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Competition Laws in India

An Overview

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1. Rationale for Competition Laws

India's pursuit of globalization has resulted in removal of controls and liberalization of the economy. A key step in India's march towards facing competition – both from within the country and from international players – is the inception of a competition law regime.

As a general rule, competition laws are premised upon the economic principle that competition is desirable in a free market. Competition laws seek to prevent businesses from engaging in practices that are harmful to competition and consumer welfare. This ideology is, in some ways, distinct from the ideology promulgated by the erstwhile legislation dealing with restrictive trade practices in India – the Monopolies and Restrictive Trade Practices ("MRTP") Act. The MRTP Act primarily focused on curbing monopolies in the market. However, with the advent of competition laws in India, the focus has now shifted from curbing monopolies, *strict senso*, to promoting competition.

Competition laws are introduced to regulate the manner in which businesses are conducted in India, so as to create a level playing field with effective competition in the market. The underlying intent for this statute is for businesses to compete on merit, and not with the aid of anti-competitive agreements and/or conduct. Having said that, however, it may be noted that even though competition laws can be used by businesses as a sword to ensure 'level playing field' in the market, the intent of this relatively new statute in the Indian legal system is not to make it easier for the weaker businesses to survive in the market, or require the more profitable businesses to give up their market share.

2. What does the Competition Act Cover?

The Competition Act ("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.

At the heart of the Act are various activities that will be prohibited as being anti-competitive. The activities comprise:

(a) Anti-competitive arrangements;
(b) Abuse of dominant position; and
(c) Mergers and acquisitions that have an appreciable adverse effect on competition in India.

Each of these will be examined in greater detail below.

(a) Anti-Competitive Arrangements

Anti-competitive arrangements are those that have as their object to, or actually effect in preventing, restricting or distorting competition in any market in India. Such arrangements cover not only agreements, but also decisions made by association of persons / enterprises, as well as the conduct of parties acting in collusion.

The ambit of s.3 of the Act is extremely wide, in as much as, it not only catches the express agreements, but also entraps implied agreements in its purview (for instance, a gentlemen's agreement by way of a handshake on a golf course would also be caught).

Although the Act does prescribe certain arrangements which will / likely to be caught by the restriction on anti-competitive arrangements prescribed thereunder, it should be noted that these are only examples of anti-competitive arrangements, and arrangements that are not specifically prescribed under the Act may still be caught within the general prohibition. The examples of anti-competitive arrangements prescribed under the Act are set out below:

(i) directly or indirectly determining purchase or sale prices;
(ii) limiting or controlling production, market(s), technical development or investment;
(iii) arrangements for the sharing markets or sources of production or provision of services;
(iv) directly or indirectly engaging in bid rigging or collusive bidding;
(v) enforcing a condition on the purchaser of certain goods, to also purchase some other goods(s);
(vi) entering into exclusive distribution or supply arrangement(s);
(vii) arrangements between persons involving a refusal to deal with a particular manufacturer or customer; and/or
(viii) entering into arrangements to sell goods on the condition that the prices to be charged on the resale by the purchaser, shall be the prices stipulated by the seller, unless it is clearly stated that prices lower than those prices may be charged ("resale price maintenance").

Some of the aforementioned arrangements (*viz.* - price fixing, output limitation, market sharing and bid rigging) are outright prohibited, in as much as, any arrangement involving any of these activities, shall be presumed to have an appreciable adverse effect on competition in India; while others are weighed against their impact on competition.

In a recent case, the competition regulator has found 11 cement manufacturers, guilty of cartelization and engaging in anti-competitive practices (parallel and coordinated

behavior on price, dispatch and supplies in the market), and has imposed a penalty of more than Rupees six thousand crores.

(b) Abuse Of Dominant Position

The Act prohibits any conduct which amounts to the abuse of a dominant position which may have, as its object or effect, an appreciable adverse effect on competition in any market in India. The Act defines "dominant position" as a "*position of strength, enjoyed by an enterprise, in the relevant market in India, which enables it to:*

(i) *operate independently of competitive forces prevailing in the relevant market; or*

(ii) *affect its competitors or consumers or the relevant market in its favour.*"

Exactly what will constitute as a conduct amounting to an "abuse" of dominant position has not been defined. However, the Act does prescribe certain forms of conduct as being likely to fall within this general prohibition. These are:

(i) engaging in predatory pricing or any other form of predatory behavior;
(ii) limiting production, markets or technical development to the prejudice of consumers;
(iii) indulging in practices resulting in denial of market access;
(iv) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts; and/or
(v) leveraging the dominant position in another market to enter into, or protect the relevant market.

It may be reiterated that merely being a large or a dominant player in a market, does not amount to an anti-competitive behavior. What the Act seeks to target is to dissuade a dominant player from using his dominance to adversely affect competition in a market.

