

The Competition (Amendment) Bill, 2006 *What needs to be done?*

The Competition Act, 2002 was enacted to replace the Monopolies and Restrictive Trade Practices Act, 1969, which was found to be inadequate in the changed economic environment. However, the Act was challenged in the Supreme Court on the grounds that it did not adhere to the doctrine of separation of powers between judiciary and the executive as recognised by the Constitution of India. Pursuant to the litigation, the Government has proposed to amend the Competition Act and split the competition authority into two: the Competition Commission of India and a Competition Appellate Tribunal. Though the overall direction of the Bill is good but certain areas need to be reviewed by the Parliament before giving its consent on the Bill.

The Bill at a Glance

Highlights

- ◆ Constitution of Competition Appellate Tribunal (CAT).
- ◆ Pending Unfair Trade Practices (UTPs) cases to be transferred to consumer courts.
- ◆ The Competition Commission of India (CCI) empowered for appointing administrative staff.
- ◆ Division of a dominant enterprise to be ordered by CCI itself, instead of recommending to the Central Government.
- ◆ In case of an opinion given by the CCI on a reference made to it, the sectoral regulators (statutory authorities) have to issue speaking orders.
- ◆ In formulating any policy, now even a State Government can make a reference to the CCI for its opinion on possible effects of such policy on competition.

Lowlights

- ◆ Provisions to deal with abuse of Intellectual Property Rights (IPRs) are weak.
- ◆ Interface between CCI and regulators remains at the discretion of the regulators.
- ◆ 'Exemptions' from the Act is left to the discretion of the Central Government without any guidelines.
- ◆ Financial and functional autonomy of the CCI impaired through provisions such as Government's power to allocate the budget; power to supersede the CCI; and power to issue policy directives without due process.
- ◆ Extends not only leniency provisions to all colluding parties and before the submission of report by the Director General (DG), can induce cartel members to come forward and cooperate, but also widens the goal posts of corruption.
- ◆ Local-level checks on anti-competitive practices will get diluted by doing away with the provision to establish regional benches.
- ◆ *Complete lack of public consultations (in contrast to the case of The Competition Act, 2002) in the process of drafting the current Bill.*

Action Points

- IPR abuses should be covered explicitly under the proposed Act; define 'unreasonable conditions' and specify the remedies (Sec. 3(5) of the Act).
- The Act should empower CCI to *suo moto* give its opinion on possible effect on competition (competition advocacy) instead of only on a reference made by the Government (Sec. 49).
- Parliament itself should approve the budget for the CCI and not leave it at the will of the Government, thus ensuring autonomy (Sec. 50).
- 'Exemptions' to the Act should not be left on the discretion of the Central Government, but it should be exercised publicly and in consultation with CCI (Sec. 54).
- The relationship between CCI and sectoral regulators needs to be defined properly, with CCI having jurisdiction over behavioural aspects of the regulated sector, while the sectoral regulator having to deal with structural issues. Mutual consultations should be mandatory.
- Policy directives to CCI should be issued only after a wide and thorough consultation process. Government should place in public, comments received from CCI and other stakeholders (Sec. 55).
- Powers given to the Central Government to supersede CCI on the grounds for example, public interest, etc., severely undermines the independence of the Commission and hence should be removed (Sec 56).
- Establish regional offices (not benches) of CCI to keep a check on anti-competitive practices taking place at local level (Sec. 22).
- The procedure for selecting Chairperson and Members should be clearly defined and transparent (Sec. 9).
- Appropriate mechanisms ensuring transparency in the grant of leniency to cartel members willing to cooperate. This would help counter any possibility of corruption (Sec 46).
- CCI has been empowered to deal with anti-competitive practices outside India, but to operationalise it, the Act should also empower CCI to cooperate with and seek cooperation from its counterparts in other countries (Sec. 32).

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Introduction

Competition is a process of economic rivalry between the market players to attract customers. These market players can be multinational or domestic companies and wholesalers or retailers. Such a competitive situation may also be affected by market contestability wherein competition comes not only from the existing players, but also from new players that could enter and contest in the market.

The need for a Competition Law arises to address anti-competitive practices designed to restrict the free play of competition in the market; to address unfair means adopted by firms against the consumers and other market players; to extract the maximum possible

consumer's surplus and/or producer's surplus, and to maintain and promote the competitive spirit in the market.

The *raison d'être* of the Competition Act is to create an environment conducive to competition. In a market-oriented economy, the Competition Act can be termed as the main Act of the day. The Competition Act, 2002, adopted by the Parliament during the Winter Session of 2002-03, was enacted to provide for the establishment of a Commission to prevent practices having adverse effect on competition; to promote and sustain competition in markets; to protect the interest of the consumers; and to ensure freedom of trade carried on by other participants in markets in India.

