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LAWBY WRITES

DECODING THE ACT SERIES



THE COMPETITION ACT, 2002

GROUND RULES ON HOW NOT TO COMPETE

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WHY SHOULD WE STUDY THE COMPETITION ACT, 2002?



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Founder

The Competition Act, 2002 in India that replaced the Monopolies and Restrictive Trade Practices Act (MRTP), 1969, has proved to be a reasonable deterrent against unfair competitive practices. However, the efficacy of the powers vested with the Competition Commission is yet to be fully seen or utilised given the limitations on the ability to prove an adverse effect on competition in most cases. The jurisprudence on the subject of Competition law is evolving rapidly despite the fact that **the fingerprint still lacks consensus on serious application as done in the European nations and our inability to bring serious correction towards the behaviour of MNC's and big corporates who are comfortable paying the penalty imposed which is much less in comparison to the benefit derived from the illegal trade practice.**

Section 46 of the Competition Act, 2002 that allows for leniency in cases where companies voluntarily disclose their participation in cartels has found little favour from violators. No one intends to flinch until they are found with overwhelming evidence of their misdeeds. In *Suo Motu Case No. 2 of 2017 dated 30 August 2018*, the Competition Commission gave a 100 percent leniency to Panasonic India and its office bearers where they disclosed the existence of a cartel which coordinated and controlled the prices of zinc-carbon dry-cell batteries. The regulatory framework around such leniency though found effective in intent does not help in the bigger picture where billions are lost where the anti competitive acts go untraced or well camouflaged.

Most recently, the Competition Commission of India (Commission) had imposed a penalty of Rs. 1,337.76 crore on Google for abusing its dominant position in multiple markets in the Android Mobile device ecosystem. Google had entered into multiple agreements to govern their rights and obligations through Mobile Application Distribution Agreement (MADA). MADA assured that the most prominent search entry points i.e., search app, widget and chrome browser are pre-installed on Android devices, which accorded significant competitive edge to Google's search services over its competitors. The competitors of these services could never avail the same level of market access which Google secured and embedded for itself through MADA creating significant entry barriers for competitors of Google to enter or operate in the concerned markets.

The several judgements that the Competition Commission works on, repeatedly brings to the forefront the lack of ethical behaviour adopted by big companies to subdue their smaller competitors and to consolidate market share. **The million Kirana stores and the million dreaming entrepreneurs would be best assisted legally to protect their business if they better knew and used the Competition Act, 2002. Any student or practitioner of law studying the evolving landscape of anti- competitive law throughout the world and in India would be able to interpret the white spaces and legal vacuum only upon a detailed study of the Indian Competition Act, 2002. If you are convinced of this need, please read our Newsletter further.**



HOW THE ACT EMPOWERS?

Regulating Anti-Competitive Agreements (Section 3)

The Act prohibits agreements between businesses that are likely to cause an appreciable adverse effect on competition. This includes arrangements such as **price-fixing, bid-rigging, or market allocation between competitors**. Even certain vertical arrangements-like exclusive supply or distribution agreements-may fall foul of the law if they hinder competitive conditions.

Preventing Abuse of Dominance (Section 4)

Dominant market players are not prohibited from holding such positions, but the law strictly prohibits them from abusing their dominance. This includes imposing **unfair pricing, denying access to essential facilities, restricting production, or leveraging dominance** in one market to influence another. The law ensures that dominant enterprises do not stifle competition or marginalize smaller players.

Regulation of Mergers and Acquisitions (Sections 5 & 6)

To prevent market concentration, the Act mandates that combinations-**mergers, acquisitions, or amalgamations**-exceeding prescribed thresholds be reported to the Competition Commission of India (CCI) **(u/s 6(2))**. The CCI assesses whether such transactions are likely to harm competition and has the authority to approve, modify, or prohibit them.

The Role of the Competition Commission of India (CCI)

The CCI is the regulatory authority tasked with implementing the provisions of the Act. It investigates **complaints, scrutinizes market practices**, and has the **power to pass binding orders, impose penalties, and issue interim directions** to prevent potential harm during ongoing investigations.

