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Competition Commission of India's Trysts with Law and Policy: Enforcement One Year On

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I. INTRODUCTION

The (Indian) Competition Act, 2002 ("Act") aims to promote competition and to prevent practices that adversely affect competition. The Competition Commission of India ("CCI") is the statutory body created to enforce the Act. Although enacted in 2002, the Act is being brought into force in a phased manner. Sections 3 and 4 of the Act (relating to anticompetitive agreements and abuse of dominance) were effectively brought into force in May 2009, along with the enforcement powers of the CCI. Sections 5 and 6, which create India's merger control regime, requiring CCI pre-clearance of mergers, acquisitions, and amalgamations meeting specified worldwide and/or Indian turnover/asset-based thresholds (referred to in the Act as "combinations") have not yet come into effect.

The Act superseded the Monopolies and Restrictive Trade Practices Act, 1969 ("MRTP Act"), which sought to regulate monopolistic, restrictive, and unfair trade practices with effect from September 1, 2009 when the MRTP Act was repealed. Later, on October 14, 2009, the Monopolies & Restrictive Trade Practices Commission ("MRTPC"), which had jurisdiction over MRTP Act cases, was dissolved, and pending MRTPC investigations and cases were transferred to the CCI and the Competition Appellate Tribunal ("COMPAT"), respectively.

2010 was a landmark year for the development of competition law in India, as it was the first full year with the substantive enforcement provisions of the Act in force. In that regard, 2010 saw a significant increase in the enforcement activities by the CCI. Certain key issues, pertaining to the CCI's jurisdiction, powers, and obligations towards parties to the investigation etc., which will shape the way the CCI functions and handles investigations in the future, were also decided by the Supreme Court of India and the Bombay High Court.

II. ENFORCEMENT OF COMPETITION ACT—YEAR 1

The CCI consists of seven members including the Chairman. It is supported by various case officers (many of whom are lawyers and economists). The Director General's ("DG's") office is the investigating arm of the CCI. The CCI, which is very much in the building-up stage, has recruited a large number of lawyers, financial analysts, and economists. Regular training sessions are being conducted for the CCI officials in various aspects of implementation of the Act. It is interesting to note that the U.S. and European competition law regulators have undertaken

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significant training initiatives for CCI officials, either through frequent visits to India and/or through inviting CCI officials to their offices.

After a relatively slow start in the initial few months of its existence, CCI is now looking at nearly 100 active cases under the Act and a large number of these cases relate to industries of significant importance to the Indian economy.

Two major cases being investigated by the CCI that reached the COMPAT and onward to the Indian Supreme court in 2010 related to: (a) an exclusive rail supply arrangement between Steel Authority of India Limited and Indian Railways, which was challenged by Jindal Steel and Power Limited; and (b) a code share agreement between Jet Airways and Kingfisher Airlines. Some of the other cases that the CCI is also investigating included alleged breaches of the Act involving; (i) various cement companies allegedly cartelizing to fix cement prices; (ii) the sugar industry; (iii) prepayment penalties levied by banks and housing finance companies on home loans; (iv) various contracts related to the recently concluded Commonwealth Games in Delhi; (v) public sector insurance companies; (vi) the National Stock Exchange, for allegedly abusing its dominant position; (vii) a builder for incorporating allegedly unfair terms and conditions in its contracts; (viii) aviation turbine fuel; and (ix) a collective boycott by travel agents of Singapore Airlines for refusing to pay commissions etc.

The CCI has, from its inception and at various public *fora*, clearly stated that that a key enforcement priority will be delivering benefits to the "common man" or, more popularly, "*aam aadmi*" in Hindi. For example, the CCI granted interim relief (in June 2010) in a case involving an alleged anticompetitive agreement by a film industry trade association in the state of Karnataka severely limiting the number of cinemas in which a newly released Hindi film could play.

