Update

Competition - Legal Milestones in 2018 and a Look Ahead

05 March 2019

2018 saw an evolution of the competition regime based on global best practices with CCI's core focus being on enforcement and deterrence of cartels, promotion of leniency regime and amendment of combination regulations. This update summarises some of the key developments in the past year and gives a brief overview of what can be expected in 2019.

THE YEAR THAT WAS

The year 2018 was a significant year for competition law jurisprudence in India.

Key judgments in relation to anti-competitive conduct and leniency were delivered by the Competition Commission of India (CCI) and the appellate forums under the Competition Act, 2002 (Competition Act), i.e. the National Company Law Appellate Tribunal (NCLAT) and the Supreme Court of India (Supreme Court).

On the merger control front, the CCI carried out its annual review of the Competition Commission of India (Procedure in regard to the Transaction of Business relating to Combinations) Regulations, 2011 (Combination Regulations) and made amendments to the Combination Regulations based on stakeholder comments.

MAJOR DEVELOPMENTS IN 2018

1. Leniency regime of the CCI

Detection and busting of cartels continued to remain the CCI's primary focus. The CCI has been promoting its leniency programme and in 2018, the CCI passed 7 final orders involving leniency applications by enterprises (including the first order where an enterprise was granted full immunity from the penalty imposed) which led to the unearthing of cartels in different markets including dry cell batteries, sports broadcasting and bid rigging in public procurement.

For instance, Panasonic, by way of a leniency application disclosed the existence of a cartel between manufacturers and suppliers of zinc carbon dry cell batteries1 which included Eveready Industries India Ltd. (Eveready), Indo National (Nippo) and Panasonic. Additionally, it also disclosed a bilateral ancillary cartel between Panasonic and Geep Industries (India) Private Limited (Geep)2 in the institutional sales of dry cell batteries.
Panasonic was awarded 100% reduction in penalty in both these cases, on the grounds that it had disclosed the existence of the cartel to the CCI before a *prima facie* order was passed, provided vital disclosures and extended full and continuous co-operation to the CCI during the investigation. Apart from Panasonic, Globecast was another enterprise which received a 100% reduction in penalty from the CCI, in relation to bid rigging of tenders by sports broadcasters. Once again, the CCI provided full immunity considering that Globecast approached the CCI before the *prima facie* order and provided vital disclosures.

Interestingly, in a separate case, Eveready filed a leniency application and alleged that Eveready, Nippo, Panasonic, Geep and Association of Indian Dry Cell Manufacturers (AIDCM) had violated competition law by exchanging information pertaining to sales and production as well as pricing information of flashlights (through the medium of AIDCM). However, the CCI held that though there was evidence of sharing of production and sales data including pricing information, it did not result in determination of prices of flashlights and that there was no evidence that the parties had implemented the anti-competitive agreement. Accordingly, the CCI closed the matter.

While assessing these leniency applications, the CCI weighed several factors before deciding on the quantum of reduction in penalty. These factors included the stage at which the leniency application was filed, the marker status awarded to the applicant, the value addition provided by the applicant and the co-operation extended by the applicant to the CCI during investigation. In line with the provisions of the Competition Act, the CCI also allowed reduction in penalties to subsequent leniency applicants after the first applicants, based on the quality of disclosures made and the extent of co-operation extended by enterprises. Notably, the CCI also decided to provide no reduction to leniency applicants who failed to provide additional information and value addition.

Based on the CCI's practice in the past and the 3 cases where the CCI granted 100% reduction in penalty or full immunity to the first leniency applicant, it is evident that the CCI wants to encourage and promote the use of the leniency regime.

### 2. Amendment to Combination Regulations

In October 2018, consistent with its annual practice of reviewing the Combination Regulations, the CCI, after taking into account stakeholder comments made key amendments to the Combinations Regulations. The amendments are intended to bring in certainty and transparency, and to ensure faster disposal of combination cases.

The amended Combination Regulations have brought about some welcome changes, as follows:

- It allows parties to the combination to offer modifications to the combination voluntarily to address *prima facie* concerns of the CCI raised under a Show Cause Notice (SCN) issued under Section 29(1) of the Competition Act. This is a welcome move because if the parties to the combination are able to alleviate the concerns of the CCI, the CCI need not initiate Phase II proceedings and can approve the combination by accepting the modifications proposed.

- Parties to the combination have an opportunity to withdraw and subsequently refile the notice of the proposed combination to the CCI, at any time prior to the issuance of a SCN. This will ensure that parties can address any deficiencies in the notice without a formal invalidation by the CCI.

- The CCI can now appoint supervisory agencies to oversee the implementation of the modifications proposed by the parties to the combination.

