in powers of Commission [section 19(2) of Competition Act].

Section 19(3) of Competition Act specifies factors to be considered while considering effect of any agreement on competition.

Section 19(4) of Competition Act specifies factors to be considered while inquiring whether an enterprise enjoys a dominant position or not under section 4 of Competition Act.

Section 19(5) of Competition Act specifies factors to be considered while determining whether a market constitutes a 'relevant market'.

Section 19(6) of Competition Act specifies factors to be considered while determining 'relevant geographic market'.

Section 19(7) of Competition Act specifies factors to be considered while determining 'relevant product market'.

***Information should be received within three years but Commission can condone delay -*** The Commission shall not entertain an information or a reference unless it is filed within three years from the date on which the cause of action has arisen – First *proviso* to section 19(1) of Competition Act, inserted *vide* Competition (Amendment) Act, 2023 from 18-5-2023.

However, an information or a reference may be entertained after the period specified in the first proviso if the Commission is satisfied that there had been sufficient cause for not filing the information or the reference within such period after recording its reasons for condoning such delay – Second *proviso* to section 19(1) of Competition Act, inserted *vide* Competition (Amendment) Act, 2023 from 18-5-2023.

***CCI to direct DG to investigate -*** If CCI finds a *prima facie* case, it shall direct Director General of Competition Commission (DGCC) to investigate [section 26 of Competition Act]. His report will then be considered by CCI. The CCI will hear the concerned parties and then pass necessary orders [section 27 of Competition Act].

## **5.1-2 Informant himself need not be aggrieved**

Person who supplies information on payment of prescribed fees is informant. Informant need not be an aggrieved party – *Harshita Chawla v. WhatsApp Inc.* (2020) 161 SCL 131 = 118 taxmann.com 421 (CCI).

Informant can be any person. He need not be personally aggrieved party - *Samir Agrawal v. Competition Commission of India* (2021) 3 SCC 136 = 164 SCL 344 = 122 taxmann.com 150 (SC 3 member bench).

## 5.2 Procedure for inquiry under section 19 of Competition Act

On receipt of (a) a reference from the Central Government or a State Government or a statutory authority or (b) on its own knowledge or (c) information received under section 19 of Competition Act, if the Commission is of the opinion that there exists a *prima facie* case, it shall direct the Director General to cause an investigation to be made into the matter [section 26(1) of Competition Act].

CCI will issue such direction as per regulation 18 of Competition Commission of India (General) Regulations, 2009. Such direction shall be deemed to be commencement of an inquiry under section 26 of Competition Act.

**Clubbing of information** - If the subject matter of information is substantially same as covered by any previous information received, the CCI may club the new information with the previous information [proviso to section 26(1) of Competition Act].

### 5.2-1 No notice or hearing is required at stage of giving directions to DG

At the stage of inquiry, CCI is expected to record at least some reasons for its *prima facie* view. At this stage, CCI is not required to issue any notice or grant hearing to any party - *CCI v. Steel Authority of India Ltd.* (2010) 10 SCC 744 = 7 taxmann.com 23 = 103 SCL 269 (SC 3 member bench).

It is not necessary to first take evidence under section 36(2) or regulation 41 before forming a *prima facie* view under section 26 of Competition Act - *Abbott Healthcare P. Ltd. v. CCI*(2018) 150 SCL 732 = 100 taxmann.com 198 (Del HC) - view confirmed in *Abbott Healthcare P. Ltd. v. CCI*(2019) 151 SCL 117 = 100 taxmann.com 348 (Del HC DB).

### 5.2-2 Issuing direction to DG is only administrative order

Issuance of direction by CCI to DG to cause investigation for alleged violation is only administrative. No appeal against the direction of investigation can be passed - *Abbott Healthcare P. Ltd. v. CCI*(2019) 151 SCL 117 = 100 taxmann.com 348 (Del HC DB) - confirm *Abbott Healthcare P. Ltd. v. CCI*(2018) 150 SCL 732 = 100 taxmann.com 198 (Del HC).

Order under section 26(1) of Competition Act is an administrative order. It cannot be interfered unless found to be arbitrary and unreasonable - *Monsanto Holdings v. CCI*[2020] 162 SCL 271 = 116 taxmann.com 715 (Del HC).

### **5.2-3 DG can consider other relevant matters also during investigation**

DG can consider if some other persons or entered into anti-competitive agreements and include them in his report - *Excel Crop Care v. CCI* (2017) 8 SCC 47 = 141 SCL 480 = 81 taxmann.com 173 (SC).

Once CCI orders investigation under section 26(1) of Competition Act, powers of DG are not confined to examine only such matters that formed subject matter of original complaint. DG can investigate other matters also - *CCI v. Grasim Industries* (2019) 156 SCL 178 = 109 taxmann.com 222 (Del HC DB).

