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India Competition Update: Commission & Appellate Tribunal Up and Running

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I. THE COMMISSION

Passed by the Indian Parliament in 2002, India's Competition Act ("the Act") faced a long and arduous battle before the Supreme Court regarding the constitutional validity of some of its provisions and, therefore, the Competition Commission of India ("CCI" or "Commission") could not commence its regulatory/enforcement activities despite having been officially established in 2003. The single member that had been appointed to the Commission in 2003 retired in 2008 coming to the end of his term, resulting in a period of general lull.

The Government finally got the ball rolling in March 2009 when the statutorily-prescribed quorum for the CCI to become operative was achieved with the assumption of office by the Chairperson, Mr. Dhanendra Kumar (a member of the Indian Administrative Service and former Executive Director of the World Bank), and members Mr. Harish Chandra Gupta (former Coal Secretary) and Mr. Ratneshwar Prasad (former Chairman of Central Board of Direct Taxes). In mid April 2009, two more members, Mr. Prem Narayan Parashar (an advocate and former member of the Income Tax Appellate Tribunal) and Dr. Geeta Gouri, (an economist and former member of the Andhra Pradesh Electricity Regulatory Commission) assumed office. On May 20, 2009, the substantive provisions of the Act relating to "anti-competitive agreements" and "abuse of dominant position" were finally brought into force by the Government.

Mr. Anurag Goel, a former Secretary of the Ministry of Corporate Affairs, joined the CCI in September 2009, and the last seat was filled with the appointment of Mr. M.L. Tayal, former principal secretary to the Chief Minister of Haryana, in October 2009. The CCI is presently fully engaged in the recruitment of other officials and staff. About 25 officers (mostly on deputation from different Departments of Government) have already assumed charge and more are in the offing. The process of engagement of some professionals/experts is also at an advanced stage. In all, the CCI is looking at an approximate strength of 240 in a year's time.

Meanwhile however, the relevant provisions of the Act that dissolved the erstwhile Monopolies & Restrictive Trade Practices Commission ("MRTPC") were not notified along with the substantive provisions mentioned above. This led to a peculiar situation where both the CCI as well as the MRTPC were exercising jurisdiction over competition-related complaints under their respective enactments. The confusion was ultimately sorted out in mid October 2009 with the dissolution of the MRTPC and the transfer of all pending cases to the newly established Competition Appellate Tribunal, the appellate authority constituted under the Act.

The experience of the CCI over last year has been somewhat muted. The Commission has reportedly received around 30 complaints but has yet to pass a single effective order. The

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Commission will eventually be evaluated on its performance "in the field" and while it may be too early to predict the outcome, the CCI would certainly benefit by clearly identifying goals and prioritizing investigations as a way of managing its resources and delivering maximum consumer gains. For example the Commission could dedicate more resources towards sectors such as healthcare, petroleum, construction, banking and finance, communications, etc. The discovery and prosecution of cartels ought to be another focus area, and resources deployed proportionately. The Commission is facing a staff crunch with at least six or seven cartel cases pending since May 2009 and it is important that appointments be made a priority.

In the meantime, the Commission has also held a fresh round of consultation with industry and professionals regarding its proposed merger regulations, and a revised draft is expected to be published shortly. The Commission had published its Draft Combination Regulations in mid 2008, but following the retirement of its sole member and reconstitution of the Commission in 2009, it was thought prudent to hold a fresh round of discussions prior to finalizing the regulations.[2]

II. THE APPELLATE TRIBUNAL

Along with the substantive provisions of the Act being brought into force, the Government established the three member Competition Appellate Tribunal (the "Tribunal") headquartered in New Delhi. The Tribunal is headed by former Supreme Court Justice Arijit Pasayat as Chairperson, with ex-Secretary Personnel, Mr. Rahul Sarin, and former Deputy Comptroller & Auditor General, Mrs. Praveen Tripathi, as its other two members.

In its brief tenure, the Tribunal has disposed of several pending cases under the MRTP Act with surprising speed and efficiency. Its jurisdiction under the provisions of the Act, however, has so far been invoked only once. The Tribunal took that opportunity to deliver a very telling judgment.

