

COMPETITION (AMENDMENT) BILL 2012: A GIANT LEAP FORWARD?

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INTRODUCTION

The understanding of the word Competition differs depending on the context and it is an evasive term.¹ This may be the reason that the Competition Act, 2002 does not contain any definition of the term competition. Competition means a struggle or conflict for dominance, and this means striving for customers and businesses in the marketplace in the present commercial world.

The Competition Act 2002 was enacted to replace the Monopolies and Restrictive Trade Practices (MRTP) Act 1969 and the establishment of the Competition Commission of India (CCI) was done by the Central Government to achieve the objectives of the Competition Act. It was done with effect from October 14 2003. Accordingly, through the process of investigation and inquiry, the commission is authorized to stop abuse of dominant positions and anti-competitive agreements by enterprises and to control combinations (i.e., mergers, amalgamations or acquisitions).² In the recent years, the CCI has analyzed and given judgments on various provisions of the Competition Act in various orders, and, in this process, has highlighted the lacunae where the Act could probably be amended or altered.³

The Indian government, on December 10, 2012 introduced the Competition (Amendment) Bill in the Parliament. This aim of the Bill is to modify certain portions of the Act, as well as insert some new provisions, to meet the ever changing needs of trade and industry. The present research paper analyses some of the important proposed amendments to the Act and the potential impact they will have on competition law in India if the Bill is passed in its present form.

¹ Department-Related Parliamentary Standing Committee on Home Affairs, Ninety-Third Report on the Competition Bill, 2001, Paragraph 3.0. This is available at http://164.100.24.167/book2/reports/home_aff/93rdreport.htm (Last visited on September 24, 2013).

² MM Sharma, *Competition Law Enforcement Starts in India*. This is available at http://www.vaishlaw.com/new/articles/competition/competition_law_enforcement_starts_in_india.pdf (Last visited on September 25, 2013)

³ Dhruv Suri, *India: Proposed Amendments In The Competition Act: A Positive Step Forward?* 25th February 2013. This is available at <http://www.mondaq.com/india/x/223500/Antitrust+Competition/Proposed+Amendments+In+The+Competition+Act+A+Positive+Step+Forward> (Last visited on September 25, 2013)

PROPOSED AMENDMENT TO THE ACT AND ITS IMPLICATIONS

This research paper would focus on both, the substantive and the procedural changes, and the researcher would deal with all the proposed changes provided in the Bill and the implications that it will have on the operation of the Competition Act 2002.

VERTICAL ARRANGEMENTS TO INCLUDE "PROVISION OF SERVICES"

Present Scenario: Section 3(4) of the Competition Act refers to agreements between entities or persons at different levels of the production chain in various markets, in respect of production, storage, distribution, sale or price of, or trade in goods or provision of services. It states that such agreements shall be deemed void if they hamper the competition or cause or are likely to cause any substantial or appreciable adverse effect on competition. This section mentions the provision of services, but the illustrations provided therein, such as exclusive supply agreements, tie-in arrangements, refusal to deal, exclusive distributorship agreements and resale price maintenance, only make mentions the "sale of goods" and not "provision of services."

Proposed Law: The Bill aims to include reference to "provision of services" in the explanation provided for all the illustrations under vertical agreement. The interpretation of section 3(4) would not change per se with this amendment because the reference to "provision of services" is already included in the section, but it does makes sure that there is no dichotomy between the text of the main clause and explanation provided for its illustrations.

INTRODUCTION OF "COLLECTIVE DOMINANCE"

Present Scenario: The provision of Section 4(1) states that "No enterprise or group shall abuse its dominant position." In the case of *Consumer Online Foundation vs. Tata Sky Ltd. & Others*⁴, the CCI had to construe the scope of "group" wherein the informant had suspected that all DTH operators were "individually dominant" in their "relevant market." This contention was out-rightly rejected by the CCI which stated that,

"The word "group" referred to in section 4 of the Act does not refer to group of different and completely independent corporate entities or enterprises. It refers to different enterprises belonging to the same group in terms of control of management or equity."

