



# **COMPETITION LAWS IN INDIA**

## **Analysis and Comparison**

**India \* US \* EU**



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## INTRODUCTION

### Evolution

Competition Act 2002 has come into force to replace the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969. After the economic reforms of 1990, it was felt that MRTP has become obsolete pertaining to international economic developments relating to competition law and there was a need of law which curbs monopolies and promotes competition. In 1990s India saw substantial increases in the value and volume of international trade in goods and services, in foreign direct investments (FDI), and in cross border mergers and acquisitions (M&A). Over the period of time, trade barriers fell and restrictions on FDI were reduced. The Competition Act, 2002 has been enacted with the purpose of providing a competition law regime that meets and suits the demands of the changed economic scenario in India and abroad.

The Competition Act has repealed the Monopolies and Restrictive Trade Practices Act, 1969 and has dissolved the Monopolies and Restrictive Trade Practices Commission. The cases pending before the MRTP Commission are transferred to Competition Commission of India “CCI”, barring those which are related to unfair trade practices and the same are proposed to be transferred to the National Commission constituted under the Consumer Protection Act, 1986.

### HIGHLIGHTS OF COMPETITION ACT 2002

- It provides for the establishment of a Competition Commission of India “CCI” to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect interests of consumers and to ensure freedom of trade carried on by other participants in markets.
- CCI prohibits enterprises to enter into anti-competitive agreements, abusing their dominant position and forming combinations.
- **Scope of CCI** - CCI shall look into any alleged violations under the Act, (a) either on its own motion, or (b) on receipt of a complaint from any person, consumer or their trade association, or (c) on references made by the Central Government, State Governments or any statutory authority.
- **Exclusion of jurisdiction of civil courts**— No civil court has the jurisdiction to entertain any suit or proceeding which CCI is empowered by or under the Act to determine. Also, no injunction can be granted by any court or authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act.
- CCI is not bound by the procedure laid down by Code of Civil Procedure, 1908 and must only follow the principles of natural justice. CCI, thus, has the power to regulate its own procedure.
- If any party to such agreement is outside India; or if any enterprise abuses its dominant position is outside India; or a combination has taken place outside India; or any party to combination is outside India; or any other matter or practice or action arising out of such agreement or dominant position which causes an appreciable adverse effect on competition in the relevant market in India.
- **Powers of CCI**-- CCI has the power
  - to grant interim relief award compensation,
  - impose penalty and
  - to grant any other appropriate relief.
  - to levy penalty for contravention of its orders, making of false statements or omission to furnish material information, etc.
- **Division of dominant enterprise**— CCI can recommend the Central Government division of a dominant enterprise to ensure that it does not abuse its position. On the recommendation, the Central Government under Section 28 may direct division of such an enterprise.
- **Extent of penalty**— For abusing its dominant position or entering in anticompetitive agreements, CCI can levy penalty to the extent of 10 per cent of the average of the turnover for the preceding three financial years. The penalty is higher in case of such abuses by cartels and

penalty can be equivalent to three times of the amount of profits made out of such agreement by the cartel or ten per cent of the average turnover of the cartel for the preceding three financial years.

- **Appeal from CCI.**—Any person aggrieved by any decision or order of CCI may file an appeal to the Supreme Court within 60 days from the date of the communication of the decision or order.

## IMPORTANT PROVISIONS OF THE ACT

### Section 3 Anti-competitive agreements-

- (1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.
- (2) Any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void.
- (3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-
  - (a) directly or indirectly determines purchase or sale prices;
  - (b) limits or controls production, supply, markets, technical development, investment or provision of services;
  - (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
  - (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

**Explanation-** For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing

competition for bids or adversely affecting or manipulating the process for bidding.

