

EMERGING TRENDS IN THE INDIAN COMPETITION LAW

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The author via his scholarship seeks to enunciate upon the competition law regime in India and the roles and powers inherent within the Competition Commission of India. He explains how the CCI from its inception in 2002 has made massive strides and has now become a competent and efficient body. He lists out the powers of the CCI with a special emphasis on its powers regarding regulating mergers and its power to place huge penalties on violators. He also lists the latest occurrences in the competition law regime in India; especially the Competition Bill, 2012.

I. INTRODUCTION

Indian Competition law is governed by the Competition Act of 2002 (“Competition Act”) and various regulations formed thereunder and is regulated by the Competition Commission of India (CCI) which is the nodal agency established under the Competition Act. Whilst the Competition Act was enacted in the year 2002, the substantive provisions of the Competition Act were notified much later. The provisions relating to anti-competitive agreements and abuse of dominance became effective from 20 May 2009 and the provisions relating to merger control came into force on 1 June 2011 after a long wait of almost 9 years.

II. IMPORTANT ASPECTS OF THE COMPETITION ACT

The Competition Act deals with three major areas:

- (a) *Anti-competitive agreements*: The Competition Act prohibits agreements which are anti-competitive in nature. An agreement is considered to be anti-competitive if it has the potential to result in an appreciable adverse effect on competition (“AAEC”) in India. For example, price-fixing, market sharing, output restriction, cartels;
- (b) *Abuse of dominant position*: Secondly, the Competition Act prohibits a dominant enterprise from abusing its dominant position in the market. For example, predatory pricing, excessive pricing, unfair conditions in sale, tying, leveraging, denial of market access, limiting

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production; and

(c) *Combinations*: Thirdly, Sections 5 and 6 of the Competition Act are the operative provisions that deal with merger control or the regulation of combinations in India. Section 5 prescribes worldwide and Indian turnover and assets thresholds for transactions involving the acquisition of an “enterprise” or mergers and amalgamations of an enterprise that will be subject to merger control (i.e., require prior approval of the CCI) (“Combinations²”). Section 6 prohibits combinations which causes or are likely to cause an AAEC within the relevant market in India and treats such combinations as void. In addition to the provisions under Section 5 and 5 of the Competition Act, the CCI has notified the *Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations 2011* (“Combination Regulations”) which provide the procedure for filing the merger notification.

A. Penalties

The Competition Act provides for the highest economic penalties in India. Under Section 27 of the Competition Act, the CCI has the power to order the following in case of breach of Sections 3 or Section 4: to impose a penalty up to 10% of the average of the turnover for the last 3 preceding financial years, upon each contravening party.

Further, in case of cartels, the CCI is empowered to impose a penalty of up to 3 times of the amount of profits made out of such agreement by the cartel or 10% of the average of the turnover of the cartel for the last preceding 3 financial years, whichever is higher.

In addition to the penalties, the Competition Act empowers the CCI to pass *cease and desist* orders. In case of abuse of dominance, the CCI has the power to order the division of an enterprise enjoying a dominant position, in a manner that ensures that the enterprise is no longer able to abuse its dominant position.³

In case of a contravention by a company, every person in charge and responsible for the company at the time of contravention as well as the company will be liable to be proceeded

² Any acquisition of shares, voting rights, assets, or control of one enterprise over another or the merger or amalgamation of two or more enterprises, exceeding the jurisdictional thresholds prescribed under Section 5 of the Competition Act.

Act, is referred to as a “Combination.”

³ So far, the CCI has only imposed fines and cease and desist orders against enterprises found to be abusing their dominance.

against and punished. Further, the directors, managers, secretaries or other officers of the company, with whose consent or connivance or due to whose negligence the contravention was caused, would also be liable to be proceeded against and punished under Section 48 of the Competition Act.

It should be noted that the Competition Act provides for the filing of claims for compensation to the Competition Appellate Tribunal (“COMPAT”), the appellate authority established under the Competition Act. Further, in the case of abuse of dominance, officers of a company are precluded from filing compensation claims in relation to any loss or damage arising from the CCI’s orders in relation to the division of a dominant enterprise. It is relevant to note that the COMPAT has not passed any order in relation to claims for compensation thus far.

The CCI hasn’t shied away from levying huge penalties on errant parties and has in numerous cases levied penalties that were generous to say the least. In *Builders Association of India v. Cement Manufacturers’ Association & Ors.*⁴ (Cement Cartel case), the CCI imposed a penalty of INR 6317.32 crores. In the recently passed *Coal India case*, the CCI has imposed a penalty of INR 1773.05 crores on Coal India for abuse of its dominant position. In *Belaire Owners’ Association v. DLF Limited, HUDA & Ors.*⁵, the CCI imposed a penalty of INR 630 crores on DLF for abuse of its dominant position. As such, the CCI has imposed penalty in more than a dozen cases to date.

