TRIFECTA OF COMPETITION LAW IN INDIA

*Private Circulation Only FEBRUARY, 2014

"Anti-trust laws— an impetus to innovation, industry and competition"

Competition in the economy is the impetus to the innovation and growth which reflected in their influence and control of prices. Independent suppliers capable of maintaining bonafide competitive pressures on each other are the influencers of survival of healthy Competition. In reality a perfect competition in the market is a rarity. Hence, the anti-trust laws are designed with an intention to prevent monopolies, regulate anti-competitive conduct and encourage competition.

In comparison to its developed counterparts in Europe and West, the Competition law in India is at a nascent stage. In India, the relevant legislation is the Competition Act, 2002 ("**CA**") which prohibits and regulates anti-competitive agreements (under Section 3 of the Act), abuse of dominant position (under Section 4 of the Act) and combinations (under Section 5 & 6 of the Act) which are likely to cause adverse impact on competition.

The Competition Commission of India ("**CCI**") has been formed under the CA to regulate, monitor and enforce the provisions of the CA thereby promoting and sustaining competition in the markets and protecting the interest of the consumers.

Each of the three essential elements of CA is touched upon below:

Anti-competitive Agreements

The first restrictive covenant of the competition regime in India is the absolute prohibition of anti-competitive agreements. An Anti-competitive agreement which causes or is likely to cause an appreciable adverse effect on competition ("**AAEC**") within India is prohibited [Section 3 of the CA]. In ***Neeraj Malhotra V. Deutsche Post Bank (CCI Case No. 05 of 2009)*** , CCI has held that in order to establish an infringement under Section 3 of the CA the Agreement must be established unequivocally.

Anti-competitive agreements include tie-in arrangements, exclusive supply agreement, exclusive distribution agreement, refusal to deal and resale price maintenance.

AAEC is not defined under the CA, it would be presumed in the case of an agreement which directly or indirectly determines price, or limits or controls production, or divides a market by allocation of geographical area, type of goods or services or number of customers; or directly or indirectly results in bid rigging or collusive bidding, etc. such that the new competitors are barred from entering the market and the extant competitors are driven out thereof to the detriment of the consumer.

Although the CA does not define AAEC, Section 19(3) of the CA specifies certain factors that help determine AAEC. The following are the factors that the CCI must have due regard to in determining whether an agreement has an AAEC under Section 3 of the CA:

i. creation of barriers to new entrants in the market;

ii. driving existing competitors out of the market;

iii. foreclosure of competition by

hindering entry into the market;

iv. accrual of benefits to consumers

v. improvements in production or distribution of goods or provision of services;

vi. promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

Though the CA does not categorize agreements into horizontal (i.e. between competitors on same level) and vertical (i.e. between firms at different levels), it may seem that Section 3(3) is aimed at regulating horizontal agreements and Section 3(4) is aimed at vertical agreement. Certain horizontal agreements (except joint-venture agreements) are arguably presumed to have AAEC. Vertical agreements are considered illegal only if after analysis it is found that they would have AAEC.

Certain types of horizontal agreements take the form of a "cartel". The CA also arguably presumes that cartels have AAEC upon the market.

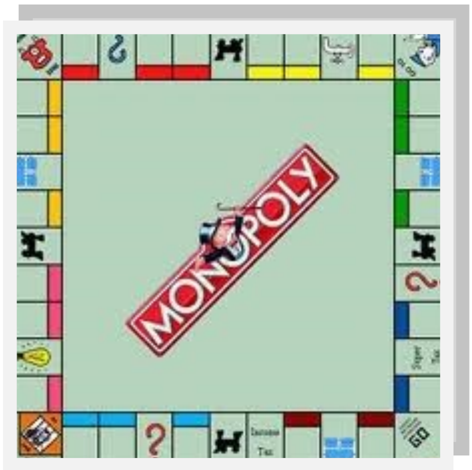
The term "cartel" is defined under the CA. Cartel is a group of legally independent producers / seller/ distributer / service provider who act together to fix prices, to limit supply or to limit competition.

Cartel is different from monopoly as defined above-single seller market; however a monopolist may be guilty of abusing said monopoly ("Guidelines for Cartels for CCI" by Suman Sanwal).

Hence, any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect thereof which causes or is likely to cause an AAEC on competition in India shall be an agreement in contravention of the provisions of CA .