A. Landmark Decisions

In its first ever decision on the operation of the Act, the Supreme Court of India ("Supreme Court"), in *Competition Commission of India v. Steel Authority of India Limited and Jindal Steel and Power Limited*,[2] decided in favor of the CCI on several procedural and jurisdictional matters (primarily related to initiation, conduct, and completion of the investigation), that the CCI had brought before it on appeal from a decision of the COMPAT.[3] This case presented the Supreme Court with an opportunity to clarify several aspects of the Act that will be critical for the efficient and effective functioning of India's new competition law regime. The main findings included:

a. *Notice and/or hearing at the prima facie stage:* There is no statutory duty on the CCI to issue notice of or grant a hearing, nor can any party claim, as a matter of right, notice and/or a hearing prior to the CCI's forming an opinion directing an investigation. However, during this initial stage, the CCI, in its sole discretion and in appropriate cases, may call upon the concerned parties to render required assistance (including an oral hearing) or produce requisite information.

b. *Granting Interim Relief:* The power of the CCI to issue interim orders under Section 33 of the Act has to be exercised sparingly and under compelling and exceptional circumstances. The CCI, while recording a reasoned order regarding its decision to grant

[2] Civil Appeal Number 7779/2010, http://cci.gov.in/menu/civilAppealNo.7779.pdf.
[3] http://compat.nic.in/JudgementsAndOrdersFeb2010.html.

or deny interim relief, should, *inter alia*: (i) record its satisfaction (which has to be of much higher degree than formation of a *prima facie* view under Section 26(1) of the Act) in clear terms that an act in contravention of the stated provisions has been committed and continues to be committed or is about to be committed; (ii) It is necessary to issue an order of restraint; and (iii) from the record before the CCI, it is apparent that there is every likelihood that the party moving for interim relief is likely to suffer irreparable and irretrievable damage or there is definite apprehension that it would have an adverse effect on competition in the market.

c. *Recording of reasons*: The CCI is expected to record at least some reasons even while forming a *prima facie* view about the existence of a case under the Act. However, while passing directions and orders dealing with the rights of the parties in its adjudicatory and determinative capacity, the CCI must pass "speaking orders,"[4] upon due application of mind, responding to all the contentions raised before it by the parties to the investigation.

d. *Appealable orders*: An appeal shall lie only against such directions, decisions, or orders passed by the CCI before the COMPAT which have been specifically stated under the provisions of Section 53A (1)(a) of the Act.

e. *CCI as a necessary/proper party*: The CCI shall be a necessary party in cases where inquiry has been initiated on the CCI's own initiative and, in all other cases the CCI shall be a proper party, in appellate proceedings before the COMPAT.

In addition to the above, the Supreme Court also issued certain directions for maintaining confidentiality and timely completion of the investigations. It is believed that the CCI has framed regulations which will give the DG's office required flexibility in relation to timelines for completing investigations.

B. Kingfisher Airlines Limited and Another v. Competition Commission of India[5]

In a case dealing with the temporal scope of the Act that was litigated before the Bombay High Court, Kingfisher Airlines ("Kingfisher") and Jet Airways ("Jet"), two leading India-based airlines, announced a cooperation agreement. The agreement in question related to, *inter alia*, code sharing, joint fuel management, common ground handling, and joint network rationalization. The agreement was entered into in October 2008 (i.e., before the substantive enforcement provisions of the Act came into force), but continued to be in force even after the Act came into force.

The CCI, on receipt of a complaint (or "information") alleging that Kingfisher and Jet had entered into an anticompetitive agreement which was causing an appreciable adverse effect on competition and were abusing their dominant position in the market, formed a *prima facie* view that a case under the Act had been made out and directed that investigation be conducted by the DG. Kingfisher filed a writ petition in the Bombay High Court challenging this direction, and the Bombay High Court examined, *inter alia*, the following critical issues:

a. *Retrospective application and continuing agreements:* It was contended that an investigation into an agreement entered into prior to the enforcement of the Act amounted to retrospective

[4] Orders supported by sufficient reasons

[5] http://bombayhighcourt.nic.in/data/original/2010/WP180609310310.pdf .

application of a penal statute,[6] which is disallowed in India by virtue of the application of Article 20 of the Constitution of India, 1950 ("Constitution"). The Bombay High Court held that the Act was not a penal statute and that the investigation was legitimate as the CCI was empowered to investigate any agreement in force at the time the enforcement of the Act was notified. Therefore, the application of the statute was not retrospective.

b. *Defining relevant markets at a prima facie stage:* It was contested that there was an infirmity in the *prima facie* order passed by the CCI since it did not define the relevant market for the purposes of the investigation. The Bombay High Court observed that the standard that the CCI must meet when ordering an investigation is a *prima facie* standard and, therefore, it need not define the relevant market before ordering an investigation.

