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THE COMPETITION LAW – UNFOLDING OF THE INDIAN STORY

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I. INTRODUCTION

The Competition Act of India ["**the Competition Act**"] is one of the most scrutinized enactments of India from time to time by the High Courts and the Hon'ble Supreme Court of India. After introduction of the economic liberalisation of Indian economic policy in July 1991, several economic legislations were enacted by the Parliament of India[1]. The Competition Act is one such economic legislation, which came into being on 13 January 2003. However, ever since it got the assent of the President of India[2], debates emerged at the behest of various stakeholders challenging, *inter alia* the proposed structure of the Competition Commission of India ["**the CCI/Commission**"].[3] Despite these challenges, the Government of India notified the establishment of the Commission and appointment of the first Chairperson and one Member to discharge the duties and functions of the new enactment since no Constitutional Court had ever stayed the operation of the Competition Act.[4] It is interesting to note that the challenges, filed before the Constitutional Courts after the Competition Act obtained the assent of the President of India, were primarily afterthoughts by such petitioners, some of who may have participated in the consultation process prior to the drafting of the Bill. Let us examine holistically.

Prior to presenting the Competition Bill before the Parliament, the then Government of India decided to set up a high-powered committee to assess legal and economic issues threadbare as to whether or not India, a nascent open-economy, would require a new and modern competition law at a time when it already had the Monopolies and Restrictive Trade Practices Act, 1969 ["**the MRTP Act**"] and the Consumer Protection Act, 1986 in operation. The intent and purpose of setting up of such high-powered committee were to collect and collate views of

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[1] The Securities and Exchange Board of India Act, 1992; Telecom Regulatory Authority of India Act, 1997; Insurance Regulatory and Development Authority of India Act, 1999; Electricity Act 2003; The Petroleum and Natural Gas Regulatory Board Act, 2005; Airports Economic Regulatory Authority of India Act, 2006; Real Estate Regulatory Authority Act, 2016.
[2] The Competition Act, 2002 received Presidential Assent on 13 January 2003.
[3] WP before the Madras High Court in August 2003 and later WP No. 490 of 2003 before the Supreme Court of India.
[4] Notifications of the Ministry of Corporate Affairs dated 14 October 2003.

various stakeholders enabling the Government of India to decide the appropriate way forward. One of the cardinal concerns of the then Government was to ascertain as to whether or not there was any necessity of a new enactment, balancing between the new free-trade policy and protection of the interest of the existing domestic enterprises. The Committee was set up under the Chairmanship of Mr SVS Raghavan and came to be popularly known as the *Raghavan Committee*. In brief, the core recommendations of the Raghavan Committee formed part of the substantive provisions of the Competition Bill, 1999. Briefly, the Committee recommended:

1. Prohibition of anti-competitive agreements which may cause appreciable adverse effect on competition in India;
2. Prohibition of abuse of dominant position of an enterprise; and
3. Regulation of Combinations or merger control

Besides the above, the Committee also emphasized the need to make the enactment competitive neutral which means that both the State-Owned-Enterprises ["**SOEs/PSUs**"] and the private enterprises must be brought within the ambit and scope of the Competition Act. It did make a few interesting suggestions including certain departures from then existing MRTP Act. New introductions included e.g., "competition advocacy", "regulation of merger control", "lesser penalty provisions for cartels (Leniency regime)", "unannounced search and seizure operations for gathering of smoking-gun evidence" and "provision for imposition of pecuniary penalties against proven breach of the law both against an enterprise and its controlling individuals" whereas amongst departures, curbing the powers of the Director General, the investigating arm, to initiate *suo motu* investigation and closing the same, on its own motion, without the knowledge, oversight and intervention of the Commission.

However, the cause of the constitutional writs was not against the aforesaid recommendations. The challenges before the High Court of Madras and later before the Supreme Court of India centred around as to whether or not -

(a) the Orders to be passed by the Commission would have identical execution power and intent as those of the High Courts of India[5];
(b) one of the Members of the Commission would enjoy higher administrative powers than the Chairperson of the Commission[6]; and

[5] Competition Act 2002, s 39 (deleted in 2007 Amendments).
[6] Competition Act 2002, s 13 (deleted in 2007 Amendments).