Investigations and Enforcement

Investigations are led by the Director General, who serves as the principal investigating officer under the CCI **(u/s 26)**. Upon identifying potential violations, the **Director General** conducts a thorough inquiry to assist the Commission in decision-making.

Penalties (Chapter VI)

Businesses found violating the Act may face **substantial penalties**, including **monetary fines** or **structural remedies**. However, entities involved in cartels that voluntarily **disclose their conduct and cooperate with investigations** may be eligible for a reduction in penalties under the Act.

Right to Appeal

Any person aggrieved by an order of the CCI has the **right to appeal** before the **National Company Law Appellate Tribunal (NCLAT) (u/s 53A)**. Further appeals can be made to the **Supreme Court of India (u/s 53T)**, ensuring judicial oversight and accountability.

Advocacy and Awareness

Apart from its enforcement functions, the CCI actively engages in **competition advocacy (u/s 49)**. It works with **businesses, regulatory bodies**, and the **public** to promote awareness about the **benefits of a competitive marketplace** and encourage compliance with the law.

Extra-Territorial Jurisdiction

The Act extends to **conduct** or **transactions outside India** if they have or are likely to have a significant adverse effect on competition within India **(u/s 32)**. This includes foreign mergers that could create monopolistic situations in Indian markets.

Exemptions and Protections

The Central Government may, in certain circumstances, grant exemptions to specific sectors or enterprises from the application of the Act **(u/s 54)**. Additionally, officials acting in **good faith** under the Act are protected from legal proceedings **(u/s 59)**. Importantly, once the CCI initiates proceedings, the **jurisdiction of Civil Courts** is barred to avoid parallel adjudication **(u/s 61)**.





PENALTY UNDER THE ACT

1. Penalty for Anti-Competitive Agreements (Section 27(b))

If an enterprise or person is part of an agreement that adversely affects competition (e.g., cartels, price-fixing), the CCI can impose:

- **Up to 10%** of the average turnover for the last three financial years.
- For cartels: **Up to three times the profit** for each affected year, or **10% of turnover**, whichever is higher.

2. Penalty for Abuse of Dominant Position (Section 27(b))

When a dominant enterprise misuses its position (unfair pricing, market denial, etc.), CCI may impose the same penalty structure as above:

- **Up to 10%** of the average turnover for the last three financial years.
- In cartel-type conduct, **three times the profit** or **10% of turnover**, whichever is greater.

3. Penalty for Failure to Notify Combinations (Section 43A)

If a company fails to inform the CCI about a merger/acquisition that crosses financial thresholds:

- Penalty can go up to **1% of the total turnover or assets** of the combination, whichever is higher.

4. Penalty for Making False Statements or Omitting Material Facts (Section 44)

If a party knowingly provides false information or withholds crucial facts during merger filings or proceedings:

- The CCI can impose a penalty of up to **Rs. 1 crore**.

5. Penalty for Furnishing False Information (Section 45)

Separate from Section 44, this deals with knowingly giving false data when required to furnish information under the Act:

- Penalty may go up to **Rs. 1 crore**.

6. Penalty for Non-Compliance with CCI Directions (Section 42)

If a person fails to comply with orders or directions issued under various provisions:

- **Rs. 1 lakh per day** of default, capped at **Rs. 10 crores**.

7. Penalty on Individuals for Company's Contravention (Section 48)

If a company violates the Act, individuals responsible for its operations may also be held personally liable:

- Penalty up to **10% of their average income** for the last three financial years, unless they prove lack of knowledge or due diligence.

8. Leniency and Leniency Plus (Section 46)

Members of a cartel who disclose its existence and fully cooperate may receive:

- **Reduced penalties**, depending on timing and value of the disclosure.
- Under **Leniency Plus (2023 Amendment)**: If a party discloses an additional undiscovered cartel, they may get further reduction in penalty in both cases.





HOW THE COURTS HAVE INTERPRETED & ADJUDICATED?

