PROTECTION AGAINST ANTI-COMPETITIVE AGREEMENTS UNDER COMPETITION LAW IN INDIA

Written by ***Aprajita Bhargava***

Research Scholar, DAVV, Indore (M.P.)

ABSTRACT

Competition Act 2002 has come into force to replace the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969. After the economic reforms of 1990, it was felt that MRTP has become obsolete pertaining to international economic developments relating to competition law and there was a need of law which curbs monopolies and promotes competition. In 1990s India saw substantial increases in the value and volume of international trade in goods and services, in Foreign Direct Investments (FDI), and in cross border Mergers and Acquisitions (M&A). Competition Act is enacted to provide, keeping in view of the economic development of the country, for the establishment of a Commission 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, and for matters connected therewith or incidental thereto.

Keywords: *Competition Commission, Dominant Position, Anti-Competitive Agreement, Competition Advocacy.*

INTRODUCTION

Over the period of time, trade barriers fell and restrictions on FDI were reduced. The Competition Act, 2002 has been enacted with the purpose of providing a competition law regime that meets and suits the demands of the changed economic scenario in India and abroad. The Competition Act has repealed the Monopolies and Restrictive Trade Practices Act, 1969 and has dissolved the Monopolies and Restrictive Trade Practices (MRTP) Commission. The cases pending before the MRTP Commission are transferred to Competition Commission of India barring those which are related to Unfair Trade practices and the same are proposed to be transferred to the National Commission constituted under the Consumer Protection Act, 1986.

The Competition Act, 2002 also provides for the establishment of the Competition Commission of India (CCI) which would function as a market regulator for preventing and regulating anti-competitive practices in the country, and Competition Appellate Tribunal (COMPAT) which is a quasi-judicial body established to hear and dispose of appeals against any direction issued, or decision made by the CCI. '

HISTORY OF INDIA'S COMPETITION REGIME

A sketch of the history of India's competition regime and its possible future conditions were prepared. The emphasis was on explaining the transition from the Monopolies and Restrictive Trade Practices Act (MRTPA) 1969 to Competition Act, 2002 (CA02) and its amendment in 2007. The shift from the former to the latter was explained on the basis of the demands of the consumer movement for effective regulation of anti-competitive practices such as cartels, refusal to deal, anti-competitive mergers and acquisitions, abuse of dominance etc. These demands first led to the amendment of the MRTPA in 1984 to bring in consumer protection provisions against Unfair Trade Practices (UTPs), and then in 1991 to bring the state sector into its ambit. The shift from MRTPA to CA02, which is explained well by the report, finally came about because of change in the Government's stand in response to lobbying efforts by cuts and consequent recognition, enhancing competition is more important than checking monopoly. The report then goes on to describe and analyse the proceedings of the Raghavan Committee which was subsequently set up to draft a new competition policy and law. The committee heard various interest groups and came up with a concept bill which postulated the staggered implementation of a new competition law with a cooling off period of three four years in which advocacy efforts would be undertaken to popularize the new law and invite debate on it.

The Concept bill was revised and finally a draft Competition Bill was placed for adoption by the Parliament in 2002, which was adopted as Competition Act, 2002. The appointments were challenged in the Supreme Court, which reminded the government about the doctrine of separation of powers between the executive and the judiciary. Consequently, several amendments were carried out in 2007. A few major changes were introduced. The authority was split into two: A Competition Commission, headed by an expert, to regulate, and a Competition Appellate Tribunal (CAT), headed by a judge, to adjudicate. Other than that, the selection procedure was legislated as against the earlier one where the government did things in an arbitrary fashion, which actually lead to the challenge in the apex court. However, one major change involved making all merger notifications mandatory as against the earlier provision of these being voluntary, which actually had all big business houses up in arms. The report, however, notes that Competition Act, 2002 did bring about many groundbreaking changes: extra territorial jurisdiction which would allow the competition authority to chock abuses abroad with an effect on India; the shift from the structural approach of checking dominance to the behavioural approach of checking abuse of dominance etc. The report also points out a major failing of the competition law as finally passed: it did not postulate a completely neutral and representative procedure of selecting the chairmen and members of the competition agency and continued with the tradition of appointment directly by government.