(c) the Commission should be headed by a judicial member as opposed to an expert or non-judicial member.[7]

On these three premises, as above, let us examine the challenges raised by petitioners before the Constitutional Courts. It is not out of place to mention that none of the challenges raised before the Constitutional Courts were against the core recommendations of the Raghavan Committee relating to substantive provisions of the principal law. Therefore, it minimised the risk of declaring the Competition Act unconstitutional or ultra vires to the Constitution of India. Hence, it was justified that the Court did not stay the operation of the substantive provisions of the Competition Act. The Supreme Court by a well-contested order dated 20 January 2005 disposed of the writ with the observation,[8] that the substantive provisions of the Competition Act intend to mandate the Commission with statutory powers of (a) adjudication; (b) inquisitorial (investigative); (c) advisory; and (d) regulatory – hence with such wide-ranging statutory powers, it would be gainsaid not to have an oversight of the final orders of the Commission by a specialised appellate tribunal to be headed by a Judicial Member.

It is noteworthy that the petitioners before the Supreme Court did not make any other prayers but the amendments which followed on the recommendations by the Government of India and carried out by the Parliament after the decision of the Supreme Court, made substantial changes in the Principal Law. A new food for thought then for the legal fraternity. Some of such departures are (1) the initiation of "complaint" by a party aggrieved was altered to "information"; (2) the Bench system and inclusion of a judicial member on each Bench was distinguished; (3) the office of the "Registrar" was altered to "Secretary"; (4) the voluntary merger control regime was changed to "compulsory regime". The entire intent of these changes beyond the observations of the Supreme Court was probably to curtail the autonomy of the Commission and to make the Commission an "expert body" and not a mix of adjudicatory and regulatory body. However, the promoters of these vague suggestions did not diligently examine the Act then existing clause-by-clause rendering the functioning of the Commission open to various interpretations in future. Inconsistencies in legislative drafting were soon to be visible as the Commission in exercise of its limited delegated legislative powers under Section 64 kept on issuing statutory regulations after it came into existence.[9] The

[7] Competition Act 2002, s 7, 22 (amended in the 2007 Amendments).
[8] Paragraph 6 of the WP 490 of 2003 [Brahm Dutt vs Union of India] extracts not in verbatim.
[9] 20 May 2009 and 01 June 2011

recommendations retained the provisions relating to the core status of the Commission and the Office of the Director General ["DG"] as "Civil Courts",[10] with the Commission mandated to function within the confines of the "principles of natural justice"[11] to be assisted by the DG,[12] an office which would be at arm's length from the Commission as the appointing authority of it would continue to be the Union of India.[13] With the omission of having a judicial member and Bench system, the Commission cannot automatically become an "administrative expert body" as the structure of the Commission and the DG continues to be that of a Civil Court and representation of parties before the CCI was to be governed by the provision of Section 35 of the Competition Act.[14]

Thus, quite a number of provisions of the Amended Act of 2007 appeared to contradict some substantive provisions of the principal law. Such contradictory provisions could be argued to repeal each other either directly or by implications and hence, keep the operation of the Commission unpredictable and shaky. In view of above analysis, it seemed that the legislative corrections which may have been made in 2007, have deviated from the ratio, as enunciated by the Hon'ble Apex Court in January 2005, and the enforcement journey of the Commission began in May of 2009 as per the amended law.

II. POST AMENDMENT OF 2007 AND AMENDMENT BILL 2022

The Commission had been made fully operational by Government Notifications.[15] Ad-hoc amendments to the principal law have continued to be made from time to time without the oversight of the Parliament more often than not by invoking the principles of public interests.[16] In addition to such amendments, it is reiterated that the Commission in exercise of its limited delegated legislative powers,[17] has been making regular amendments in the merger control regulations.[18] At times, the Commission makes substantive amendments to the principal law

