



Competition Act, 2002 - India Inc. attempts at fair competition

A decade after the Raghwan Committee had submitted its report to revise and reform the competition (anti-trust) laws in the country, the Competition Act, 2002 has finally come into force in its entirety. The Competition Act, 2002 (*"the Act"*) got the President's consent more than eight years back in January 2003. Since then the new proactive and flexible competition regime has been in the process of coming into place replacing its reactive and rigid predecessor, the Monopolistic and Restrictive Trade Practices Act, (*"MRTP Act"*) 1969 part by part. The MRTP Act lost its place in the country post liberalization and globalization which began in 1991. Attempts were being made since 1991 to restructure and remove the then restrictive regime with a new progressive and protective law and the Competition Act is hence to be the answer to the difficulties faced by the MRTP Act.

The Ministry of Corporate Affairs (*"MCA"*) formed the Competition Commission of India (*"CCI"*) in October 2003 to take over the affairs of the MRTP Commission (to be repealed entirely in September 2011) and to regulate, develop and enforce the competition law in the country in a phased manner. The MCA constituted the Competition Appellate Tribunal in May 2009 as the appellate body to hear appeals against orders passed by CCI. Two major aspects of the Competition Act, i.e., *anti-competitive agreements* (Section 3) and *abuse of dominance* (Section 4) were successfully enforced with effect from May 2009.

Having already enforced sections 3 and 4 of the Act in 2009, the MCA and the anti-trust regulator together had been long attempting at enforcing the combination regulations to control mergers and acquisitions having appreciable adverse effect on competition. The MCA realizing that the practice of mergers and acquisitions had attained considerable significance in the contemporary corporate scenario in India, finally brought combinations under the purview of CCI when it notified Section 5 to be enforced with effect from 1st June, 2011 along with the Competition Commission of India (Procedure in regard to the transaction of business relating to combination) Regulation 2011 (*"Combination Regulations"*). Under the new law, a mandatory notice to CCI would get triggered where the transacting parties or the merged entity meet certain asset or turnover thresholds prescribed under the Act.

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ALMT Legal Relocates Its London and New Delhi Offices; Inducts New Partners

Following its split from Clyde & Co in April this year, ALMT Legal has relocated its offices in London and New Delhi. Concurrently, with the relocation, the firm has also expanded its partnership by inducting two new partners in these offices. Garima Basu will lead the London office while Seema Kothari will lead the New Delhi office.

In London, where the Firm will practice only Indian law, the office has strategically relocated to the city keeping in mind the accessibility and reach of English law firms and multinational corporate houses around the square mile of the city. Garima has in-depth experience of Indian law, having previously been with AZB & Partners, New

Delhi where she worked extensively on M&A and private equity deals. She then incubated her own Indian law practice, before joining ALMT Legal to lead the Firm's London office.



In New Delhi, ALMT Legal's office has been relocated to the new corporate hub of Saket in South Delhi. The Delhi office will be headed by Seema Kothari, who was earlier an in-house legal counsel to a large industrial house having handled arbitrations and dispute resolutions



at all levels. The Delhi team of ALMT is further strengthened by the Firm's existing team of senior and other associates in both fields of dispute resolution and corporate M&A.

ALMT Legal proudly welcomes both Seema and Garima.



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Acquisitions and mergers meeting the thresholds require a prior notice to be filed with CCI within a period of 30 days of the Board approval or execution of a binding agreement whichever is earlier. On receiving such a notice, CCI would scrutinize such combinations and form a prima facie opinion within 30 days of the notice on whether the proposed combination is likely to have an appreciable adverse effect on competition in India. Where such a prima facie opinion is formed, CCI would then order a detailed investigation.

The Act provides for a period of upto 210 days within which CCI is to file its final report stretching the statutory approval period to approximately seven months before which the combination cannot come into effect. After the investigation CCI would issue its final decision on the combination which could either be to approve the combination, reject the combination or order certain modifications to the same. Modifications if acceptable to the parties would be carried out under the scrutiny of independent agencies after which a compliance report is to be submitted to CCI.

