

India's Competition Law Regime – Starting Pistol Fired

The Chairperson of the Competition Commission of India (“CCI”) has announced that the provisions of the Competition Act, 2002 (“CA 2002”) relating to anti-competitive agreements and prohibition of abuse have come into force with effect from 20 May 2009. The regulations dealing with the procedure for filing of complaints are not yet in place but the CCI consisting of the Chairperson and four other members are duty bound to accept complaints.

There was a delay in the implementation of CA 2002 as some of its provisions were challenged before the Supreme Court of India. Subsequently several changes were brought to CA 2002 by way of the Competition (Amendment) Act, 2007.

Anti-competitive agreements

The language used in the sections dealing with anti-competitive agreements in CA 2002 is similar to that of Article 81 of the EC treaty. Horizontal agreements and certain types of vertical agreements such as exclusive supply agreements and exclusive distribution agreements will be found to be anti-competitive if they cause an appreciable adverse effect on competition within India.

Abuse of dominance

The provisions of CA 2002 dealing with abuse of dominance draws heavily from EC jurisprudence on the topic and Article 82 of the EC treaty. CA 2002 lists several factors that will be considered when dealing with a complaint alleging abuse of a dominant position. Other than the usual suspects like market share, size and resource of the enterprise etc. they also include factors such as vertical integration of the enterprise, social obligations and social costs, relative advantage by way of contribution to the economic development by the enterprise enjoying a dominant position and dependence of the consumers on the enterprise.

Combinations

The provisions dealing with the regulation of combinations (mergers, acquisitions) have not been notified in the official gazette and hence are yet to come into force. The decision to defer the implementation of these provisions seems to have been made because of the concerns raised from different quarters about the regulations.

Fines/penalties/orders/Leniency

The penalty for a cartel offence is substantial in that an enterprise can be fined up to three times its profit or ten per cent of its turnover, for each year of the existence of such agreement (whichever is higher). The CCI can also require the division of an enterprise or order the parties to discontinue the practice. The CCI has the discretion to impose a lesser penalty in case of a cartel offence in case vital disclosures are made by a leniency applicant.

Competition Appellate Tribunal

The Indian government has also made appointments to the Competition Appellate Tribunal (CAT) which will be hearing appeals against the decisions of the CCI.

Extra-territorial application

It is to be noted that the CCI can investigate acts taking place outside India, but having an effect on competition in India. The operation of CA 2002 will be prospective in nature and it is highly unlikely that, the CCI will be able to pass similar orders against, the big corporations who have already been fined by the European or US antitrust authorities, unless they continue with such activities.

What is in store?

The CCI has been performing advocacy functions over the last few years, when its other operations were suspended because of the challenge before the Supreme Court. Last year it had directed companies in several sectors including cement, airlines and explosives to frame and follow model codes of conduct. It also appears that the CCI would be closely watching companies operating in the telecom and airline sectors. Companies operating in these sectors should be wary of continuing with any anti-competitive/abusive practices.

The goal of competition law is to maximise consumer welfare. India is home to one sixth of the world's population and hence it is important that the CCI develops a world class competition policy.

KIRAN DESAI

Partner

Tel: +32 2 551 5959

MANU MOHAN

Associate

Tel: +32 2 551 5942

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