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Global Business and Competition Law in India

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Competition has become a driving force in today's globalised world. Measures such as deregulation, liberalisation and privatisation are necessary, but not sufficient to ensure the efficient functioning of markets. The market distortions deprive markets of their ability to deliver efficient results, adversely impact growth and hurt the poor most of all through higher prices. Hence, there is a need for a robust competition law to protect and nurture the competitive process of the economy.

Evolution of Competition Law in India

India was among the first developing countries to have a competition law in the form of the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969. This was necessitated due to high concentration of economic power in most industries. It was a direct outcome of restrictions on freedom of entry into Indian markets due to industrial licensing policy of the Government of India. The MRTP Act was designed to check concentration of economic power, prohibit restrictive or unfair trade practices and control monopolies.

The reforms of 1991 were a watershed moment in the history of India's economic development when India embraced economic reforms and became a market-driven economy with competition as the key driver. After opening up of the Indian economy, private and foreign enterprises could enter the market and compete in areas hitherto under the monopoly of the state. The new economic architecture necessitated enactment of a new competition law to discipline and regulate the market so that competitive forces were not stifled. Further, the focus shifted from curbing monopolies to promoting competition. Accordingly, the MRTP Act, which had become obsolete, was repealed and the Competition Act, 2002 came on the Statute Book in January 2003.

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The Competition Act, *inter alia,* seeks 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.

As with most international competition laws, the Indian law prohibits anti-competitive agreements (including cartels) and abuse of dominant position by an enterprise besides regulating mergers and acquisitions, which meet the threshold limits in terms of turnover or assets specified in the Act.

In order to achieve the objectives, the Competition Commission of India (CCI) was established under the provisions of the Act, which focuses on the above three enforcement areas. It also takes up competition advocacy and advisory functions.

Anti-competitive Agreements

The Competition Act prohibits any agreement which causes, or is likely to cause Appreciable Adverse Effect on Competition (AAEC) in the markets in India. Any such agreement is void. An agreement may include any arrangement, understanding or action in concert. Such an arrangement could either be in writing or oral. Even if the parties to the agreement do not intend their arrangement, understanding or action to be enforceable by legal proceedings, it would still be an 'agreement' for the purposes of the Act.

Agreements between two or more enterprises that are at the same stage of the production chain and in the same market are commonly known as horizontal agreements. Horizontal agreements, which directly or indirectly determine purchase or sale prices; limit or control production, supply or provision of services; share the market or provision of services by way of allocation of geographical market; and directly or indirectly result in collusive bidding, are presumed to have AAEC. However, this presumption is rebuttable.

This category of agreements includes cartels, which are usually secret and executed on the basis of an unwritten understanding between competitors. Such arrangements where parties agree not to compete with each other are considered most pernicious and are a priority for competition authorities all over the world.

Under the Act, all other kind of agreements are not subject to presumptive rule as these may have beneficial aspects as well which need to be weighed against the harmful effects to assess the overall impact of the agreement in the market. The harmful effects may include restrictions on intra-brand

competition, foreclosure of competition, and compartmentalisation of markets, and the pro-competitive effects can include efficiency gains, increase in inter-brand competition, and prevention of free-riding. An illustrative list of such agreements as provided in the Act includes tie-in arrangement, exclusive supply agreement, exclusive distribution agreement and refusal to deal, etc.

Abuse of Dominance

Dominant position signifies a position of strength and is reflected in terms of market power that an enterprise commands in a particular market. It is a well-recognised principle of modern competition law that holding a dominant position/monopoly is not a violation of the law. However, dominant firms in the market may tend to exploit their market power to eliminate a competitor or to deter future entry by new competitors and harm competition. Abuse of dominance impedes fair competition between firms, makes it difficult for other players to compete with the dominant firm on merit and also harms consumers and the economy.

Therefore, the Act prohibits a firm from abusing its dominant position. Dominant position under the Act is defined as a position of strength, enjoyed by an enterprise, in the relevant market in India, which enables it to operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour.

It is relevant to note that the Act does not prohibit any enterprise from actually holding a position of dominance or having substantial market power. What the Act frowns upon is the abuse of such dominant market power.

The Act prescribes a three-step test for the determination of abuse of dominance: (a) defining the relevant market; (b) assessing dominance in the defined relevant market; and (c) establishing the abuse of dominance.

The dominance of an enterprise is always determined in the context of a particular relevant market. For CCI, such delineation of 'relevant market' clarifies the economic space within which it needs to adjudicate on the alleged abuse of dominance case. As per the provisions of the Act, relevant market is determined on the basis of relevant product or service and relevant geographic market.

The Act sets out several factors that CCI may consider while determining the relevant product market. These include physical characteristics or end-use of goods; price of goods or service; consumer preferences; exclusion of in-house production; existence of specialised producers; classification of

industrial products. While determining the relevant geographic market, CCI may consider such factors as: regulatory trade barriers; local specification requirements; national procurement policies; transport costs; regular supplies or rapid after-sales services.