- (4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including-
  - (a) tie-in arrangement;
  - (b) exclusive supply agreement;
  - (c) exclusive distribution agreement;
  - (d) refusal to deal;
  - (e) resale price maintenance,

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

**Explanation-** For the purposes of this sub-section,-

- (a) "tie-in arrangement" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;
  - (b) "exclusive supply agreement" includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;
  - (c) "exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;
  - (d) "refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;
  - (e) "resale price maintenance" includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.
- (5) Nothing contained in this section shall restrict-
    - (i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under-
      - (a) the Copyright Act, 1957 (14 of 1957)
      - (b) the Patents Act, 1970 (39 of 1970)
      - (c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999)
      - (d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999)
      - (e) the Designs Act, 2000 (16 of 2000)
      - (f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000)

- (ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export. Prohibition of abuse of dominant position

**Section 4. Abuse of dominant position-**

- (1) No enterprise shall abuse its dominant position.  
 (2) There shall be an abuse of dominant position under sub-section (1), if an enterprise,-  
 (a) directly or indirectly, imposes unfair or discriminatory-  
 (i) condition in purchase or sale of goods or service; or  
 (ii) price in purchase or sale (including predatory price) of goods or service.

**Explanation-** For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or

- (b) limits or restricts-  
 (i) production of goods or provision of services or market therefore; or  
 (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or  
 (c) indulges in practice or practices resulting in denial of market access; or  
 (d) 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  
 (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

**Explanation-**For the purposes of this section, the expression-

- (a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to-  
 (i) operate independently of competitive forces prevailing in the relevant market; or  
 (ii) affect its competitors or consumers or the relevant market in its favour;  
 (b) "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

**Section 5. Combination-** The acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if—

- (a) any acquisition where—  
 (i) the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired jointly have,—  
 (A) either, in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or  
 (B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or  
 (ii) the group, to which the enterprise whose control, shares, assets or voting rights have been acquired or are being acquired, would belong after the acquisition, jointly have or would jointly have,—  
 (A) either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or  
 (B) in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India; or  
 (b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, if—  
 (i) the enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control jointly have,—  
 (A) either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or

- (B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or
- (ii) the group, to which enterprise whose control has been acquired, or is being acquired, would belong after the acquisition, jointly have or would jointly have,—
- (A) either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or
- (B) in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India; or
- (c) any merger or amalgamation in which—
- (i) the enterprise remaining after merger or the enterprise created as a result of the amalgamation, as the case may be, have,—
- (A) either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or
- (B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or
- (ii) the group, to which the enterprise remaining after the merger or the enterprise created as a result of the amalgamation, would belong after the merger or the amalgamation, as the case may be, have or would have,—
- (A) either in India, the assets of the value of more than rupees four-thousand crores or turnover more than rupees twelve thousand crores; or
- (B) in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India;

**Explanation—** For the purposes of this section,—

- (a) "control" includes controlling the affairs or management by—
- (i) one or more enterprises, either jointly or singly, over another enterprise or group;
- (ii) one or more groups, either jointly or singly, over another group or enterprise;
- (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;
- (c) the value of assets shall be determined by taking the book value of the assets as shown, in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of proposed merger falls, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout-design or similar other commercial rights, if any, referred to in sub-section (5) of section 3.

#### **Section 6. Regulation of combinations-**

- (1) No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.
- (2) Subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into a combination, may, at his or its option, give notice to the Commission, in the form as may be specified, and the fee which may be terminated, by regulations, disclosing the details of the proposed combination, within seven days of-
- (a) approval of the proposal relating to merger or amalgamation, referred to in clause (c) of section 5, by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be;
- (b) execution of any agreement or other document for acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of that section.
- (3) The Commission shall, after receipt of notice under sub-section (2), deal with such notice in accordance with the provisions contained in sections 29, 30 and 31.
- (4) The provisions of this section shall not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor,

- bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement.
- (5) The public financial institution, foreign institutional investor, bank or venture capital fund, referred to in sub-section (4), shall, within seven days from the date of the acquisition, file, in the form as may be specified by regulations, with the Commission the details of the acquisition including the details of control, the circumstances for exercise of such control and the consequences of default arising out of such loan agreement or investment agreement, as the case may be.

