Proposed amendments in the Competition Act: A positive step forward?

Introduction

The Competition Commission of India ("**CCI**") is an active regulatory body and, in a short span, has made its presence felt across a wide spectrum of industry. The substantive provisions of the Competition Act, 2002 ("**Act**") pertaining to "anti-competitive agreements"[1] and "abuse of dominant position"[2] were implemented in 2009, while merger control became effective from June 01, 2011. In the recent years, the CCI has analyzed and ruled on various provisions of the Act in several orders, and, in the process, highlighted the lacunae where the Act could possibly be amended.

On December 10, 2012, the Indian government introduced the Competition (Amendment) Bill ("**Bill**") in the parliament. This Bill aims to modify certain provisions of the Act, as well as insert some new provisions, to meet the evolving needs of industry. The Bill still has to be debated and passed by two houses of the parliament before it becomes law. The present newsletter analyses some of the key proposed amendments and the potential impact they will have on competition law in India if the Bill is passed in its present form. The references to sections here are in the context of the Act.

1.0 Proposed Amendments

For ease, the proposed amendments are divided into two broad heads, *namely* substantive and procedural, both of which are described below.

1.1 Substantive Amendments

(i) Vertical arrangements to include "provision of services"

Present law: Section 3(4) refers to agreements between enterprises or persons at different stages of the production chain in different markets, in respect of production, distribution, storage, sale or price of, or trade in goods or ***provision of services***. It states that if such vertical agreements *cause or are likely to cause* any appreciable adverse effect on competition, they shall be deemed void. While this provision makes reference to *provision of services*, the illustrations mentioned therein, such as tie-in arrangements, exclusive supply agreements, exclusive distributorship agreements, refusal to deal and resale price maintenance, only make reference to "sale of goods" and not to "provision of services."

Proposed law: The Bill now aims to include reference to "provision of services" in the explanation provided for all the illustrations under vertical agreement. While this amendment does not substantively impact the interpretation of section 3(4) *per se* since the main clause includes reference to "provision of services," it does ensure that there is no dichotomy between

[1] Section 3 of the Act
[2] Section 4 of the Act

the text of the main clause and explanation provided for its illustrations. For instance, the present definition of "tie-in arrangements" includes "*any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods*." The amendment proposes the definition to be modified as "*any agreement requiring a purchaser of goods* ***or recipient of services****, as a condition of such purchase* ***or provision of such services****, to purchase some other goods* ***or availing of some other services***."

(ii) Introduction of "collective dominance"

Present law: Section 4(1) states that "No enterprise or group shall abuse its dominant position." The CCI had to interpret the scope of "group" in the case of ***Consumer Online Foundation vs. Tata Sky Ltd. & Others***[3] wherein the Informant had alleged that all direct-to-home operators were "individually dominant" in their "relevant market." The CCI did not accept this contention and stated that "*the word "group" referred to in section 4 of the Act does not refer to group of different and completely independent corporate entities or enterprises. It refers to different enterprises belonging to the same group in terms of control of management or equity*." The CCI further held that "*the concept of dominance does centre on the fact of considerable market power that can be exercised only by a single enterprise or a small set of market players. Every single player in any relevant market cannot be said to possess such dominance…"* The principle of this finding was also reiterated by the CCI in the case of ***Royal Energy Ltd. vs. Indian Oil Corporation Limited & Others.***[4]

Proposed law: The Bill now proposes to replace section 4(1) with "No enterprise or group, **jointly or singly** shall abuse its dominant position." The intention behind this amendment is to include enterprises or groups, related or unrelated, whether within the same management or not, to fall within the ambit of section 4. This implies that independent and unrelated parties could be held "dominant" under section 4 explanation (a).[5] The amendment proposed by the Bill is a positive step forward since it will regulate instances where, for instance, a particular industry may *collectively abuse* its position but a *single* enterprise within that industry may not qualify as a *dominant player* under section 4.

In a significant judgment, CCI had imposed a penalty of about US$ 114 million on DLF Limited in ***Belaire Owner's Association vs. DLF Limited and Others***.[6] One ground was that DLF abused its dominant position in the *relevant market* by imposing unfair and discriminatory conditions in its builder contracts. Other real estate enterprises, which also, perhaps, indulged in similar practices, were not reprimanded since they did not *singly* stand out as "dominant" in the relevant market. With the proposed amendment, if all (*or at least more than*

[3] Case No. 2 of 2009 dated March 24, 2011

[4] MRTP Case No. 1/28 (C-97/2009/DGIR) dated May 09, 2012. This case was filed before the Monopolies and Restrictive Trade Practices Commission and then, post its dissolution, transferred to the CCI.

[5] According to section 4 explanation (a), "dominant position" means a position of strength which enables an enterprise to operate independent of competitive forces prevailing in the relevant market, or affect its competitors/consumers in its favour.