[10] Competition Act 2002, s 36(2) and 41(2).
[11] Competition Act 2002, s 36(1).
[12] Competition Act 2002, s 41(1).
[13] Competition Act 2002, s 16.
[14] *Bharat Bank Ltd. v. Employees* [1950] SC Civil Appeal No. 34 of 1950 , para. 77.
[15] Sections 3 and 4 of the Competition Act were notified effective on 20 May 2009 and Sections 5 and 6 were notified effective 01 June 2011.
[16] Section 54(a) of the Competition Act empowers the Nodal Ministry of Government Of India to carry out ad-hoc and temporary amendments to the Act.
[17] Competition Act 2002, s 64.
[18] The CCI Combination Regulations, 2011.

on the ground that the industry stakeholders were agreeable to such changes[19]. Since the Commission's duties and functions are defined under Section 18 of the Competition Act, some amendments at times could have raised unforeseen concerns. Interestingly, in over 13 years of life-cycle of the Commission, need-based amendments continued to be made by the Commission. It may perhaps have prompted the Government to undertake a comprehensive review of the functioning of the Commission. In this behalf, the Government of India set up the Competition Law Review Committee ["**CLRC**"] in October 2018.

The Government of India on 5 August 2022 presented before the Lok Sabha, lower House of the Indian Parliament, yet another comprehensive Amendment Bill, 2022 pursuant to the detailed recommendations of the CLRC. The Chairman of the Lok Sabha by a Notification has sent the Amendment Bill 2022 to the Chairman of the Parliamentary Standing Committee of Finance of the Lok Sabha on 17 August 2022 with a direction to submit the report by or before 16 November 2022.

A. Statement of Objects and Reasons (Competition Amendment Bill, 2022)[20]

There has been significant growth of Indian markets and a paradigm shift in the way businesses operate in the last decade. In view of economic development, emergence of various business models, and the experience gained out of the functioning of the Commission, the Government of India constituted CLRC, to examine and suggest the modifications in the said Act. After review of the recommendations proposed by the Committee, public consultations with a view to provide regulatory certainty and trust-based business environment, were considered imperative to amend the said Act.

On perusal of entire content of the objective of the Amendment Bill, it is palpably clear that the core legislative intent has been proposed to be shifted from economic development of India to providing 'regulatory certainty' and 'trust-based business environment' to the stakeholders. The underlined portions of the previous sentence are noteworthy. These objectives are too complex especially in relation to collecting robust evidence ensuring predictable outcomes to

[19] Introduction of the Green Channel Filing in Merger Control started from 14 August 2019.
[20] The Competition (Amendment) Bill, 2022.

commercial disputes involving business houses. Hence, all of us need to wait and watch as to how these objectives unfold going forward.

On perusal of the Amendment Bill, one may like to say that the changes suggested in the Regulation of Combinations (Merger Control) may at best be called positive and forward-looking as the track record of the Commission in this space of the law has thus far been very satisfactory. However, in fact, the statutory activities of the Commission, in so far as the regulation of combination are concerned, have never been investigated by the Office of the DG.

On the other hand, the changes suggested in the structure of the Commission and in the provisions relating to the anti-trust prohibitory decrees of the law, are quite comprehensive and may have far-reaching consequences for enterprises. The proposal to merge the office of the DG with the CCI is one of such changes which may have far-reaching consequences. The legislative powers of the DG have been proposed to be enhanced so much that the DG would be exercising dual statutory functions of investigation and beyond. This kind of structure exists in the Office of the Director General of the European Commission ["**DG Comp**"]. The drafters may have borrowed the concept from European Commission ["**EC**"]. But all Member States of the EC have their own National Competition Agencies independent of the EC. Hence, a powerful DG in EC has an objective beyond national jurisdictions to monitor the economic distortions within the European Common Market ["**ECM**"]. This process may have evolved in the EU over the decades since 1957. National economies of the Member States of the EC are not identical hence the DG Comp besides enjoys stronger powers has the mandate to oversee "State Aid" and "FDI" issues of the ECM as part of anti-trust regulation.

