Levelling the Playing Field

The Indian Competition Act 2009 has made significant in-roads in clamping down on anti-competitive conduct. *Ritika Ganju, Manjula Chawla & Yamini Roy* Of *Phoenix Legal* steer us through some of the potholes faced by Indian companies and what this means for consumer and investor confidence in the market.

Scores of lawyers practising competition law in Indian law firms; teaching faculty and future lawyers at law schools taking initiative to acquire good understanding of the principles of competition law and complaints galore with the Competition Commission of India (CCI) are recent phenomena witnessed after the Competition Act, 2002 was made effective in May, 2009. The era of the big wigs calling the shots; and conglomerates deciding prices behind closed doors is a thing of the past. This may be attributable to the growing awareness amongst Indian companies about the competition regulations which help to ensure fair competition. The Act also serves to provide a tool for the new entrants to find a place for themselves in the market. The proactive role played by the CCI over the last few years to disseminate the competition regulations has provided the impetus to create the regulatory framework designed to ensure fair competition. The main thrust of the Competition Act is to ensure fair competition in the market by prohibiting anti-competitive agreements, abuse of dominant position, and regulation of combinations which is in line with the American and European Anti-trust laws. The competition law experts have often remarked that the Competition Act primarily covers general propositions related to anti competitive practices and in the words of Professor Richard Whish, faculty at King's College London and an authority on anti-trust laws, "the legislation is drafted, as are most of the competition laws in the world (of which there are now more than 100), in fairly general terms".

Anti-Competitive Agreements & Abuse of Dominance

The Competition Act prohibits anti-competitive agreements and abuse of dominant position under sections 3 & 4 respectively. Under the Competition Act, the test of appreciable adverse effect on competition (AAEC) in India's market is applied to any agreement or act for it to be termed as anti-competitive. The presumption of proving so or not, shifts from the one alleging to the person against whom a complaint is made.

Anti-competitive agreements may be vertical or horizontal. Vertical agreements are those entered into between persons at different levels of the supply chain and horizontal agreements (including cartels) are such agreements amongst market players placed at the same level who enter into arrangements to determine price, limit or control pro-

By Ritika Ganju, Manjula Chawla and Yamini Roy, ***Phoenix Legal***

duction/supply or allocate market share, etc. Horizontal agreements are presumed to have an AAEC unlike the case of vertical arrangements. The principle of abuse of dominant position is founded on the instance of a dominant player causing AAEC. Holding of a dominant position in the market in itself is not punishable; however, a dominant player manipulating markets is frowned upon.

In 2009, when the provisions came into effect, the CCI began actively testing cases on the ground of abuse of dominance. The first of the critical verdicts delivered by the CCI, in *Neeraj Malhotra v. Destsche Post Bank Home Finance Limited* (Deutsche Case) was where banks levied pre-closure penalties on home loan customers. While the Deutsche Case was a test case to determine CCI's attitude, the order of CCI kept the corporate and legal fraternity interested. The question in the Deutsche Case was whether the factum of banks levying pre-payment charges to prevent borrowers from switching to other enterprises offering loans at a lower rate of interest was discriminatory and an abuse of dominance by the banks and therefore, anticompetitive. The bone of contention was the existence of collusion amongst the players in the loan market for the imposition of a pre-payment penalty, which eroded the faith and resolve of the borrowers.

The CCI tested the above argument on the anvil of 'rule of reason' and found that the practice of charging a penalty has reasonable economic justification and hence the practice did not violate section 3 of the Competition Act. Further, on allegations of abuse of dominance, the CCI tested the market strength of the players and held that market concentration was fairly diluted and there was no obvious entry barrier for newer banks to enter the home loan market.

Observing the orders delivered by CCI through a bioscope, there seems to be a fine balance being struck by the regulator while juxtaposing the consumer interests against the competition in market.

Very recently, the CCI has caused tidal waves in the real estate sector when it imposed a heavy fine of approximately INR 6.3 billion (US$128,836,987) on DLF, one of the largest Indian real-estate developers. In the matter of *DLF Park Place Residents Welfare Association v. DLF Ltd.* (DLF Case), the CCI was approached by an aggrieved group of customers alleging that DLF is abusing its dominant position and had imposed unreasonable, arbitrary and unfair conditions. To the deep consternation of the real estate barons, the pro-consumer order of the CCI had imposed a heavy penalty on the builder (close to 7% of DLF's turnover) which led to a scramble of consumers filing their grievances against builders with the CCI. While deciding the DLF Case, the CCI first upheld the dominant position of DLF in the real estate sector of 'high end apartments' and in the relevant geographic market and then scrutinized the practices adopted by DLF in dealing with its consumers in terms of the Competition Act.