B. Extra-territorial application of the Competition Act:

Under Section 32, the CCI has the power to inquire into any agreements executed outside India or agreements executed amongst foreign parties that may have an AAEC in the relevant market in India.

III. TRENDS IN INDIAN COMPETITION LAW

Despite being a new regulator on the block, the CCI has proved itself in a short span of five years to be a proactive, forceful and a sincere regulator conducting *suo motu* investigations across varied sectors, including gas supply, aviation, banking, power and essential commodities etc. The CCI have also passed several orders relating to various important issues such as burden

⁴ Case no. 29/2010.

⁵ Case no. 19/2010.

of proof, standard of proof⁶, single economic enterprise⁷, establishment of an agreement in the case of cartels⁸ and bid-rigging⁹ as well as the delineation of the relevant market in abuse of dominance cases.¹⁰ However, there are several open ended issues where there is no jurisprudence or guidelines provided by the CCI.

In relation to merger control, the CCI has passed more than 140 orders (including both Form I and Form II merger notifications) to date, having examined a wide variety of sectors, including aviation, automobile, steel, manufacturing, loyalty programs, information technology, media and communication, real estate, retail, pharmaceuticals, etc. Given that the Competition Act provides a maximum time period of 210 days to the CCI, the notification of the merger control provisions met with a stiff resistance from the industry which treated this as another impediment to the M&A process. Nevertheless, the CCI has thus far cleared all the Combinations within Phase I¹¹. However, the CCI's timely review of the merger filings have quelled the apprehensions of the business community that notification of transactions with the CCI could lead to tremendous delay in completing transactions.

A. Establishing existence of an agreement: Direct v. Circumstantial Evidence

In the alleged *Cement Cartel Case*, the CCI found that in absence of direct evidence, circumstantial evidence alone can be relied upon. The CCI found a trend of increases in cement prices, especially increases after two meetings of the Cement Manufacturers' Association (CMA) and steady reduction in production capacity, which did not match with the capacity utilization patterns for previous years. This was sufficient evidence to indicate a violation of Section 3(3) of the Competition Act¹². Further, the opportunity to discuss and determine prices through the

⁶ *Builders Association of India v. Cement Manufacturers' Association and Others*, Case no. 29/2010 and *All India Tyre Dealers Federation v. Tyre Manufacturers*, MRTP Case RTPE No.20/200

⁷ *Exclusive Motors Private Limited v. Automobili Lamborghini S.P.A.*, Case no 52/2010.

⁸ *In Re: Sugar Mills*, Case no. 1/2010, *Builders Association of India v. Cement Manufacturers' Association and Others*, Case no. 29/2010 and *All India Tyre Dealers Federation v. Tyre Manufacturers*, MRTP Case RTPE No.20/2008.

⁹ *In Re: Aluminium Phosphide Tablets Manufacturers*, Case no. 2/2011 and *In Re: LPG Cylinder Manufacturers*, Case no. 3/2011.

¹⁰ *MCX Stock Exchange Limited v. National Stock Exchange of India Limited*, Case no. 13/2009 and *Belaire Owners Association v. DLF Limited*, Case no. 19/2010.

¹¹ Under the Combination Regulations, the CCI is required to provide its prima facie order within 30 days of filing of the merger notification.

¹² 3. Anti- competitive agreements.-

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of

platform of the CMA, which was already engaged in collecting retail and wholesale prices for benchmarking purposes, along with the above facts, was held to be sufficient evidence. Parallel behaviour in prices, supply, dispatches, and production can be considered as an indication of the co-ordinated behaviour among the companies, relying on evidence from other jurisdictions to substantiate its arguments. As such the CCI observed that the anti-competitive conspiracies (especially cartels) are often hatched in secrecy and the companies engaged in such anti-competitive activities are not likely to leave any direct evidence of the same. The CCI held that in absence of any direct evidence of agreement among the conspirators, circumstantial evidence can be taken into consideration.

B. Competition Bill, 2012

Given that the Competition Act have certain ambiguities, the Ministry of Corporate Affairs introduced certain legislative amendments in 2013 by way of the Competition Amendment Bill, 2012 (“Bill”). However, the bill was not passed by both the houses of the Parliament and the Bill is still pending before the Parliament of India. While some of the proposed amendments are merely clarificatory, the Bill, if passed, could result in the CCI having stronger investigation powers and wider jurisdiction.

