Touchstone Partners

GREY MATTERS

Ten Years of the Indian Antitrust Regime

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The Indian antitrust regime recently completed 10 years of enforcement of the Competition Act, 2002 (the ***Act***). In this update, we discuss five key themes of its journey so far.

A NOT-SO-SMOOTH JOURNEY

Even though the Act was passed in 2003, it took several years for it to be enforced on account of judicial challenges. Given that the Competition Commission of India (***CCI*** or ***Commission***) has certain adjudicatory functions, the judicial challenge pushed for the appointment of a judge as its Chairman as opposed to a bureaucrat. This led to the Government reworking the Act, including setting up a competition appellate body, to address these issues.

Even after the coming into force of the Act, implementation has often been problematic. This has mainly been on account of legal challenges before various courts, challenging the CCI's powers, jurisdiction, and investigation and decision-making processes. As a result, investigations into potential antitrust violations were frequently delayed or stymied. The lengthy appeals process has also contributed to delays in the implementation of the CCI's orders and affected the overall jurisprudential development of antitrust law in India.

The *auto parts* case is one such instance where the CCI issued an order imposing penalties on certain car manufacturers for their anti-competitive conduct in the aftermarkets for spare parts in 2014, but having made its way through the appellate process, the case is currently pending in the Supreme Court. The *JCB* case is another example of how judicial challenge to the validity of dawn raids could delay an investigation. In this case, the investigative arm of the CCI (i.e. the Director General or the DG) was directed by the CCI to investigate a potential abuse of dominance in March 2014. However, the dawn raid conducted by the DG to discover evidence led to a five year long battle right up till the Supreme Court to settle the scope of the DG's powers during such dawn raids. This challenge meant that the DG exercised its powers to conduct dawn raids very sparingly during this period, resulting in a slowdown in enforcement.

HIGH TECH AND BIG DATA

With respect to the high tech market, the decisions of the CCI appear to show a pro-innovation approach while dealing with disruptive innovation models (such as e-commerce portals or app-based radio taxi services), which seems to be in line with international best practices. It has recognised that

unnecessary interference in a market which is yet to evolve fully would not only disturb market dynamics, but also pose a risk of prescribing sub-optimal solutions to a nascent market situation.

However, through its 2018 order penalising *Google* for abusing its dominance in the online general web search and search advertising services markets, the CCI has shown that it also aims to balance legitimate business rights and the growth of the high tech sector with the rights of customers in case of two-sided markets. Like the trend in Europe, the CCI has been laying emphasis on the special responsibility and obligations applicable to dominant undertakings vis-à-vis "fairness" in their business practices.

It appears that for now, the CCI is finding traditional tools of antitrust to be sufficient for its market definitions and assessment in the high tech sector. However, entities like Google, Ola, Uber and Flipkart benefit from a large number of users finding their services valuable. It now remains to be seen how the legitimate benefits derived from being part of such innovation-driven platforms can offset the negative competitive impact of the network effects enjoyed by such large entities.

In an effort to understand the overall architecture of the e-commerce sector, the CCI has commissioned a market study on e-commerce in India. In a climate where competition regulators around the world are increasingly going after big data entities, such studies would hopefully enable the CCI to make a more informed assessment of cases involving high tech markets going forward.

A LENIENT APPROACH TO CARTELS?

The leniency regime has been a big part of the CCI's efforts to unearth instances of cartelisation. Given the challenges in successfully establishing cartels that antitrust authorities generally face, having a well-defined and objective leniency regime is important for cartel enforcement.

Whilst the CCI's leniency regime was slow to take off – with the investigation into the first leniency application still in limbo due to judicial challenges – there have been several leniency orders in the last couple of years. Indeed, as was seen in one leniency matter, even though two cartel members could not make any significant value addition, their corroboration and continuous and genuine cooperation during the investigation process ensured a lower penalty for them.

The timing in relation to filing a leniency application is likely to have a bearing on the quantum of leniency granted by the CCI. The general rule of thumb is that the earlier an applicant approaches the CCI during the investigation process, the probability of receiving a higher reduction in penalty is greater. This is because the threshold of making vital disclosures by "early bird" applicants is lower as compared to any applicants that come on board subsequently.

There is now much-needed certainty to the leniency regime, which should provide an impetus to the regime and encourage cartel participants to come forward and avail of leniency. However, amendments that have been carried out to the confidentiality provisions (permitting the DG to disclose information / evidence submitted by a leniency applicant without such applicant's consent) could pose an issue. If this leads to disclosure of the identity of a leniency applicant, it could have an adverse effect on cartel members coming forward.

