

Corpsec Hotline

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COMPETITION ACT ONCE AGAIN UNDER REVIEW

The Competition Act, 2002 ("Act") continues to be under constant review even before coming into force in totality. In 2005, following the public interest litigation, the Supreme Court of India, required the government to carry out the amendments to the Act in respect of the constitution of the Competition Commission of India (CCI) and to form an appellate tribunal to hear the appeals from the orders of the CCI. The Amendment Bill to this effect is currently pending in the Lok Sabha, the lower house of the Parliament.

Now an inter-ministerial group led by the Planning Commission has suggested further amendment to the Act to introduce a system of mandatory consultation between the CCI and sectoral regulators such as the Telecom regulatory Authority of India ("TRAI") and Securities and Exchange Board of India ("SEBI"). This has been suggested to eliminate possible friction between CCI, and the sectoral regulators.

Background

In wake of the unprecedented economic growth and the consequential change in market functioning, the Government of India enacted the Competition Act to replace the existing Monopolies and Restrictive Trade Practices Act, 1969 ("M.R.T.P."). The CCI is established to control "Anti-Competitive Agreements", "Abuse of Dominant position by an Enterprise" and for regulating certain "Combinations". With regard to these matters, CCI can initiate an inquiry suo moto, on complaint of consumers or trade associations, or on reference by the Government or Statutory Authority as defined in the Act.

When, in the course of a proceeding before such Statutory Authority, an issue is raised by any party that any decision which such statutory authority has taken or proposes to take is or would be, contrary to any of the provisions of the Act, then such Statutory Authority may make a reference in respect of such issue to the CCI. On receipt of such reference the CCI is required to, give its opinion to such Statutory Authority after hearing the parties to the proceedings. Upon receipt of the opinion the Statutory Authority is to pass such order on the issues referred to in that sub-section as it deems fit. (Section 21). However, it is not mandatory for the Statutory Authority to seek such an opinion.

Under Section 18 of the Act it is stated that it is the duty of the CCI to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India. Thus CCI has a wide mandate under this Section.

In July, 2007, the CCI, using its mandate under the Act, vehemently opposed TRAI's move of putting artificial caps on the number of telecom operators. One of the main objectives of TRAI is to provide a fair and transparent policy environment which promotes a level playing field and facilitates fair competition. In view of the limited spectrum availability, TRAI's consultation paper makes mention of certain thresholds or caps such as 67% market share and a cap on the number of service providers.

In a letter to TRAI, CCI member Mr. Vinod Dhall has said '*some of the issues in the consultation paper are at variance with the Competition Act 2002*'. He added '*the consultation paper has raised a number of important issues that have implications for matters concerning competition in the telecom markets. Some of the approaches mentioned in the competition paper are at variance with the Competition Act 2002 or even with the generally accepted elements of competition analysis*'.

To avoid such confrontations between CCI and other regulators in future on policies and jurisdiction, the Planning Commission of India has recommended inclusion of a provision in the Act for mandatory consultation between the CCI and the sectoral regulators on a regular basis. This arrangement is proposed to be part of a two-level coordination committee. The role of the sectoral regulators is to administer the functioning of players in each sector and determine tariffs and rules of operation. The CCI would have a larger focus and ensure that none of the players in any sector engage in practices prohibited under the Act. These amendments, which may be introduced in the Parliament later this year, assume significance in view of CCI's coming into operation in 2008.

It is worth noting that the Singapore competition law has excluded sectors such as electricity, gas and telecommunication from the purview of their Competition Act, 2004. However, it appears that the Singapore government does not intend to keep such sectors out of the purview of the Act permanently. And the Government may include the excluded sectors in the Competition Act taking into account the market developments.

In case of telecommunication industry in India, due to availability of limited spectrum, TRAI has to put in place certain regulations e.g. controlling the number of operators. Thus, there are certain sector specific issues that have to be kept in mind before any regulations are formulated. Indian Government could examine the success of sectoral exclusions stand adopted by the Singapore Government before the proposed amendments.

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