**Explanation-** For the purposes of this section, the expression-

- (a) "foreign institutional investor" has the same meaning as assigned to it in clause (a) of the Explanation to section 115AD of the Income-tax Act, 1961 (43 of 1961)
- (b) "venture capital fund" has the same meaning as assigned to it in clause (b) of the explanation to clause (23FB) of section 10 of the Income-tax Act, 1961 (43 of 1961).

**Section 18. Duties of Commission-** Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India:

**Provided that** the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country.

**Section 29. Procedure for investigation of combinations-**

- (1) Where the Commission is of the opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India, it shall issue a notice to how cause to the parties to combination calling upon them to respond within thirty days of the receipt of the notice, as to why investigation in respect of such combination should not be conducted.
- (2) The Commission, if it is prima facie of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall, within seven working days from the date of receipt of the response of the parties to the combination, direct the parties to the said combination to publish details of the combination within ten working days of such direction, in such manner, as it thinks appropriate, for bringing the combination to the knowledge or information of the public and persons affected or likely to be affected by such combination.

- (3) The Commission may invite any person or member of the public, affected or likely to be affected by the said combination, to file his written objections, if any, before the Commission within fifteen working days from the date on which the details of the combination were published under sub-section (2).
- (4) The Commission may, within fifteen working days from the expiry of the period specified in sub-section (3), call for such additional or other information as it may deem fit from the parties to the said combination.
- (5) The additional or other information called for by the Commission shall be furnished by the parties referred to in sub-section (4) within fifteen days from the expiry of the period specified in sub-section (4).
- (6) After receipt of all information and within a period of forty-five working days from the expiry of the period specified in sub-section (5), the Commission shall proceed to deal with the case in accordance with the provisions contained in section 31.

**Section 30. Inquiry into disclosures under sub-section (2) of section 6-**

Where any person or enterprise has given a notice under sub-section (2) of section 6, the Commission shall inquire-

- (a) whether the disclosure made in the notice is correct;
- (b) whether the combination has, or is likely to have, an appreciable adverse effect on competition.

**Section 31. Orders of Commission on certain combinations-**

- 1) Where the Commission is of the opinion that any combination does not, or is not likely to, have an appreciable adverse effect on competition, it shall, by order, approve that combination including the combination in respect of which a notice has been given under sub-section (2) of section 6.
- 2) Where the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall direct that the combination shall not take effect.
- 3) Where the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition but such adverse effect can be eliminated by suitable modification to such combination, it may propose appropriate modification to the combination, to the parties to such combination.
- 4) The parties, who accept the modification proposed by the Commission under sub-section (3), shall carry out such modification within the period specified by the Commission.

- 5) If the parties to the combination, who have accepted the modification under sub-section (4), fail to carry out the modification within the period specified by the Commission, such combination shall be deemed to have an appreciable adverse effect on competition and the Commission shall deal with such combination in accordance with the provisions of this Act.
- 6) If the parties to the combination do not accept the modification proposed by the Commission under sub-section (3), such parties may, within thirty working days of the modification proposed by the Commission, submit amendment to the modification proposed by the Commission under that sub-section.
- 7) If the Commission agrees with the amendment submitted by the parties under sub-section (6), it shall, by order, approve the combination.
- 8) If the Commission does not accept the amendment submitted under sub-section (6), then, the parties shall be allowed a further period of thirty working days within which such parties shall accept the modification proposed by the Commission under sub-section (3).
- 9) If the parties fail to accept the modification proposed by the Commission within thirty working days referred to in sub-section (6) or within a further period of thirty working days referred to in sub-section (8), the combination shall be deemed to have an appreciable adverse effect on competition and be dealt with in accordance with the provisions of this Act.
- 10) Where the Commission has directed under sub-section (2) that the combination shall not take effect or the combination is deemed to have an appreciable adverse effect on competition under sub-section (9), then, without prejudice to any penalty which may be imposed or any prosecution which may be initiated under this Act, the Commission may order that-
- the acquisition referred to in clause (a) of section 5; or
  - the acquiring of control referred to in clause (b) of section 5; or
  - the merger or amalgamation referred to in clause (c) of section 5,

shall not be given effect to:

Provided that the Commission may, if it considers appropriate, frame a scheme to implement its order under this sub-section.