[6] Case No. 19 of 2010 dated August 12, 2011. DLF filed an appeal against the order of the CCI with the Competition Appellate Tribunal. The Competition Appellate Tribunal stayed the payment of penalty and directed the CCI to amend the terms of DLF's builder contract to ensure that it is in conformity with the Act. On January 03, 2013, the CCI passed a supplementary order modifying the relevant clauses of the contract.

one) real estate companies indulge in practices similar to that of DLF, they could *collectively* be held in contravention of the Act.

Further, unlike cartels, there is no requirement for the parties to have *intent* to be *collectively dominant*. To explain this further in the aforementioned judgment, it may not be necessary for the real estate enterprises to have a common *intent* to *collectively dominate* in the relevant market. Conduct without intent would be sufficient for them to fall within the ambit of section 4 on account of collective dominance. This can have serious ramifications on small and mid-size companies, who, under the present Act, may not be deemed *dominant*.

(iii) Definition of "Turnover"

Present law: Section 2(y) states that "Turnover" includes value of sale of goods or services. However, this definition does not specifically clarify whether any applicable taxes on such goods or services would form a part of "turnover" while calculating it under sections 5,[7] 27[8] and 43A.[9] Under section 5, "turnover" is used to ascertain the financial thresholds which trigger the requirement for seeking an approval of the CCI before a proposed combination. Under sections 27 and 43A, "turnover" is used to ascertain the amount on which penalty may be levied. Therefore, it is critical that the definition of "turnover" is unambiguous to ensure a correct estimation of values.

Proposed law: The Bill now proposes to modify section 2(y) to state that "Turnover" will include value of sale of goods or services **excluding the taxes, if any, levied on sale of such goods or provisions of services**. Interestingly, Form II, which is filed with the CCI to seek an approval of proposed "combinations," specifically states that "*the turnover shall be computed in accordance with section 2(y) of the Act, excluding indirect taxes, if any*." With the proposed amendment, the Act will statutorily clarify that taxes ought to be excluded, not only for the purpose of seeking a combination approval (*for which Form II is filed*), but also when "turnover" has to be ascertained for imposing penalties under section 27 and 43A. Nevertheless, computation of "turnover" for determining the thresholds under section 5, as well as penalties, continues to be a grey area. Explanation (c) of section 5 explains the basis of determination of "asset value" which must pertain to the financial year immediately preceding the financial year in which the date of the proposed combination falls. No such explanation is provided with respect to computation of "turnover." Ambiguity on this point can potentially have harsh repercussions while calculating penalties.

(iv) Definition of "Group"

Present law: The definition of "group" under section 5 explanation (b)(i) states that a "group" means two or more enterprises which, directly or indirectly, are in a position to exercise **26% or more** of the voting rights in other enterprises. This definition assumes significance in cases pertaining to alleged contraventions under section 4 which stipulates that

[7] Section 5 deals with "combinations" and specifies the various financial thresholds based on (i) asset value and (ii) turnover, which once crossed, require the parties to seek an approval from the CCI for the proposed combination.
[8] Under section 27, penalties are levied for any contravention of section 3 or 4 of the Act.
[9] Under section 43A, penalties are levied in cases where information is not furnished to the CCI under section 6 of the Act for seeking a combination approval.

"no enterprise or *group* shall abuse its dominant position," as well as under sections 5 and 6 for ascertaining whether a proposed "combination" ought to seek a CCI approval or not. On March 02, 2011, the Indian government released a notification[10] ("**Notification**") which increased the 26% threshold to 50%. The Notification specifically stated that "groups exercising *less than 50%* voting rights in other enterprises" were exempt from any approvals under section 5. This implied that even 50-50 joint ventures fell within the definition of "group."

Proposed law: The Bill aims to bring the Act in sync with the Notification and revises the definition of "group" to include "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." 50-50 joint ventures continue to fall within its scope. This amendment does not change the present interpretation of "group," but merely brings the Act in conformity with the Notification.

1.2 Procedural Amendments

(i) Dawn raids to be simplified

Present law: Under section 41(3), the Director General ("**DG**") is empowered to conduct search and seizure in accordance with provisions of sections 240 and 240A of the Companies Act, 1956 ("**Companies Act**"). Pursuant to these provisions, the DG has to procure an order from a Magistrate for undertaking a search and seizure. This procedure is consistent with how raids are conducted in any other civil/criminal proceeding in India. As on date, there has been no case before the CCI where any search and seizure order has been obtained by the DG, so, the "effectiveness" of the existing regulation is untested.

Proposed law: The Bill now proposes that instead of the Magistrate, the DG can seek an order from the Chairperson of the CCI, under section 41(3) to conduct any search and seizure. While this amendment can be criticized on the ground that dawn raids would become "unchecked" and managed "internally" within the CCI, it will also ensure that as competition issues get more complex and high-value, search and seizure raids would become be an extremely productive tool for the DG to conduct its investigation and ensure a stricter competition regime.