The competition watchdog has recently fined DLF, a major real estate player in India, for abusing its dominance in the real estate market (relevant market of "High end Residential Units" which are developed and sold to the prospective buyers). The competition regulator, in the instant case, found that not only the market share, size, resources and economic power of DLF, but also its practices, had given DLF superlative market power over its competitors. Such market power had assisted DLF in exploitation of consumers' biases, asymmetry of information, costly exit option, one-sided agreement(s) and unfair conditions being imposed on the consumers – all of which, affected the consumers as well as competition in the market. To this effect, the competition regulator imposed a penalty of Rupees six hundred and thirty crores, as well as directing DLF to cease and desist from formulating and imposing unfair conditions in its agreements with buyers, and modifying the unfair conditions imposed on the buyers.

(c) Anti-Competitive Combinations

Combinations of enterprises (i.e. where 2 or more entities "combine" together to form a single entity, thereby reducing the number of players in the market) may result in lessening of competition within a relevant market in India. The Act prescribes that a "combination" may be defined by looking at:

(i) the type of transaction (ie whether a combination is an acquisition, merger or amalgamation); and/or

(ii) the jurisdictional thresholds – the Act stipulates certain thresholds in terms of assets and turnover of the target company and the acquiring company which need to be reviewed before a determination may be made as to whether such a combination would be violative of the Act or not.

However, not all combinations are deemed to be anti-competitive. Some instances of such combinations are:

(i) combinations within the same group of companies;
(ii) acquisition of not more than 15% of voting rights, not leading to control;
(iii) acquisition of shares where the acquirer already has 50% or more shareholding;
(iv) combinations taking place entirely outside India and which have insignificant local nexus and effects on markets in India.

Ever since the inception of the provisions relating to the regulation of combinations (in 2011), the competition regulator has been inundated with filings seeking approval for their respective proposed "combination". The competition commission has thus far, been able to clear all filings submitted to them within the time period stipulated under the Act (the Act provides a time period of 210 days for the competition commission to take a decision on a merger filing). Two of the most recent filings that have been approved by the competition regulator are:

(i) Acquisition of Shri Ram Electro Casr Limited by Saint-Gobain Produits pour la Construction SAS; and
(ii) Acquisition of control over Network 18 Group companies by Reliance Industries.

3. Enforcement

Once the Competition Commission of India ("CCI") – the quasi-judicial body, entrusted with the task of ensuring compliance under the Act in India – is satisfied of the existence of an anti-competitive agreement, or an abuse of dominant position, it may give any of the following orders:

(i) cease and desist;

(ii) impose a penalty of up to 10% of the average turnover of the enterprise for the preceding 3 financial years;

(iii) in case of cartel, the CCI may impose a penalty of up to 3 times its profits, or up to 10% of its turnover, whichever is higher, for each year during which the agreement was in force;

(iv) order a modification to the agreement / practice; and/or

(v) issue any directions in addition to the above which may bring about an end to the contravention.

In the event of a "Combination", where the CCI opines that any combination does, or is likely to have an appreciable adverse effect on competition, the CCI may:

(i) direct that such a combination shall not take effect; or

(ii) propose suitable modification(s).

The CCI is not only empowered to investigate the breaches of the competition laws in India, but is also the body formed to administer and impose sanctions in the event of infringement of the provisions of the Act. Towards this end, the CCI may impose penalties of:

(i) upto ten percent (10%) of the average turnover of an enterprise for the three (3) preceding financial years; and

(ii) in the case of a cartel, the CCI may impose, on each member, a penalty of up to three (3) times its profits or up to ten percent (10%) of its turnover, whichever is higher, for each year during which the cartel arrangement / agreement was in force.

The Act also prescribes for a jail term of up to three (3) years, in the event of a person not complying with the orders or directions issued by the CCI, or where a person fails to pay the fine imposed by the CCI within the stipulated time period.

4. Conclusion

This is a short update which provides key insights into the Act, and what can potentially tantamount to an anti-competitive behavior. The introduction of competition laws is not novel and is already in existence in various countries.

The firm has a team of lawyers with knowledge and experience in this area, and who are able to help analyse the clients' competition law queries, conduct competition compliance audits as well as draft competition law compliance manuals for the clients' internal purposes.

About the author

Piyush Gupta is a partner at Kochhar & Co. and heads the competition advisory practice group of the firm.

Piyush has almost ten years of trans-national experience in the competition law regimes across India and Singapore. Piyush is well-versed with the complexities of this relatively new entrant in the Indian legal arena and has drafted the competition law compliance manuals and guidelines for companies across various industries. Piyush has also conducted competition law compliance audits for various corporates, in addition to providing training and holding workshops on identification of issues pertaining to competition laws for the purposes of various companies' in-house legal counsels, as well as for various operational personnel, such that competition law issues can be highlighted and dealt with on an immediate basis. In this regard, you may contact Piyush Gupta at +91.124.454.5222 or email him at piyush.gupta@kochhar.com.

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