The Combination Regulations, keeping in mind the corporate scenario in the Indian economy; have categorized certain transactions as to ordinarily not have an appreciable adverse effect on competition. Intra group restructurings, acquisition of assets in the ordinary course of business, bonus issue, stock splits, rights issue etc. are a few such transactions and have been exempted from filing a mandatory notice. Private Equity Funds or Venture Capital Funds or other forms of financial investments made, where the acquisition of shares or voting rights are solely made for investment purposes or in the ordinary course of business, are also exempted if the post acquisition direct or indirect stake of the acquirer does not exceed 15%. It should be noted

that like several foreign jurisdictions, powers have been specifically provided to CCI to inquire into combinations taking place outside India if they are likely to have an appreciable adverse effect on competition in India. The merger control law in India is in line with the international best practices.

The present law lays emphasis on protecting the market from an appreciable adverse effect on competition and as a result protecting the interests of the consumers by regulating the transactions and actions of major players in any particular industry. Some of the major sectors which have already fallen under the scanner of the regulator include civil aviation, stock exchanges, private sector banks, housing finance companies, DTH service providers, etc. According to the Act, CCI has the power to regulate both horizontal and vertical agreements under section 3 if it believes the same may be anti-competitive in nature. CCI has the power to direct discontinuance of and nullify any such agreement and also to impose stringent penalties in terms of the provisions of the Act, on the defaulting party/s if upon due investigation, it finds that such transactions were in adverse effect of competition. A similar power has been given to CCI under Section 4 of the Act, under which it can regulate any action of a dominant player in a market which is in abuse of such dominance. In addition to the above actions, CCI is empowered to direct division of an enterprise enjoying dominant position if it finds it necessary.

Within the first quarter of the Combination Regulations coming into force and CCI being fully empowered to regulate competition in the country, CCI is proving its metal by carrying out its duties as the country's anti-trust regulator. CCI cleared Reliance Industries' buyout of Bharti group's 74% stake in insurance joint ventures with AXA of France within 14 days of application as there was no anti-competition issue involved. Recently, UTV Software Communications has also approached CCI to seek approval for its proposed merger with Walt Disney Co (South East Asia) in a deal valued at around Rs 2,000 crore.

CCI has passed stringent orders and has imposed hefty penalties against several entities for being in contravention of Sections 3 and 4 of the Act. National Stock Exchange of India, in June 2011, was fined a sum of Rs. 55.50 crores, being 5% of its average turnover, for abusing its dominance in the consumer derivatives segment, on a complaint made by competitor MCX Stock



Companies Bill, 2009

Finally to be tabled before the 2011 session of Parliament, the Companies Bill 2009 seeks to place an increased onus on ideas like Corporate Social Responsibility and to tighten the reigns on immoral practices like insider trading and raising money from the unassuming public. It remains to be seen how long Parliament takes to get the Bill moving and to implement its ideals in reality.



Special measures in respect of transactions with persons located in notified jurisdictional area

A new provision, section 94A, has been inserted in the Income Tax Act, 1961 by the Finance Act, 2011 with effect from 01 June 2011. This provision specifically deal with transactions in relation to the jurisdictions with which India does not have effective mechanism for exchange of information. Such jurisdiction will be notified by the Central Government.

Anti-avoidance measures have been put in place in this regard as follows:

- a) Transfer pricing regulations will apply to transactions, where one of the parties to the transaction is located in a notified jurisdiction, as if the parties to the transaction shall be deemed to be associated enterprises and the transaction shall be deemed to be an international transaction.
- b) Payments made to a financial institution located in a notified jurisdiction shall not be allowed as deduction unless the assessee furnishes authorisation to the income tax authorities in the prescribed form to seek relevant information from such financial institution on behalf of the assessee.
- c) Expenditure or allowance (including depreciation) arising from the transaction with a person located in a notified jurisdiction shall not be allowed unless the assessee maintains prescribed documentation and furnishes prescribed information.
- d) Any sum received or credited by the assessee from persons located in a notified jurisdiction shall be deemed to be income of the said assessee unless the assessee explains to the satisfaction of the income tax authorities, the source of such money in the hands of the payer.
- e) Withholding tax at the rates in force or rates specified in the Income Tax Act or 30 per cent, whichever is higher, will apply on any sum payable to persons in a notified jurisdiction.

Remarks:

The objective is to get information about transactions done with a person in a notified jurisdiction and about assets held in such jurisdiction. The present provision is intended to detect, deter and discourage offshore tax evasion and keeping unaccounted money abroad, by applying transfer pricing regulations, having higher withholding taxes and disallowing deductions.