(ii) Orders of the CCI during the stage of inquiry

Present law: In some cases filed before the CCI, a peculiar concern has been highlighted in the CCI's orders. Once a complaint is filed and a prime facie case is established, the CCI directs the DG to conduct its investigation.[11] If the DG submits a report that there is a contravention of the Act, the CCI has to invite objections/suggestions from the parties. After hearing the objections/suggestions, the CCI can only pass an order under sections 26(8)[12] or

[10] S.O. 481(E) dated March 04, 2011 issued by the Ministry of Corporate Affairs.
[11] Such orders are passed under section 26(1) of the Act.
[12] In the event the DG recommends a contravention of the Act, the CCI can only pass an order under section 26(8) for further inquiring into the contravention in accordance with the Act. This section does not empower the CCI to close a case in such situations.

under section 27,[13] neither of which permit it to go against the finding of the DG where the DG has held a contravention. This situation was first examined by the CCI in the case of ***Pankaj Gas Cylinders Ltd. vs. Indian Oil Corporation Limited***,[14] and the correct interpretation of the Act was adopted in its dissenting order. The dissenting order rightfully stated that "*Under section 27 of the Act, an order can only be passed when a contravention is established. Therefore, dropping of a case after DG has found a contravention is not authorized under the Act*." Since then, numerous cases have been heard by the CCI where, despite the DG's confirmation of a contravention, the CCI passed an order closing the case.[15]

Proposed law: In order to give the CCI statutory provisions under which it can close a case even if the DG finds a contravention of the Act, the Bill proposes to expand the scope of section 26(8). In addition to passing an order directing a further inquiry, the amendment will also allow the CCI to "make appropriate orders thereon after hearing the concerned parties." This means that if the amendment is effected, the CCI will *legitimately* be able to pass any order, irrespective of the finding of the DG during its investigation.

(iii) Opportunity to be heard before imposition of penalty

Present law: Under section 27(b) of the Act, the CCI can impose a penalty for contravention of section 3 or 4. Such penalty can be up to 10% of the average turnover for the last 3 financial years, or, in cases of a cartel, up to 3 times the profit or 10% of the turnover, whichever is higher, for each year the alleged cartel is in force. In the last 3 years, there have been multiple cases where CCI has imposed penalties for contravention. However, in each of these instances, once the contravention was proved, the CCI imposed penalties without offering any hearing to the parties on the "quantum" of penalty to be imposed. While this practice has been prevailing due to the lack of any corresponding provision in the Act mandating a hearing, it is inconsistent with the judicial process followed in courts and with *due process* principles. Typically, an opportunity is provided to the contravening party to present its arguments for the imposition of the least applicable penalty. In ***Hindustan Steel Ltd. vs. State of Orissa***,[16] the Supreme Court of India ("**SC**") held that "*...an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances.*" Various other judgments have corroborated and upheld the principle of judiciously exercising the right to levy penalties.[17]

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[13] Under section 27, orders are passed by the CCI after inquiry into agreements of abuse of dominant position is completed by the DG. These orders only pertain to directing parties to discontinue the alleged practice, impose a penalty or modify the terms of any impugned agreement.

[14] Case No. 10 of 2010 dated June 22, 2011

[15] See the CCI's orders in (i) All India Tyre Dealer's Federation vs. Tyre Manufacturers, MRTP Case: RTPE No. 20 of 2008 dated October 30, 2012; (ii) Film and Television Producers Guild of India vs. Multiplex Association of India, Mumbai and Others, Case No. 37 of 2011 dated January 03, 2013.

[16] 1969(2)SCC627

[17] Kesar Enterprises Limited vs. State of Uttar Pradesh and Others, 2011(13)SCC733, wherein the SC emphasized on the principles of natural justice to be followed before imposition and recovery of penalty.

Proposed law: The Bill now proposes to amend the language of section 27(b) as well as 27(g)[18] to include a proviso requiring the CCI to grant a hearing to the party(s) before it passes any order under any of the aforementioned sections. This development will be consistent with judicial practice and offer a fair chance to parties to defend any imposition of the penalty once the CCI holds them in contravention of the Act.

Conclusion

The present newsletter includes only certain key amendments proposed by the Bill. These amendments will make the Act more in sync with other mature jurisdictions, like the European Union, where, for instance, provisions relating to collective dominance, conducting dawn raids without approaching courts and imposition of penalty after giving parties a chance to be heard, have been in force successfully.

The Bill is still at an extremely nascent stage and will probably take another 6-8 months before it is debated by both houses of the Indian parliament and becomes law. Till then, the future of some orders of the CCI remains questionable. For instance, under what provision has the CCI closed cases when the DG's report concludes a contravention of the Act? Similarly, how have penalties been imposed without giving a personal hearing to parties in view of the SC's decision in ***Hindustan Steel Limited vs. State of Orissa***? It will be interesting to see how the SC will interpret the lacunas in the Act once appeals lie before it from the orders of Competition Appellate Tribunal.[19] At this juncture, the Bill is a positive step in the evolution of Indian competition law.

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[18] Section 27(g) of the Act empowers the CCI to pass any order or issue such directions as it may deem fit. This is a broad section giving residuary powers to the CCI.
[19] Under section 53T of the Act, appeals from the Competition Appellate Tribunal vest with the SC within 60 days from the date of the order.