India starts antitrust enforcement

The legal framework explained

With the enforcement of antitrust law beginning on 20 May 2009, India joins the circle of global economic powers with effective tools to combat anti-competitive agreements and abuses of dominant positions; powers to review mergers and acquisitions will follow.

Expectations regarding the enforcement ambitions of the Competition Commission of India (the "CCI"), along with risks of hefty financial penalties for firms as well as (and even imprisonment) for individuals, mean that it is now vital for all companies that deal with India to factor antitrust law into decisions affecting their Indian businesses.

Antitrust impacts on firms' longer-term as well as day-to-day operational issues. Additionally, antitrust must be factored into the due diligence and contractual negotiation processes of mergers and acquisitions to ensure that any risks arising from antitrust compliance are addressed properly. When the CCI is granted powers of merger review, that process will also impact on the feasibility of certain deals.

The Competition Act 2002 (the "Act") represents a clean break with the former competition law regime:[1] a "modern" competition law inspired by the laws on restrictive agreements and dominant firm conduct, as well as merger regulation, in jurisdictions with long-standing enforcement records, most notably the European Union. Owing to, in particular, a constitutional impasse over the composition of the CCI, the new law was amended only in 2007 and enforcement powers granted to the CCI this year.

The Act introduces the three enforcement areas usually found in modern competition law regimes: prohibition of anticompetitive agreements, prohibition of abuse of dominance and merger regulation. Many concepts of the new law are similar to those found in other jurisdictions, such as European Union or US competition law. But since the market conditions are very different in India, these concepts may not be interpreted or applied in the same way.

1 Anti-competitive agreements

1.1 Scope of the prohibition

Section 3(1) of the Act sets out the general prohibition of any agreement (interpreted broadly) having an "appreciable adverse effect on competition" ("AAEC") within India. Such an agreement is void as a matter of law. The framework of analysis for

[1] Traditionally, India's economy was based on State-directed economic policy. With policy reforms introduced, particularly since the early 1990s, the course towards an open market economy was set – with impressive economic development following in the wake. In the era of state-direction, anti-competitive conduct had been susceptible to scrutiny under the Monopolies and Restrictive Trade Practices Act 1969, providing also the means of administrative intervention in the economy, but lacking real enforcement powers.

determining whether an agreement has an AAEC is different for hard core "horizontal" agreements (between competing firms) and "vertical" agreements (between firms that are active at different levels of an industry) and other "horizontal agreements".

The Act states explicitly that egregious horizontal agreements – i.e., price-fixing, output restrictions, market-sharing, bid-rigging – are presumed to give rise to an AAEC. This approach is in line with the severe anti-cartel enforcement policy of antitrust authorities world-wide. Other categories of horizontal agreements are analysed under a "rule of reason", balancing the benefits arising from the agreements against the restrictions on competition. This applies also to joint ventures that can be proven to be efficiency-enhancing; these will not be presumed to give rise to an AAEC – even if involving competitors and "hard-core" restrictions.

The approach for all vertical agreements is uniform: these are to be analysed under a "rule of reason" in order to determine whether they give rise to an AAEC.

The prohibition does not apply to "reasonable" conditions in agreements that aim to protect certain intellectual property rights (for instance patents, copyrights and trademarks). Similarly, although agreements relating to the export of goods are capable of being prohibited under competition laws outside India, they are unimpeachable under the Indian Act. The law will need to develop on how these rules are to operate in practice.

1.2 Sanctions

The CCI can enjoin an infringing party from continuing or re-entering an illegal agreement and, in addition, impose upon such a party fines not exceeding 10% of the average turnover for the last three financial years. For any firm, such a sanction is considerable. The fact that – in addition to firms – individuals may also be held liable for competition law violations is significant and expected to incentivise compliance. The CCI can impose any other related order or direction.

In respect of cartels, sanctions are potentially even more severe: the CCI may impose on each cartel member a penalty for each year of the cartel of up to three times its profits or 10% of its turnover, whichever is higher.

Any contravention of the CCI's orders can entail imposition of further penalties, and ultimately, the CCI can file a complaint against contravention of its orders in the criminal court, which, in turn, may order additional fines and even a prison term up to three years.

The CCI will operate a leniency programme applicable to cartel cases. Firms that disclose evidence and information on cartels to the CCI under this programme can obtain reduced fines or avoid fines altogether. In line with the experience from other jurisdictions where similar systems are in place, it is expected that the CCI's leniency programme will have a destabilising effect on cartels that operate in India..

It remains to be seen how the CCI's policy on sanctions develops, but there are clear indications that the CCI plans to pursue an active anti-cartel enforcement programme.