Legally permissible Agreements cannot be termed "anti-competitive". Hence, the right of any person to prevent and restrain any infringement of or to impose reasonable conditions to ensure the protection of his intellectual property rights will not be held "anti-competitive" (Section 3(5) of CA).

In cases where it is determined that the agreement is anti-competitive, the CCI is empowered to direct the enterprises involved in such agreement to discontinue and not re-enter into such agreements. The CCI is also empowered to impose penalty on such enterprise or cartel involved or even direct modification of agreement, etc.



In ***Varca Druggist & Chemist & Others v/s Chemist & Druggists Association, Goa*** ("**CDAG**"), the CCI reached the conclusion that the conduct and practices of CDAG were limiting and controlling the supply of drugs in the district of Baroda in the state of Gujarat in violation of provisions of Section 3(3)(b) read with Section 3(1) of the CA. The CCI imposed a penalty Rs. 2,00,000 on CDAG.

Further in CCI ***Suo-Moto Case no. 03/2011*** decided on February 24, 2012 against the LPG cylinder Manufacturers, CCI discovered that the manufacturers of LPG had manipulated the bids and colluded to quote identical rates as a group.

CCI held all the bidding companies responsible in equal measure and imposed a penalty at the rate of 7% of the average turnover of the company.

Abuse of Dominant Position

Abuse of dominant position is prohibited under Section 4 of the CA. A market player is said to have abused their dominant position when an enterprise imposes unfair or discriminatory conditions in purchase or sale of goods or services or in the price for purchase or sale of goods or services. An acute cognizance has to be maintained by the CCI towards certain subtle aspects of agreement and intents of the market player with careful weighing of the attending circumstances. Prior to the determination of such abuse, the relevant market with respect to which the dominant position is assumed needs to be ascertained. Though dominance per se is not against public policy but, the use of the dominant status to the detriment of the relevant market is. The CA therefore targets the "abuse" of dominance and not dominance per se [United States v. Grinnell Corp., 384 U.S. 563 (1966)] .

'Relevant Market' is defined in terms of substitutability or interchangeability of products inter se and can be a product market or a geographic market, or a combination of the two.

Abuse has to be proved and cannot be presumed on the ground of the behaviour of the enterprise enjoying dominance. The market share of the enterprise, size and resources of the enterprise, size and importance of market competitors, etc are some of the factors that influence the determination of a dominant position and its anticipated abuse.

In ***Maharashtra State Power Generation Limited v Coal India Limited and Others (Case No. 3/2012)*** , firstly the CCI determined the relevant market as the production and sale of non-coking coal to the thermal power generators in India. Thereafter determining the status of the opposite party and its ability to stay uninfluenced by the market forces, CCI came to the conclusion that Coal India Limited and its subsidiaries enjoyed a dominant status. Considering the unconscionability of the terms of the contract involved and the imposition of a 'take it or leave it' proposition only highlighted the abuse by the opposite parties. The CCI imposed a penalty of Rs. 1773.05 Crores on Coal India Limited.

In ***MCX Stock Exchange Ltd. Vs. National Stock Exchange of India Ltd.*** ("**NSE**"), ***DotEx International Ltd. and Omnesys Technologies Pvt. Ltd***, it was alleged that NSE had waived the transaction fee principal revenue) and employed other subsidizing activities in its Currency Derivative ("**CD**") segment.

CCI observed a clear intent on part of NSE to eliminate competition and acquire a dominant position by cross subsidizing the CD segment from other segments where it already exercised apparent monopoly and thereby CCI imposed a penalty at the rate of 5 % of the average of NSE's 3 year annual turnover [**Case No.13/2009 Decided On June 3, 2011**].

It is pertinent to note that in cases of the abuse of dominance, the CCI is empowered to impose a penalty of up to 10% of the average turnover for the last 3 preceding financial years and / or direct discontinuance of any practice or direct the dilution of a dominant enterprise.

Merger Control

CA expounds combination under Section 5 as

"….acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises…."

Thus it is evident from above that the combinations are capable of bringing about as much benefits to the economy as they do by expansion of the current market. The rationale for their regulation also stems from the same expansionist and adverse effects which can be caused due to the considerable reduction in combination that may entail such combination.