Australia, Canada, Netherlands, USA do not have powers to pass final orders and are dependent on the external civil or criminal courts, as the case may be, independent of competition agencies. On the other hand, China has absolute powers of investigation and adjudication at the State Administrative for Market Regulation ["**SAMR**"] under the Anti-Monopoly Law of China of 2008. Japan Fair Trade Commission ["**JFTC**"] passes the cease and desist order and imposes sur-charge (pecuniary penalty) but the process of appeals lie firstly before the District Court of Tokyo and thereafter, before the Tokyo High Court and finally before the Supreme Court of Japan. Illustrations from these jurisdictions show that the national competition laws vary from country to country. The Competition Act of India has a non-obstante clause and

exclusion of civil court jurisdictions with a specialised appeal tribunal,[21] thereby making the competition regime of India unique from rest of the world.[22] Empowering the DG with additional statutory powers under the Amendment Bill could pose unforeseen challenges to enterprises which at times may result in course corrections via constitutional writs.

B. Analysis of Amendment Bill

The Amendment Bill, 2022 – passed by both the Houses of the Parliament in March 2023 by voice votes and has become law after the President assented it on 11 April 2023.

i. Positive developments

The amendment seeks to introduce quite a few positive changes which would go a long way to ensure predictability for the stakeholders. Some such features are listed below:

- Introduction of a period of limitation of 3 years for antitrust behavioural cases. This besides assisting the Commission to not entertain old allegations would also make the regime fair and transparent.
- Definition of relevant market has been broadened.
- Closure orders have been made appealable.
- Waiting period for merger control has been reduced from 210 days to 150 days.
- Leniency plus has been introduced which may assist an enterprise obtaining lower marker status behind another in an earlier matter may be able to benefit in another product with a higher marker status enabling it to mitigate overall financial risks.
- Right of compensation application shall arise only after an order is passed by either the Appellate Tribunal or Supreme Court of India and not after an order is passed by the Commission thereby ensuring more predictability to parties to such proceedings.
- Deal Value Thresholds in excess of INR 2000 crore for combinations may allow the Commission to assess the competition issues in transactions involving enterprises whose combined thresholds may have negligible assets but high turnovers, therefore,

[21] Competition Act 2002, s 53A read with 53B.
[22] Ompetition Act 2002, s. 60 and 61.

the deal value in such transactions would enable the Commission to assess such merger transactions.

ii. <u>Not so positive developments</u>

- Settlement and commitment applications are subject to orders of the Commission and with no appeal rights are made available to the party/parties aggrieved by such orders, rendering the cause of action to remain alive for further remediation beyond the Appellate Tribunal.
- With the Commission becoming the appointing authority of the DG, the investigative autonomy could be compromised in some cases.
- Deposit of sum equivalent to 25% of the total penalty is essential for getting an appeal admitted may in some cases cause extreme hardship to an appellant especially when the penalties have been proposed to be computed on the global turnover and not on relevant turnover per *Excel Corp* ratio of the Supreme Court of India.
- Despite a binding decision of the Supreme Court arising out of a statutory appeal under the Competition Act in *Excel Corp vs CCI & Ors*[23], the Amendment Bill expressly inserted global turnover for calculation of the penalty against defaulting enterprises.
- Finally, the definition of "control" in cases of combinations will be "material influence" as opposed to "decisive influence" may cause higher filings before the Commission when in most of such cases the proposed combinations may not cause any appreciable adverse effect on competition in relevant markets in India.

iii. <u>Possible arguments which may be advanced by parties post implementation of the amendments:</u>

In brief, some of the defendants in antitrust behavioural cases will face higher challenges. The amended law appears to strengthen some of the informants (the complainants) against the respondents. The options of settlement and commitments, as may be available with the defendants, would in effect in law mean "admission of contravention" by defendants. With no appeal available for such admissions to such defendants, the informants and the Commission would jointly take legal advantage in the name of expeditious disposal of antitrust cases.

[23] Excel Crop Care Ltd. v. CCI, [2017] SC 8 SCC 47.

Besides, with office of the DG subsuming into the Commission, the balance would surely get tilted further against the defendants. The mandate of adoption of "principles of natural justice",[24] may at times be compromised and remain for academia to debate and deliberate in academic institutions. It is not out of place to mention that the Preamble and the intent of Section 18 of the Act remaining unchanged hence with the amendments having been assented to by the President of India on 11 April 2023, interesting legal debates may arise from time to time especially in statutory appeals and at times before the constitutional writ courts.