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The CCI held that DLF abused its dominant position by imposing unfair conditions on allottees by way of a non-negotiated apartment buyers agreement. In view of the powers given to CCI under the Competition Act, it directed DLF and its group companies offering services of construction to cease and desist from formulating and imposing such unfair conditions in its agreements with buyers and to suitably modify unfair conditions imposed on its buyers, within three months of its order.

Regulation of Combinations

Sections 5 and 6 of the Competition Act regulate combinations both inside and outside India that may have an adverse affect on competition in India and thus, form the basis of the merger control regulatory framework for India. Much had been said about the merger control provisions even before these provisions and the related regulations had been made effective in June 2011. The regulatory framework established by the Competition Act and CCI (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (Regulations) requires all mergers, acquisitions and amalgamations to be compulsorily notified to the CCI for prior clearance. This is in the

event such combinations meet the monetary thresholds relating to the assets or turnover as prescribed under section 5 of the Competition Act and this is in keeping with well-known global regulatory practice.

Three broad categories of combinations and their respective thresholds in terms of the value of assets and turnover of the acquirer and target company jointly are provided under the Act. In some cases the values for a company resulting from a merger/acquisition (combined entity) is also to be found under the Competition Act. The broad categories of combinations are: (i) acquisition of control, shares, voting rights or assets; (ii) acquisition of control where the acquirer has direct or indirect control over another enterprise engaged in production, distribution or trading of similar or identical or substitutable goods or services; and (iii) any merger or amalgamation. A collective sigh of relief resonated in the Corporate Inc corridors when the high thresholds prescribed under the Competition Act were boosted by 50% earlier this year which, as clarified by Competition gurus, reflects the intention of the regulator; to intervene only when the stakes are substantial. To bring respite to the skeptics who view the Competition Act and the Regulations warily, CCI's involvement was pared down with the exemptions introduced in the Regulations. The most critical exemption is the five year exemption extended to an enterprise, whose control, shares, voting rights or assets are being acquired in case the value of the assets is not more than INR 2.5 billion (about US$51.2 million) or the turnover is not more than INR 7.5 billion (about US$153.6 million)

Ritika Ganju

Yamini Roy

"The main thrust of the Competition Act is to ensure fair competition in the market by prohibiting anti-competitive agreements, abuse of dominant position, and regulation of combinations which is in line with the American and European Anti-trust laws"

Initially, M & A experts, foreign investors and industrialists were expressing concerns on the timeline for the clearance process, given that this could cause delays to any fast-paced M & As. Owing to such concerns, the Regulations have provided that CCI will endeavour to clear the deals in 180 days even though the maximum timeline of 210 days has been provided under the Competition Act. However, all concerns for the time being have been laid to rest with the nascent regulator, CCI having commendably cleared three combinations within 30 days from the date of filing of the notifications. This comes as a big relief to the foreign investors as well as Indian companies and has further boosted the confidence of foreign investors in the Indian regulatory regime.

CCI has made some very relevant and interesting observations while concluding combination proposals, in three sectors which include insurance, media and nutrition. It is reported that CCI has relied on various external sources of information, such as market surveys and reports for determining factors considered important to ascertain if a given combination is or is likely to have an AAEC in India. The CCI has been consistent in its approach of thoroughly considering certain critical factors to examine the effect of the proposed combinations on competition in India. These critical factors include the existence or any potential of either vertical or horizontal business between the acquirer and the target, market or industry scenario and typical conditions such as barrier to entry and exits from industry, growth potential, number of market players, presence of market regulator and consumer behaviour. A snapshot of the facts of the proposed combinations and observations of CCI as stated in CCI's orders on the three combination proposals would be helpful to explain the factors considered by CCI while considering a combination proposal.