It is pertinent to note that the CA also has extra-territorial operation and assumes jurisdiction over acts outside India if the market player or the combination is capable of affecting the/a market within India.

Any combination which causes or is likely to cause an AAEC within the relevant market in India shall be declared void.

Under the CA, prior approval of the CCI shall be required by a compulsory notification (Section 5 of CA) if the prescribed threshold of assets or turnover exceeds in following circumstances:

(a)An acquisition of control, shares, voting rights, or assets of one or more enterprise by one or more persons;

(b)An acquisition of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service; and (c)A merger or amalgamation of enterprise;

The GOI has notified the Competition Commission of India (Procedure in regards to the transaction of business relating to combination) Regulations, 2011 ("Combination Regulations").

within the thresholds prescribed by the CA (specified below) and comply with the other requirements specified in the CA.

* 1 crore = 10 million

In India (Rs. Crores)*		
	Combined Assets	**Combined turnover**
Parties	INR. 1,000 Crores (approx. USD 167 million**)	INR 3,000 Crores (USD 505 Million**)
Group	INR 4,000 Crores (USD 673 Million**)	INR 12,000 Crores (USD 2021 Million**)
Worldwide (USD Million)**		
	Combined Assets	**Combined turnover**
Parties	USD 500 Million [including at least INR. 500 crores (approximately USD 84 Million) in India]	USD 1,500 Million [including at least INR. 1,500 crores (approximately USD 252 Million) in India]
Group	USD 2,000 Million [including at least Rs. 500 Crores (approx. USD 84 Million**) in India]	USD 6,000 Million [including at least 1,500 Crores (approx. USD 252 Million**) in India]

However all amalgamations or mergers are not governed by the definition of Section 5 of the CA. Only such mergers and acquisitions exceeding the assets and turnover criterion laid down under the CA are regulated. With effect from June 1, 2011, the parties intending to enter into combinations have to seek prior approval of the CCI in the event proposed combination falls

**the rate of conversion of foreign exchange would be based on the average rate over the last six months as quoted on the London Foreign Exchange market. For the purpose of this Note, the conversion has been calculated at USD 1 = INR 59.37

The terms "Group", "Turnover" and "Assets" have been defined under the CA.

The following are the two exceptions to the provision of combinations:

(a) A share subscription or financing facility or any acquisition pursuant to any loan or investment agreement by Public Financial Institution or Foreign Institutional Investor or Bank or Venture Capital Fund; are exempted, and a 'for information only' filing is required to be made with the CCI within 7 days from the date of the acquisition.

(b) In the case wherein the GOI has granted an exemption, for a period of 5 years, to an enterprise, whose control, voting rights, shares or assets are being acquired, provided that the assets of such target do not exceed INR.250 crores (approximately USD 42 Million) or its turnover does not exceed INR.750 crores (approximately USD 126 Million).

The factors such as barriers to entry into the market, the nature and extent of innovation; the degree of countervailing power in the market; relative advantages and benefits, etc. are considered to determine whether a combination has or is likely to have an AAEC (Section 20(4) of CA). It may be pertinent to note that the combined value of the turnover/asset of the acquirer and the target and not the transaction value act as the trigger to the notification requirement under the CA.

The Combination Regulations have interestingly granted exemption to certain categories of combination such as: (i) where acquisition of shares or voting rights is solely for investment or in ordinary course and the total shares or voting rights held by acquirer do not exceed 25%(Vide the Amendment Regulation), (ii) where the acquirer holds 50% or more shares or voting rights prior to acquisition and there is no transfer from joint control to sole control; (iii) acquisition of shares or voting rights through bonus issues, stock splits, consolidation of face value of shares or rights issues provided it does not lead to acquisition of control; (iv) acquisition by an intermediary on behalf of clients in ordinary course of business etc.

Within 30 days of the approval of the proposal relating to merger or amalgamation by the board of directors of the enterprises concerned or the execution of any agreement thereof a notification in the prescribed form to enter into a combination under the CA is required to be given to the CCI. A failure to notify when required attracts penalties of up to 1% of the turnover or assets of the combination, whichever is higher.

