THE DRAFT FINANCIAL CODE 2015: THE RISE OF A SUPER-REGULATOR

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On July 23, 2015, the Ministry of Finance, Government of India (‗**Finance Ministry**') released the revised draft of the Indian Financial Code 2015 (‗**2015 Code**'). The 2015 Code aims to regulate the financial sector and the workings of financial agencies such as the Financial Authority, the Reserve Bank of India (‗**RBI**'), the Financial Redress Agency, the Resolution Corporation, the Financial Stability and Development Council and the Public Debt Management Agency, together called the ‗ **Financial Agencies**'. It seeks to replace a gamut of different laws governing the financial sector and thus bring coherence and efficiency in the financial regulation network. The 2015 Code was written by the Financial Sector Legislative Reforms Commission (‗ **FSLRC**') set up in 2011 and headed by Justice Srikrishna. The FSLRC initially submitted its findings and the draft Financial Code in 2013 (‗**2013 Code**'). After incorporating comments from various stakeholders, the Finance Ministry released the 2015 Code in June 2015.

By introducing the 2015 Code, the Government of India (‗**GoI**') seeks to strengthen regulatory accountability of such Financial Agencies. The 2015 Code also removes a highly contentious issue in the 2013 Code, namely the provision (of the 2013 Code) empowering the Financial Sector Appellate Tribunal to review regulations and general guidance given by any Financial Agency. However, scarcely had the 2015 Code been released that the Finance Ministry and the GoI ran into a heavy storm of controversy. The 2015 Code, *inter alia*, dilutes the absolute powers that the RBI governor currently enjoys in setting benchmark rates. Under the provisions of the 2015 Code, the RBI governor will no longer have the power to veto interest rates; instead the decision of the monitory policy committee will be by majority. The 2015 Code also grants the government the power to appoint a majority of the members of the monetary policy committee. Detractors have been vehemently claiming that these proposals would lead to the dilution of the near-autonomy that the RBI governor enjoyed in taking key policy decisions.

However, amidst all the controversy regarding the RBI governor‗s veto power, the powers given to the Competition Commission of India (‗**CCI**') under the 2015 Code have gone

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unnoticed. Chapter 16 of the 2015 Code gives CCI the power to review and submit its comments on any draft regulations made by a financial regulator, i.e. the RBI or the Financial Authority (together referred to as (‗ **Financial Regulators**‘). The RBI has the powers to regulate banking, systemically important payment systems and authorised dealerships. The Financial Authority has the power to regulate all financial services and products, apart from banking, systemically important payment systems and authorised dealerships.

Under the provisions of the 2015 Code, the CCI may submit comments to every regulations, guidance or code proposed by Financial Regulators, if it feels that the regulations will create or are likely to create any restriction or distortion of competition in the market for financial products or financial services (‗**Negative Effect**‘). Further, the CCI may give such comments even when the Negative Effect has been created on account of *‗a feature or combination of features of a market that could be dealt with by regulatory provisions or practices*‘.‗Features of a market‘ include both the structure of the market for financial products / services as well as the conduct of financial service providers or consumers (even if this conduct is not in the market for the concerned financial product/services). Once the CCI has submitted such comments to the Financial Regulator concerned, the Financial Regulator is required to, within a mutually agreed time, provide a response to the CCI stating what action it proposes to take and the reasons if it does not. Post such response, if the CCI continues to remain of the opinion that a Negative Effect is/will be created, it may issue binding directions to the regulator requiring it to take particular actions to remedy the negative effect. When the CCI issues such binding directions, a copy is required to be submitted to the Central Government. Finally, such binding directions need to be approved by the Parliament.

Further, the 2015 Code imposes an obligation on the CCI to make a reference to the Financial Regulator when it undertakes any proceedings under the Competition Act in which at least one of the parties is a financial services provider. In such proceedings, the Financial Regulator would be entitled to nominate a member or senior official to attend the CCI‘s proceedings as a non-voting participant. The 2015 Code also obliges the Financial Regulator to make a reference to the CCI to report any conduct of a financial service provider which it believes is in violation of the provisions of the Competition Act.