Kingfisher appealed the above order to the Supreme Court, but ultimately withdrew its appeal.[7]

C. CCI's first substantive decision - Neeraj Malhotra v. HDFC Bank and Ors.[8]

The CCI, on December 2, 2010, issued its first substantive decision in a case relating to the imposition of pre-payment penalties by banks and housing financial companies ("HFC") on premature repayment of housing loans. The CCI unanimously agreed that no bank was guilty of an abuse of a dominant position and, by a 4 to 2 majority, found that the banks and HFCs were not part of any anti-competitive agreement.

The complaint in this case was filed by an advocate and alleging that number of banks and HFCs had agreed to impose a pre-payment penalty on premature repayment of housing loans, thus violating Section 3 of the Competition Act. The complaint also alleged that there was an abuse of a dominant position by the banks and HFCs in levying this penalty. The DG's investigation concluded that there was no abuse of dominance, but found that banks and HFCs were guilty of entering into an anti-competitive agreement. The CCI, overruling the DG's investigation, disagreed with this finding as it characterized the actions of the banks as staggered and not simultaneous, and, therefore, not the result of an agreement. The two dissenting opinions agreed with the DG's analysis and found that the banks were guilty of a tacit agreement to impose a pre-payment penalty.

D. Case Closure Decisions

The CCI, at the end of the first year of its existence, has not yet published any decision discussing substantial questions of law, a matter after a detailed investigation by the DG has been ordered. There have, however, been several case closure decisions[9] stating that no *prima facie* case existed, for various reasons such as: (a) failure to supply sufficient information;[10] (b) party

[6] A penal statute is a statue that imposes penalties consequences on a person for non-compliance. This essentially includes statutes that criminalize certain kinds of behavior.

[7] http://courtnic.nic.in/supremecourt/temp/dc%201687710p.txt.

[8] Decision available at

[9] 25

[10] Suresh Goel v. Seagate Singapore International Headquarter Ltd., http://cci.gov.in/menu/SeagateCaseNoC35.pdf; All India Distillers' Association, New Delhi v. Haldyn Glass Gujarat Ltd. Baroda & Others, *available at* http://cci.gov.in/menu/AllIndiaDistAsso170910.pdf.

complained against was a government ministry and, under the circumstances of the case, was not an enterprise;[11] (c) action complained of was a sovereign function of government;[12] etc.

III. MERGER CONTROL: WHEN IS IT COMING INTO FORCE?

With numerous false starts throughout 2010, the Indian merger control regime is still not in force. While there continue to be rumors about the exact date, there is no authoritative source on when Indian merger control will finally see the light of day. To some degree, the delay has been occasioned by concerns in some quarters that the financial thresholds in the Act are too low and could catch many relatively insignificant transactions, thereby impeding expansion opportunities in India. According to a recent press report,[13] we understand that the merger control provisions under the Act may be brought into force in the relatively near future (e.g., 2011). While not confirmed, the following may be some of the possible amendments to the existing merger control provisions of the Act:

a. *Additional thresholds:* Merger control thresholds are likely to be revised effectively upwards. Moreover, only those proposed mergers, acquisitions, or amalgamations that meet the financial thresholds and where the smaller enterprise has turnover of at least INR 750 crores (approximately USD 162 million)[14] or assets worth INR 250 crores (approximately USD 54 million) will be required to be notified.

b. *Statutory suspensory time period:* The total time for investigating a proposed combination will be reduced from 210 days[15] to 180 days.[16]

Further, several sectoral regulators are seeking exemptions from merger control laws for their respective sectors. For example, the Reserve Bank of India is seeking an exemption from merger control laws for bank mergers. Similar demands for exempting the shipping industry have also been made.

From a competition policy perspective, it appears that, as part of the overall decision to make the Act's merger control provisions effective, the Indian Government will have to engage in a careful balancing exercise between the CCI's powers to review mergers and at the same time allowing sector-specific regulators to retain some control over review process of the mergers in their respective sectors. Additionally, several gaps in the existing merger control provisions of the Act have been a cause for concern for Indian industry, including the lack of transitional provisions, treatment of joint ventures (discussed below), triggering event, etc.

