

The Competition Commission of India (Competition Assessment of Economic Legislations and Policies) Guidelines, 2017

(Framed under section 49 (1) and (3) of the Competition Act, 2002)

The Competition Commission of India (the Commission) is established under the Competition Act, 2002 (the Act) with the objectives 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. It is mandated, inter alia, to (a) give opinion on a reference from Central Government or a State Government on possible effect on competition of a proposed policy, and (b) take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues. It pursues its objectives mainly through two sets of instruments, namely, advocacy and sanctions targeted at enterprises. While these two measures are complementary, advocacy ex ante ensures freedom of trade by enterprises and achieves 'fair competition for greater good'.

A. Preamble

India adopted a new economic order in the early 1990s. This empowered the invisible hands of the market, namely, demand for and supply of goods and services to determine two major outcomes, namely, quantities to be produced / supplied in the economy and prices at which these are to be exchanged. The invisible hands may occasionally malfunction in the presence of information asymmetry, externalities or market power. State usually intervenes to address these concerns to prevent market failure. The State intervenes in the market and the economy by (a) enacting legislations and subordinate legislations that define the contour of the freedom of economic agents and their rights and obligations, and (b) formulating economic policies relating to trade, commerce, industry, business, investment, disinvestment, fisc, taxation, IPR, procurement, etc. These interventions usually strengthen the invisible hands of the market and promote competitive neutrality as well as competition. However, despite best intentions and exercise of the best of the skills, care and due diligence, these may inadvertently carry potential to restrict the ability of economic agents to effectively compete at the market place.

The full benefits of competition can be realized if the market structure resembles perfect competition. A competitive market generally has four salient features, namely, (a) large participation on both sides - supply and demand; (b) free entry and exit of participants; (c) perfect symmetry of information; and (d) every participant is a price taker. It is necessary to ensure that no state intervention unnecessarily humbles any of these four features significantly. Many jurisdictions have programmes to evaluate the existing/upcoming state interventions from the perspective of competition. This aims to identify the elements that

may have potential to restrict the ability of economic agents to effectively compete at the market place or limit the choices of consumers. It is reported that Australian Government in mid1990s launched competition impact assessment of its economic policies and found about 1800 instances of competition distortions. Removal of these distortions eventually allowed the economy to grow faster and benefited the consumers substantially.

In sync with its mandate and the role of competition in economic development, the Commission wishes to assess select upcoming / existing economic legislations and policies (Acts, Bills, Rules, Regulations and Policies) from the perspective of competition and share the assessment with the associated stakeholders.

B. Objective

The objective of these Guidelines is to facilitate objective and transparent assessment of select upcoming /existing economic legislations and policies made by Parliament / a State Legislature /a Ministry/ Department of Central/ a State Government/ a Statutory Authority from competition perspective. Based on the assessment, the Commission would suggest, if necessary, appropriate modifications in the economic legislation or the policy, as the case may be, along with the reasons for such suggestion from the competition perspective, to the relevant stakeholders, including Parliament / State Legislature and its Committees concerned, the Administrative Ministry or the Department of the Government or the statutory authority, which has formulated / piloted the legislation / policy,. This would complement the proactive role of the Commission in preventing any provision inadvertently sneaking into law that may have potential to cause appreciable adverse effect on competition.

C. Legislations / Policies for Assessment

While the number of legislations / policies to be assessed in a year would depend on the resources with the Commission, legislations / policies identified by the following three sources would be considered for assessment from competition perspective:

- i. The Advocacy Division of the Commission will continuously scan and identify the upcoming / existing economic legislations and policies which may potentially have adverse effect on competition, for assessment;
- ii. Any Government Agency, including statutory authority, may refer any upcoming / existing economic legislation or policy to the Commission for competition assessment; and
- iii. The Commission may identify any legislation/ bill for assessment.

The legislations / policies referred to / identified at (i) and (ii) above would be taken up for assessment only if it is approved by the Commission.

D. Panel of Expert Institutions

The Commission shall maintain a Panel of as many number of institutions as it feels appropriate to carry out initial competition assessment of the economic legislations or

policies referred to them. The institutions must have expertise in law, economics, finance or management. The institutions would be selected by a selection committee constituted by the Commission based on evaluation of their abilities as demonstrated by them in a sample Competition Assessment submitted by them in response to a public advertisement. The Panel of institutions would be displayed on its web site. Unless removed from the Panel for reasons to be recorded in writing on file, an institution shall remain on the Panel for a period of three years. It would, however, be eligible to be empanelled again subject to meeting the requirements. The empanelled institutions would require to sign a non-disclosure agreement with the Commission.

The Commission may arrange for training of the professionals of the institutions in the Panel on the methodology of Competition Assessment of legislations / policies and share its expectation from them while making Competition Assessment.