- 11) If the Commission does not, on the expiry of a period of ninety working days from the date of publication referred to in sub-section (2) of section 29, pass an order or issue direction in accordance with the provisions of sub-section (1) or sub-section (2) or sub-section (7), the

combination shall be deemed to have been approved by the Commission.

**Explanation-** For the purposes of determining the period of ninety working days specified in this sub-section, the period of thirty working days specified in sub-section (6) and a further period of thirty working days specified in sub-section (8) shall be excluded.

- 12) Where any extension of time is sought by the parties to the combination, the period of ninety working days shall be reckoned after deducting the extended time granted at the request of the parties.
- 13) Where the Commission has ordered a combination to be void, the acquisition or acquiring of control or merger or amalgamation referred to in section 5, shall be dealt with by the authorities under any other law for the time being in force as if such acquisition or acquiring of control or merger or amalgamation had not taken place and the parties to the combination shall be dealt with accordingly.
- 14) Nothing contained in this Chapter shall affect any proceeding initiated or which may be initiated under any other law for the time being in force.

**Section 32 Acts taking place outside India but having an effect on competition in India-** The Commission shall, notwithstanding that,—

- an agreement referred to in section 3 has been entered into outside India; or
- any party to such agreement is outside India; or
- any enterprise abusing the dominant position is outside India; or
- a combination has taken place outside India; or
- any party to combination is outside India; or
- any other matter or practice or action arising out of such agreement or dominant position or combination is outside India, have power to inquire in accordance with the provisions contained in sections 19, 20, 26, 29 and 30 of the Act into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India and pass such orders as it may deem fit in accordance with the provisions of this Act.

**WHAT IS AN ANTI-COMPETITIVE AGREEMENT?**

An anti-competitive agreement is an agreement having appreciable adverse effect on competition. Anti-competitive agreements include, but are not limited to:-

- Agreement to limit production and/or supply;
- Agreement to allocate markets;
- Agreement to fix price;
- Bid rigging or collusive bidding;
- Conditional purchase/sale (tie-in-arrangement);
- Exclusive supply/distribution arrangement;
- Resale price maintenance; and
- Refusal to deal.

**WHAT CONSTITUTES ABUSE OF DOMINANCE?**

Dominance refers to a position of strength which enables an enterprise to operate independently of competitive forces or to affect its competitors or consumer or the market in its favour. Abuse of dominant position impedes fair competition between firms, exploits consumers and makes it difficult for the other players to compete with the dominant undertaking on merit. Abuse of dominant position includes imposing unfair conditions or price, predatory pricing, limiting production /market or technical development, creating barriers to entry, applying dissimilar conditions to similar transactions, denying market access and using dominant position in one market to gain advantages in another market.

**WHEN MAY THE COMMISSION INITIATE INQUIRY?**

- On Its own on the basis of information and knowledge in its possession, or
- On receipt of an information, or
- On receipt of a reference from the Central Government or a State Government or a statutory authority.

**WHO CAN PROVIDE INFORMATION?**

Any person, consumer, consumer association or trade association can provide information relating to anti-competitive agreements and abuse of dominant position.

- A person includes an individual, Hindu undivided family (HUF), company, firm, association of persons (AOP), body of individuals (BOI), statutory corporation statutory authority, artificial judicial person, local authority and body incorporated outside India.
- A consumer is a person who buys products (goods and services) for personal use or for other purposes.
- Intermediate customers can also provide information.

**CAN COMMISSION INITIATE INQUIRY SUO-MOTO?**

Yes, the Commission can initiate inquiry on its own on the basis of information or knowledge in its possession; or

On receipt of information or reference, if the Commission is of the opinion that there is a prima facie case, it shall direct the Director General, appointed under the Act, to investigate the matter and report his findings to the Commission.