Proposed law: The new Bill now looks to replace section 4(1) with "No enterprise or group, **jointly or singly** shall abuse its dominant position." The motive behind this alteration is to broaden the scope of section 4 to an extent that it includes enterprises or groups which are related or unrelated, whether within the same management or not. This implies that under section 4 explanation (a), independent and unrelated parties could be held "dominant".⁵

In a significant judgment of *Belaire Owner's Association vs. DLF Limited and Others*⁶, a penalty of about US\$ 114 million was imposed on DLF Limited by the CCI. The most important ground was that DLF abused its position of dominance in the relevant market by imposing discriminatory and unfair circumstances in its builder agreements. Other real estate enterprises were not reprimanded when they got involved in similar practices since they did not create a position of being singly "dominant" in the relevant market. With the proposed amendment, if one or more than one real estate companies could be held in contravention of the act if they indulge in practices similar to that of DLF.

⁴ Case No. 2 of 2009 dated March 24, 2011. See also *Royal Energy Ltd. vs. Indian Oil Corporation Limited and Others* MRTP Case No. 1/28 (C-97/2009/DGIR) dated May 09, 2012. This case was filed before the Monopolies and Restrictive Trade Practices Commission and after its dissolution it was transferred to the CCI.

⁵ According to section 4 explanations (a), "dominant position" means a position of strength which enables an enterprise to operate independent of competitive forces prevailing in the relevant market, or affect its competitors/consumers in its favor.

⁶ Case No. 19 of 2010 dated August 12, 2011. DLF filed an appeal against the order of the CCI with the Competition Appellate Tribunal. The Competition Appellate Tribunal stayed the payment of penalty and directed the CCI to amend the terms of DLF's builder contract to ensure that it is in conformity with the Act. On January 03, 2013, the CCI passed a supplementary order modifying the relevant clauses of the contract.

DEFINITION OF "TURNOVER"

Present Scenario: Section 2(y) of the Competition Act, 2002 states that "Turnover" includes value of sale of goods or services.⁷ However, it is not very clear from this that whether the definition of "turnover" would include the applicable taxes on such goods or services while calculating it under sections 5⁸, 27⁹ and 43A.¹⁰ It is very important that the definition of "turnover" is unambiguous to ensure that a correct estimate of values is derived. For seeking an approval of the CCI before a proposed combination under section 5, "turnover" is used to ascertain the financial thresholds that prompt the requirements for it. To estimate the amounts on which the penalty is to be levied under section 27 and 43A, "turnover" is used.

Proposed Law: According to the proposed Bill, the section 2(y) is to be modified to state that "Turnover" will include value of sale of goods or services **excluding the taxes, if any, levied on sale of such goods or provisions of services.** Form II, which is filed with the CCI to look for an sanction of projected "combinations" clearly states that "the turnover shall be computed in accordance with section 2(y) of the Act, excluding indirect taxes, if any."

If the proposed amendment is carried out, the taxes will be excluded not only for the purpose of getting an approval for the proposed combinations but also for the ascertainment of the "turnover" for imposing penalties under section 27 and 43A. However, computation of "turnover" under section 5, as well as penalties under section 27 and 43A, continues to be a grey area. Under the explanation (c) of section 5, the determination of the value of the asset must pertain to the financial year immediately preceding the financial year in which the date of the proposed combination falls. In the proposed amendment, no such explanation is provided with regards to the calculation of "turnover". Clarity on this point should be provided otherwise it can potentially have serious repercussions while computing penalties.

⁷ Section 2 - In this Act, unless the context otherwise requires,—

(y) "turnover" includes value of sale of goods or services;

⁸ Section 5 deals with "combinations" and specifies the various financial thresholds based on (i) asset value and (ii) turnover, which once crossed, require the parties to seek an approval from the CCI for the proposed combination.

⁹ Under section 27, penalties are levied for any contravention of section 3 or 4 of the Act.

¹⁰ Under section 43A, penalties are levied in cases where information is not furnished to the CCI under section 6 of the Act for seeking a combination approval.