E. Process of Assessment

As soon as a legislation /policy is identified by the Commission for Competition Assessment, it will be assigned to (i) an institution in the Panel depending on its interest, expertise and experience, or (ii) an in-house team of officers. The Commission will decide as to which legislation / policy will be assigned to an institution or to an in-house team for assessment and if assigned to an institution, the honorarium to be paid for the assessment. The institution / team must give an assessment of the legislation / policy in the annexed format within 15 days or such period as may be prescribed, of the receipt of the assignment. The assessment shall carry findings, observations and suggestions for modification of the legislation / policy along with the rationale for the same. The Advocacy Division shall examine the assessment of the institution / team and shall submit its views along with the assessment for consideration of the Commission within 15 days of the receipt of the assessment. The Commission shall form its views at the earliest and, if it considers necessary, shall suggest modifications in the legislation / policy from competition perspective to Parliament / State Legislature and its Committees concerned, the Administrative Ministry or the Department of the Government which has piloted the legislation / formulated the policy, and the Statutory Authority. The Commission may publish the assessment made by the empanelled institution on its web site.

F. Obligations of Expert Institution

The institution must give its assessment, within 15 days or such period as may be prescribed, of its receipt. It shall exercise full care and diligence to ensure that its assessment is of very high quality. The Commission shall examine if the assessment made by the institution is satisfactory. If it is satisfactory, it shall pay, within 15 days or such period as may be prescribed, of receipt of the assessment, the honorarium indicated at the time of assignment.

G. Criteria for Assessment

The legislation/ policy shall be assessed from the competitive perspective. In particular, the assessment shall address if the it has any provision which could:

- a. cause appreciable adverse effect on competition in the relevant market in India;
- b. humble any of the salient features of a competitive market;
- c. restrict the freedom of players in the market and choices of consumers; or
- d. be in disharmony with the objectives of the Competition Act, 2002. While determining the above, the assessment should take into account the factors listed in section 19(3), 19(4) and 20(4) of the Act.

H. Effect of the Guidelines

These Guidelines shall be effective from January 1, 2017 and remain in force until further reviewed by the Commission. The Commission may relax any of these Guidelines in case of expediency. It may discontinue the Panel of institutions / these Guidelines at any time without any notice.

Annexure

Format of Competition Assessment¹

1. Name of Legislation / Policy²
2. Current Status of the Legislation / Policy
3. General Competition Assessment

(Please elaborate in 500-800 Words. Please give an overall assessment keeping in view the provisions of the Legislation/ Policy, which promote competition, and which hinder competition in the context of overall economic environment to which the legislation/ policy relates to.)

4. Does the Legislation / Policy have any provision (including the manner of its implementation) which could cause appreciable adverse effect on competition in the relevant market in India?

(Please elaborate, keeping in view the relevant market as the assessor defines it.)

5. Does the Legislation / Policy have any provision (including the manner of its implementation) which could humble any of the salient features of a competitive market, namely, free entry and free exit, number of participants, perfect symmetry of information, and ability and motivation of participants to compete?

(Please elaborate.)

6. Does the Legislation / Policy have any provision (including the manner of its implementation) which could restrict the freedom of producers, suppliers or consumers in the market or their choices?

(Please elaborate.)

7. Does the Legislation / Policy have any provision (including the manner of its implementation) which could be in disharmony with the objectives of the Competition Act, 2002, namely, prevention of practices having adverse effect on competition, promotion and sustenance of competition in markets, protection of the interests of consumers, and freedom of trade carried on by other participants in markets, in India?

(Please elaborate.)

8. Comments on each of the anti-competitive (anti-competitive according to the assessor) provisions in the Legislation / Policy in the following format (Please have a separate table as under for each such anti-competitive provision)³ :

¹For the present, this exercise is limited to competition assessment. However, this could be enriched to include competition impact assessment to the extent the assessor has data and information.

²These are upcoming / existing economic legislations or policies (Acts, Bills, Rules, Regulations and Policies).

³Please attach model, estimate, data, table, or graph, if any, in support of the assessment.

(a) Clause / Section / Para / Item No. of Legislation / Policy:

Provisions in this Clause	(Reproduce from the Legislation / Policy)
What are the likely effects of this Clause on competition?	(Please elaborate)
What could be rationale behind this Clause?	(Please elaborate)
Are the provisions in this Clause absolutely necessary in the present form to achieve the objectives of the Legislation / Policy?	(Please elaborate)
What modifications are required in this Clause from competition perspective?	(Please suggest modifications. Modification could be incorporation of sun-set clause.)
Do the modifications, if accepted, come on the way of achieving the objectives of the Legislation / Policy?	(Please elaborate)
Is there any countervailing factor that could possibly justify continuing with the existing provision in the Clause?	(Please elaborate)

(Please elaborate) (Please elaborate (Please elaborate) Please elaborate)

(b) Clause / Section / Para / Item No. of Legislation / Policy:

Provisions in this Clause	(Reproduce from the Legislation / Policy)
What are the likely effects of this Clause on competition?	(Please elaborate)
What could be rationale behind this Clause?	(Please elaborate)
Are the provisions in this Clause absolutely necessary in the present form to achieve the objectives of the Legislation / Policy?	(Please elaborate)
What modifications are required in this Clause from competition perspective?	(Please suggest modifications. Modification could be incorporation of sun-set clause.)
Do the modifications, if accepted, come on the way of achieving the objectives of the Legislation / Policy?	(Please elaborate)
Is there any countervailing factor that	(Please elaborate)

could possibly justify continuing with the existing provision in the Clause?	
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(c) Clause / Section / Para / Item No. of Legislation / Policy:
(Please add as many tables as anti-competitive Clauses the Legislation / Policy has)

Signature(s)
On behalf of the Institution

Date

Or

Signature(s)
Officers of the in-house Team

Date