**TYPES OF ORDERS BY COMMISSION**

- During the course of inquiry, the Commission can pass interim order restraining a party from continuing with anti-competitive agreement or abuse of dominant position.
- The Commission can impose a penalty of not more than 10% of the average turnover of the last 3 preceding financial years of the enterprise. In case of a cartel, the Commission can impose on each member of the cartel, a penalty of up to 3 times its profit for each year of the continuance of such agreement or upto 10% of its turnover for each year of continuance of such agreement, whichever is higher.

- After the inquiry, the Commission may direct a delinquent enterprise to discontinue and not to re-enter anti-competitive agreement or abuse its dominant position (cease and desist order). The Commission may also direct modification of such agreement.
- The Commission may direct division of enterprise in case it enjoys dominant position.

### MEANING OF COMBINATION

Broadly, combination includes acquisition of control, shares, voting rights or assets, acquisition of control by a person over an enterprise where such person has control over another enterprise engaged in similar businesses, or mergers and amalgamations between or amongst enterprises where the total assets or turnover of the combined entity exceed the thresholds specified in the Act in terms of assets or turnover. If a combination causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India, it is prohibited and can be scrutinized by the Commission.

### APPLICABILITY ON INDIAN & FOREIGN ENTITIES

The Indian and foreign companies will fall under the Act only if they fulfill the following criterias:

		<u>ASSETS</u>		<u>TURNOVER</u>	
In India	No Group	INR 1000 Cr.		INR 3000 Cr.	
	Group	INR 4000 Cr.		INR 12,000 Cr.	
In India and Outside		<u>ASSETS</u>		<u>TURNOVER</u>	
		Total	India	Total	India
	No Group	USD 500 mn	INR 500 Cr.	USD 1500 mn	USD 1500 Cr.
	Group	USD 2000 mn	INR 500 Cr.	USD 6000 mn	USD 1500 Cr.

1 Cr = 10 million (mn)

### FILING WITH COMMISSION BY COMPANIES

An entity proposing to enter into a combination, shall notify the Commission in the specified form disclosing the details of the proposed combination within 30 days of the approval of such proposal by the Board of Directors or execution of any agreement or other document.

### POST FILING WAITING PERIOD

The Commission now provides for a post-filing review period of 210 days, during which the merger cannot be consummated and within which the Competition Commission is required to pass its order with respect to the notice received. If the commission fails to pass an order within the time limit, the proposed combination will be deemed to be approved. The 210-day period applies in case of cross-border transactions outside India where one of the contracting parties has a substantial presence in India. Regardless of the size of the transaction, notification is required where the combined asset value or turnover in India exceeds a certain value. This means that it is mandatory for a foreign company with assets of more than \$500 million that has a subsidiary or joint venture in India with a substantial investment (above \$125 million) to notify the Competition Commission before acquiring a company outside India.

### FILING FEES TO COMMISSION

The notice must be accompanied by a fee of approximately \$50,000, which may increase to \$100,000 in certain cases. Further, the Competition Commission will issue a show-cause notice if it is of a *prima facie* opinion that the combination is likely to cause an appreciable adverse effect on competition in India. A fee of \$40,000 is to be filed along with the response to the show-cause notice. In addition, the Competition Commission has the power to compel parties to publish the details of a proposed combination to enable any person from the public to raise objections to such

combination. Such publication burdens parties with an additional sum of \$40,000.

## COMBINATIONS INVESTIGATION PROCEDURE

If the Commission is of the opinion that a combination is likely to cause or has caused adverse effect on competition, it shall issue a show cause notice to the parties as to why investigation in respect of such combination should not be conducted. On receipt of the response, if Commission is of the *prima facie* opinion that the combination has or is likely to have appreciable adverse effect on competition, it may direct publication of details, inviting objections from the public and hear them, if considered appropriate. It may invite any person, likely to be affected by the combination, to file his objections. The Commission may also inquire whether the disclosure made in the notice is correct and combination is likely to have an adverse effect on competition.