In all, the amendments made have brought positive changes to the Combination Regulations, which would ultimately expedite the CCI approval process for a proposed combination.

### 3. Key decisions on anti-competitive conduct

In 2018, the Supreme Court provided much-needed guidance in relation to cartel matters under the Competition Act through its third judgment on cartels. The Supreme Court set aside the order of the erstwhile Competition Appellate Tribunal (COMPAT), which had affirmed the earlier findings of the CCI, that 44 manufacturers of LPG cylinders had
violated competition laws by rigging bids with respect to the tender floated by the Indian Oil Corporation Limited (IOCL) in the year 2010-11. The Supreme Court held that the similar or identical bids by cylinder manufacturers were a necessity given the market conditions and not a result of anti-competitive conduct.

The Supreme Court also clarified that the presumption of appreciable adverse effect on competition (AAEC) under Section 3 of the Competition Act for cartels, is rebuttable by the enterprises or persons against which such presumption exists by providing evidence and the CCI failed to discharge its burden of examining the defence advanced by the LPG cylinder manufacturers.

The appellate tribunal i.e. NCLAT, also passed two substantive orders pertaining to competition law in 2018. The NCLAT affirmed the earlier findings of the CCI in relation to an alleged cement cartel and upheld the penalty amounting to approximately INR 6000 crores on 11 cement manufacturers and the Cement Manufacturers Association for allegedly fixing prices (the matter is currently before the Supreme Court, which has stayed the penalty subject to a deposit of 10% of the penalty amount). The NCLAT held that there was a meeting of minds between the cement manufacturers with regard to the fixation of sale price of cement and for regulating its supply and production and agreed with the findings of the CCI that the cement manufacturers had violated the provisions of Section 3(3)(a) of the Competition Act.

The NCLAT noted that the CCI had failed to conduct an analysis by itself and had merely rubber stamped the findings of the Director General, CCI i.e. the investigative arm of the CCI (DG), in regard to the resale price maintenance undertaken by Hyundai. Accordingly, the order of the CCI was set aside by the NCLAT (the CCI has however approached the Supreme Court appealing the order passed by the NCLAT). This is an important decision as the NCLAT has held that the CCI must independently analyze the evidence and cannot merely rely upon (and affirm) the recommendations of the DG.

The CCI in 2018, also passed a final order penalizing Google for abusing its dominant position in the ‘Online General Web Search’ and ‘Web Search Advertising Services’ markets in India and imposed a penalty of INR 135.86 crores on Google based on the turnover of its India operations. Interestingly, two members of the CCI (i.e. Mr. Sudhir Mittal and Justice GP Mittal) wrote a dissenting opinion concluding that there was not enough evidence to find an abuse of dominant position by Google under the provisions of the Competition Act.

4. Review of the Competition Act by the CLRC

By setting up a Competition Law Review Committee (CLRC), the Ministry of Corporate Affairs has commenced an initiative to strengthen/re-calibrate competition laws of India in line with international best practices and the changing economic reality.

The CLRC has been set up with the aim to (i) review the Competition Act/ rules/ regulations, in view of changing business environment and bring necessary changes, if required; (ii) look into international best practices in the field of competition, especially antitrust laws, merger guidelines and handling cross border competition issues; (iii) study other regulatory regimes/ institutional mechanisms/ government policies which overlap with the Competition Act; and, (iv) study other matters related to competition issue and considered necessary by the CLRC.

The CLRC has also constituted working groups which would look into specific aspects such as, (i) regulatory structure, (ii) competition law, (iii) competition policy, advocacy and advisory functions, and, (iv) new age markets and big data. The working groups consist of notable practitioners in the field of competition law including Nisha Kaur Uberoi, Partner & National Head, Competition Law, Trilegal.

LOOKING AHEAD

The year 2019 is expected to be another critical year for competition law jurisprudence. Given the outlook of the CCI towards the leniency regime, we expect a substantial rise in leniency applications before the CCI to get the first mover advantage.

In November 2018, Mr. Ashok Kumar Gupta was appointed as the new Chairperson of the CCI. Mr. Gupta who is a former
A civil servant with a background in defence, health and commerce ministries, is set to be the longest serving Chairperson of the CCI and will hold office until 25 October 2022.

Several matters in relation to cartels and abuse of dominance are currently pending before the NCLAT and the Supreme Court and we expect judgments to be delivered on those matters in 2019. Judgments from the appellate forums will help in the growth of competition law jurisprudence and bring legal certainty to enterprises regarding their business conduct.

In view of the work of the CLRC which is already under way, we also anticipate several significant changes to be made to the competition laws/regulations this year.

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[2] In Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India Vs. Panasonic Corporation, Japan & Ors., Suo Moto Case No. 2 of 2017