OBJECTIVES OF THE COMPETITION ACT

To achieve its objectives, the Competition Commission of India endeavours to do the following:

i. Make the markets work for the benefit and welfare of Consumers.

ii. Ensure fair and healthy competition in economic activities in the country for faster and inclusive growth and development of economy.

iii. Implement competition policies with an aim to effectuate the most efficient utilization of economic resources.

iv. Develop and nurture effective relations and interactions with sectoral regulators to ensure smooth alignment of sectoral regulatory laws in tandem with the competition law.

v. Effectively carry out competition advocacy and spread the information on benefits of competition among all stakeholders to establish and nurture competition culture in Indian economy.

ANTI-COMPETITIVE AGREEMENT

An anti-competitive agreement is an agreement having appreciable adverse effect on competition. Anticompetitive agreements include, but are not limited to:

i. Agreement to limit production and/or supply;
ii. Agreement to allocate markets;
iii. Agreement to fix price;
iv. Bid rigging or collusive bidding;
v. Conditional purchase/sale (tie in arrangement)
vi. Exclusive supply/distribution arrangement,
vii. Resale price maintenance; and
viii. Refusal to deal.

ABUSE OF DOMINANT POSITION

Section 4 of the Act provides, "No enterprise shall abuse its dominant position". Dominant position is the position of strength enjoyed by an enterprise in the relevant market, which enables it to operate independently of competitive forces prevailing market, or affect its competitors or consumers or the relevant market in its favour. There shall be an abuse of Dominant Position if an enterprise indulges into the below mentioned activities:

1) Directly or indirectly imposing discriminatory conditions in the purchase or sale of goods or service, or setting prices in the purchase or sale (including predatory pricing) of goods or services;

2) Limiting or restricting the production of goods, or provision of services or market therefore; or limiting technical or scientific development relating to goods or services to the prejudice of customers;
3) Indulging in practice or practices resulting in the denial of market access
4) Making conclusion of contracts subject to acceptance by other parties of supplementary obligations, which has no connection with the subject. of such contract
5) Utilization of the dominant position in one relevant market to enter into, or protect, another relevant market.

COMPETITION COMMISSIN OF INDIA

It is a body of the Government of India responsible for enforcing The Competition Act, 2002 throughout India and to prevent activities that have an adverse effect on competition in India. It was established on 14 October 2003. It became fully functional in May 2009. CCI, entrusted with eliminating prohibited practices, is a body corporate and independent entity possessing a common seal with the power to enter into contracts and to sue in its name. It is to consist of a chairperson, who is to be assisted by a minimum of two and a maximum of ten other members.

ACTS TAKING PLACE OUT OF INDIA

CCI has the power to enquire into unfair agreements or abuse of dominant position or combinations taking place outside India but having adverse effect on competition in India, provided that any of the below mentioned circumstances exists:

(a) An agreement has been executed outside India

(b) Any contracting party resides outside India

(c) Any enterprise abusing dominant position is outside India

(d) A combination has been established outside India

(e) A party to a combination is located abroad.

(f) Any other matter or practice or action arising out of such agreement or dominant position or combination is outside India,

To deal with cross border issues, CCI is empowered to enter into any Memorandum of Understanding or arrangement with any foreign agency of any foreign country with the prior approval of Central Government.

BENCHES

For the execution of duties, the Act contemplates the exercise of the jurisdiction, powers and authority of CCI by number of Benches. If necessary, a Bench would be constituted by the chairperson of at least two members; it being mandated that at least one member of each Bench would be a "Judicial Member". The Bench over which the chairperson presides is to be known as the Principal Bench and the other Benches known as Additional Benches. However, the Act further empowers the chairperson to further constitute one or more Benches known as Mergers Benches exclusively to deal with combination and the regulation of combinations.

JURISDICTION

An enquiry or complaint could be initiated or filed before the Bench of CCI if within the local limits of its jurisdiction the respondent's actually or voluntarily resides, carries on business or works for personal gain, or where the cause of action wholly or in part arises.

CCI has been vested with the powers of a ci vil court including those provided under sections 240 and 240A of the Companies Act, 1956 on an "Inspector of Investigation" while trying a suit, including the power to summon and examine any person on oath, requiring the discovery and production of documents and receiving evidence on affidavits. CCI is also vested with certain powers of affirmative action to act in air expedited manner. Civil courts or any other equivalent authority will not have any jurisdiction to entertain any suit or proceeding or provide injunction with regard to any matter which would ordinarily fall within the ambit of CCI.

