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Monthly Newsletter

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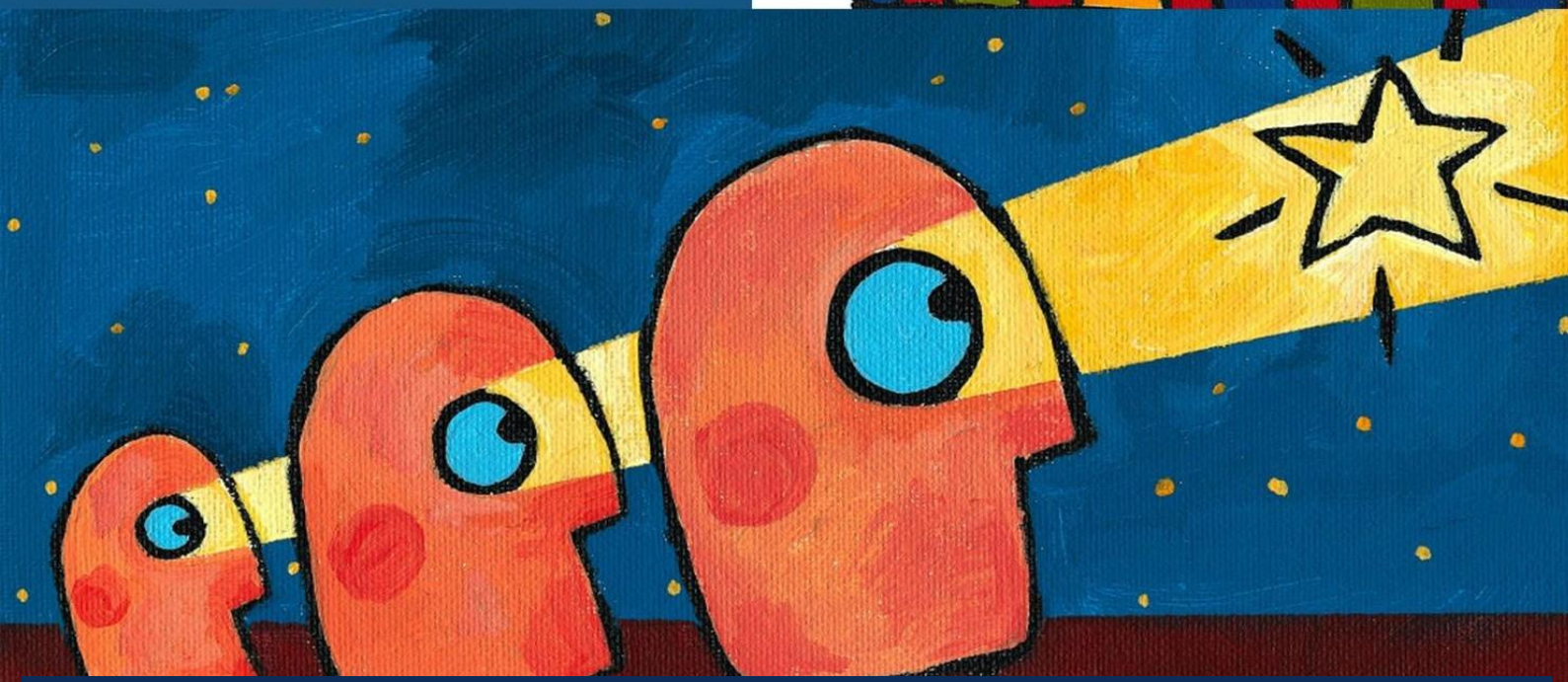

Economic Laws | Governance, Regulations and Risk | Public Affairs and Policy

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Recommendations of Standing Committee on Finance
On the Competition (Amendment) Bill, 2022

The competition law regime of India, under the Competition Act, 2002 **('the Act')**, is all set to get substantial changes through The Competition (Amendment) Bill, 2022 **('the Bill')**. The Bill, introduced on 05.08.2022, was sent to the Standing Committee on Finance **('Committee')** for assessment on 16.08.2022. The Committee after due deliberation recommended the following:

On Deal Value Threshold: The Committee noted that the Bill does not provide any guidance on how 'Deal Value Threshold', proposed to be added by introducing clause (d) to section 5, for filing merger notice, is to be calculated. Therefore, the Committee opined that the Bill needs to specify how the Deal Value will be calculated and that the meaning of direct, indirect and deferred consideration should also be included. Further, the Committee observed that the proviso to the new clause needs to bring more clarity to the provision by clarifying that the *"'enterprise' being referred to is the party being acquired"*.