The manner in which the relevant market is defined directly impacts the assessment of dominance of the impugned enterprise. A narrow market definition would be more likely to render a favourable verdict against the defendant enterprise, whereas a broader market definition shall more likely pre-dispose the case towards a negative finding of dominance. Therefore, the relevant market in each case must be delineated carefully in order to correctly assess the dominance of an enterprise.

The Act gives an exhaustive list of practices that shall constitute abuse of dominant position and, therefore, are prohibited. Such practices shall constitute abuse only when adopted by an enterprise enjoying dominant position in the relevant market in India. Abuses as specified in the Act fall into two broad categories: exploitative (excessive or discriminatory pricing, including predatory pricing) and exclusionary (for example, denial of market access).

Combinations

A 'combination' means transaction involving a merger, an amalgamation or acquisitions of control, shares, voting rights or assets, where the assets or turnover of the enterprises involved in such transaction meet the jurisdictional thresholds specified in the Act. Most combinations do not raise serious prospect of an increase in market power. However, combinations which cause or are likely to cause an AAEC in the relevant market in India are prohibited under the Act. The core purpose of regulating combinations is to prevent the prospective anti-competitive effects of such combinations through appropriate remedies including prohibition, if necessary. It is *ex-ante* in nature and aims to ensure that after the combination firms do not harm the interests of consumers, economy and society as a whole.

The law requires that all combinations must be pre-notified to the CCI. The regime is suspensory and transactions subject to merger control review by the CCI cannot be concluded unless merger clearance from the CCI has been obtained or a review period of 210 days has been passed, whichever is earlier.

Failure to report a qualifying transaction to CCI would run the risk of a monetary penalty and also of having the transaction declared null and void.

CCI has in the past penalised parties for 'gun-jumping' or for consummating parts of a transaction without filing adequate notice to CCI. The Commission may also take *suo motu* cognisance of transactions where parties have not complied with the mandatory filing requirement. In the area of merger control, till date CCI has received more than 173 merger filings.

Remedies

CCI has the powers of inquiry and enforcement and may also impose heavy penalties for non-compliance with the provisions of the Act. If after inquiry, CCI finds breach of Section 3 (dealing with anti-competitive agreements, including cartels) or/and Section 4 (dealing with abuse of dominance) of the Act, as the case may be, CCI can impose a penalty of up to 10 per cent of the average turnover for the last three preceding financial years upon each person or enterprise, which is party to such agreement or abuse of dominance. In case of a cartel, CCI can penalise each member of the cartel, up to three times of its profit for each year of the continuance of such agreement or up to 10 percent of its turnover for each year of continuance of such cartel, whichever is higher. Further, CCI can restrain a party from continuing with an anti-competitive agreement or abuse of dominant position, modify anti-competitive agreements to the extent and in the manner CCI deems fit or direct division of a dominant enterprise in case of abuse of dominant position to ensure that such enterprise does not abuse its dominant position in future.

In case of combination filings, CCI can either approve the combination if no AAEC is found in the applicable relevant market in India or propose suitable modifications in the terms and conditions of the proposed combination; or even block the combination if such AAEC cannot be avoided by suitable modifications. For failure to notify the combination, CCI may *suo motu* direct the parties to file a notice and also impose a fine, which may extend to 1 per cent of the total turnover of the assets of the combination, whichever is higher.

The Act also provides for personal liability of directors and senior officers if firms under their supervision violate provisions of the Act and such violation occurs with their knowledge or due to lack of effective supervision. In the last five years, CCI has imposed more than Rs.98840 million in financial penalties, including imposition of approximately Rs.182.5 million in personal fines on officers in charge of erring enterprises. While levying penalties or fines, CCI assesses all the relevant factors including the aggravating and mitigating circumstances in each case.

Further, in a country like India, where substantial business operations in several key sectors are still run by government-owned companies, CCI has shown no hesitation in pursuing cases involving government-owned companies.

The Act, within the framework of enforcement mechanism, covers all economic activities irrespective of whether the same are undertaken by private entities or government departments barring activities relatable to the sovereign functions such as atomic energy, currency, defence and space. The Commission has not only inquired into the alleged instances of abuse by state monopolies and state-owned enterprises but also penalised the contravening parties and reinforced the principle of competitive neutrality.

For example, CCI recently penalised Coal India, a state-owned monolith, and imposed Rs 17,730 million for abuse of dominance as monopoly suppliers of coal, sending a clear message that public entities cannot escape their responsibility under the country's competition law. CCI has taken effective action in several instances of bid-rigging allegations in government procurement contracts.

Appeal from CCI's orders

Competition Appellate Tribunal (COMPAT) was set up in May 2009 to hear and dispose of appeals emanating from orders passed by CCI under the various sections of the Act. An appeal has to be filed within 60 days from the orders of CCI. Orders of the COMPAT are appealable before the Supreme Court of India.