However, the Competition Act and the Selection Rules were challenged. A writ petition filed in the Supreme Court challenged that the Competition Commission envisaged by the Act is more of a judicial body having adjudicatory powers and that in the background of the doctrine of separation of powers recognised by the Indian Constitution, the Chairman of the Commission had necessarily to be a retired judge.

The Government after examining the issues and with a view to resolving the matters, decided to incorporate certain changes to the Competition Act, 2002 and the present amendment Bill is said to meet the demand. However, it falls short and certain areas still needs to be reconsidered, which are addressed in this Bill Blowup.

The Competition (Amendment) Bill, 2006: What amendments have been proposed?

1. Composition of the CCI

The CCI consists of a Chairperson and not less than two and not more than 6 other Members to be appointed by the Central Government. There is no provision to appoint part-time Members. Provision for part time Members is necessary to ensure that persons, who would otherwise not be available on a whole time basis to the Commission because of professional commitments and economic considerations, do agree to serve the Commission. This is a practice followed in many countries, including in the Telecom Regulatory Authority of India (TRAI).

A Selection Committee both for the CCI and the CAT is to be constituted which is proposed to be headed by the Chief Justice of India or his nominee; and two other Members who are the Secretary in the Ministry of Company Affairs and the Secretary in the Ministry of Law and Justice respectively.

However, the procedure for selection of the candidates has not been defined and left at the discretion of the Selection Committee. As per selection rules, the Committee is required to recommend a panel of suitable candidates to the Central Government within a time period of 90 days. Putting a time limit in selecting candidates for such an important and technical post and not specifying the selection procedure would lead to quick and ineffective methods of selection, which invariably end up in an untransparent search process. Hence, the quality of the persons so appointed could be severely compromised. There is a need to specify clearly the selection procedure in order to attract the best talent,

which could include advertising the positions etc.

Moreover, though the word 'administration' has been removed as one of the qualifying criteria for the selection of Chairman and Members of the CCI, which was originally incorporated in the Act, the Bill still prescribes the age limit for these posts to 65 years.

The age limit of 65 years opens the door for appointment of retired/retiring bureaucrats as has normally been done in case of other existing Regulatory Boards. This provision would be contrary to the submission made by Mr. Jaswant Singh, former Finance Minister on December 20, 2002, on the floor of the House that CCI would not be a parking space for retired bureaucrats. A similar view is expressed in the approach paper to the 10th Five Year Plan prepared by the Planning Commission. Para 4.21 of this paper reads, "...The State and Central Governments...should avoid post retirement jobs to the civil servants as also the judiciary." Thus, **the age limit should be kept at 60 years.**

The Amendment Bill proposes to transfer all the staff of the MRTPC Commission to CCI. This would add to confusion and seriously hamper the working of a new body, which requires a fresh outlook. This is not desirable and the **Government could offer the MRTPC staff a voluntary retirement scheme or adjust them in other services.**

2. Interface with other Regulators

The coordination between the sector regulatory authorities and CCI is another

grey area, which needs to be re-examined. The Bill lays down provisions allowing the regulatory authority to make a *suo-moto* reference to CCI, even without any party asking for such a reference, in cases where it believes that there is an anti-competitive practice.

Unfortunately, such a reference continues to be voluntary in nature and at the discretion of the regulatory authorities.

Further, the draft Amendment Bill proposes that on the opinion given by the Commission on such a reference, the regulatory authority would have to issue speaking orders. Thus, even though CCI's advice is not binding on regulators, they will have to provide a 'reasoned reaction' to such advice received from the CCI. This would put a check on the way regulators use CCI's advice. Nevertheless this Amendment is an improvement over the existing provision in the Act.

However, by keeping the consultation process voluntary and at the discretion of regulators, the amended provision would not serve much purpose. Keeping in mind that regulators have to give speaking orders on the opinion given by CCI, they would have no incentive to refer the matter to CCI in the first place itself, given the discretion they would enjoy.

Such inadequacies in the Act will create conflicts between the competition authority and the regulators and lead to inconsistent decisions and forum shopping. Instead, the Bill should clearly demarcate the respective jurisdictions of CCI and sectoral regulators. For example, in France the Competition Authority is empowered to deal with all

behavioural issues in independently regulated sectors, while the sectoral regulators take care of structural issues. This includes mandatory consultations between them provided for in both the laws.

Thus the Bill should have necessary provisions in place that give the powers to CCI to have the prime or at least the concurrent responsibility of acting on sectors, even if other regulatory authorities exist in the interest of maintaining competition in the market.