On Definition of Control: The Committee observed that the 'Material Influence' is a widely accepted standard to determine control in competition cases all over the world. Further, the same has also been used by the Competition Commission of India **('CCI'/ 'Commission')** at many instances. The Committee, therefore, recommended that it should be explicitly defined in the Act. Further, that the explanation of the word 'Control' should be modified and be explicitly defined in the regulations.

On Procedural Timelines for Section 6(2A) read with Section 29 and 31: The Committee on the issue of reducing procedural timelines for combinations, from 210 days to 150 days in case of allowing/disallowing a combination, and from 30 days to 20 days in case of forming a prima facie opinion, observed that this would be burdensome on an already understaffed Commission. Therefore, the Committee opined that the existing timelines shall remain unchanged.

On Ability of DG to Seek Deposition of Legal Advisors: The Committee, on proposed amendment to section 41 of the Act, to include 'legal advisors' into the definition of 'agents', observed that this amendment may bring advocates under the ambit of DG investigation. Therefore, the Committee, agreeing with the stakeholders, recommended that the new clause should clearly specify that nothing in this section shall be in contravention to any law protecting the attorney client privileges.

On Settlement and Commitment: On introducing the new 'settlement and commitment' regime, by adding 2 new sections 48A and 48B to the Act, the Committee, after duly considering the concerns raised by stakeholders, recommended the following suggestions: **a)** The inclusion of third parties, in the settlement and commitment process, should not be mandatory but discretionary, for the CCI, as it will have issues related with the secrecy of the matter; **b)** The power to withdraw in between a settlement process, given only to the Commission, should also be given to the parties; **c)** Cartels should also be included under the scope of settlement and commitment to give a pragmatic approach to the whole process; **d)** The Committee, on the issue of whether an application for settlement and commitment require admission of guilt, observed that prima facie admission of guilt should not be mandated. Moreover, the mechanism should allow the parties to make an application to revisit the settlement after the final settlement.

On Hub and Spoke Arrangements: On the issue of proposed amendment in section 3(3) of the Act, to add a new proviso, to include the Hub and Spoke arrangements within its ambit, the Committee noted that the words *'active participation'*, mentioned in the proviso, has not been clearly defined. Therefore, the Committee recommended modifying the proviso to *'If it is proved that such person intended to actively participate'*. This recommendation is proposed with an intention to bring those enterprises under the ambit of section 3(3) of the Act that act in furtherance of anti-competitive agreements even though not engaged in similar trade.

On Requirement of a Judicial Member: On the issue of presence of judicial members, in the Commission, the Committee didn't offer any recommendation as the issue was sub-judice before the Hon'ble Supreme Court of India.

On the IPR as a Defense of Abuse of Dominant Position: The Committee, on the issue of adding protection of IPR as defence under section 4, noted that exemptions to IPR are provided only under section 3 of the Act. Therefore, the Committee taking into account Competition Law Review Committee **('CLRC')** report, which advocated for reasonable protection of IPR, recommended that similar defense, as provided under section 3 of the Act, shall also be introduced in section 4 of the Act.

On Effect Based Test: The Committee observed that effect based test does not exist in the current competition law regime and the same can be introduced through the proposed amendment. Therefore, it suggested that section 4(1)(a), *"if an enterprise causes or likely to cause AAEC on competition then it will be a contravention of Section 4(1)"*, be added under section 4 of the Act. Further, it recommended that the words 'conduct' & 'section 4' shall be introduced in section 19(3) for making assessment, of AAEC, under section 19(3) of the Act.

