

The Handbook of Competition Enforcement Agencies

2010

A Global Competition Review special report
published in association with:

Luthra & Luthra Law Offices



Overview

Rajiv K Luthra and GR Bhatia

Luthra & Luthra Law Offices

2009 saw India embrace its new competition regime with the twin ex post dimensions of the Competition Act 2002 (the Act), namely the prohibition on ‘anti-competitive agreements’ and ‘abuse of dominant position’, being brought into force. The Competition Commission of India (CCI) has since commenced its enforcement and regulatory functions in these spheres. The third component of the Act, dealing with the ex ante regulation of combinations (merger control) is expected to be notified once the relevant regulations are fine-tuned. The Monopolies and Restrictive Trade Practices Act 1969 (MRTP Act) has now been repealed and the MRTP Commission has been dissolved.

The central government also established the Competition Appellate Tribunal (Appellate Tribunal) to hear appeals against orders passed by the CCI; adjudicate on claims for compensation and to direct recovery thereof; and dispose of enquiries pending with the disbanded MRTP Commission. The Appellate Tribunal is a three-member body headed by the chairman, Justice Arijit Pasayat, retired judge of the Supreme Court of India. Appeals against orders and directions of the Appellate Tribunal must be made to the Supreme Court of India.

The CCI consists of a chairman and six other members. It is mandated to prohibit anti-competitive agreements, abuse of dominant position and to regulate certain combinations. The Act also provides for a mirror image consultative mechanism on competition issues between the CCI and sectoral regulators. Furthermore, the government can make a reference to CCI for its opinion on the possible implications of an existing or proposed policy or law.

Scope of the Act

The Act is the principal instrument by which the CCI will oversee the behaviour of market participants as well as changes in the structure of an industry. The Act incorporates the appreciable adverse effect on competition (AAEC) test as the substantive legal standard for assessing anti-competitive behaviour and structural changes.

On matters falling within the domain of the Act, the jurisdiction of other civil courts is expressly excluded.

Duties and powers of the CCI

The CCI is required to examine alleged anti-competitive practices through a process of enquiry, the detailed procedures of which are set out in the Competition Commission of India (General) Regulations 2009. The CCI has also notified inter alia the Lesser Penalty Regulations, setting out the leniency programme for cartel inquiries and the Cost of Production Regulations for cases relating to predatory pricing. The CCI, after an enquiry into an alleged anti-competitive agreement or abuse, is empowered to direct the persons or enterprises or association of persons/enterprises involved to discontinue and not to re-enter into such agreement or abuse, and can also impose significant monetary penalty.

Under the Act, all combinations are subject to a mandatory notice filing requirement with the CCI and such transactions cannot be consummated unless they are approved by the CCI. The Act sets out a time-bound procedure, following which the CCI may approve, or approve with modifications, or block the combination and may direct structural or behavioural remedies.

During investigation, the CCI is assisted by the Office of the Director General, who is vested with powers of a civil court, including the power of ‘search and seizure’. Subject to certain conditions, the government has the power to grant exemptions from the applicability of the Act, to issue directions, and to supersede the CCI. The Act allows the CCI, with the approval of the government, to enter into memorandums of understanding (MOUs) with any foreign agency to facilitate investigation and enforcement of its orders against overseas enterprises.

Since the commencement of its enforcement and regulatory activities, the CCI is known to have instituted various enquiries, namely: a cartel inquiry against producers and distributors of motion picture films; an alliance between two of India’s largest domestic airlines; loan prepayment

penalties imposed by some of India's leading banks and financial institutions; the expulsion and removal of a member for not following Travel Agents Association decisions; and an exclusive supply agreement between a steel producer and Indian Railways.

In order to create awareness and to educate stakeholders, the CCI has put in the public domain a series of advocacy booklets and the findings of several market studies, which were undertaken to gain better understanding of the market structures

and anti-competitive practices prevailing therein. The CCI is also known to be resisting attempts by certain sectors lobbying central government to secure exemptions from applicability of the Act.

The CCI continues to create awareness and garner experience in the enforcement of anti-competitive agreements and abuse of dominance. It remains to be seen how the CCI will cope with the merger control provisions once they are brought into force.

Luthra & Luthra Law Offices



Luthra & Luthra
Law Offices

103, Ashoka Estate
24 Barakhamba Road
New Delhi – 110 001
India
Tel: +91 11 4121 5100
Fax: +91 11 2372 3909

Rajiv K Luthra
rajiv@luthra.com

HS Chandhoke
bobby@luthra.com

GR Bhatia
gbrhatia@luthra.com

www.luthra.com

Luthra & Luthra Law Offices is an award-winning full-service law firm with a legal practice focused in the areas of corporate & commercial, infrastructure & project finance, policy & regulatory, intellectual property, international trade laws, competition laws and litigation & ADR.

With offices in New Delhi, Mumbai and Bangalore, 27 partners and 180 lawyers qualified in multiple jurisdictions, Luthra & Luthra is one of the largest law firms in India. The firm enjoys the unique distinction of being India's first ISO 9001-certified law firm, a reflection of the standards of quality maintained by it.

The competition law practice group in the firm provides innovative and commercial solutions on antitrust and competition issues with specific focus on business houses, MNCs, SMEs, sensitising law makers, planners, government functionaries and trade associations as to the concerns emanating from the existing and contemplated policies, laws, rules and procedures of central and state governments, statutory authorities and suggests pragmatic solutions to their concerns.

The firm was legal adviser to the United States Federal Trade Commission (FTC) and the Antitrust Division of the United States Department of Justice (DoJ) in a USAID-sponsored exercise to prepare the Internal Reference Material on Combinations, a training tool kit for the functionaries of the Competition Commission of India. The firm's interdisciplinary team of lawyers, economists and chartered accountants gives the firm an edge in competition, consumer and trade protection investigations and inquiries.