## IMPACT ON M&A, TAKEOVERS, JV ETC

Competition Act governs anti-competitive agreements and prohibits: agreements involving 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' in India. Competition Act prohibits the abuse of a dominant position by an enterprise. Under the Monopolies Act, a threshold of 25% constituted a position of strength. However, this limit has been eliminated under the Competition Act. The Competition Act prohibits enterprises from entering into agreements that cause or are likely to cause an 'appreciable adverse effect on competition within the relevant market in India'. Under the new regime, the Competition Commission has investigative powers in relation to combinations. Various factors are provided for determining whether a combination will or is likely to have an appreciable adverse effect on competition in India, and penalties are provided for such violations. At present, any acquisition, merger or

amalgamation falling within the ambit of the thresholds constitutes a combination.

Essentially, a transaction must satisfy two conditions (i) it must involve total assets or turnover, with separate criteria for domestic and international entities; and (ii) it must have a territorial nexus with India. Under the originally enacted Competition Act 2002, the reporting of a combination was optional. However, the act now mandates notification within 30 days of the decision of the parties' boards of directors or of execution of any agreement or other document for effecting the combination. The general industry perception is that a memorandum of understanding or a letter of intent will qualify as an 'agreement'. However, these are generally executed to spell out a basic understanding among the transacting parties and to enable the acquirer to conduct due diligence, based on which further negotiations are carried out. Going forward, execution of such a document shall trigger merger filings. This will increase compliance costs at a premature stage when it is uncertain whether the transaction will close. It will also add to the bulk of notification applications submitted to the Competition Commission.

## FILINGS BY FOREIGN COs (IN OR OUTSIDE INDIA)

- If a foreign entity, operating in or outside India, desires to enter into a combination in or outside India which adversely affects the relevant market in India, then it has to give a notice to the CCI in the prescribed form by submitting the prescribed fee and disclosing the details of such combination within seven days of-
  - (a) approval of the proposal relating to such merger or amalgamation from the Board of Directors of such enterprise;
  - (b) execution of any agreement of such acquisition.
- If the CCI is of the opinion that such combination has caused or is likely to cause an appreciable adverse

effect on competition in the relevant market in India then-

- (a) it shall issue a show cause notice to the parties to such combination to respond within 30 days as to why investigation shall not take place against them;
- (b) it shall direct the parties to such combination within seven working days after receiving response from the parties as to publish details of such combination to the knowledge of the affected persons;
- (c) it shall direct for suitable modifications in such combination if such adverse effect can be eliminated;
- (d) it shall direct that the combination shall not take effect.

### EXTRA-TERRITORIAL JURISDICTION

The Competition Act explicitly allows the Competition Commission to examine a combination already in effect outside India and pass orders against it provided that it has an 'appreciable adverse effect' on competition in India. This power is extremely wide and allows the Competition Commission to extend its jurisdiction beyond the Indian shores and declare any qualifying foreign merger or acquisition as void. An 'appreciable adverse effect' on competition means anything that reduces or diminishes competition in the market. Unlike sector specific regulatory authorities, the Commission combines the twin powers of private enforcement and the ability to pursue claims for damages.

The COMPETITION ACT enables the Commission to smoothen and accelerate the exercise of its power by way of entering into arrangements and memorandum of understandings with the regulatory bodies of other countries in order to facilitate the entire process. Cross border merger regulation in India has only been partly taken care under the regulatory landscape of Securities and Exchange Board of India (SEBI). With the emergence of the new Competition

Law regime in India a host of issues need to be looked into as far as cross border merger regulation is concerned and recognize the need to find a purposive solution to the possible conflicts and grey areas.

### UNITED STATES ANTI-TRUST LAWS

Antitrust law was enacted in the U.S. in 1890 primarily to control the concentration of economic and industrial power. However, Section 7 of the Clayton Act is the primary legislation in the U.S. governing mergers and acquisitions, but limits itself to the territory of the United States. The Clayton Act applies to both mergers with immediate anticompetitive effects and those that have a future probability of substantially reducing competition. In addition, the principal legislation Sherman Act broadly states that every contract, combination, or conspiracy that restrains trade or commerce among the states, or with foreign nations, is illegal and that every person who monopolizes, or attempts to monopolize is guilty of a felony.

