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The Future of Competition Law in India: Reading The Portents

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I. INTRODUCTION: THE REGIME THUS FAR

Competition law in India is governed by the Competition Act, 2002 (“Act”) and accompanying regulations. The Act itself came into force in phases: the provisions relating to anticompetitive agreements and abuse of dominance becoming operational as of May 20, 2009 and the provisions relating to merger control² being notified on June 1, 2011. The competition law regime in India has only been in force for less than three years, with the merger control regime being in force for approximately 18 months.

Despite the relatively nascent merger control regime, the Competition Commission of India (“CCI”) has quickly established its credibility as a regulator, having undertaken several *suo motu* investigations and examined complaints relating to various sectors (such as cement, tires, steel, coal, aviation, sugar, etc.). They have also passed several orders pertaining to issues such as burden of proof and the establishment of an agreement in the case of cartels³ and bid-rigging⁴ as well as the delineation of the relevant market in abuse of dominance cases.⁵ Nevertheless, there remain several unresolved issues, including the lack of guidelines or rationale for the imposition of penalties by the CCI in its orders thus far, the inconsistencies in the approach of the CCI towards the standard of proof to establish a cartel, etc.

In relation to merger control, the CCI has passed 96 orders, having examined a wide variety of sectors, including steel, manufacturing, information technology, media and communication, private equity investment, real estate, retail, pharmaceuticals, etc. Given that the maximum time period for the CCI to review Combinations under the Act is 210 days, the introduction of the merger control regime was initially resisted by industry as being a roadblock in the M&A process, affecting transaction timelines as the CCI reviewed Combinations⁶ under

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² Including the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011, which govern the procedural aspects of merger control under the Act.

³ *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.

⁴ *In Re: Aluminium Phosphide Tablets Manufacturers*, Case no. 2/2011 and *In Re: LPG Cylinder Manufacturers*, Case no. 3/2011.

⁵ *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.

⁶ 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 Act, is referred to as a “Combination.”

the mandatory suspensory regime.⁷ Nevertheless, the CCI has thus far cleared all 96 Combinations within Phase I and has taken up to 78 days (inclusive of clock stops) for its review.

Even though the CCI has been clearing merger notifications at a brisk pace, it has considerable ground to cover in relation to bringing about clarity in the law. While the CCI has clarified its stance on control,⁸ the determination of “enterprise” in the case of slump sales,⁹ the scope of the exemption to intra-group mergers and amalgamations,¹⁰ and, most recently, the duration of non-compete clauses,¹¹ there remain several grey areas, including the determination of turnover under the Act, the treatment of joint ventures, the scope of the exemption for Combinations occurring entirely overseas, etc.

The merger control regime also underwent amendment in February 2012, which brought about several significant substantive and procedural amendments that addressed some of the loopholes in the Act and were designed to bring clarity in the law and simplify the process of notification. The amendments were moderately successful in this regard.¹²

II. THE FORECAST FOR INDIAN COMPETITION LAW IN 2013

A. Legislative Amendments

In acknowledgment of the fact that the regime continues to have certain ambiguities, significant legislative amendments are likely to be brought about in 2013 by way of the Competition Amendment Bill, 2012 (“Bill”), which has been tabled before the Parliament of India.¹³ 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.

B. Dawn Raids and Increased Investigations

Even though the CCI has initiated *suo motu* investigations in various sectors, it has not yet conducted any dawn raids. The CCI is currently reportedly investigating alleged cartels in

⁷ While the Act provides for a total time period of 210 days for the CCI’s review, the review period is divided into a Phase I investigation period, which is a 30-day period from the date of notification of a Combination (excluding “clock stops” where the CCI requests parties for further information or clarifications), within which time the CCI is required to pass a *prima facie* order approving, disapproving, proposing modifications to the Combination, or initiating a Phase II investigation. The Phase II investigation lasts for up to 210 days from the date of notification of the Combination and includes publication of non-confidential details of the Combination in public newspapers and the invitation of public comments or objections to the Combination, especially from stakeholders such as customers, competitors, suppliers, etc.

⁸ *Century Tokyo Leasing Corporation/Tata Capital Financial Services Limited*, C-2012/09/78; *SPE Investments/SPE Holdings/MSM Sony*, C-2012/06/63; *Alok Industries Limited/Grabal Alok Impex Limited*, C-2012/1/28.

⁹ *Wockhardt/Danone*, C-2011/08/03; *Aica Kogyo Company Limited/Bombay Burmah Trading Corporation Limited*, C-2011/09/04; *NHK Automotives/Bombay Burmah Trading Corporation Limited*, C-2011/10/05.

¹⁰ *Tata Chemicals Limited/Wyoming I*, C-2011/12/12; *Alstom Holdings/Alstom Projects*, C-2011/10/06.