2 Abuse of dominance

2.1 Scope of the prohibition

Section 4(1) of the Act prohibits the abuse of a dominant position by an enterprise. Although the definition of "dominance" does not correspond word by word[2] with the definition given in the jurisprudence of the European Court of Justice, the CCI is expected to interpret the concept according to this jurisprudence. When determining whether an undertaking enjoys a dominant position, the CCI will take into consideration a variety of parameters. Most of these criteria – such as the firm's market share, existing barriers to entry in the relevant market and the level of effective competition in that market – are driven by economic factors. In addition, the CCI is also entitled to take into consideration social obligations and social costs or any other factor it may consider relevant.

Dominance is not incriminating on its own: a firm holding such a position must have engaged in conduct characterised as an abuse. In this regard, the Act contains an exhaustive list of potentially prohibited practices: discrimination; restrictions on output/technology development; foreclosure of markets to new/potential entrants; tying; and leveraging.

Although the CCI's decisional practice has yet to develop in this area, many expect the authority to be inclined, at least initially, towards a form-based (rather than effects-oriented) approach to analysing dominant firms' conduct. If so, the nature of the practice (e.g., exclusive supply contracts or below-cost pricing), might be more important to the outcome of the analysis than any anti-competitive impact that the practice may have in the marketplace.

2.2 Sanctions

All the sanctions described above in the case of anticompetitive agreements are available to the CCI against abuse of dominance, except that the penalties are limited to 10% of the dominant firm's average turnover for the three preceding years.

In addition, the CCI can impose structural remedies: it can order division of a dominant firm with a view to ensure that the undertaking does not abuse its dominant position. It appears that such an order can be only corrective, not pre-emptive, i.e., the CCI must identify an ongoing abuse before ordering division of a dominant enterprise; however, the direction in which the law will develop has to be watched.

3 Regulation of combinations

In line with most competition law regimes, the Act introduces mandatory competition law review of certain mergers and acquisitions (referred to as "combinations"). This system will not take effect at the same time as the CCI's enforcement of the antitrust prohibitions discussed above, but only at a later stage.

In the past couple of years, the Act's system for combination review has been intensively debated in India and abroad. Concerns were identified, especially because of how the Act defines classes of transactions capable of being reviewed and the jurisdictional thresholds identifying transactions that are to be reviewed by the CCI, as

[2] Within the terms of this prohibition, an enterprise is regarded as dominant when it enjoys a position of strength enabling it either to operate independently of the competitive pressure existing on the relevant market, or to affect its competitors or consumers in its favour.

well as the long (210 days) review period during which notified transactions must not be completed. In 2008, the CCI published draft secondary legislation aimed at addressing these concerns. The CCI *inter alia* introduced a fast track for clearing combinations having little competition concerns, brought in *de minimis* provisions, and exempted certain categories of transactions from mandatory notification.[3]

4 Institutional framework

The CCI is charged with the enforcement of the Act's prohibitions of restrictive agreements and abuses of dominant positions (and it will be charged with pre-closing review of combinations), in addition to advisory and advocacy tasks.[4] The Competition Appellate Tribunal has jurisdiction to hear appeals brought against the CCI's decisions. Appeals against orders of the Tribunal can be challenged in the Supreme Court of India.

The CCI has wide ranging powers of investigation in support of its mandate. It can order the production of documents, summon witnesses, and record statements on oath. It can also undertake search and seizure operations (so-called "dawn raids") at the premises of firms, and individuals. Pending the final outcome of an investigation, the CCI may adopt interim measures.

Damages claims resulting from infringements of the provisions of the Act relating to anti-competitive agreements, abuse of dominance and regulation of combinations will only be admissible – in the Competition Appeals Tribunal – once the CCI has established that an infringement has occurred. Damages claims may also be brought in case of contravention of any orders of the CCI or Appellate Tribunal. Enforcement will be concentrated to one specialist agency and litigation channelled into one specialist court. This concentration of jurisdiction should facilitate development of decisional practice and case law.

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[3] At the time of preparation of this memorandum, the CCI is in the process of adopting revised secondary legislation laying down the "nuts and bolts" of the combination review system. Once this has been done, we will prepare a separate memorandum on this topic to properly explain the combinations review provisions. More than in respect of the antitrust prohibitions, the package of secondary legislation for combinations is expected to add a great deal of precision to the provisions in the Act.

[4] The CCI has extra-territorial jurisdiction, in the sense that it can undertake an inquiry notwithstanding the fact that an agreement or an abuse of dominance or a combination has taken place outside India so long as there is an AAEC within India.

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Linklaters has a best-friend relationship in the field of competition law with Dhall Law Chambers, founded by Vinod Dhall, former Member and Acting Chairman of the CCI. Mr Dhall is uniquely placed to assist Linklaters' clients with specialist, strategic antitrust advice to navigate the emerging Indian competition law landscape.

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