In October 2009, Jindal Steel & Power Ltd. ("Jindal") approached the CCI with a complaint regarding a "Memorandum of Understanding" executed between the Steel Authority of India ("SAIL") and the Indian Railways in 2003. The MoU essentially provided that SAIL would upgrade its facilities to manufacture rails of the quality and specifications desired by the Indian Railways, which in turn would purchase its entire requirement of rails only from SAIL. Jindal asserted in its complaint that the arrangement between SAIL and the Indian Railways amounted to an exclusive supply agreement in violation of Section 3 of the Act. Jindal further alleged that SAIL occupied a super dominant position in the market for supply of rails in India, and that it was an abuse to foreclose the market to Jindal, the Railways being the largest purchaser of rails in India.

On reviewing the information filed by Jindal, the Commission decided it would be prudent to first seek SAIL's preliminary thoughts on the complaint, and consequently sent a copy of the documents to SAIL and directed it to submit its comments within two weeks. SAIL, on receiving the documents, which ran into several hundred pages, realized that filing a response within the time-period stipulated by the CCI would be problematic, and sought an extension. The Commission, however, decided that an extension was not warranted at this stage, formed an opinion that a *prima facie* case existed, and referred the matter to the Director General ("DG") for

[2] For more information on the draft regulations published by the CCI in 2008, *see* Hussain & Nair, *Steps in the Right Direction: A Look at the Draft Regulations Framed by the CCI Regarding M&A Controls,* 8(2) CPI ANTITRUST CHRONICLE (August 2008), available at www.competitionpolicyinternational.com.

a detailed investigation. SAIL, feeling aggrieved by the turn of events, filed an appeal before the Tribunal. Its basic grievance was that of not being given sufficient time to respond to the CCI, prior to the Commission forming its opinion as to whether a *prima facie* case existed. Jindal and the Commission opposed the proceedings, stating that the appeal was not maintainable since the direction of the CCI was not appealable under the provisions of the Act.

At the heart of the controversy are Sections 26 and 53A of the Act. Section 26[3] lays out the procedure to be followed by the CCI after receiving a complaint such as Jindal's. Sub-section 1 states that where the Commission "is of the opinion that there exists a *prima facie* case, it shall direct" the DG to investigate into the matter. Appeals by the Tribunal are entertained under Section 53A[4] of the Act, which is worth reproduction:

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[3] Section 26:

1. On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, 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: Provided that if the subject matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.
2. Where on receipt of a reference from the Central Government or a State Government or a statutory authority or information received under section 19, the Commission is of the opinion that there exists no prima facie case, it shall close the matter forthwith and pass such orders as it deems fit 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.
3. The Director General shall, on receipt of direction under sub-section (1), submit a report on his findings within such period as may be specified by the Commission.
4. The Commission may forward a copy of the report referred to in sub section (3) to the parties concerned: Provided that in case the investigation is caused to be made based on reference received from the Central Government or the State Government or the statutory authority, the Commission shall forward a copy of the report referred to in subsection (3) to the Central Government or the State Government or the statutory authority, as the case may be.
5. If the report of the Director General referred to in sub-section (3) recommends that there is no contravention of the provisions of this Act, the Commission shall invite objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be, on such report of the Director General.
6. If, after consideration of the objections and suggestions referred to in sub section (5), if any, the Commission agrees with the recommendation of the Director General, it shall close the matter forthwith and pass such orders as it deems fit and communicate its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.
7. If, after consideration of the objections or suggestions referred to in sub section (5), if any, the Commission is of the opinion that further investigations is called for, it may direct further investigation in the matter by the Director General or cause further inquiry to be made by in the matter or itself proceed with further inquiry in the matter in accordance with the provisions of this Act.
8. If the report of the Director General referred to in sub-section (3) recommends that there is contravention of any of the provisions of this 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 this Act.

[4] 53A:

1. The Central Government shall, by notification, establish an Appellate Tribunal to be known as Competition Appellate Tribunal:
   a) to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under sub-sections (2) and (6) of section 26, section 27, section 28, section 31, section 32, section 33, section 38, section 39, section 43, section 43A, section 44, section 45 or section 46 of the Act;

> 53A. (1) The Central Government shall, by notification, establish an Appellate Tribunal to be known as Competition Appellate Tribunal to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under sub-sections (2) and (6) of section 26, section 27, section 28, section 31, section 32, section 33, section 38, section 39, section 43, section 43A, section 44, section 45 or section 46 of the Act.

The objection raised by the Respondents was that only the orders passed by the CCI under the provisions listed in Section 53A were appealable and, therefore, CCI's reference of the matter to the DG for investigation, being under sub-section (1) of Section 26 and not sub-sections (2) or (6), was not appealable under Section 53A.

