

Corpsec Hotline

August 30, 2007

COMPETITIVE MOVES: THE COMPETITION (AMENDMENT) BILL, 2007

The review of the Competition Act, 2002 ("Act"), continues in an effort to update the legislation to deal with the contemporary realities of a world growing rapidly smaller. Fresh from the oven, and preceded by a series of issues such as the friction between the regulators like the Telecom Regulatory Authority of India and the Competition Commission of India ("CCI") as well as legal challenges to the validity of certain provisions of the Act, the Competition (Amendment) Bill, 2007 ('the Bill') amending the Competition Act, 2002 has been introduced in the Lok Sabha. The Competition (Amendment) Bill, 2006 was withdrawn prior to the introduction of the current amendment. We highlight certain key changes proposed by the Bill.

Mandatory Reporting and Waiting Periods

Where previously reporting of a combination (a term defined under the Act to encompass an acquisition, merger or amalgamation) was optional, the Bill propose to make it mandatory for persons undertaking combinations above a prescribed threshold limit in India or overseas (albeit with an India connection), to give notice to the CCI before making such mergers and acquisitions. It is proposed that the information will be provided to the CCI in the prescribed format within 30 days (against 7 as provided earlier) of the approval of the combination or the execution of any agreement or other document for acquisition.

In a significant departure from the earlier position, no combination shall be effective until the elapse of a 210 day period from the date on which notice is given to the CCI, or after the CCI has passed an order approving the combination or rejecting the same. The lengthy waiting period may impact time lines in the closing of mergers and acquisitions, and the cost involved in waiting out the period of 210 days. However, the wording of the proposed clause seems to suggest that if the CCI delays an order longer than the prescribed 210 days, the combination would be deemed to have been approved by the CCI, therefore removing the uncertainty of waiting for the completion of a potentially elongated regulatory process, as well as forcing the regulators to act in an expeditious manner.

Thresholds and Penalties

The most impactful change brought about by the Bill is with respect to international mergers. The Act as it currently stands does not provide for an Indian nexus on foreign parties engaged in a combination. The changes proposed seek to cover combinations between foreign parties by providing for a threshold value of Indian assets and operations, in addition to the existing global asset or turnover limits provided in the Act. By virtue of this change, combinations involving foreign parties with an asset base of \$500 m or turnover of \$1,500 m and involving an Indian asset base of Rs 500 crore, or turnover of Rs 1,500 crore will be covered under the provisions of the Act. No change has been made to the threshold figures for Indian mergers which are at an asset base of Rs 1,000 crores or turnover of Rs 3,000 crores. The parties undertaking such combinations will now have to mandatorily notify the CCI within 30 days of approving or signing the transaction. The failure to make such notifications would entail a penalty of up to one per cent of the total turnover or assets, whichever is higher.

In respect of contravention CCI's order's, the Bill proposes a more deterrent punishment. In the first instance, disregard of orders of the CCI or Competition Appellate Tribunal ("CAT") would be considered a civil offence entailing a fine up to Rupees one lakh for each day during which such failure continues subject to a maximum of Rs. 1 Crore. However, subsequent non-compliance with any orders would be treated as criminal offences and entail a penalty of Rs 25 Crore or an imprisonment of up to three-years or both.

Functioning of the CCI

The Act currently provides that the CCI may inquire into alleged contraventions under certain provisions of the Act either *suo moto* or upon receipt of a complaint. The Bill proposes to enable the CCI to inquire into any alleged contravention upon receipt of information, and not only a complaint. While this may be perceived as enhancing the risk of vexatious attempts to stall combinations, it empowers the Commission to act in cases where a complainant is not forthcoming, or in cases where there is no cause to complain but the information merits an inquiry into the effects of combinations.

The Act currently provides for appeals from the CCI directly to the Supreme Court of India. This provision has been successfully challenged in India. In line with case law on the matter, the Bill now proposes to amend the Act to provide for appeals against orders passed by the CCI by providing for the establishment of the CAT. The CAT also has the power to pass orders awarding compensation resulting from violations of the provisions of the Act. In a move to enhance the ability of the CCI to collect penalties imposed under the Act, the CCI may make a reference to this effect to the concerned income-tax authority under the Income-tax Act, 1961 for recovery of the penalty as tax due.

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The Act previously provided that statutory authorities could make reference of matters to the CCI only when an issue was raised by a party before the statutory authority. In order to minimize contradictions between stands taken by the CCI and statutory authorities and to enhance cooperation between statutory authorities and the CCI the Bill proposes changes to enable the CCI to make references *suo moto* to regulatory authorities and vice versa. This move could lead to a more uniform view and better settled law with less dissonance between interpretations taken separately by statutory authorities and the CCI. The Bill obligates the CCI or the statutory authority to which references are made to provide opinions and reasoned findings within 60 days of the reference of a matter to them. While the time lines prescribed are not unduly long, there are no consequences of delays in providing such findings, and hence such references could lead to lengthy delays in the process of obtaining approvals under the Act.

In a measure to ensure some continuity, the Bill requires continuation of the Monopolies and Restrictive Trade Practices Commission ("MRTPC") to deal with the pending cases for up to two years after the establishment of CCI and the dissolution of the MRTPC thereafter. However, the MRTPC would not entertain any new cases after the CCI is fully constituted. All cases pending with MRTPC after two years of setting up of CCI will be transferred to the CCI.

Challenges

As mentioned at the outset, the validity of certain provisions of the Act was challenged in the Supreme Court. The Supreme Court had declined to make a judgment in this matter and left open all questions regarding validity to be decided after the proposed amendment of the Act. In view of this, the 2006 Amendment Bill was referred to the Parliamentary Standing Committee on Finance. The Bill now seeks to capture the recommendations of the Committee as well as deal with the legal challenges to make the CCI fully operational.

The Bill proposes many welcome changes to the Act, and is certainly in line with contemporary reality and practices. As always, the key to the efficacy of the law lies in the implementation of it, and therein may reside concerns as yet unvoiced.

- Kartik Ganapathy & Anurag Dubey

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