(Report dated 13.12.22)

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Heard at the BAR

Legal news from India and the world

FTC is Determined to Block Acquisition by Microsoft in the Gaming Industry

The Federal Trade Commission **('FTC')**, United States, is determined to block, possibly the biggest acquisition by Microsoft Corp. **('Microsoft'),** in the video game industry, the acquisition of Activision Blizzard Inc. **('Activision'),** a video game developer, and several of its gaming franchises. This deal is being alleged, by the FTC, as the largest deal ever made by Microsoft in the video game industry, worth $69 billion. The FTC wants to block this deal because of the fear that this acquisition would pave the way for Microsoft to get huge market power over the competitors of Xbox gaming consoles and Microsoft's cloud gaming business.

The acquirer, Microsoft, is a prominent player in the relevant market providing the highest performance gaming consoles namely the Xbox series S and series X. Further, it provides game content subscription called the Xbox Game Pass, whereas the target Activision is small video game developer in the forefront creating high quality video games that include Call of Duty, World of Warcraft, Diablo, and Overwatch etc. which has over millions of active users in the world.

The FTC is concerned that with access to control over highly subscribed gaming franchises and being the producer of high performance gaming consoles, Microsoft will have total control over the market if the said deal is allowed. The Director of the FTC's Bureau of Competition opined that *"Today we seek to stop Microsoft from gaining control over a leading independent game studio and using it to harm competition in multiple dynamic and fast-growing gaming markets."*

To preserve competition in the market and to eliminate the possible harm to consumers FTC is assured to block this deal.

(Press Release dated 08.12.22)

European Union's Digital Markets Act, 2022 comes into Force

The Digital Markets Act, 2022 **('DMA')**, of European Union **('EU')**, came into force on 1st November, 2022 with the objective to prevent 'gate keeping' in the online platform economy.

A company, who provides important gateway between users and consumer, can create bottlenecks in the digital economy by acting as a private rule maker. The DMA considers companies in the field of app stores, online search engines, social networking services, certain messaging services, video sharing platform services, virtual assistants, web browsers, cloud computing services, operating systems, online marketplaces, and advertising services to be eligible to be gate keepers. If a company satisfies the following three criteria, it will come under the scope of DMA: ***1)*** *A size that impacts the internal market: when the company achieves a certain annual turnover in the European Economic Area ('EEA') and it provides a core platform service in at least three EU Member States;* ***2)*** *The control of an important gateway for business users towards final consumers: when the company provides a core platform service to more than 45 million monthly active end users established or located in the EU and to more than 10,000 yearly active business users established in the EU;* ***3)*** *An entrenched and durable position: in the case the company met the second criterion during the last three years*

In furtherance of its objective, of ensuring a fair and open digital market, the DMA gives a list of "Do's and Don'ts" for the companies to be implemented in their daily operations. As a result, the other players will be able to stand up to the gatekeepers based on merit of their product or service. This will open up the market for more innovation.

Thierry Breton, Commissioner for Internal Market, said: *"After the new digital markets rules were agreed in record time, we are now entering a decisive moment for their application. We now have certainty when the rules will apply and gatekeepers have to change their current unfair practices, which for too long have deprived digital markets of innovative alternatives. It is time for gatekeepers to be designated and to comply with the rules. The Commission is already actively engaging with potential gatekeepers to ensure that compliance with the new rules starts from day one. We will also not shy away from using our enforcement powers should there be indications that obligations and prohibitions are not respected."*

The DMA will enter its critical implementation phase and begin to apply in six months, on May 2, 2023. Following that, potential gatekeepers must notify the European Commission **('EC')** of their key platform services if they fulfil the DMA's standards within two months and no later than 3 July 2023.

The EC will assess the companies who have completed notification within 45 days, testing them on the thresholds established by the DMA and designate them as gatekeepers accordingly. Finally the designated gatekeepers will have six months to implement the requirements in the DMA.

The EC will have the authority to levy penalties and fines of up to 10% of a company's global revenue, and up to 20% in the case of repeated violations. In the case of systematic violations, the EC may additionally impose behavioural or structural remedies necessary to guarantee the efficacy of the requirements, such as a prohibition on future acquisitions.