¹¹ *Hospira/Orchid Chemicals and Pharmaceuticals*, C-2012/09/79.

¹² Please see R. Shyam Khemani, Cyril Shroff, & Nisha Kaur Uberoi, *Merger Control in India*, CPI ANTITRUST CHRON. (October 2012) (1) for an analysis of the amendments to the merger control regime.

¹³ The Bill was introduced in the winter session of Parliament (November 22, 2012 to December 20, 2012), but was not passed by both houses of Parliament.

relation to the real estate sector, steel sector,¹⁴ oil manufacturing companies,¹⁵ rayon and man-made fibers industry,¹⁶ dairy sector, pharmaceuticals sector, and telecommunications,¹⁷ among others. Given that the CCI has expressed the difficulty of procuring evidence while investigating cartels and bid-rigging, which typically operate in secrecy, dawn raids will serve as a useful tool in the course of the CCI's investigations. During these raids, the DG may seize physical and electronic documents, e-mails, mobile phone communications, etc. both in company offices as well as in the private residences of company officials and management.

The CCI has not used the tool of dawn raids partly because it currently lacks the authority to order the Office of the Director General ("DG") to investigate without a warrant from the Chief Metropolitan Magistrate, New Delhi ("CMM"). However, this loophole is likely to be plugged by way of a proposed amendment to the Act whereby the Chairperson of the CCI will be empowered to order the DG to undertake dawn raids. This will allow the CCI to conduct investigations with greater ease. Given that the CCI is in the course of investigating several alleged cartels, it is to be expected that the CCI will utilize dawn raids as an important tool to buttress its investigations across a variety of sectors and industries.

C. Use of Leniency Program

In the context of the difficulty of securing evidence to prove the existence of cartels, it should be noted that leniency may be granted by the CCI under the Competition Commission of India (Lesser Penalty) Regulations, 2009 ("Leniency Regulations") to the first three cartel participants who apply to the CCI and provide such information as may constitute "vital disclosures" as defined under the Leniency Regulations. Thus far, the leniency program has not been utilized. However, the CCI is aggressively promoting its leniency program in order to better investigate cartelization¹⁸ and it is likely that cartel participants will come forward under the leniency program and assist the CCI in its investigations, given the high penalties being imposed.

D. Competition Compliance Programs

While the CCI, on the one hand, has indicated that it intends to continue to monitor markets and investigate either *suo motu* or on the basis of complaints, on the other hand and as a part of its responsibility to undertake competition advocacy, it is proposing to encourage corporate India to initiate competition compliance programs. On account of the CCI's

¹⁴ CCI completes probe into cartelization in steel industry, THE HINDU BUSINESS LINE (October 21, 2012), available at <http://www.thehindubusinessline.com/industry-and-economy/cci-completes-probe-into-cartelisation-in-steel-industry/article4019226.ece>

¹⁵ CCI wants investigation against oil manufacturing companies, THE ECONOMIC TIMES (September 23, 2012), available at http://articles.economictimes.indiatimes.com/2012-09-23/news/34040701_1_petrol-prices-omcs-international-oil-prices (last visited on January 8, 2013).

¹⁶ CCI probing alleged cartelization by textile firms: Sources, (July 14, 2011) available at http://www.moneycontrol.com/news/business/cci-probing-alleged-cartelisation-by-textile-firms-sources_565633.html (last visited on January 8, 2013).

¹⁷ CCI probing alleged cartelisation in pharma, telecom sectors, THE HINDU BUSINESS LINE, (September 3, 2012), available at <http://www.thehindubusinessline.com/industry-and-economy/article3854217.ece> (last visited on January 8, 2013).

¹⁸ See, *Be a cartel whistleblower and win: CCI*, THE INDIAN EXPRESS (July 24, 2012) available at <http://www.indianexpress.com/news/be-a-cartel-whistleblower-and-win-cci/978800> (last visited on January 8, 2013).

investigative zeal and the headline penalties being imposed by the CCI, Indian companies are gradually coming to realize the importance of ensuring that their business practices are in compliance with competition law and that strong and comprehensive competition compliance programs could serve as mitigating factors in the event of a CCI investigation. The CCI Chairperson is reportedly expected to meet with the heads of 100 of the largest companies in India in a move to improve awareness of the competition law regime in India and also to impress upon them the importance of competition compliance.¹⁹ It is likely that Indian corporates will adopt competition compliance programs in the near future.

E. Collective Dominance

Currently, the Act prohibits the abuse of dominance by an enterprise or a group, as defined under the Act, i.e.

“two or more enterprises which, directly or indirectly, are in a position to:

- Exercise 50% or more of the voting rights in the other enterprise; or
- Appoint more than 50% of the members of the board of directors in the other enterprise; or
- Control the management or affairs of the other enterprise.”