Other Salient Features

As discussed above, the Act enables the Commission to order various types of remedies including the power to impose penalties upon the contravening parties unlike the MRTP Act, which only empowered the MRTP commission to issue cease and desist orders. The new law is also significantly different from the erstwhile MRTP Act in that it makes explicit provisions for competition advocacy by mandating the Commission to take measures for the promotion of competition advocacy, for creating awareness and for imparting training in competition issues. This supplements and complements the enforcement functions of the Commission and at the same time, aids the stakeholders to remain competition law compliant by way of appropriate programmes. The other distinguishing feature in the present law is the express

extra-territorial jurisdiction conferred upon the commission to examine *inter alia* global cartels having AAEC in India.

Competition Advocacy

The cornerstone of a successful market economy is the existence of a 'competition culture' for which competition advocacy is vital. Competition advocacy is a process of outreach to influence the economic behaviour of enterprises, elicit support for the principles of competition and convince stakeholders about the innate advantages of competition regime. World over, competition advocacy is recognised as a very vital tool to promote competition culture in the country.

In India, this is mandated under the Act and CCI has addressed the whole range of stakeholders, including industry, academia, judiciary, consumers, public sector undertakings and government at the federal and provincial levels, to make them aware of the beneficial role of competition. In the last five years, CCI has organised numerous workshops, conferences, seminars, used electronic media and undertaken studies in pursuance of advocacy mandate.

CCI is focusing on advocacy and communication in a very big way to pass on the message that the competition law is a new paradigm and the business community has got to adapt to it. As government policies may be an important source of market distortions, CCI is also engaging the government to review economic policies and make them competition compliant.

Extra-territorial Jurisdiction

The new Competition Law is significant in conferring extra-territorial jurisdiction upon the commission to inquire into anti-competitive conduct and combinations even if the act or transaction has taken place outside India or if the party or enterprise is outside India provided that it has AAEC in the relevant market in India. To make the enforcement of such jurisdiction, the Act also enables the commission to enter into memorandum or arrangement with any agency of any foreign country, with the prior approval of the central government.

International Cooperation

Driven by economic globalisation, the world is getting smaller and now business and money have no geographical boundaries. Competition authorities are facing a unique challenge - competition law is national, while markets are increasingly

global in their reach. The key question is how to deal with transactional competition issues in a global economy, when competition laws are national. CCI recognises that international dialogue and co-operation is vital for discussing these concerns and others like exposure to the best practices, sharing of knowledge and building capacity. Enforcement co-operation has also become the need of the hour to deal with international cartels crossing the boundaries of jurisdictions. Similarly, globalisation and worldwide proliferation of merger control regimes imply transactional merger filings, which may require co-ordination amongst several jurisdictions to avoid inconsistent orders and remedies.

Therefore, dialogue and cooperation between competition agencies are no more a matter of choice. CCI is developing a comprehensive international co-operation strategy, that includes co-operation and partnerships with competition jurisdictions as well as with multilateral organisations. CCI's interactions with mature jurisdictions as well as multilateral agencies have helped in learning how best to forge ahead. CCI has signed Memoranda of Understanding (MOUs) with competition agencies of the US, the EU, Australia and Russia and is considering MOUs with other international agencies. In addition, informal exchanges with other competition authorities in various forums provide invaluable insights into their experiences. CCI benefits from such co-operation with the Federal Trade Commission (FTC), USA, the Directorate General for Competition (DG Comp), the European Commission, etc.

CCI also fully supports close co-operation amongst the BRICS competition authorities to develop better relationship amongst its members, share experiences and help stakeholders, particularly business enterprises to be assured of a fair deal with competition authorities of BRICS member countries. CCI recently brought into focus the global relevance of BRICS competition authorities by successfully organising the Third BRICS International Competition Conference in New Delhi. The competition authorities of India, Russia, Brazil, China and South Africa during the BRICS conference signed a joint accord, called the 'Delhi Accord', which reflects 'the principle of mutual trust and respect, considered the need of establishing good communication between the BRICS Competition Authorities on competition law and policy to further improving and strengthening the relationship between the BRICS Competition Authorities.'

Multilateral organisations like the International Competition Network (ICN), the Organization for Economic Cooperation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD) bring

together competition experts from all over the world to provide rich insights into competition issues. Therefore, CCI has been pro-actively engaging with these organisations and regularly participating in the competition policy deliberations at the global level.

Way Ahead

Competition law and policy in India is emerging as a tool to enhance economic development, promote competition and protect consumers in India. In order to give impetus to the evolutionary phase of competition law and policy in India, the government of India is considering wide-ranging amendments to the Act and also a National Competition Policy. The National Competition Policy aims to specifically deal with policy distortions and impediments that hinder healthy competition. Further, CCI hopes that its pro-active role in India in uncovering cartels and other anti-competitive agreements would go a long way in encouraging fair market practices, deepening competition in markets and contributing to economic growth with equity.

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