The first of the combinations approved by CCI was an acquisition by Reliance Industries Limited & Reliance Industrial Infrastructure Limited of Bharti group's 74% stake in two of its joint venture companies,

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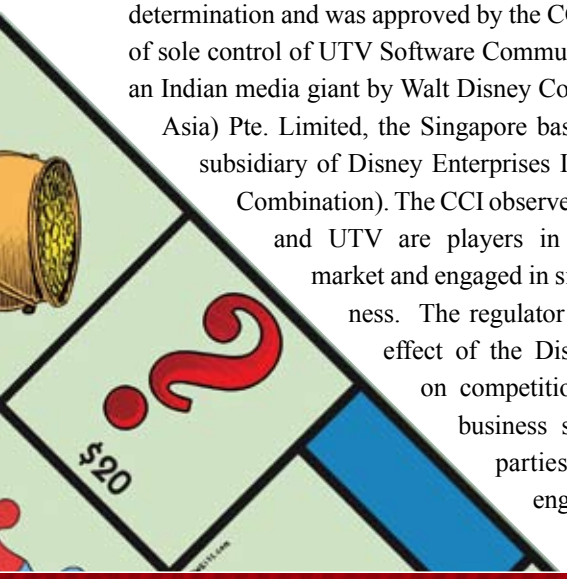
Bharti AXA Life Insurance Company Limited and Bharti AXA General Insurance Company engaged in insurance business (Reliance Combination). The foremost concern of CCI was to examine the presence of either a horizontal or vertical relationship between the target and acquirer companies. On satisfying itself that there could not be any horizontal relation since the Reliance entities were not engaged in the same business as the target companies and that the vertical relationship between the two set of companies was insignificant, CCI moved on to consider other relevant factors. These factors included the insignificant market share of the target companies in the insurance sector and presence of a regulatory body namely, Insurance Regulatory and Development Authority (IRDA) to keep a check on the practices of insurance companies. Interestingly, right in this first combination proposal, CCI had an opportunity to make an observation that the acquirer will need to obtain fresh clearance from the CCI on the uncertain future acquisition by the acquirer which may be made depending upon the equity limit on FDI being raised in the insurance sector in the future. The CCI was of the view that such future acquisition will be dealt in the future when the acquisition is made and will not form a part of the determination of the current proposal.

In combination proposals that followed the Reliance Combination, CCI's approach to determine and evaluate the impact of these proposals on Indian markets was primarily guided by market segmentation. Breaking down of these businesses into different markets made sense as the acquirer and target companies were engaged in various lines of business.

The second combination proposal that came up for determination and was approved by the CCI was acquisition of sole control of UTV Software Communications Limited, an Indian media giant by Walt Disney Company (Southeast Asia) Pte. Limited, the Singapore based wholly owned subsidiary of Disney Enterprises Inc., USA (Disney Combination). The CCI observed that both Disney and UTV are players in the India media market and engaged in similar line of business. The regulator also analysed the effect of the Disney Combination on competition in each of the business segments that the parties were presently engaged in. These segments included business of motion pictures, TV broadcasting, interactive media and character merchandising. Factors largely similar to those in the Reliance Combination were considered by CCI while analysing the Disney Combination, with certain factors which are business specific to the Disney Combination also being discussed. While evaluating the effect of Disney's acquisition of UTV's business of motion pictures on the competition spirit in the Indian cinema business, the CCI also observed that audience response will also be one of crucial factors that would contribute to keep a check on competition in this segment of the media business.



The last combination proposal considered and approved by CCI involved acquisition of the nutrition business of Wockhardt Group, a leading Indian pharma and healthcare company by Danone Group through its Asian subsidiaries, one of the global leaders in the food industry (Danone Combination). Following the approach of market segmentation, CCI observed that the nutrition business being acquired involved the business of baby food and medical nutrition. CCI approved the combination with substantial emphasis on the present market share of this specific business in India and the possibility of any horizontal or vertical integration.

It can't be denied that right in its first steps towards establishing a merger control regime, CCI has had the opportunity to decide on combination proposals of some of the 'biggest' names in myriad industries. Interestingly, these big names also brought with them varied structures of combinations. While the Reliance Combination was reasonably vanilla in most respects, the Disney Combination involved a two step process of acquisition involving acquisition of the shares held by public shareholders of UTV by way of delisting offer. As against these combination structures, the Danone Combination involved an interesting business transfer arrangement between Wockhardt Group and Danone.

The CCI has come a long way in a short span of time setting forth precedents to follow and building up an effective regime of competition control. What remains to be seen now is whether the CCI can continue to walk the tightrope balancing investor confidence whilst effectively evoking the provisions of the regulatory framework.

ritika.ganju@phoenixlegal.in
manjula.chawla@phoenixlegal.in
yamini.roy@phoenixlegal.in