1. Case Insight: Interpretation of Section 3 – Cartelization and Bid Rigging

Case Title: *Shri B P Khare, Principal Chief Engineer, South Eastern Railway v. M/s Orissa Concrete and Allied Industries Ltd. and 28 Others [CCI Ref. Case No. 05 of 2011]*

Provision Involved: Section 3(1) and 3(3)(d) of the Competition Act, 2002

Legal Issue

Whether the conduct of the opposite parties amounted to an anti-competitive agreement involving cartelization and bid rigging under Section 3 of the Competition Act, 2002?

Context

The South Eastern Railway floated a tender for 45.50 lakh anti-theft elastic rail clips. Out of 29 approved bidders, most quoted an identical rate of ₹66.50-approximately 10% higher than previous procurements and offered quantities below 50% of the total requirement. However, the combined quantity offered closely matched the tendered amount, leading to suspicion of cartelized bidding and a reference to the CCI.

CCI's Findings & Final Order

The Competition Commission of India concluded that the conduct of the parties amounted to **bid rigging**, contravening Section 3(3)(d) read with Section 3(1) of the Act. The Commission found a “**meeting of minds**” among the bidders based on compelling circumstantial evidence, including identical prices across firms with different cost structures and locations, similar handwriting and content in bid documents, sequential demand drafts from the same banks, and bids that collectively matched the required quantity. In the absence of any plausible justification from the parties, the CCI held this as clear indication of an anti-competitive agreement. However, considering mitigating factors such as the parties' lack of awareness, their non-compliance with tender conditions (offering less than 50% quantity), and the fact that they were not the lowest bidders, the Commission issued a **cease and desist** order without imposing monetary penalties.

2. Case Insight: Abuse of Dominant Position in the Real Estate Sector

Case Title: *Belaire Owner's Association v. DLF Limited and Another [2011 CompLR 0239 (CCI)]*

Provision Involved: Sections 2(f), 2(o), 2(t), 2(s), 19(3), 19(4), 19(7), and 4(2)(a)(i) of the Competition Act, 2002

Legal Question

Whether DLF Limited, as a dominant player in the relevant real estate market, engaged in an abuse of its dominant position by imposing unfair conditions on the allottees of the Belaire apartment complex, thereby contravening the provisions of the Competition Act, 2002?

Context

The dispute arose from the construction of “The Belaire,” a high-rise residential complex in Gurgaon, developed by DLF Limited in collaboration with the Haryana Urban Development Authority (HUDA). Complaints were filed by the allottees alleging that DLF abused its position by inserting one-sided, arbitrary, and unfair clauses in the apartment buyer agreements. The allegations included delays in construction, unilateral changes to allotment terms, and the imposition of conditions detrimental to consumer interests. The scale and nature of DLF’s operations, along with its financial and marketing strength in Gurgaon’s high-end residential segment, suggested dominance in the relevant market.

CCI’s Findings & Final Order

The Competition Commission of India held that DLF Ltd. held a **dominant position** in the relevant real estate market in Gurgaon and had abused this position in violation of **Section 4(2)(a)(i)** of the Competition Act, 2002. The Commission observed that:

- DLF had imposed **unfair and one-sided conditions** in the apartment agreements.
- Buyers were not in a position to negotiate or amend the terms.
- DLF exercised its market strength in a manner that undermined the interests of consumers, amounting to **unfair trade practices**.

The Commission concluded that DLF’s conduct contravened the **prohibition against abuse of dominance**, and accordingly imposed a **penalty of 7% of the company’s average turnover**, amounting to **₹630 crores**. Additionally, the CCI issued a **cease and desist** order directing DLF to refrain from such practices in the future.

3. Case Insight: Appealability and Procedural Scope of CCI's Prima Facie Orders

Case Title: *Competition Commission of India v. Steel Authority of India Ltd. & Another [(2010) 10 SCC 744]*

Provisions Involved: Sections 19, 26(1), 33, 53A, and 53B of the Competition Act, 2002; Regulations 17(2) and 18(2) of the CCI (General) Regulations, 2009

Legal Question

Whether a direction issued by the Competition Commission of India (CCI) under Section 26(1) forming a prima facie opinion and directing an investigation is appealable under Section 53A(1)?