ORGANISATIONAL CHALLENGES

The CCI has itself been facing various organisational concerns. The latest available annual report of the regulator shows a severe staff crunch, with the number of unoccupied posts in the CCI and the DG's office being almost 50% and 60%, respectively. This is further compounded by the CCI's practice of engaging certain employees / professionals on a deputation / contract basis for a limited time period. This means that by the time such ad hoc employees have worked their way up a steep learning curve, it is time for them to leave the regulator. So, unless such person is absorbed into the regulator or their deputation / contract extended, it may lead to a discontinuity in learning.

Further, under the Act, there is no requirement to have a judicial member on the Commission at all times, unlike the appellate body. However, in a recent judgment, the High Court of Delhi has, *inter alia*, held that since the CCI performs certain adjudicatory functions, it needs to mandatorily have a judicial member at all times. It also held the provision granting the Chairperson a casting vote (which has formed the basis of several decisions in the past) to be unconstitutional. Further, it directed the minimum quorum for hearings to be at least five members (with at least one judicial member). Given that the Government itself downsized the CCI's strength from seven to four members in April last year, there is uncertainty on how the CCI should balance the High Court judgment and the Government's downsizing. For now, the Government appears to be searching for a judicial member.

The merger of the erstwhile specialised Competition Appellate Tribunal into the more general appellate body for company law and insolvency and bankruptcy (i.e. the National Company Law Appellate Tribunal or NCLAT) has come with its own consequences. The experience at the NCLAT till now suggests that doing away with a specialised tribunal has resulted in a loss of expertise and institutional memory. It has also slowed down the disposal rate of appeals as the NCLAT is struggling with a huge pendency of company law and insolvency and bankruptcy matters, which has resulted in competition matters not getting the necessary attention.

APPELLATE STAGE CONCERNS

We have experienced a number of cases being remanded by the appellate tribunal to the CCI for fresh decisions. Whilst this has led to a significant delay in the adjudication process, it has also proved to be helpful when cases have been remanded on technical grounds – permitting the CCI to do a course correction and follow the principles of natural justice.

However, timelines do get affected further when appeals are filed with the apex appellate court – the Supreme Court. With around 59,000 pending cases, the Supreme Court is stretched beyond capacity and final orders in competition appeals may end up taking several months or years. Indeed, appeals in respect of orders issued by the CCI in the *DLF* and *National Stock Exchange* abuse of dominance cases in 2011 are still pending before the Supreme Court. The corollary is that the cease and desist orders issued by the CCI in such cases have technically not been in effect all this while.

These delays have resulted in slower than usual development of competition law jurisprudence in India, including compensation jurisprudence. For instance, it was only when the *aluminium phosphide tablet manufacturers* cartel case was decided by the Supreme Court (eight years after the Act came into force) that clarity was forthcoming in relation to the "relevant turnover" for imposition of penalty in case of multi-product enterprises. And it took nine years – when the *LPG cylinder manufacturers* cartel case reached the Supreme Court – to obtain clarity that the presumption of certain horizontal agreements being deemed to be anti-competitive is, in practice, rebuttable.

There have been additional challenges in recovery of penalties under the Act. Whilst FY 2012-13 showed a spike in the total penalty imposed by the CCI (of around USD 1.04 billion), subsequent years have mostly seen a downward trend. This has mainly been on account of appeals being filed against the CCI's orders or appellate bodies reducing the penalty amounts or overturning the orders of the CCI / lower appellate tribunal. Accordingly, whilst the total penalties imposed by the CCI till FY 2017-18 have been about USD 2 billion, only about USD 17.54 million of penalties have actually been realised.

Further, in an appeal decided by the Supreme Court with respect to jurisdictional conflict between the overarching market regulator (i.e. the CCI) and the telecom sector regulator, it held that such telecom sector regulator should have first jurisdiction to look at an issue on account of its technical expertise. Thereafter, the CCI can exercise jurisdiction over any anti-competitive conduct. This could lead to similar challenges to the CCI's jurisdiction in other regulated sectors.

CONCLUDING REMARKS

The CCI can already be considered a significantly empowered regulator given its active enforcement activities. And even though its journey so far has not been free from challenges, it is learning on the job. In addition, steps are also being taken to strengthen antitrust enforcement in India. For instance, a Competition Law Review Committee that was constituted by the Government has provided several recommendations to strengthen the antitrust and merger control regime. This includes recommending the appointment of a dedicated bench at NCLAT for hearing competition appeals and possibly introducing a settlement and commitment mechanism for antitrust issues in vertical agreements (though not for cartels) and abuse of dominance cases. All of this will hopefully assist and enhance the CCI's ability to adopt an increasingly sophisticated approach in its enforcement activities.

We are closely monitoring developments regarding this and if you would like any further information, we would be happy to assist.

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