- Santoshi Varma and Vikas Aggarwal

Exchange Ltd. Recently, CCI also imposed a penalty of around Rs 600 crore on realty major DLF Ltd for abusing its dominant market position. On the other hand, CCI cleared the 2008 strategic alliance between private carriers Jet Airways and Kingfisher Airlines as not being violative of the provisions of the Act; and the state-run Coal India Ltd of charges of anti-competitive practices while placing orders for supply of mining explosives. International entities like Facebook, Apple, Google, etc., have also been brought under the scanner by CCI.

It is to be borne in mind that the new law is in its nascent stage and certain areas of the law can develop and be clearer only with time. One such issue that exists on account of use of ambiguous terms in the Combination

Regulations, such as 'market share', 'insignificant local nexus', etc., can only be resolved by a clarification from CCI or by analyzing its interpretation in practice provided CCI stays consistent in the same. The road ahead for the regulator and the industry may not be very smooth since CCI would be learning on the job and the industry is already grappling with a fast changing legal environment in the country.

CCI now has a strong mechanism in place and is adequately armed and ready to carry out its duties as the anti-trust regulator in the country. Time will as with most things spell exactly how CCI plays a fine balancing act between regulatory needs and business interests.

- Aditya V Jalan



Snippets

Law Ministry is bringing in legislation to stop frivolous PILs

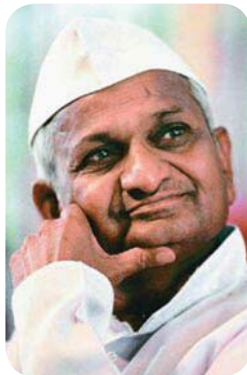
To bring in an effective tool to stop filing of frivolous Public Interest Litigations (PIL), the Union Ministry of Law and Justice is giving final touches to a Bill to regulate the filing of PILs. The Ministry is proposing to effectively discourage and curb PILs filed for extraneous considerations. It also wants to make it an offence for anybody to file a PIL for extraneous and ulterior motives and empower the courts to discourage such PILs by imposing exemplary costs. Will the ministry be successful in fulfilling its aim of not making it illegal to file a PIL but only to check frivolous and motivated PILs?

MCA steps back!

Barely a month after an initiative to allow online incorporation of companies within 24 hours, the government has gone back on its ambitious plan aimed at giving ease to the corporate world to carry out business in India. It seems the ministry has traced back its steps and believes India isn't ready for speedy incorporation of companies.

Lokpal Bill

Anna vs. The Government: The struggle for the upper hand continues as Anna refuses to back down. Surprisingly, it has been the Government who has taken the initiative and moved several steps ahead in order to meet the demands of Team Anna.



Swiss Banks to provide information to India

In keeping with the terms of the recently amended DTAA between India and Switzerland, the Swiss government has agreed to follow-through with the provision of banking information to India.

While Swiss banks are famous (infamous?) for their promise of complete anonymity, labeling them a haven for money launderers and other illicit financial practices, this move on

the part of the Government will open up channels of information earlier completely closed off and will enable the Indian Government to check the financial activities of Indian citizens abroad, stemming the growing tax avoidance mechanisms and practices.

India – Georgia DTAA

The Double-Taxation-Avoidance-Agreement between India and Georgia was signed by Mr. M.C.Joshi, Chairman, Central Board of Direct Taxes(CBDT) on behalf of the Government of India and Mr. Zurab Katchkatchishvili, Ambassador of Georgia to India on behalf of the Government of Georgia on 24 August, 2011.

Along with the standard provisions of information sharing and the maintenance of international best standards between the two countries, the DTAA between India and Georgia envisages a single tax being levied in the source state on an enterprise



established and having its permanent location in that source state. The Agreement also makes allowances for the taxation of income from other sources and provides an enhanced recourse mechanism against double taxation to residents of both countries.

Finance Ministry to launch a new scheme to refund service tax on goods exported

The Finance Ministry is all set to launch a new scheme to refund service tax to exporters on the lines of duty drawback scheme for tangible imports used to produce goods. The scheme, which is based on the architecture suggested by a panel headed by Planning Commission member Saumitra Chaudhury, will allow quick return of service tax to exporters. The industry now waits the new scheme to be passed and its effects to be felt.



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