PROCEDURE OF INVESTIGATION AND ORDER THEREOF

If a prima facie case exists with respect to anticompetitive agreements and abuse of dominant position, CCI is empowered to direct the Director General to conduct an investigation in the matter, in determining the nature of agreements, the following factors are to be taken into account:

a. Barriers to new entrants in the market
b. Driving existing competitors out o the market
c. Foreclosure of competition by hindering entry into the market
d. Accrual of benefits of consumers
e. Improvements in production, or distribution of goods or provision of services

f. Promotion of technical, scientific and economic development.

In determining the nature of the dominant position enjoyed by an enterprise, following factors are to taken into account:

a. Market share of the enterprise and market structure and size
b. Size and resources of the enterprise
c. Economic power of the enterprise including commercial advantages over the competitors
d. Size and importance of the competitors
e. Dependence of consumers on the enterprise
f. The extent of vertical integration and consumer dependence
g. Whether the monopoly was gained by reason of statute or otherwise
h. Entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry market entry barriers, technical entry barriers, economies of scale, Countervailing buying power and social obligations and costs.
i. Any other factor which CCI may consider relevant for the enquiry.

The Director General would submit his report with recommendations. If CCI is of the view that there are no merits to the case, the complaint would he dismissed, with costs. However, during the course of enquiry, CCI may grant interim relief by way of temporary injunctions restraining a party from continuing with the ant competitive agreements or abuse of dominant position. An order of CCI subsequent to an enquiry could consist of:

1. Directing the persons or entities ruled against to desist from abusing a dominant position or discontinuing acting upon anti-competitive agreements
2. Imposing penalty to the maximum extent of ten percent of the average turnover for the last preceding three financial years upon each person or entity party to the abuse
3. Award compensation
4. Modify agreements
5. Recommend the division of the dominant enterprise to the Centre, which has the ultimate authority to decide the fate of a dominant enterprise
6. Recovery of compensation from any enterprise for any loss or damage shown to have suffered by the other party.

PENALTIES

In case of failure to comply with the directions of CCI and Director General or false representation of facts by parties, penalties ranging from Rs. 1 lakh to Rs 1 crore may be imposed as the case may be.

EXECUTION OF ORDER

So far, the execution of the order is concerned, it is the responsibility CCI. However, in the event of its inability to execute it, CCI may send such order for execution to the High Court or the principal civil court, as the case may be.

POST DECISIONAL OPTIONS

- REVIEW

The aggrieved person may apply to CCI for review of the order within thirty days from the date of the order, provided that the below mentioned conditions are fulfilled:

- An appeal is allowed by this Act
- No appeal has been preferred

- APPEAL

Provision has been made for an appeal against any order or decision of CCI by any aggrieved person to Competition Appellate Tribunal within 60 days of receipt of order or decision of CCI. A person aggrieved with the direction or order of COMPAT can appeal to the Supreme Court within sixty days from the date of communication of the decision or order.

COMPETITION ADVOCACY

Perhaps one of the most crucial components of the Act is competition advocacy. Intention is to help evolve competition law through review of policy, promotion of competition advocacy, creating awareness and imparting training about competition issues. For this purpose, Government may, in its discretion, make a reference to CCI for its opinion thereon but is not bound by it, the power of the Centre to issue directions to CCI is inherent, and such directions would bind it.

CONCLUSION

The Competition Act of India was enacted in 2002 as a result of India's pursuit of globalization and liberalization of the economy. Introduction of the Act was a key step in India's march towards facing competition both from within the country and from international players. The Act is not intended to prohibit competition in the market. What the Act primarily seeks to regulate, are the practices that have an adverse effect on competition in the market(s) in India. In addition, the Act intends to promote and sustain competition in markets, protect consumer interests, and ensure freedom of trade in the market(s) in India.

REFERENCES

[1] MAGDALEEN VAN WYK & MARUMO NKOMO, *competition and trade policy*, Enforcement & Exemptions Division at the Competition Commission

[2] The Other Side of Harmony: Can Trade and Competition Laws Work Together in the International Marketplace? Julian Epstein, American University International Law Review, Volume 17, Issue 2, 2002

[3] Competition Policy and international trade distortions, Alden F. Abbott and Shanker Singham at p 23.

[4] The Other Side of Harmony: Can Trade and Competition Laws Work Together in the International Marketplace? Julian Epstein, American University International Law Review, Page 362, Volume 17, Issue 2, 2002

[5] Preamble to the Marrakesh Agreement Establishing the World Trade Organization 1994