Context

Jindal Steel and Power Ltd. filed information alleging that SAIL abused its dominant position by entering into an exclusive supply agreement with Indian Railways. The CCI, upon forming a prima facie opinion under Section 26(1), directed the Director General to initiate an investigation. SAIL challenged this direction before the Competition Appellate Tribunal, which ruled that such an order was appealable, required CCI to record reasons, and directed that affected parties be heard at the preliminary stage. The CCI appealed this decision to the Supreme Court.

Supreme Court's Findings & Final Verdict

The Supreme Court **partially allowed the appeal**, clarifying several important procedural aspects under the Competition Act:

- **Appealability:** The Court held that a direction under **Section 26(1)** to initiate an investigation is **not appealable** under **Section 53A**, as it is not an order that affects the rights of the parties and is not among those specifically enumerated as appealable.
 - **Notice/Hearing:** There is **no statutory requirement** for the CCI to issue a notice or provide a hearing at the stage of forming a **prima facie opinion**. This function is **administrative and preliminary**, not adjudicatory.
 - **Recording of Reasons:** While **detailed reasoning is not necessary**, the CCI is expected to record **some brief reasons** to demonstrate application of mind while forming a prima facie view. Orders determining rights or obligations must, however, be **reasoned and detailed**.
 - **CCI as a Party:** The Commission is a **necessary party** in proceedings initiated **suo motu**, and a **proper party** in other cases before the Appellate Tribunal, as its participation facilitates full and effective adjudication.
 - **Section 33 Interim Orders:** The Court also noted that **interim relief under Section 33** can be granted **ex parte** after a prima facie opinion is formed, but should be used **sparingly** and must be supported by **a higher degree of satisfaction and a reasoned order**.
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4. Case Insight: Applicability of Competition Law to State-Owned Monopolies

Case Title: *Coal India Limited and Another v. Competition Commission of India and Another* [Civil Appeal No. 2845 of 2017]

Provisions Involved: Sections 2(h), 4, 19(4)(g), 19(4)(k), 60 of the Competition Act, 2002; Sections 3, 5, 11 of the Coal Mines (Nationalisation) Act, 1973

Legal Question

Whether the Competition Act, 2002, applies to Coal India Limited (CIL) and its subsidiary Western Coalfields Limited (WCL), which are statutory monopolies established to achieve socio-economic objectives under Article 39(b) of the Constitution?

Context

The Competition Commission of India (CCI) found CIL and WCL to have abused their dominant position in the coal supply market. These findings were affirmed by the Competition Appellate Tribunal. CIL and WCL contended that the Competition Act should not apply to them, as they were public sector undertakings functioning under the Coal Mines (Nationalisation) Act, 1973, to ensure equitable distribution of resources for the common good. They argued that applying competition law would interfere with pricing and production decisions made for public welfare. They also relied on the historical protection of the Nationalisation Act under the Ninth Schedule of the Constitution.

In response, the CCI argued that the Competition Act represents a clear policy shift and is intended to regulate monopolistic behavior, even by state entities. It was also pointed out that the Coal Mines (Nationalisation) Act was removed from the Ninth Schedule in 2017.

Supreme Court's Findings & Final Verdict

The **Supreme Court** upheld the applicability of the **Competition Act, 2002**, to **state-owned monopolies** like CIL and WCL. The appeal was allowed to proceed on merits, but the central issue—**whether state monopolies are exempt from the Act—was answered in the negative**. Key observations included:

- The definition of "**enterprise**" under **Section 2(h)** expressly includes government companies and PSUs.
 - **Section 19(4)(g)** recognizes dominance arising from statute, government status, or otherwise—indicating legislative intent to include state monopolies.
 - **No exemption** is provided in the Competition Act for government monopolies, unlike the **repealed MRTP Act**, reflecting a **paradigm shift in policy**.
 - **Section 60's non-obstante clause** gives the Act **overriding effect** over conflicting provisions in other laws.
 - While **social obligations** may inform certain actions, **Section 19(4)(k)** allows CCI to consider them when assessing abuse of dominance.
 - The Court clarified that **CIL and WCL could justify their conduct** based on **government policies or Presidential Directives**, and such defences must be duly considered by the CCI.
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5. Case Insight: Jurisdictional Limitations of CCI Over Statutory Regulators

Case Title: *Institute of Chartered Accountants of India v. Competition Commission of India and Others* [W.P.(C) No. 2815/2014, Delhi High Court, decided on June 2, 2023]

Provisions Involved: Sections 19, 26, 33, 53A–53B of the Competition Act, 2002; Regulations 17(2), 18(2) of the CCI (General) Regulations, 2009

Legal Question

Whether the Competition Commission of India (CCI) has jurisdiction to investigate the Institute of Chartered Accountants of India (ICAI) for alleged abuse of dominant position in relation to its mandatory Continuing Professional Education (CPE) program, which is part of ICAI's regulatory function?