The Tribunal disagreed.[5] According to the Tribunal, three different words are used in section 53A, namely "direction," "decision," and "order." Moreover, these are used in disjunctive—"direction issued **or** decision made **or** order passed." The Tribunal therefore reasoned that if appeals were limited to the orders passed under the provisions listed in the Section, it would render the terms 'direction' and 'decision' "superfluous."[6] Rejecting the argument that such an interpretation would lead to a floodgate of litigation, the Tribunal noted that "[t]he legislature does not waste its words"[7] and "[a] Court of law is not concerned with the policy of the administration nor with the effect of the piece of legislation of any section of society. Courts have to administer the law as they find it."[8]

It is not clear how far the effects of this judgment will be felt. Technically, if, as concluded by the Tribunal, an appeal can lie against any direction or decision, then directions by the Commission as to the period within which the DG must submit its report;[9] further investigations or inquiries to be carried out;[10] publication of a proposed combinations;[11] invitation of comments of the public on a proposed combinations;[12] references by or to a regulatory authority in areas such as telecom, electricity, or insurance;[13] directions regarding summoning or discovery of documents, calling of experts, etc.,[14] may all be appealed. Whereas appeals on such matters may never materialize in practice, this judgment does set the stage for further *prima facie* decisions of the Commission being challenged before the Tribunal.

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b) to adjudicate on claim for compensation that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any finding of the Commission or under section 42A or under subsection(2) of section 53Q of this Act, and pass orders for the recovery of compensation under section 53N of this Act.

2. The Headquarter of the Appellate Tribunal shall be at such place as the Central Government may, by notification, specify.

[5] Order of the Competition Appellate Tribunal dated 15th February 2010 in Appeal No. 1 of 2010, available at http://compat.nic.in/Upload/PDFs/Court%20Order%2015.2.2010.doc

[6] *Id.*, ¶ 15, p. 12.

[7] *Id.*, ¶ 17, p. 13.

[8] *Id.*, ¶ 18, p. 15.

[9] § 26(3).

[10] § 26(7).

[11] § 29(2).

[12] § 29(3).

[13] §§ 21 and 21A.

[14] § 36.

The Tribunal further held that the Commission must set out the reasons on which its opinion regarding the existence of a *prima facie* case is based. Such reasons, it was noted, "need not be elaborate but should be sufficient to show application of mind."[15]

One is left wondering whether the outcome would have been different had the Commission not sought the comments of SAIL prior to referring the matter to the DG for investigation. The Commission had pointed out to the Tribunal that under the Act, it was not obligatory on its part to hear a respondent prior to forming a *prima facie* opinion and referring the matter to the DG. However, the Tribunal noted that after having done so in this case, "it [was] not open to the Commission to abandon the opportunity granted midway."[16]

Interestingly, at the time of filing the appeal, the Commission was not made a party respondent. The Commission subsequently moved an application seeking to be impleaded as such, arguing that the Commission must be given a chance to defend its order.

Again, the Tribunal disagreed. Reviewing the scheme of the Act and the nature of the Commission, the Tribunal concluded that the Commission "cannot be a respondent in view of the accepted position of the Commission that it has no adversarial role and its role is only investigative in nature."[17] Citing judgments of the Supreme Court where the practice of impleading Courts or Tribunals was deprecated, the Commission's application was dismissed.[18]

This is a marked departure from similarly placed regulators. For example, the Securities and Exchange Board of India ("SEBI") is a statutory authority that performs investigative, regulatory, and adjudicatory functions in enforcing the provisions of the SEBI Act, 1992. On complaints made by investors, an investigation is undertaken by SEBI to determine whether the provisions of the SEBI Act or regulations have been violated and an appropriate order is passed. SEBI is almost always a party respondent to appeals before the Securities Appellate Tribunal. Similarly, the state electricity regulatory commissions are made respondents to appeals before the Appellate Tribunal for Electricity. As such, the Tribunal's comparison of the CCI to courts and tribunals may have been misplaced. It also leads to the curious situation where the Commission is incapable of defending its order before the Tribunal but may then appeal from the Tribunal's order and defend itself before the Supreme Court.[19] Indeed, this is the very position in the Jindal case, where the Commission has filed an appeal before the Supreme Court.

The matter is currently *sub judice* before the Supreme Court of India, and its decision eagerly awaited.

[15] *Supra* note 5, ¶ 37, p. 26.
[16] *Id.*, ¶ 33, p. 23.
[17] *Id.*, ¶ 29, p. 21-22.
[18] *Id.*, ¶¶31-33, pp. 22-23.
[19] § 53T.