

Indian Competition Law - Annual Review (2011)

Overview

- India adopted a new Competition law in 2002 (Competition Law) prohibiting anti-competitive agreements and abuse of dominant position and providing for regulation of combinations. The Competition Act was partially enforced on 20 May, 2009 when the provisions relating to anti-competitive agreements and abuse of dominant position were notified. In May 2011, the combination regulations were also notified and became operative from 1 June, 2011.
- 2011 saw the Competition Commission of India (CCI) adopting a tough stance against cartel formation and abuse of dominance cases. In one instance, it imposed a fine of \$124 million for abuse of dominant position. However, the CCI did not provide a detailed economic analysis in its rulings and its delineation of relevant market was controversial. Most of the major rulings of the CCI in abuse of dominance cases were temporarily suspended by the higher appellate body, Competition Appellate Tribunal (COMPAT), which is indicative of the protracted and long drawn quasi-judicial and judicial process.
- In the area of combinations, CCI cleared all 11 transactions that were notified to it under the combination regulations within 30 days. However, none of the transactions cleared were economically complex or covered wide geographic markets.

Combination Regulations

- **Threshold Limits:** Qualifying M&A transactions that meet certain revenue/turnover and asset based thresholds must be notified to the CCI prior to the closing of the transaction. Under the initial threshold limit, only combinations with respect to targets that have assets of more than INR 250 Crores (appx. \$56 million) or revenue/turnover of more than INR 750 Crores (appx. \$167 million) need to be notified.
- **Timeline:** Statutory timeline is comparatively long (210 days from the first notification). However, in practice CCI has cleared all the transactions in 2011 within the review period of 30 days.
- **Notification to CCI:** There are three forms for notifying transactions to CCI. Form I is used to notify transactions that are less likely to cause adverse effect on competition, Form II is more detailed and is the equivalent of a "second request". Form III is required to be filed for acquisition by a public financial institution, foreign institutional investor, bank or venture capital fund.
- **Exemptions:** Certain categories of combinations that are unlikely to cause an appreciable adverse effect on competition in India are exempt from notification e.g., a combination taking place entirely outside India with insignificant local nexus and effects on markets in India.

Analysis Of Selected Combination Filings

Notice of acquisition filed by Reliance Industries Limited and Reliance Industrial Infrastructure Limited (July 2011)

- Notice of Acquisition filed by Reliance Industries Limited and Reliance Industrial Infrastructure Limited (the acquirers) of the 74% stake held by the Bharti Group in each of two joint venture insurance companies, namely Bharti AXA Life Insurance Company Limited and Bharti AXA (target entities) General Insurance Company Limited on 8 July, 2011.
- CCI approved the acquisition proposal within 18 days and this was the first approval under the combination regulations.

- CCI ruled that there is no horizontal combination as the acquirers do not directly operate in the life insurance or general insurance business and the target entities do not operate in the acquirers' business.
- Further, CCI ruled that anti-competitive effects in the transaction are immaterial given the significant number of other insurance brokers operating in the field.

Notice of acquisition filed by Walt Disney Company (Southeast Asia) Pte. Limited (August 2011)

- CCI approved the proposed combination of Walt Disney Company (Southeast Asia) Pte. Limited (the "Acquirer") and UTV Software Communications Limited within 25 days of receiving the notice in August 2011.
- This was the first case in the broadcasting sector which went before the CCI.
- CCI cleared the approval on grounds that the broadcasting sector is highly competitive, innovative and dynamic and there is presence of a large number of players and prevalence of intense competition among them.

Notice of acquisition by KKR Mauritius Direct Investments, Ltd (December 2011)

- This was the first case where an application to CCI has been filed by a Foreign institutional investor (FII).
- Proposed acquisition of up to 10% equity share capital of Magma Fincorp Limited (Magma) pursuant to a proposed share purchase from the secondary market at prevailing market price to be undertaken by KKR Mauritius Direct Investments Ltd (KKR FII). KKR FII is an affiliate of Kohlberg Kravis Roberts & Co. LP
- CCI asked KKR FII to cure some defects and provide additional information/ documents after the filing of the notice.
- CCI approved the acquisition within 18 days of receiving the notification from KKR FII and ruled that the proposed acquisition is not likely to have an adverse effect on competition in India.
- CCI ruled that that the proposed acquisition will not result in the acquisition of any control by KKR FII over Magma and will not result in any change in the constitution of the Board of directors or the management of Magma.
- The combination regulations provide that a foreign institutional investor (FII) shall, within seven days from the date of acquisition, file in Form III with the CCI, the details of the acquisition and the details of control.