However, there is a proposed amendment to introduce the concept of collective dominance, which allows for the CCI to investigate the abuse of dominance, not merely by two companies belonging to the same group under the Act, but also by two unrelated enterprises whose joint market power is sufficient for them to act independent of market forces and thereby abuse their dominance.

It is likely that this will result in more investigations into abuse of dominant position by two or more unrelated enterprises, which may not be considered dominant by themselves. The introduction of the concept of collective dominance could also result in the CCI revisiting sectors it has already investigated, such as the airlines industry, where it has held that players in the airlines sector were not abusing their dominance as none of the enterprises could be considered to be dominant individually.²⁰

F. Form II (Long Form) Merger Notifications

The merger control regime is the most recent aspect of the Act to have come into effect. The CCI has scrutinized 96 merger notifications in Form I and one merger notification in Form II. Form I is the short form merger notification, requiring details relating to the parties to the Combination, the relevant market, competitors, customers and suppliers in the relevant market, etc. While the CCI is required to take into account several factors listed under Section 20(4) of the Act in analyzing Combinations, the factors considered by the CCI thus far include the market shares of parties, the level of concentration in the relevant market, the number of competitors,

¹⁹ CCI to meet CEOs of top 100 firms on competition issues, LIVE MINT (November 29, 2012), available at <http://www.livemint.com/Companies/fCikDvJxq5xJodKICUsZ8N/CCI-to-meet-CEOs-of-top-100-firms-on-competition-issues.html> (last visited on January 8, 2013).

²⁰ *MP Mehrotra v. Kingfisher Airlines Limited and Ors.*, Case no. 4/2009.

the presence of a regulator in the relevant market, the level of maturity in the relevant market, etc.

The first two Form II merger notifications were filed in November and December 2012.²¹ Form II is the long form merger notification and requires extensive detail, including information relating to the group companies of the parties to the Combination, the products and services of such group companies, the existence of specialized producers and suppliers in the market, the details of exports and imports into the relevant market for a period of two years prior to the Combination, the details of intellectual property rights held by the parties, pipeline products of the parties, etc. The Combination Regulations specify that Form II is preferably to be filed by the parties in the following instances:

- If the market share of the parties is greater than 15 percent in the case of a horizontal overlap; or
- If the market share of the parties in either vertically linked relevant market is greater than 25 percent in the case of a vertical overlap.

The first Form II notification related to the natural gas sector and notified the proposed acquisition of a stake of 65.12 percent in Gujarat Gas Company Limited from BG Asia Pacific Pte Limited by GSPC Distribution Networks Limited, a wholly-owned subsidiary of GSPC Gas Company Limited, an undertaking of the Government of Gujarat. On January 11, 2013 the CCI approved the proposed transaction in a record 26 days (excluding clock stops) i.e. within Phase I. The Form II merger notification relating to the proposed transaction was complex, involving a detailed competition impact analysis of the relevant product and geographic markets that related to the natural gas sector.

The relevant markets involved in the transaction were the markets for the transmission and distribution of natural gas in the State of Gujarat, given that the acquirer group and the target enterprise are engaged in these markets in various districts in the State of Gujarat. The CCI scrutinized the various stages of production in the natural gas sector (i.e. exploration and production of natural gas, transmission of natural gas and distribution of natural gas, through City Gas Distribution (“CGD”) networks) as well as the regulatory regime governing the sector, i.e. the Petroleum and Natural Gas Regulatory Board Act, 2006 (“PNGRB Act”) and accompanying regulations.

In the market for the transmission of natural gas, the CCI noted that the target’s transmission pipeline spanned only 73.2 kilometers and was primarily used as captive natural gas supply to its own CGD network. However, the acquirer’s transmission pipeline was observed to be much larger in scope, extending over 2,065 kilometers, and also that it transmitted natural gas to several customers across the State of Gujarat. Further, the CCI noted that the acquirer’s transmission pipeline had a capacity utilization of only 44 percent and, therefore, there was sufficient excess capacity available for use on a common carrier or contract carrier basis to third parties. Therefore, the CCI held that there was no appreciable adverse effect on competition in the market for transmission of natural gas in the State of Gujarat.

²¹ The authors have been involved in notifying both Form II merger notifications.

Further, in the market for distribution of natural gas, it was noted that CGD entities have a natural monopoly in their respective geographic areas in light of the exclusivity granted under the PNGRB Act and the regulations thereunder.²² The PNGRB had granted exclusivity to the target's CGD network for twenty-five years, which expired on March 31, 2014, and three years' marketing exclusivity (as a common carrier or contract carrier) commencing from November 2012. The CCI held that in light of the regulatory regime, as both the acquirer and target are engaged in the distribution of natural gas in discrete districts (albeit on an exclusive basis) in the State of Gujarat, that the proposed transaction was not likely to cause an appreciable adverse effect on competition in the market for the distribution of natural gas in the State of Gujarat.