### EU COMPETITION LAWS

European competition law is governed primarily by Articles 85 and 86 of the Treaty Establishing the European Community. Article 85 is designed primarily to achieve the same goal as the Sherman Act in U.S. legislation insofar as it prohibits all agreements and concerted practices that affect trade among E.U. members and which have as their main objective the prevention, restriction or distortion of competition. Article 86 is designed to meet the policy objectives of the Clayton Act in that it prohibits the abuse of a dominant market position through unfair trading conditions, pricing, limiting production, tying, and dumping. The European Court of Justice (E.C.J.) has also adopted a similar approach to extraterritorial enforcement of competition laws than that of U.S. courts.

## COMPARISON - INDIAN, US AND EU LAWS

### INDIA

In Indian law, a foreign entity desiring to enter into a combination outside India which affects the relevant market in India, must give a notice to the CCI in the prescribed form to establish the same. The Competition Commission of India has the power to extend its jurisdiction beyond the Indian shores and declare any qualifying foreign merger or acquisition which affects the relevant market in India as void. CCI can exercise its power by way of entering into arrangements and memorandum of understandings with the regulatory bodies of other countries in order to facilitate the entire process.

### UNITED STATES

In US law, when a “person”, including foreign nationals whose activities affects the trade in United States, acquires any voting securities or assets of any other person then both the persons shall file a notification in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, would not violate the antitrust laws. However, the person shall file such notification only when the waiting period stated in S. 18a of Clayton Act of 1914 has expired.

### EUROPEAN UNION

Article 4 of the Merger Regulation<sup>1</sup> of European Commission states that merger shall be notified to the Commission prior

<sup>1</sup> COUNCIL REGULATION (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)

to its notification. It shall be notified jointly notified by the parties to the merger or by those acquiring joint control. They shall also publish the fact of the notification, at the same time indicating the names of the undertakings concerned their country of origin, the nature of the concentration and the economic sectors involved. The parties shall make a submission to the Commission prior to the notification stating that the merger significantly affects competition in a market within a Member State which presents all the characteristics of a distinct market and should therefore be examined. The decision whether or not to refer the case shall be taken within 25 working days starting from the receipt of the reasoned submission by the Commission.

Articles 1-5 of Implementation Regulation<sup>2</sup> of European Commission also makes it more or less obligatory for the parties to file pre-filing notification as failure to comply with the obligation to notify renders the parties liable to fines and may also entail civil law disadvantages for them.

### COMPARISON

From the above analysis we observe that the procedure for pre-filing notification is similar throughout the world. The Competition Act throughout the world has been enacted to protect the consumers, society and the business community. The pre-filing notification is effective in cases where the transaction is going to effect competition beyond one-member nation. It proposes whether the proposed transaction violates the Competition law. Each jurisdiction has a mandatory merger notification based on targeting parties to "large transactions" which must notify the agency, supply required information for the review of competition issues and wait for the lapsing of established time periods before they can legally complete the transaction.

<sup>2</sup> Implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings

## CONCLUSION

The Commission needs to swing into action undertaking substantial capacity building to implement the extra territorial jurisdiction that is embodied in the Competition Act, 2002.

As India integrates at a fast pace with the global economy there is a need to ensure international co-operation to tackle cross border challenges. Even though the COMPETITION ACT embodies the 'effects' doctrine, its implementation has been more or less ineffective.

The Competition Act is yet to fully come into force as a result of which a significant jurisprudence under the legislation is yet to be developed. Moreover, the actual implications in enforcing the rather broad mandate prescribed for the Competition Commission of India are to be fully realized. The difficulties in implementing the provisions are yet to be encountered; they can only be anticipated or predicted based on the analysis of the bare provisions of the enactment.

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