Notice of the proposed combination between Siemens SVAI, Morgan Construction Company India Private Limited and Siemens Limited (December 2011)

- CCI approved the acquisition within 23 days of receiving the notification.
- CCI observed that the parties to the combination operate in different markets and are currently part of Siemens Group of companies, Siemens AG
- Further, CCI ruled that the ultimate control over the business activities carried by Siemens Limited, SVAI and Morgan, before and after the combination, remains with Siemens AG. Therefore, the proposed combination does not give rise to any adverse competition concern.

Abuse of Dominant Position

- There is deemed to be an abuse of dominant position if an enterprise or group imposes unfair or discriminatory conditions in purchase or sale of goods or services (including predatory price) or limits or restricts production of goods or provisions of service to the prejudice of consumers,

indulges in practices resulting in denial of market access, makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts or uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Analysis of Selected Abuse of Dominance Cases

Belaire owner's association Vs. DLF (August 2011)

- CCI passed an order against DLF Ltd. imposing a penalty of \$ 124 million at the rate of 7% of the average turnover of the company for the last three preceding year.
- DLF Ltd, a leading real estate company was found abusing its dominant position and imposing unfair conditions in its agreement with customers.
- The ruling showed that consumer welfare may be a major determinant in future abuse of dominance cases.
- The ruling also resulted in government planning a real estate regulator to safeguard the interests of the consumers.
- In November 2011, COMPAT provided relief to DLF and stayed the CCI order.

MCX Stock Exchange Ltd. Vs. National Stock Exchange (June 2011)

- The MCX-SX filed a complaint before the CCI that National Stock Exchange (NSE) had resorted to anti-competitive behavior and abuse of dominant position by eliminating competition from currency derivative segment
- CCI on 26 July, found NSE responsible of predatory pricing
- COMPAT on 8 September, stayed the penalty imposed on NSE but asked NSE to comply with the directions of CCI pending the final hearing of the case.

Anti-competitive Agreements

- The Competition Law prohibits persons entering into agreements in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which cause or are likely to cause an appreciable adverse effect on competition within India (including cartels).
- CCI has been actively looking into cartel formation cases. Presently it is investigating the possibility of cartelization in the drug and tyre industry based on a report submitted by its Director-general.

Other Competition Law News in 2011

- **Banking mergers to be kept out of purview of CCI:** The Finance Committee's report on the Banking Laws (Amendment) Bill, 2011, which was tabled in the Lok Sabha (lower house of Indian parliament) in December proposed keeping bank mergers out of the purview of CCI.
- **Pharma M&A by MNC to face competition review**
 - Concerned over several acquisitions of domestic pharmaceutical companies by overseas firms, the Indian government has done away with automatic approval for foreign direct investment (FDI) in existing pharmaceutical companies.
 - Instead, under the new rules, for any merger or acquisition in the next six months, the overseas investor will have to seek permission from the Foreign Investment Promotion Board (FIPB).

- During this six month interim period, CCI will put in place "regulations for effective oversight on mergers and acquisitions to ensure that there is a balance between public health concerns and attracting Foreign Direct Investment (FDI) in the pharma sector".
- After six months, the government has decided to route all pharmaceutical M&A clearances through the CCI and FIPB would not be responsible for granting such clearances.
- **State Enterprises not exempt from CCI review:** The CCI Chairman Ashok Chawla has clarified that Competition Act applies to state monopolies and public enterprises and there is no exception to the rule.
- **CCI chairman advocates search and seizure powers for DG:** Competition Commission of India Chairman, Ashok Chawla has advocated greater powers for the commissions' investigation wing Director-general so that it can undertake search and seizure operations for effective implementation of Competition law.

For any questions concerning this memorandum or to receive periodic updates on matters addressed here, please contact Kirtee Kapoor.

Kirtee Kapoor

+852 2533 3320

kirtee.kapoor@davispolk.com

© 2012 Davis Polk & Wardwell, Hong Kong Solicitors

Notice: This publication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. Please note that under the current Indian law, foreign lawyers like ourselves are not authorized to practice Indian law or to render legal opinions in respect of Indian Law. If you would rather not receive these memoranda, please respond to this email and indicate that you would like to be removed from our distribution list. If you have received this email in error, please notify the sender immediately and destroy the original message, any attachments thereto and all copies. Refer to the firm's [privacy policy](#) located at davispolk.com for important information on this policy. Please add Davis Polk to your Safe Senders list or add dpwmail@davispolk.com to your address book.