

THE AMERICAN LAWYER

www.americanlawyer.com

MAY 2009

THE AM LAW
100
2009

HOW BAD?

For the first time since 1991, profits and revenue dipped last year. Then things got worse.

An incisivemedia publication

THE DAWN OF A MODERNISED COMPETITION REGIME IN INDIA

Luthra Luthra

INDIA is ushering in a modernized competition regime with the Competition Act, 2002 ("the Act") expected to be made fully effective soon. Thus far, the Monopolies and Restrictive Trade Practices Act, 1969 ("MRTP Act") has remained India's operative competition law. The Act faced legal challenges in the Supreme Court of India almost immediately after its enactment, but all the controversies seem to have been finally settled after significant amendments to the Act in 2007.

The Act provides for the establishment of the Competition Commission of India ("CCI") as well as the Competition Appellate Tribunal ("CAT"). Although the Government established the CCI in October 2003, the Chairman and two Members have entered office only recently. On assuming charge, the Chairman of the CCI was reported to have stated: "...competition is the essence of business rivalry and the Commission will like to promote level playing field and get the consumers the best quality in goods and services." India's Minister of Corporate Affairs, has also been reported to have said "though there had been delay due to legal challenges, India had now become one among 105 other countries of the world to have a full fledged Competition Commission... and that the Appellate Tribunal is in the process of being formed."

The Act is applicable to an 'enterprise' including Departments of the Government performing non-sovereign functions and also covers acts of overseas enterprise which have an 'appreciable adverse effect on competition (aaec)' in markets, in India. Civil courts have no jurisdiction to try any matter which falls within ambit of the Act which also provides for the repeal of the existing MRTP Act, from the day the Act is made fully effective.

The Act mandates the CCI to

prohibit "Anti-Competitive Agreements", the "Abuse of Dominant Position" and to regulate certain "Combinations" which includes acquisition of shares, voting rights, assets, control, mergers/amalgamation amongst enterprises, and also provides for a mirror image consultative mechanism on competition issues between the CCI and sector regulators. Furthermore, the Government may make a reference to CCI for its opinion on the possible implications of an existing or proposed policy or law. The Act, thereby, adopts a two pronged approach, namely (i) the elimination of anti competitive practices/structures in markets; and (ii) a reform in anti competitive public action through advisory/advocacy measures.

The CCI is required to examine alleged anti-competitive practices through a process of "enquiry" and the detailed procedures are to be specified in the 'regulations'. These 'regulations' would govern enquiries into anti competitive agreements (including a leniency programme in cartel enquiries), abuse of a dominant position (including predatory pricing), as well as combinations. Of particular significance to these enquiries is the identification of the "relevant market". Agreements on price, production/supply, market, bidding, between competitors, are all presumed to have aaec while agreements in the vertical chain are examined under the rule of reason. For inquiries into an 'abuse of dominant position', the twin conditions precedent are the determination of 'dominance' and 'abuse' thereof. After an enquiry, the CCI may pass a wide range of orders and impose a penalty. During an enquiry, the Act allows the CCI to issue interim orders.

Combinations, where the total value of the 'turnover' or



Rajiv K. Luthra
Founder and Managing Partner



G R Bhatia
Partner, Competition Law Practice

'assets' exceeds the prescribed threshold limits, are required to be notified and can be consummated only after approval by the CCI. After a time bound process, the CCI may approve; approve with modification(s); or block the combination and may direct structural/behavioral remedies.

In carrying out investigation, the CCI is assisted by Director General who has powers of a Civil Court and of 'search and seizure.' The CAT is to hear and dispose of appeals filed against an order/direction of the CCI and also adjudicate on claims for compensation. An appeal against an order of CAT lies in the Supreme Court of India. Subject to conditions, the Government has the power (i) to grant exemptions; (ii) to issue directions; and (iii) to supersede the CCI. The CCI may, with the approval of the Government, enter into Memorandums of Understanding (MOUs) with any foreign agency to facilitate investigation and enforcement of its orders against overseas enterprises.

Since 2003, the advocacy initiatives undertaken by the CCI include (i) commissioning market studies; (ii) organizing workshops/seminars; (iii) development and circulation of competition literature; and (iv) training and capacity building of stakeholders. The CCI has put in the public domain, certain guiding principles so as to ensure that it is transparent; able to maintain confidentiality; in sync with the markets; minimize the costs of compliance/enforcement; and able to adopt a consultative mechanism. All in all, these principles promise a positive and balanced approach.

The dawn of the modernized competition regime in India presents a huge opportunity for the legal fraternity since the law (a) has a wide canvas; (b) applies to cross border transactions; (c)

leans heavily on the rule of reason; (d) provides for deterrent penalties and recovery mechanisms as a 'tax due'; (e) encourages the furnishing of information; (f) heightens the possibility of detection of violations with the help of the leniency and other programmes; (g) provides a platform for the wholesome redressal of grievances; (h) offers a mechanism for policy intervention through advisory opinions; and (i) promotes 'advocacy' to build a strong competition culture.

Since the law is wedded to the 'effect theory', trade agreements relating to production, supply, distribution, storage, acquisition or control of goods (including intellectual property) or provision of services, have to comply with the Act. A foreign business entity or group, having 'dominance' in the 'relevant market' in India, has to refrain from conduct which is 'abusive.' Cross border combinations (both inbound and outbound), which meet the specified thresholds, and have the requisite domestic nexus, are to be mandatorily notified to the CCI. Therefore, the landscape of modernized competition jurisdictions will shortly stand broadened with a new entrant - India. ■

Luthra & Luthra Law Offices

Delhi Office

Tel: +91-11-4121 5100
Fax: +91-11-2372 3909,
Email: delhi@luthra.com

Mumbai Office

Tel: +91-22-6630 3600,
Fax: +91-22-6630 3700,
Email: mumbai@luthra.com

Bangalore Office

Tel: +91-80-4112 2400,
Fax: +91-80-4112 2332,
Email: bangalore@luthra.com

www.luthra.com