Context

The CCI initiated an investigation against ICAI based on an allegation that ICAI abused its dominant position by restricting access to the market for CPE seminars. ICAI's CPE program requires members to complete a prescribed number of learning hours conducted exclusively by ICAI or its affiliates. The Informant contended this created unfair barriers and violated Section 4 of the Competition Act.

Final Verdict

The Delhi High Court allowed ICAI's petition and set aside the CCI's order directing an investigation. The Court held that:

- ICAI's CPE program, being a statutory regulatory function to maintain professional standards, is **not subject to CCI review**.
- While ICAI qualifies as an "enterprise" providing "services," its regulatory activities are distinct from commercial market activities.
- The Competition Act empowers the CCI to regulate markets, **not to interfere with statutory regulators performing their mandatory duties**.
- The CCI cannot compel statutory bodies to outsource regulatory functions or review decisions that do not interface with trade or commerce.



CASE TITLE	LEGAL QUESTION	FINAL VERDICT	RELEVANT PROVISIONS
Shri B P Khare v. Orissa Concrete and Allied Industries Ltd. and 28 Others (CCI Ref. Case No. 05 of 2011)	Whether the opposite parties contravened Section 3 of the Competition Act, 2002 regarding cartelization and bid rigging?	CCI found bid rigging and cartelization; cease and desist order issued, no penalty imposed due to parties' admissions and failure to meet tender conditions.	Sections 3(1), 3(3)(d) of the Competition Act, 2002
Belaire Owner's Association v. DLF Limited and Anr. (2011 CompLR 0239 [CCI])	Whether DLF abused its dominant position by imposing unfair conditions on apartment allottees?	CCI held DLF guilty of abuse of dominant position; imposed 7% penalty of average turnover (~Rs 630 crore).	Sections 2(f), 2(o), 2(r), 19(3), 19(4), 4(1), 4(2)(a) (i) of the Competition Act, 2002
Competition Commission of India v. Steel Authority of India Ltd. and Anr. (Civil Appeal No. 7779 of 2010)	Whether a prima facie opinion and investigation order under Section 26(1) of the Competition Act is appealable and whether CCI must provide notice/hearing at this stage?	SC held such orders are not appealable; no statutory requirement for notice/hearing at prima facie stage; CCI must record some reasons CCI is necessary in part.	Sections 19, 26, 33, 53A–53B of the Competition Act, 2002; Regulations 17(2), 18(2) of the CCI (General) Regulations, 2009
Coal India Ltd. and Anr. v. Competition Commission of India and Anr. (Civil Appeal No. 4854 of 2017)	Whether Competition Act applies to Coal India Ltd. and its subsidiaries as state-owned monopolies?	SC held Competition Act applies; state monopolies not exempt; CCI must consider social obligations in inquiries.	Sections 2(h), 4, 19(4) (e), 19(4)(j) of the Competition Act, 2002; Coal Mines (Nationalisation) Act, 1973
Institute of Chartered Accountants of India v. Competition Commission of India & Ors. (W.P. (C) No. 285/2014)	Whether CCI can investigate a statutory regulator's mandatory professional education program for abuse of dominant position?	Court held CCI has no jurisdiction over statutory regulatory functions; regulatory decisions are not market activity.	Sections 2(h), 4(1), 4(2) of the Competition Act, 2002; Sections 15(2)(j), 30 of the Chartered Accountants Act, 1949

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Have Suggestions or Questions?

We value your input! Feel free to contact us at support@lawby26.com with any questions, topic suggestions, or feedback.

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