[11] Travel Agents Association of India v. Balmer Lawrie and Co. Ltd., http://cci.gov.in/menu/BalmerCaseNo39.pdf .

[12] Internet Service Providers Association of India (ISPAI) v. Department of Telecommunications (DoT), http://cci.gov.in/menu/CaseNo10-2009.pdf.

[13] http://www.thehindubusinessline.com/2010/09/29/stories/2010092953580100.htm.

[14] Exchange rate assumed as 1 USD = INR 46

[15] Wherever the Act refers to "days," the reference is to calendar days unless otherwise stated. This article also follows the same format.

[16] http://www.thehindubusinessline.com/2010/09/29/stories/2010092953580100.htm.

IV. SOME KEY GRAY AREAS UNDER THE ACT

A. Treatment of Joint Ventures

Joint ventures ("JVs") are not specifically covered under the merger control provisions of the Act. However, in the event that the JV is established by way of acquiring shares of an existing company, the transaction, being an acquisition, could become notifiable (if it meets the prescribed thresholds) to the CCI. Significantly however, in the event the JV is established by way of the JV partners subscribing to the share capital of a newly incorporated company, the Act provides no clarity as to whether the merger control provisions of the Act would become applicable or not.

Another important issue relating to treatment of JVs is the lack of classification, i.e., "full-function joint ventures" or "non-full function joint ventures." The former are created as long lasting, independent entities in a particular market, with the possibility that they could change the market structure permanently. The latter are formed with the intention that only a particular function (e.g. R&D, marketing, etc.) is to be performed by them and they do not exist independently of their parent companies in the market. The full function JVs that meet the EU merger regulation thresholds must be pre-notified to the European Commission. In contrast, non-full function JVs do not need to be notified to the European Commission and are examined only under laws relating to anticompetitive agreements. A similar classification of JVs in India, which is currently not present, would help differentiate their impact on competition and clarify their expected treatment under the Act.

B. Fining Guidelines

The penalties for violating provisions of the Act can be significant and are based on turnover size (and, in the case of cartels, possibly profit). However, it is not clear as to (a) whether the fines relate to the worldwide or Indian turnover of the company found to be infringing the Act and (b) whether the turnover is limited to the product/service at issue in the breach. This lack of guidance creates uncertainty for all parties involved and may be especially problematic for large multinational corporations doing business in India. Further, there is no guidance with regard to aggravating and/or mitigating factors while deciding the quantum of the fine, other than a statutory maximum cap.

C. Transitional Provisions

The Act does not currently provide for any transitional provisions for pending transactions when merger control finally becomes effective in India. Stated another way, it is not clear whether transactions that have been signed or public offers which have been launched but not closed would be subject to Indian merger control law. It is possible and desirable that the statutory instrument used to implement the merger control provisions of the Act, or any regulations brought into force with the merger control provisions, will provide for this eventuality, as this is clearly a gap in the law that needs to be addressed.

V. CONCLUSION

India is one of the last major jurisdictions to introduce competition law and the world is clearly watching the evolution of the law. CCI has recruited a significant number of people but lack of sufficient resources at the DG's office still remains a challenge. The CCI is slowly but surely finding its feet in dealing with the large number of complaints that it is receiving, involving novel questions about application of the Act. It is evident that the clear focus of the CCI is on

providing as much benefit as possible to the "*aam admi*." At this stage, the, CCI has not yet framed its priority guidelines to deal with cases which it considers would be more beneficial and in the larger public interest. The decisions from various Indian courts suggest that they are willing to support and establish the CCI as a credible regulator and brush aside any baseless challenges to its jurisdiction. Indeed, the Supreme Court has gone a step further by laying out criteria for the efficient functioning of the CCI.

The next few years will be important for the CCI from the perspective of building its reputation as a credible and serious regulator that is willing to learn from its experience during these initial years. The CCI has already made significant steps by implementing many of the best practices applied by jurisdictions abroad and by being trained by experienced competition regulators from across the globe. While admittedly there appears to be resistance to the implementation of merger control, once the Government enforces these provisions, the CCI will really be tested, both in terms of its priorities due to its ever-increasing workload and in terms of dealing with both *ex ante* and *ex post* competition law regulation.