Consultation between sector regulators and competition authority should be 'mandatory' and reciprocal in nature. The latter refers to regulators seeking CCI's advice on competition matters as well as the CCI seeking regulators' advice on issues that have implications on the regulated industry.

3. Establishment of CAT

The Bill proposes to establish a Competition Appellate Tribunal (CAT) to hear appeals against the orders of the CCI and to adjudicate compensation claims arising out of the findings of the CCI or orders of the Tribunal. The Amendment is a forward-looking step designed to keep a check on the functioning of the CCI by providing the option to appeal against its orders.

Considering the overlap in the functions performed by various regulatory agencies-between the CCI and sectoral regulators, between electricity regulators and the proposed petroleum regulator and so on, setting up an appellate body

for each regulatory body is leading to an unnecessary proliferation of appellate tribunals. Most of them do not have enough work and are an unnecessary burden on the exchequer. This could lead to forum shopping and inconsistent decisions at the appellate level.

In view of this, **a common Appellate Tribunal with regional benches should be established for the CCI and sectoral regulators.** This will ensure convergence in application of competition and regulatory laws and set healthy conventions to ensure their harmonious application. The jurisdiction of the tribunal should be restricted to issues of law.

4. Leniency Provision

The leniency provision, as per existing provisions in the Act, provides specific relief to the first party who 'spills the beans' in cases of collusion (cartels) and before the beginning of the inquiry. It is now proposed in the Bill, that all the parties who wish to cooperate with an enquiry can do so right until the time, the DG submits his report to the CCI.

Allowing leniency during investigations is a way to induce cartel members to come forward and cooperate. This provision, however, also expands the gateways for corruption in the offices of the DG and could defeat the very purpose of the leniency provision. **Therefore, leniency provision should be applied only prior to the initiation of investigation to put a lid on this potential avenue for corruption.**

On the other hand, it is argued that leniency can be granted only if the firm

provides useful information to indict its co-conspirators, hence clandestine deals with the DG's office are less likely. The latter is possible if the reasons to grant of leniency to further cartel members, willing to cooperate during investigations, is made public. Further, corruption is less likely to occur if other cartel members are allowed to challenge the grant of leniency before the CAT.

5. Competition Advocacy

The purpose of Competition Advocacy is to create awareness on competition culture. The CCI is empowered to participate in the formulation of policies, which have an effect on competition at the instance of the Central and State Governments. By including the provisions of Competition Advocacy, the Act extends the mandate of the CCI beyond merely enforcing the law.

However, CCI can merely advocate to the Government when called upon to do so and its recommendations are only advisory, not mandatory. This clause needs to be amended and **CCI should be empowered to suo moto participate in the formulation of a policy without being invited by the Government(s).** For example, the CCI has an important role in disinvestment/privatisation issues, to ensure that it does not lead to monopolies or dominance. Such provisions exist in many competition laws of the world. Secondly, the process should be transparent so that the people are aware of what is happening and are able to participate.

The Competition (Amendment) Bill, 2006: What further amendments are required?

1. IPR Provisions

The Act recognises that the bundle of rights that are subsumed in intellectual property rights (IPRs) should not be disturbed in the interests of creativity and intellectual/innovative power of the human mind. It, accordingly, exempts reasonable conditions forming a part of protection or exploitation of IPRs.

However, 'what is reasonable?' is not explicitly mentioned in the Act. Secondly, the Act is silent on the remedies, if *unreasonable* conditions accompany IPR licenses and limit competition. Compulsory licensing and parallel imports are two key remedies of great importance and a competition law cannot remain silent in this regard.

In India, the IPR laws such as the Patent Act or Copyright Act or Trade Marks Registration Act have over-riding powers over the Competition Act in

matters related to IPR abuses. For instance, in cases where an anti-competitive outcome arises from the exercise of the rights by the patent holder, the Patent Amendment Act, 2005 provides for issue of licenses to stop such anti-competitive activity. However, the role of CCI to examine such matters does not find any mention.

Competition law is a useful tool to keep a check on anti-competitive practices such as licensing agreements that restrain marketing and product development. Accordingly CCI should be empowered to deal with cases of abuse of IPRs. In many countries, the competition law has the provision to deal with IPR abuses. For example, the Zimbabwe competition law has very clear provisions.

It is, therefore, suggested to have an **elaborate chapter on the issue of**

IPRs in the Bill. This is important not only to check the said transgressing activities of the firms but also to exploit the flexibility provided under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) of the World Trade Organisation (WTO). By flexibility, we mean that the TRIPs does not prevent countries from specifying in their respective legislations licensing practices or conditions that may in practice constitute an abuse of IPRs having an adverse effect on competition in their markets. Thus the use of this flexibility is the onus on the Members states to enact such provisions.