### **5.3 Closing matter at initial stage itself**

Where on receipt of a reference or information (as above), the Commission is of the opinion that there exists no *prima facie* case, it shall close the matter forthwith and may pass such orders as it deems fit. Copy of the order will be sent to Central Government, State Government, Statutory Authority or the parties concerned, as the case may be [section 26(2) of Competition Act].

Such communication shall be made as per regulation 19 of Competition Commission of India (General) Regulations, 2009.

**No inquiry if similar issue was decided earlier** - The Commission may not inquire into agreement referred to in section 3 or conduct of an enterprise or group under section 4, if the same or substantially the same facts and issues raised in the information received under section 19 or reference from the Central Government or a State Government or a statutory authority has already been decided by the Commission in its previous order – Section 26(2A) of Competition Act, inserted *vide* Competition (Amendment) Act, 2023 from 18-5-2023.

**Order of CCI to close the matter is appealable** - Final order passed by Commission after finding that there exists no *prima facie* case to direct Director General to close the matter is appealable order – *CCI v. Steel Authority of India Ltd.* (2010) 10 SCC 744 = 7 taxmann.com 23 = 103 SCL 269 (SC 3 member bench).

**Summary of orders to be published on website of CCI** - Summary of orders under section 26(2) of Competition Act or section 26(6) of Competition Act shall be published on website of Competition Commission – Regulation 53(2) of CCI (General) Regulations, 2009.

### **5.4 Investigation and Report by DG**

The Director General shall, on receipt of direction under section 26(1) of Competition Act, submit a report on his findings within such period as may be specified by the Commission. [Section 26(3) of Competition Act].

If, after consideration of the report of the Director General referred to in section 26(3), the Commission is of the opinion that further investigation is required, it may direct the Director General to investigate further into the matter - section 26(3A) of Competition Act, inserted *vide* Competition (Amendment) Act, 2023 from 18-5-2023.

The Director General shall, on receipt of direction under section 26(3A), investigate the matter and submit a supplementary report on his findings within such period as may be specified by the Commission - section 26(3B) of Competition Act, inserted *vide* Competition (Amendment) Act, 2023 from 18-5-2023.

The Commission may forward a copy of the report referred to in section 26(3) and 26(3B) of Competition Act to the parties concerned [section 26(4) of Competition Act][words in italics inserted *vide* Competition (Amendment) Act, 2023 from 18-5-2023].

However, if the investigation was made on reference received from Central Government, State Government or Statutory authority, the Commission *shall* forward a copy of report of DG referred to in section 26(3) and 26(3B) of Competition Act to the Central Government or the State Government or the statutory authority, as the case may be. [Proviso to section 26(4) of Competition Act] [word in italics inserted *vide* Competition (Amendment) Act, 2023 from 18-5-2023].

Investigation and report by Director General shall be as per regulation 20 of Competition Commission of India (General) Regulations, 2009.

Director General should submit his report within 45 days for expeditious disposal - *CCIV. Steel Authority of India Ltd. (2010) 10 SCC 744 = 7 taxmann.com 23 = 103 SCL 269 (SC 3 member bench)*.

Director General cannot initiate an investigation *suo motu*. However, permission to expand scope of enquiry cannot be construed as initiation of investigation *suo motu* by DGIR - *Hyundai Motor v. CCI (2016) 134 SCL 373 = 67 taxmann.com 40 (Mad HC)*.

## **5.5 Procedure if report of DG recommends that there is no contravention**

If the report of the Director General referred to in section 26(3) and 26(3B) of Competition Act recommends that there is no contravention of any of the provisions of the Competition Act, the Commission shall invite objections or suggestions from Central Government, State Government or Statutory authority or the parties concerned, as the case may be [section 26(5) of Competition Act][words in italics inserted *vide* Competition (Amendment) Act, 2023 from 18-5-2023].

If, after consideration of objections and suggestions, the Commission agrees with the recommendation of the Director General, it shall close the matter forthwith and pass such orders as it deems fit. Copies of order shall be communicated to concerned parties [section 26(6) of Competition Act].

***Summary of orders to be published on website of CCI*** - Summary of orders under section 26(2) of Competition Act or section 26(6) of Competition Act shall be published on website of Competition Commission of India (CCI) - Regulation 53(2) of CCI (General) Regulations, 2009.

***CCI can direct further investigation or inquiry*** - If, after consideration of objections and suggestions, the Commission is of the opinion that further investigation is called for - (i) it may direct Director General for further investigation, or (ii) cause further enquiry to be made or (iii) itself inquire into the contravention as per provisions of the Act [section 26(7) of Competition Act].

#### **5.5-1 Further enquiry by Commission if DG is of opinion that there is contravention**

If the report of the Director General referred to in section 26(3) and 26(3B) of Competition Act recommends that there is contravention of any of the provisions of the Competition Act, and the Commission is of the opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of the Act [section 26(8) of Competition Act] [words in italics inserted *vide* Competition (Amendment) Act, 2023 from 18-5-2023].