DEFINITION OF "GROUP"

Present Scenario: Under section 5 explanation (b) (i), the definition of “group” is provided which states that a "group" means two or more enterprises which, directly or indirectly, are in a position to exercise **26% or more** of the voting rights in other enterprises.¹¹ This definition holds importance in cases pertaining to “abuse of dominant position” by enterprises under section 4 of the act and also to ascertain whether a proposed combination should seek approval of the CCI or not under section 5 and 6.

The Indian government on March 02, 2011 released a notification¹² which increased the 26% minimum limit to 50%. The Notification explicitly stated that the groups which were exercising less than 50% voting rights in other enterprises were not liable for any approvals under section 5. This means that even 50-50 joint ventures fell within the definition of "group".

Proposed Law: The proposed Bill aims to bring the provisions of Competition Act in consonance with the Notification and revises the definition of "group" to include "two or more entities or enterprises which, directly or indirectly, are in a arrangement to use **50% or more** of the voting rights in the other enterprises". 50-50 joint ventures continue to fall within its scope. This amendment only intends to bring the provisions of the Competition Act in conformity with the Notification and does not change the interpretation of the definition of “group”.

¹¹ Section 5 – Explanation for the purposes of this section –

(b) "group" means two or more enterprises which, directly or indirectly, are in a position to —

(i) Exercise twenty-six per cent. or more of the voting rights in the other enterprise; or

(ii) Appoint more than fifty per cent. of the members of the board of directors in the other enterprise; or

(iii) Control the management or affairs of the other enterprise;

¹² S.O. 481(E) dated March 04, 2011 issued by the Ministry of Corporate Affairs.

SIMPLIFICATION OF DAWN RAIDS

Present Scenario: Search and seizure can be conducted by the Director General (DG) under section 41 (3)¹³ in accordance with provisions of sections 240 and 240A of the Companies Act, 1956. An order by the Magistrate is necessary for the DG to undertake such search and seizure under these provisions. This procedure is similar to raids are conducted in any other civil/criminal proceeding in India. This regulation is still untested because there has been no case before the CCI where any search order has been obtained by the DG.

Proposed law: The Bill proposes that under section 41 (3) of the Competition Act, the DG should be able to take the order for search and seizure from the Chairperson of the CCI instead of the Magistrate. The criticism of this amendment is that it would hamper the checking and testing of the search and seizure procedure and it would start to be managed internally within the CCI. But on the other hand, it will also ensure that search and seizure raids would become an extremely productive tool for the DG as competition issues get more complex and high-value.

CCI'S ORDERS DURING ENQUIRY

Present Scenario: The CCI directs the DG to conduct its investigation when a complaint is filed regarding the contravention of the act by any enterprise and if a prime facie case is established.¹⁴ The CCI invited objections from the parties if the DG submits a report that there is a contravention of the Act. IF the DG has found a contravention by any party, the CCI cannot go against the findings of the DG and it has to pass an order under section 26(8)¹⁵ or section 27¹⁶. This correct interpretation of the act was first observed in the dissenting opinion in the case of *Pankaj Gas Cylinders Ltd. vs. Indian Oil Corporation Limited*¹⁷ which stated that,

¹³ Section 41- Director General to investigate contravention

(3) Without prejudice to the provisions of sub-section (2), sections 240 and 240A of the Companies Act, 1956, so far as may be, shall apply to an investigation made by the Director General or any other person investigating under his authority, as they apply to an inspector appointed under that Act.

¹⁴ Such orders are passed under section 26(1) of the Act.

¹⁵ In the event the DG recommends a contravention of the Act, the CCI can only pass an order under section 26(8) for further inquiring into the contravention in accordance with the Act. This section does not empower the CCI to close a case in such situations.

¹⁶ Under section 27, orders are passed by the CCI after inquiry into agreements of abuse of dominant position is completed by the DG. These orders only pertain to directing parties to discontinue the alleged practice, impose a penalty or modify the terms of any impugned agreement.

¹⁷ Case No. 10 of 2010 dated June 22, 2011.

"Under section 27 of the Act, an order can only be passed when a contravention is established. Therefore, dropping of a case after DG has found a contravention is not authorized under the Act."