The Act should explicitly mention what constitutes 'unreasonable conditions'. An indicative list of unreasonable conditions should be given, such as patent pooling, tie-in arrangements, prohibiting licensee

to use competing technology, an agreement to continue paying royalty even after the patent has expired, fixing the prices at which licensee should sell, etc. The Act should also specify the remedies that are available in case of abuse of IPRs. In this context the competition law should override IPR laws.

2. Independence of the CCI

The Bill fails to address certain provisions in the Act, which impair the autonomy and independence of CCI. The provision such as grant of money to the CCI as the Government may think fit undermines the financial autonomy of the Commission (Clause 50). This provision should be reworded to remove the discretion of the Government in providing budget to the CCI. Instead, the **Parliament should itself approve the budget** for the CCI, like it does for other independent bodies such as the Election Commission of India.

Directions of the Government on questions of policy bind CCI. This provision contravenes the letter and spirit of independence of the CCI, a requirement inevitable for its effectiveness. This is also in contrast to the recommendations of the high level Raghavan Committee on Competition Policy and Law in 2000.

In other countries (e.g. Canada), elaborate measures are undertaken to involve various stakeholders before finalising the policy guidelines. The issue of **policy directives by the Government should be qualified by including an enabling provision for a wide consultation process**. Government should be required to place in the public domain the advice received from the CCI and other stakeholders, and provide reasons for the issue of the directives. The CCI should be independent and free from the intervention of the Central Government as far as possible.

Another provision, gives power to the Government to supersede CCI on certain grounds, for example public interest. If the CCI has to effectively implement the Competition Act and bring about competitiveness in the market, the provision to supersede is not likely to help. This provision severely undermines the

independence of the Commission and should be removed (Clause 56 of the Act).

3. Accountability of CCI

The provisions discussed above, in the context of autonomy of CCI, mainly aim at keeping a check on CCI's functioning by limiting its independence. However, this is not a good approach of making an independent authority accountable, as it reduces its effectiveness.

Under the existing provisions, the Parliament has an oversight over the rules and regulations made to carry out the provisions of the Act. CCI is also made accountable to the Parliament by requiring it to submit an Annual Report and Statement of its activities. This provision, however, is not effective since one cannot expect the Parliament to devote the amount of time required for a proper study of the Annual Reports and Statements. Thus, there is a need to improve the supervisory role of the Parliament.

A Parliamentary Committee on Regulation and Competition should be established as the reporting authority for the CCI and all sector regulators. CCI should submit an activity and outcome report to the Parliament through this Committee. The Committee's domain should be confined to systemic issues only and not individual decisions and orders of regulators.

Additionally, the proposed CAT would keep a check on CCI's and sectoral regulators' functioning by hearing appeals against their orders. In addition to the existing provisions, the Act should make CCI accountable by providing for an independent review by external agencies and peer review by competition agencies from other countries.

4. Exemptions to the Act

The Act provides for exemptions to mergers and abuse of dominance on certain grounds such as economic development, public interest, etc. However, there is no definition of these terms. **In the absence of clear definitions, relevant provisions would be open to varying interpretations**, based on subjective interpretations and which shall dilute the very essence of these grounds for

exemptions. The Act should lay down the criteria under which such exemptions shall be granted and such exemptions should be publicly notified. A similar provision exists in the South African law.

5. Regional Offices of CCI

Since CCI would now be an expert body, the provision of establishing benches for decision making are proposed to be deleted. However, the key issue is how would CCI then address competition concerns that arise at the local level. Considering the huge size of our country and the extent of anti-competitive practices that are prevalent at the local level, the proposed amendment will not ensure a proper check of local level competition concerns if it is implemented from Delhi.

Instead, a provision should be added to provide for the **establishment of regional offices of the CCI**. Several countries around the world (e.g. Spain, Ukraine) provide for establishment of regional offices of their competition authority. In federal countries such as the US and Australia, provinces also have local competition laws.

6. International Cooperation

The Act should provide **clear powers to CCI to enable it to cooperate with competition authorities of other countries, especially to deal with matters pertaining to cross-border competition concerns, both ways**. The present provision in the Bill does not seem to be sufficient.

Conclusion

In conclusion the Amendments proposed in the Act seem to have been done to address solely the concerns that have arisen out of the apex court's order.

However, to have an effective Competition Act, some important improvements are suggested, which have not been considered in the Amendment Bill.

Parliamentarians are requested to consider these suggestions in order to have an effective and a modern Competition Act. The amendments should be considered as an opportunity to set the house right, rather than wait for another crisis or challenge to appear.

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