(Press Release dated 31.10.22)

NCLAT Sent Tyre Cartel Case back to CCI for Reconsideration

The Hon'ble National Company Law Appellate Tribunal **('NCLAT')**, in Competition Appeal (AT) No.05 of 2022, filed by the domestic tyre manufacturers, **('Appellants')** against the order of the Competition Commission of India in case no. 08 of 2013, decided to send the matter back to the Commission to decide the issues afresh in the light of the order passed by the NCLAT.

The origin of the case was a complaint filed by the All India Tyre Dealers Association **('AITDF')** before the MRTP Commission vide RTP Case No. 20 of 2008. In the complaint, the AITDF had made allegations against domestic tyre manufacturers of price fixing and anti-competitive trade practices. Investigation was conducted, in the matter, for the period of 2005-2010 and the matter was disposed by the CCI, in 2012, stating that evidence was not satisfactory to sustain the allegations of contravention of section 3(3)(a) and 3(3)(b) read with section 3(1)of the Competition Act, 2002 **('the Act')**. This order was challenged before the Hon'ble Competition Appellate Tribunal **('COMPAT')** in appeal. The COMPAT, upholding the findings and conclusions of the CCI, disposed the appeal in 2013.

AITDF again agitated this matter, in 2013, by sending a letter to the Ministry of Corporate Affairs **('MCA')** asking for an inquiry by the CCI. MCA forwarded this letter to CCI, terming it as a reference under section 19(1)(b) of the Act, and asked them to look into the matter and pass appropriate orders.

The CCI, based on the above, directed an investigation by Director General **('DG')** under section 26(1) of the Act. The DG found domestic tyre manufacturers to be involved in cartelization, in violation of section 3(3) read with section 3(1) of the Act. The Commission observed that the domestic tyre manufactures, by acting in concert, artificially increased the prices of tyres. Further, they limited and controlled the production and supply of tyres thereby contravening the provisions of section 3(3)(a) and section 3(3)(b) read with section 3(1) of the Act.

Therefore, the Commission under section 27(b) of the Act imposed a penalty @ 5% for 3 financial years i.e. 2011-12, 2012-13, 2013-14 on Automotive Tyre Manufacturers Association **('ATMA')**, the domestic tyre manufacturers, and Office bearers of domestic tyre manufactures.

The ATMA and the domestic tyre manufacturers aggrieved by the order of the Commission preferred an appeal before the NCLAT. The NCLAT considering all the submissions made by the parties observed the following: **a)** On the issue of whether the reference made by the MCA is a reference or not- NCLAT held it to be an improper reference as it was made to the Commission without following The CCI (General) Regulations, 2009 **('Regulations')**. NCLAT further, held that when a reference is made to the Commission it should be done in compliance with the Regulations; **b)** On the issue of arithmetical errors in calculation of penalty- The NCLAT noted that the DG's calculations contain arithmetical errors and if the same were corrected it shows no price-parallelism. Further, upon correction, the range of variance of price among various manufacturers, varied in a wide range of 11.6% to 16.5% which doesn't really indicate any agreement, as alleged by CCI; **c)** On the issue of wrong period for calculation of Correlation Coefficient- The NCLAT opined that the time period (2009-13) taken for calculation of Correlation Coefficient was erroneous and if the correct financial year (2011-12) is taken into consideration then the Correlation Coefficient will be much lower; **d)** On the issue of the order being vitiated as the case was heard by the 4 members while the order was signed by only 3 members- The NCLAT noting that this issue is under consideration with the Hon'ble Supreme Court made no observation on the same; **e)** On the issue of violation of section 3(3)(b)- The NCLAT observed that there was no allegation of violation of section 3(3)(b) in the representation made by the AITDF. However, the CCI found the domestic tyre manufacturers to be violating section 3(3)(b) of the Act without providing any sufficient reason for the same. Based on these observations the NCLAT concluded that there were no violations under section 3(3) of the Act.

The NCLAT, therefore, decided to send the matter back to the CCI for review. Further, it opined that the CCI should take into account the prevailing market conditions and the stiff competition faced by the domestic tyre manufacturers from foreign tyre manufacturers to make the correct assessment of penalty. ***(Order dated 01.12.22)***

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