1. Proposed amendment to “Search and Seizure” norms

The CCI’s extensive powers of investigation include the power to conduct “dawn raids” i.e. carry out unannounced inspections to search for relevant evidence. However, the CCI has not used the tool of dawn raids partly because it currently lacks the authority to order the Director

enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-

- (a) directly or indirectly determines purchase or sale prices;
- (b) limits or controls production, supply, markets, technical development, investment or provision of services;
- (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
- (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition: Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services. Explanation.- For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

General (“DG”) to investigate without a warrant from the Chief Metropolitan Magistrate, New Delhi (“CMM”).

By way of an amendment to Section 41, the Bill proposes to permit search and seizure powers (including dawn raids) to the DG, after obtaining proper authorization from the Chairperson of the CCI instead of the CMM, thereby making it easier for the DG to conduct dawn raids as well as improving the quality of investigations. The amendment also empowers the DG to record statements of persons having knowledge of such information or documents, that it thinks are being withheld or are likely to be destroyed.

This move will help the CCI to use dawn raids as an important instrument to strengthen its investigation process across a variety of sectors and industries. This will also enable the CCI to collect vital direct or indirect evidence regarding alleged anti-competitive activities.

2. *Collective Dominance*

At present, the Competition Act prohibits abuse of dominance by an enterprise or a group¹³. However the abuse of dominance provisions does not apply to a situation where two or more groups which are not part of the same group abuse their “collective” dominance. Given the loophole, the Government has decided to introduce the concept of “collective dominance” in Section 4 of the Competition Act. This will allow the CCI to investigate cases where two unrelated enterprises which are not part of the same group (as defined under the Competition Act) are alleged to have abused their joint market power.

3. *Different thresholds for merger control relating to different sectors*

Currently, the asset and turnover thresholds prescribed in the Competition Act apply uniformly to all enterprises across all sectors. However, the Bill seeks to insert an enabling provision under the Competition Act allowing the Central Government to provide sector specific thresholds. While the intention of the legislature seems to be to provide variable and possibly lower asset and turnover thresholds for certain sectors (given that present asset and turnover levels are arguably high), any such variation may result in complicating the merger control rules

¹³ The term "group" has been defined under the Competition Act to mean *two or more enterprises which, directly or indirectly, are in a position to —*
(i) *exercise twenty-six per cent. or more of the voting rights in the other enterprise; or*
(ii) *appoint more than fifty per cent. of the members of the board of directors in the other enterprise; or*
(iii) *control the management or affairs of the other enterprise.*

and create confusion in cases where the parties to the combination are engaged in several businesses in varied sectors.

C. Leniency Regulations

The CCI has issued the *Competition Commission of India (Lesser Penalty) Regulations, 2009* (the “Lesser Penalty Regulations”) prescribing the method and extent to which the CCI may grant leniency (lesser penalties) to applicants that make any “vital disclosure” relating to a cartel. The reduction in penalties that may be awarded by the CCI depends on when the disclosure is made.

First applicant – up to 100% reduction of penalty;

Second applicant – up to 50% reduction of penalty, if they make a disclosure of evidence that provides significant added value to the evidence already in possession of the CCI or the DG;

Third applicant - up to 30% of the full penalty leviable, only if the information is a vital disclosure, which enables the CCI to form a *prima facie* opinion in relation to the existence of a cartel, and the CCI did not have sufficient evidence to form such opinion, at the time of making the application.

Whilst the leniency program has been in place since 2009, it has not been utilized. However, there has been several news report which indicate that at least one leniency applications have been filed before the CCI and the matter is currently pending before the CCI.¹⁴

D. Definition of “control” - from merger control perspective

The term “control” has been defined under the Competition Act to include controlling the affairs or management of one or more enterprises or group, either jointly or singly. Given that this definition of control is a circular definition it leaves scope for confusion and ambiguity. However in *MSM India/SPE Holdings/SPE Mauritius*¹⁵, the CCI has effectively concluded that the right to block special resolutions (by way of a more than 26% equity stake) amounts to ‘negative control’, which is ‘control’ for the purposes of the Competition Act. Thus, at least for the purposes of the merger control provisions under the Competition Act, negative control would amount to control. However, the CCI may take a different view on what amount to control

¹⁴ http://articles.economicstimes.indiatimes.com/2014-02-27/news/47739680_1_alleged-cartel-competition-commission-regulator

¹⁵ C-2012/06/63

depending on the facts of the case.

IV. CONCLUSION

The Competition Act is an important piece of legislation which regulates and governs many aspects of the day-to-day working of any business. Non-Compliance of the Competition Act may lead to serious damage to reputation and expose the company to stringent penalties and claim for damages. The CCI has proved to be an effective regulator in a short span of time. By imposing heavy penalties on various enterprises, the CCI has given a clear signal to the industry that it will not take the violation of the Competition Act lightly. In relation to merger control, it is expected that the CCI is likely to bring greater clarity and certainty in the law by making appropriate changes in the merger control provisions under the Competition Act as well as the Combination Regulations.