It is mandated under the CA that within a maximum period of 210 days from the date of notification of the proposal to the CCI, the CCI must pass its final order approving, modifying or rejecting the proposal and if the CCI does not pass an order within this period, the combination shall be deemed to have been approved by the CCI. Though the CCI shall endeavour to pass orders within 180 days, the concerns remain that such period could go up to 210 days and this means that there shall be an inherent delay in a global transaction. Also, 210 days is a long period for obtaining a deemed approval and the dynamics of the transaction are likely to have changed manyfolds thereby affecting the viability of the transaction.

In the recent ***Jet-Etihad deal*** (Combination Registration No. C-2013/05/122) , Etihad Airways PJSC (a company incorporated in the UAE) was acquiring 24% of the equity interest in Jet Airways (India) Limited. The deal was evaluated around Rs. 2,060 crores and involved acquisition of such rights and benefits as agreed upon by Jet and Etihad. The parties gave a joint notice under Section 6(2) of the CA to the CCI. The CCI gave its clearance stating no competition concern was prima facie apparent in the transaction. Nonetheless, it is pertinent to note that since the parties did not furnish certain information on combination and since it was the onus of Etihad to give notice under Section 6(2) of the CA, a penalty was imposed of Rs. 1 crore on Etihad under the Combination Regulation.

In the ***United Spirits Limited ("USL") – Diageo Plc deal*****(Combination Registration No. C-2012/12/97)** , a joint notification was given to the CCI. After due assessment the CCI observed that the market share of the combined entity wont change much and multiple brands of other players effectively competing could only influence new products and variants enabling the consumer with expanded set of choices. Though this order of the CCI was challenged and struck down by the Karnataka High Court, it is pertinent to note that it is currently appealed at the Supreme Court of India by Diageo and United Breweries.

Mergers can belong to three categories namely - horizontal merger (where two competitors merge), vertical merger or conglomerate merger. In case of horizontal merger, the elimination of competition may alone reduce competition viz; unilateral effect. By collusion and cartelization, a merger may diminish competition by enabling or encouraging post-merger coordinated interaction among firms in the relevant market.

Normally, the question posed by a Competition Commission is whether the proposed mergers notified significantly impede effective competition in such jurisdiction. In case the answer to the above is in negative, combination is approved unconditionally. In case the answer is affirmative and no modifications proposed by the relevant competition commission are accepted by the parties or no such modification are proposed by the parties to remove the impediment, then such combinations may be disallowed in order to protect businesses and consumers from higher prices or a more limited choice of goods or services. Internationally, it seems that less than 10% of combinations have been found to have AAEC and most of them are later approved after modifications.

The CCI may of its own discretion or upon receipt of information inquire into a combination within 1 year from the date the combination has come into effect. As any person aggrieved can file an appeal against the order of the CCI, the industry has also expressed its apprehension on transaction being stalled by competitor, thereby causing further delay.

Appeal to the Competition Appellate Tribunal ("**COMPAT**") shall lie under the provisions of the CA against any direction issued or decision made or order passed by the CCI . The COMPAT shall also adjudicate on claim for compensation that may arise from the findings of the CCI or the orders of the COMPAT in an appeal against any findings of CCI and pass orders for the recovery of compensation under the provisions of the CA.

Every appeal in the prescribed form shall be filed as mentioned above within a period of 60 days from the date on which a copy of the direction or decision or order made by the CCI is received and be accompanied by the prescribed fees. The COMPAT may entertain an appeal after the expiry of the period of 60 days upon being satisfied that there was sufficient cause for not filing it within that period.

It is evident that though the approach of CCI is evolving with the changing times, the kind of reforms CA shall need in the future shall only be evident from the way CCI handles the cases before it.

"It must be borne in mind that the competition and anti-trust laws are as important to the preservation of economic freedom as fundamental rights are to the protection of our personal freedoms."

Recently the COMPAT in its order dated May 19, 2014 in ***Appeal No. 20 of 2011 (DLF LIMITED v. CCI & Ors.)*** wherein even though the COMPAT disagreed with the way in which CCI reached their order and penalty, it nonetheless upheld the reason behind the original order and maintained that the penalty shall remain as a means of dealing with the abuse of dominant position with "iron hands". Thereby imposing the penalty of Rs. 630 Crores (i.e. 7% of the average total turnover).

It must be borne in mind that the competition and anti-trust laws are as important to the preservation of economic freedom as fundamental rights are to the protection of our personal freedoms.

****