So far, various cases have been heard by the CCI where the CCI has passed an order closing the case despite DG's confirmation of a contravention.¹⁸

Proposed Law: Under the proposed Bill, the scope of the section 26(8) is proposed to be expanded after which, even if DG finds a contravention of the act, the CCI can close a case. The amendment will also allow the CCI to "make appropriate orders thereon after hearing the concerned parties" in addition to passing an order directing a further inquiry. This means that irrespective of the finding of the DG during the investigation, the CCI will be able to pass any order if this Bill is passed by the Parliament.

OPPORTUNITY TO BE HEARD BEFORE PENALTY IS IMPOSED

Present Scenario: The CCI can impose a penalty for the contravention of section 3 and 4 under section 27(b)¹⁹ of the Act. There have been multiple cases where CCI has imposed penalties for contravention in the past few years. However, in all these instances, penalty was imposed by the CCI without even providing a chance to the parties regarding the quantum of penalty to be imposed. This practice is been followed because of lack of any provisions in the Competition Act mandating a hearing. In *Hindustan Steel Ltd. vs. State of Orissa*²⁰ the Supreme Court of India held that, "...an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of

¹⁸ See the CCI's orders in (i) *All India Tyre Dealer's Federation vs. Tyre Manufacturers*, MRTP Case: RTPE No. 20 of 2008 dated October 30, 2012; (ii) *Film and Television Producers Guild of India vs. Multiplex Association of India, Mumbai and Others*, Case No. 37 of 2011 dated January 03, 2013.

¹⁹ Section 27 - Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:—

(b) Impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:

Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent. of its turnover for each year of the continuance of such agreement, whichever is higher.

²⁰ 1969 (2) SCC 627.

conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances."

Several other judicial decisions have corroborated and upheld the principle of judiciously exercising the right to impose penalties by hearing the other party.²¹

Proposed Law: The Bill proposes to amend the provisions of section 27(b) as well as 27(g)²² to include a proviso which mandates the hearing of the party(s) before the CCI passes any order against them imposing any penalty. After this section comes into force, if CCI holds any enterprise in contravention with the act, they would be offered a fair chance to defend themselves and this would truly be in the essence of the judicial practice.

²¹ *Kesar Enterprises Limited vs. State of Uttar Pradesh and Others*, 2011 (13) SCC 733 wherein the SC emphasized on the principles of natural justice to be followed before imposition and recovery of penalty.

²² Section 27 - Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:—

(g) Pass such other order or issue such directions as it may deem fit.

Provided that while passing orders under this section, if the Commission comes to a finding, that an enterprise in contravention to section 3 or section 4 of the Act is a member of a group as defined in clause (b) of the Explanation to section 5 of the Act, and other members of such a group are also responsible for, or have contributed to, such a contravention, then it may pass orders, under this section, against such members of the group.

CONCLUSION AND SUGGESTIONS

The research paper includes the key amendments proposed by the Bill. The Bill is a step in the right direction by the Central Government and these amendments, if brought into force, will make the Competition Act more in sync with other strong jurisdictions, like the European Union, where, for example, provisions relating to conducting dawn raids without approaching courts, collective dominance, imposition of penalty only after giving the parties a chance to be heard etc. have been in force successfully.

The Bill is at an emerging stage and will probably take a few months before it is debated by both houses of the Indian parliament and becomes a law. Till then, certain decisions of the CCI will have a questionable future. For example, what were the provisions under which the CCI closed cases even after the DG's report concluded a contravention of the Act? Similarly, in spite of the Supreme Court's judgment in *Hindustan Steel Limited vs. State of Orissa*, how many penalties were imposed without giving a chance of personal hearing to the parties? The treatment of joint ventures, policy regarding leniency etc. are still unaddressed and vague and require more lucidity from the proposed Bill. But it will be interesting to see how the SC will construe the shortcomings in the Act once appeals lie before it from the orders of Competition Appellate Tribunal.²³ At this juncture, the Bill is a positive step in the evolution of Indian competition law.

²³ Under section 53T of the Act, appeals from the Competition Appellate Tribunal vest with the SC within 60 days from the date of the order.