

Competition Law And Practice: Redefining Business

Competition is a driving force in a global economy. Free and fair competition is one of the pillars of a proficient market economy. In India, Monopolies and Restrictive Trade Practices Act, 1969 ("**MRTP**") was enacted to prohibit monopolistic and restrictive trade practices. However, in the wake of globalisation and liberal economic policies introduced in the country it necessitated to replace the MRTP Act.

The Competition Act, 2002 (as amended from time to time) ("**Act**") was therefore enacted with provisions (notified from time to time) relating to anti-competitive agreements, abuse of dominance, mergers and amalgamations. Competition Commission of India ("**CCI**") was set up in March, 2009 under the Competition Act, 2002 to protect and promote competition.

The establishment of a Commission seeks to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of the consumers, to ensure freedom of trade carried on by other participants in markets and for matters connected therewith or incidental thereto. The endeavour of the Commission is thus to make markets work well for the benefit of consumers.

Anti-competitive agreements

The Act prohibits anti-competitive horizontal and vertical agreements, rendering them void. Horizontal agreements are illegal if they are fixing prices, discounts; areas of operation, customers, limiting technological innovation, production, supply, bid rigging or collusive bidding are seen as cartels. Vertical agreements involving tying, exclusivity - distribution and purchase, refusal to deal and fixing minimum resale prices could violate the provisions of the Act if they cause/likely to cause an appreciable adverse effect on competition in India.

Not just formal agreements but all forms of arrangements: agreements, concerted practice or divisions could be hit by the provisions of the Act. It is irrelevant if the arrangements are oral, indirect or even unenforceable.

Contact among the competitors (including exchanging commercially sensitive information) may amount to a violation under the Act.

Abuse of a dominant position

The Act prohibits the abuse of dominance and not the existence of a

dominant position. It prohibits behaviour classified as "anti-competitive" and regulates businesses using their dominance to abuse their dominant position. A dominant enterprise imposing unfair or discriminatory price or conditions of sale; limiting or restricting production or innovation and technical development; indulging in tying of goods, exclusive dealing obligations or rebates or cross-subsidizing the costs by leveraging position in some other market could violate the provisions of the Act.

Combinations/Threshold Tests

Certain acquisitions of shares, voting rights, control or assets, mergers (including court-approved mergers), amalgamations and in some cases, demergers maybe covered under the Act's merger control provisions as "Combinations", if the transaction exceeds any of the thresholds prescribed under the Act as modified by the Ministry of Corporate Affairs ("**Threshold Tests**").

When a transaction qualifies under the Act as a combination, there are certain statutory exemptions that may mean the transaction does not need to be notified to the CCI. In addition, the amended combination regulations describe several potential transaction scenarios that "do not normally need to be notified" to the CCI, and these may also be effectively exempted. There is no concept of a voluntary notification to the CCI. If the Thresholds Tests are not met, no notice can be filed with the CCI.

Breach of Provisions of the Act

- A party breaching the provisions of the Act could incur costs up to 10% of its company's average turnover for the preceding 3 (three) years in fines. In case of a cartel, the fines for each member may extend up to the higher of 3 (three) times the profit or 10% (ten percent) of the turnover for each year of the period of contravention. Further, the directors, managers, officers and the secretary of the company could be individually fined for their consent, connivance or neglect resulting in a breach of the Act.
- Third parties, like customers or competitors could bring claims for damages against the company if it is in breach of the Act. In some cases this could even be done by a class action of similarly situated persons claiming to be aggrieved due to such acts of companies. As a result, agreements that such companies may have executed maybe held void and maybe amended or modified by the CCI if they are held to be in breach of the Act. The launch of a formal investigation by CCI's Office of Director General will usually require significant inputs from/involvement of management of the company, significant costs as to legal fees and opportunity cost. Further, the investigation or an order by the CCI against the company may result in adverse publicity and reputational damage.

Companies with international presence

The Competition authorities (like the CCI) across the world are co-operating with each other. This becomes especially relevant if the company has an international presence. India has already signed cooperation agreement with the American, Russian and Australian competition regulators with many more to come. With huge fines already issued by the CCI for cartels (for example, some participants in the cement sector were fined a total of

Rs.6,700 crores and for abuse on a dominant position, the Act, has already brought about a paradigm shift redefining the way the business is being done in India.

Advantages of competition

In today's business environment, competition seeks to ensure effective allocation of resources, productive efficiency; which ensures that the costs of productions are kept at a minimum and dynamic efficiency which promotes innovative practices. The provisions of the Act are required to be kept in mind whilst doing business, executing contracts and agreements, implementing the mergers and acquisitions or Combinations as also dealing with the competitor.

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