This is the first instance of a natural monopoly being evaluated by the CCI and, also, the first case evaluated by the CCI involving both a merger notification under the Act as well as an open offer under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. The CCI also sought behavioral commitments from the acquirer, which was required to provide an undertaking stating that it will review the contracts entered into between the target and its customers to ensure that such contracts are in compliance with the provisions of the Act, as well as the PNGRB Act, and submit a compliance report to the CCI within six months, post the consummation of the proposed transaction.

The second Form II notification, currently under review by the CCI, relates to the proposed acquisition of a stake of up to 53.4 percent in United Spirits Limited by Diageo plc, through its wholly-owned subsidiary, Relay B.V. in the alcoholic beverages space.

G. Modifications and Commitments in Merger Control

The CCI has recently issued its first commitment and ordered parties to modify a non-compete clause in the course of its review of a Combination in the pharmaceutical sector, stating that the non-compete clauses spanning five and eight years in the transaction documents were anti-competitive.²³ It is likely that modifications, whether structural or behavioral, are likely to be an important tool used by the CCI to balance possible anticompetitive effects of Combinations, if any, going forward.

H. Coordination with Sectoral Regulators

It should be noted that the transactions in both Form II merger notifications referred to above also entailed mandatory tender offers to be made by the acquirers under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("Takeover Code"). The CCI will be required to work closely in coordination with the Securities and Exchange Board of India in order to resolve the issues of inconsistent timelines and contrary obligations under the merger control regime and the Takeover Code in the course of its review of these merger notifications. For instance, in the case of Combinations involving mandatory tender

²² Exclusivity in CGD networks is granted on the basis of regulations under the PNGRB Act. However, it was noted that post the exclusivity period, the CGD entity is under an obligation to allow third-party access on a non-discriminatory basis to any entity in its CGD network at a determined network tariff. Further, the capacity in a CGD network for open access on a cumulative basis is required to be 20 percent greater than the capacity of the CGD network or the quantity of gas in the CGD network, whichever is higher.

²³ *Hospira Healthcare/Orchid Chemicals and Pharmaceuticals*, C-2012/09/79.

offers under the Takeover Code, any delay on account of the CCI's review and approval of the Combination could result in significant interest costs to the acquirer.

Further, the fact that the target enterprise may not divest its assets without receiving the approval of its shareholders under the Takeover Code has significant implications on the nature of structural modifications that the CCI may impose. It is expected that the CCI will resolve the issues in relation to these inconsistencies between the merger control regime and the Takeover Code during the course of its review of the first two Form II filings this year, which will result in greater certainty for merger notifications involving listed companies.

I. Global Coordination Among Competition Regulators

In addition to increased coordination between sectoral regulators, the CCI is also looking to increase interaction and cooperation with global competition law regulators. Recently, the CCI entered into a memorandum of understanding with the Department of Justice and the Federal Trade Commission of the United States in order to coordinate competition law training, capacity building, etc. The Chairperson of the CCI has also been elected as the Chair of the 12th Session of the Inter-governmental Group of Experts on Competition Law and Policy, UNCTAD in Geneva. This greater coordination between the CCI and global competition regulators will significantly impact global cartel investigations and cross-border M&A merger control notifications.

J. Increased Merger Control Scrutiny

The Act is proposed to be amended to vary the jurisdictional thresholds for merger control under the Act for different sectors by the Central Government, in consultation with the CCI. Such a move would result in increased merger control scrutiny by the CCI. Niche markets that currently fall below the existing jurisdictional thresholds may be brought into the CCI's purview through this provision. This provision was introduced in the context of a proposal that the CCI should scrutinize M&A in the pharmaceutical sector more closely, especially brownfield joint ventures.²⁴

III. CONCLUSION

The way forward for the CCI to establish itself as a serious and effective regulator is to adopt global best practices and to ensure better enforcement by getting more teeth. This will result in more *suo motu* investigations and the usage of more sophisticated tools to better gather evidence to support its investigations, such as dawn raids. The CCI is also likely to undertake greater competition advocacy, by advertising its leniency program as well as promoting its competition compliance programs. In relation to merger control, the CCI is likely to increase its scrutiny through varied thresholds and also introduce greater clarity and certainty in the law, especially in relation to acquisitions into listed companies, by resolving the inconsistencies with the Takeover Code.

²⁴ *Tighter M&A norms for pharma sector confuse CCI, experts*, LIVE MINT (October 11, 2011) available at <http://www.livemint.com/Companies/PmgENhXQQf2UyqgZSAS0rK/Tighter-MampA-norms-for-pharma-sector-confuse-CCI-experts.html> (last visited on January 8, 2013).