The competition law regime at present has a mechanism whereby regulators can make references to the CCI and vice versa. Although the intention behind the 2015 Code may have been inculcating free and fair competition in the market for financial services and products, there are certain fundamental issues which the current scheme gives rise to. These are discussed briefly below –

A. VAST INCREASE IN THE POWERS OF THE CCI

The Competition Act, 2002 (‗**Competition Act**') lays down a framework of co-operation between the CCI and a statutory authority. Under the provisions of Section 21of the Competition Act, a statutory authority may make a reference to the CCI if, in the course of any proceedings before it, any party to such proceeding raises the issue that any decision which the statutory authority has taken / proposes to take may violate the provisions of the Competition Act. The statutory authority may also make this reference *suo motu*. When the CCI receives such a reference from a statutory authority, it must give its opinion within 60 days. Similarly, under the provisions of Section 21A of the Competition Act, where in the course of a proceeding before the CCI, an issue is raised by any party that a decision which the CCI has taken or proposes to take (during the proceeding), is contrary to the provision of any legislation whose implementation is entrusted to a statutory authority, the CCI may make a reference in terms of such issue to the said statutory authority. The CCI may also make such a reference *suo motu*. Post the receipt of such reference, the statutory authority must provide its opinion within 60 days.

As is evident from the above, the provisions of the 2015 Code give the CCI much wider powers with respect to a regulation / guidance / code promulgated by a Financial Regulator. The CCI has been given the right to comment on and issue binding directions to such Financial Regulator in the event it is of the opinion that a Negative Effect will be or is likely to be created as a result of such regulation, guidance or code. It is to be noted that such binding directions given by the CCI need to laid by the Central Government before parliament and approved. Hence, the FSLRC seems to have acknowledged the fact that such power is to be exercised by the CCI only in rare cases. However, the 2015 Code contains no guidance or guidelines to this effect. There are also no provisions which allow further guidelines to be issued in this regard. While the 2015 Code lays down that the CCI and the Financial Regulator must enter into a memorandum of understanding to provide for issues such as procedures for reference, appointment of nominees, co-ordination in relation to the review of any combination, exchange of information between the CCI and the Financial Regulator and identification of a market, there is no scope for guidelines under the 2015 Code with respect to the CCI's power to issue binding directions to the Financial Regulators.

B. VIABILITYOF CCI ACTION IN THE FINANCIAL SERVICES/PRODUCTS MARKET

The CCI is a pan–sectoral regulator which is tasked with regulating competitive forces across sectors and markets. However, the 2015 Code gives the CCI unprecedented power to review and revise policy decisions of the Financial Regulators, if it is of the opinion that the said decisions cause a Negative Effect in the market. Such regulations / guidance issued by the Financial Regulators may be aimed at correcting certain specific issue s in the financial services / products market. Subjecting them to over-arching competition law may not be prudent in all cases. It is to be noted that competition regulators have been given such powers in no major competition law jurisdiction apart from India.

C. COLOURING OF PROCEEDINGS BEFORE THE CCI

The 2015 Code further prescribes that in proceedings under the Competition Act in which at least one of the parties is a financial services provider, the Financial Regulator would be entitled to nominate a member or senior official to attend the CCI's proceedings as a non-voting participant. While in concept, such a nomination looks like a sound way to lend sectoral expertise to the CCI proceedings, the presence of the nominee (even if non- voting) may prejudice the case against the defendant. The viewpoints of regulatory agencies, including the Financial Regulators, are necessarily formed by a multitude of issues and policy considerations. However, these considerations do not and should not form part of any assessment of anti-competitive affects by the CCI. In the event a senior official of the Financial Regulator is present during the proceedings, he/she will have the power to influence the proceedings even without a vote. This would be prejudicial towards the rights of the party concerned. Further, if an issue in the alleged contravention by the party is a rule or regulation of the Financial Regulator itself, then the Financial Regulator, though its non-voting nominee, may be said to be sitting in judgement over its own case and thus violating the principles of natural justice. In sum, the presence of a non-voting nominee may create a multitude of due–process issues which may detract from the CCI's role as a competition regulator – as opposed to a setter of financial policy.

CONCLUSION

In sum, the 2015 Code is a welcome step towards harmonising the various financial norms and regulators under one common umbrella. Instituting the CCI as a watchdog over anti-competitive effects of financial policy is a testament to the fact that the GoI places high importance on a market without significant distortions. However, as can be seen above, the present text of the 2015 Code leaves significant questions unanswered. Further, there is an abject lack of guidelines to clearly demarcate the nature and scope of the CCI‘s oversight on the market for financial services and products in India. The need of the hour thus, is for the GoI to inject some much-needed clarity into the picture by coming out with comprehensive guidelines which clearly show the position and powers of each stakeholder in this market, including the CCI.