Defendants are vibrant business houses of India and have established their businesses fairly by adopting due diligence processes of several laws of the land. They have hugely contributed to the economic growth of India since 1991.[25] They may suddenly find that the amended law is attempting to challenge their investments of decades. The vision of the Act, as intended by the same Parliament in 2003 via the Preamble to be the larger objective of Indian economic development – may perhaps get compromised, if not nullified, by the implications.
As regards the "global turnover",[26] and as opposed to "relevant transaction" for calculation of penalty against defaulting enterprises, the aggrieved parties are free to rely upon the settled ratios of the Supreme Court passed from time to time:

> *With respect to Article 14 of the Constitution of India, Supreme Court concluded that when an administrative action is challenged as discriminatory the courts would carry out a primary review using the doctrine of proportionality.*
>
> - *The Supreme Court used the Doctrine of Proportionality as the touchstone to determine the validity of the Act and scheme.*
> - *It postulates that the nature and extent of the State's interference with the exercise of a right must be proportional to the goal it seeks to achieve.*

Thus, higher checks and balances, therefore, are need of the hour to strengthen the economic development of India.

III. PRELIMINARY OBSERVATIONS ON DIGITAL COMPETITION LAW

[24] Competition Act 2002, s 36(1).
[25] The year when India adopted the Economic Liberalisation of Indian economic policy.
[26] New clause for calculation of penalty proposed and passed by Lok Sabha on 29 March 2023.

Finally, of late the mood of the policymakers is to mimic the Digital Markets Act ["**DMA**"] of the European Union. The draft proposal of the 53rd Report of the Finance Committee intends to adopt "gatekeeping", "self-preferencing" and "ex-ante regulations" to regulate the economic and behavioural patterns of Big Tech companies via yet another new law – likely to be called the Digital Competition Law of India. This proposal may substantially distinguish the overall Digital Economic Policy of Government of India unless implemented with the direct support of real tech experts.

In brief, in an *ex ante* procedure, the processes either could be that –

1. the Big Tech enterprises would produce their future business agreements with other independent enterprises for a Commission's prior approval and keep the future business in suspensory state until the approval is accorded; **or**
2. the Commission in exercise of its suo motu powers may intervene, based on information available with the Commission, before the business agreements are signed off and pass orders which would be binding upon the parties including the Big Tech enterprises.

In order to do either as above, there must be some binding list of "dos and don'ts" which should be available on the website of the Commission and any Big Tech enterprise intending to enter into some new businesses with other independent enterprises must comply with such binding directions and seek approval of the Commission before closing the business agreements. This in effect would become identical to the existing merger control provisions of the Competition Act. Filing of information by enterprises under Section 19 may not be legally possible in an *ex ante* regime and hence, prima facie order,[27] and consequent investigation by the DG could become redundant. The Commission, however, can seek assistance of the newly proposed Digital Markets Unit ["**DMU**"] which may not be identical to an investigating by the DG but an in-house division of the Commission which would be mandated to assist the Commission within the confines of the *ex-ante* rules identical to the Combination Division which has been existing since 01 June 2011. If the approval process becomes the only possibility in an *ex ante* situation with investigation by the DG becoming minimal, if not fully excluded, the process of

[27] Competition Act 2002, s 26(1) read with *Competition Commission of India vs Steel Authority of India Ltd* [2010] 10 SCC 744, para. 97.

appeals may not arise ever unless the Commission blocks the business agreements involving Big Tech and others.

IV. CONCLUSION

The journey of competition regime of India has been bumpy and with the amendments and newer concept of disciplining Big Techs before commencement of businesses by them, it may become variable unless unbiased domain experts are given the charge of the enforcement of the Competition Act. Upholding principles of natural justice, due process and rule of reason are the core tenets which may help the authorities to achieve objective of the law. Finally, it is undisputed that the Competition Act continues to be a civil law and both the Commission and the office of the **New DG,** [28] being Civil Courts, [29] must observe fair and just processes while conducting inquiries and investigation in all matters minimising challenges in various High Courts under Article 226 of the Constitution of India.

[28] Appointing authority is proposed to be changed from Union of India to Commission.
[29] Competition Act 2002, s 36(2) and 41(2).