#### **5.5-2 Show cause notice before passing final order**

Upon completion of the investigation or inquiry under section 26(7) or section 26(8) of Competition Act, as the case may be, the Commission may pass an order closing the matter or pass an order under section 27 of Competition Act, and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be. - - - Before passing such order, the Commission shall issue a show-cause notice indicating the contraventions alleged to have been committed and such other details as may be specified by regulations and give a reasonable opportunity of being heard to the parties concerned - Section 26(9) of Competition Act, inserted *vide* Competition (Amendment) Act, 2023 from 19-9-2024.

This sub-section (9) of section 26 is notified and made effective on 19-9-2024.

## 5.6 Orders by Commission after inquiry into agreements or abuse of dominant position

Where after inquiry the Commission finds that any agreement referred to in section 3 of Competition Act (in respect of anti-competitive agreement) or action of enterprise in dominant position under section 4 of Competition Act (abuse of dominant position), is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders.

### 5.6-1 Order by Commission to discontinue agreement/abuse

After enquiry, if Commission finds contravention, Commission can direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be. [Section 27(a) of Competition Act].

### 5.6-2 Imposition of penalty by CCI

Penalties for violation of provisions w.e.f. 6-3-2024 are as follows —

After enquiry, if Commission finds contravention, Commission may impose such penalty, as it may deem fit which shall be not more than 10% of the average of the turnover or income, as the case may be, for the last three preceding financial years, upon each of such person or enterprise which is a party to such agreement or has abused its dominant position - section 27(b) of Competition Act, substituted *vide* Competition (Amendment) Act, 2023 from 6-3-2024:

**Provided** that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or 10% of its turnover or income, as the case may be, for each year of the continuance of such agreement, whichever is higher - proviso to section 27(b) of Competition Act, inserted *vide* Competition (Amendment) Act, 2023 from 6-3-2024.

*Explanation 1.*—For the purposes of this clause, the expression “turnover” or “income”, as the case may be, shall be determined in such manner as may be specified by regulations - *Explanation 1* to section 27(b) of Competition Act, inserted *vide* Competition (Amendment) Act, 2023 from 6-3-2024.

*Explanation 2.*—For the purposes of this clause, “turnover” means *global turnover* derived from all the products and services by a person or an

enterprise - *Explanation 2* to section 27(b) of Competition Act, be inserted *vide* Competition (Amendment) Act, 2023 from 6-3-2024.

***Mode of Determination of turnover or income for purposes of section 27 or section 48*** - Determination of turnover or income for purposes of section 27 or section 48 of Competition Act shall be as per CCI (Determination of Turnover) Regulations, 2024 notified on 5-3-2024. The regulations specify mode of calculation of turnover or income for purposes of section 27 or section 48. This is to be certified by Chartered Accountant.

***Penalty on basis of 'global turnover' can be abnormally heavy*** - The term 'global turnover or income' is really misleading. The 'global turnover or income' does not mean turnover of all the group companies. What is covered is only '*global turnover*' derived from all the products and services (including exports) by *a person or an enterprise*. Present practice is only to consider turnover of relevant market of the person or enterprise. Of course, penalty on basis of total turnover of person or enterprise can be a very huge amount, but the penalty has to be commensurate with offence and cannot be so huge as to cripple the person or enterprise and may lead to insolvency.

***Methodology and factors to be considered for determination of monetary penalty*** - Methodology for determination of monetary penalty and factors to be considered while determining quantum of monetary penalty under section 27(b) and proviso to section 27(b) of Competition Act has been specified in chapter II and chapter III of CCI (Determination of Monetary Penalty) Guidelines, 2024 issued by CCI.

***Notice to party before imposing penalty*** - If penalty is proposed to be imposed by Commission on a person, show cause notice duly signed by Secretary shall be given asking for submitting explanation in writing within 15 days. Penalty shall be imposed only after giving opportunity of personal hearing to the person [regulation 48 of Competition Commission of India (General) Regulations, 2009].

***Mens Rea not required to impose penalty*** - *Mens rea* is not required to impose penalty - *CCI v. Thomas Cook* (2018) 5 SCC 549 = 92 taxmann.com 249 = 147 SCL 137 (SC) \* *SCM Solifert v. CCI* (2018) 6 SCC 631 = 147 SCL 273 = 92 taxmann.com 274 (SC).

### **5.6-3 Direction by Commission to modify agreement**

Commission can direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission. [Section 27(d) of Competition Act].

## **5.7 Other orders and Payment of costs that can be ordered by CCI**

Commission can direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs [section 27(e) of Competition Act].

**Any other order** – Commission can pass such other order or issue such directions, as it may deem fit. [Section 27(g) of Competition Act].

Thus, vast powers are available to CCI.

## **5.8 Order against any group company**

If the enterprise which has violated provisions of section 3 or section 4 of Competition Act is member of a group and if other members of the group are also responsible for the contravention, the Commission can pass orders under section 27 against any member of group [*proviso* to section 27 of Competition Act].