“Dealing with the Competition Law

from

a Banker's perspective”

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Competition Law - International

- Competition law, known in the United States as antitrust law, is law that promotes or maintains market competition by regulating anti-competitive conduct.

- The history of competition law reaches back to the Roman Empire. The business practices of market traders, guilds and governments have always been subject to scrutiny, and sometimes severe sanctions.

- Since the 20th century, competition law has become global. The two largest and most influential systems of competition regulation are United States antitrust law and European Union competition law.

- Modern competition law has historically evolved on a country level to promote and maintain competition in markets principally within the territorial boundaries of nation-states. Yet, at present most regimes allows for extraterritorial jurisdiction in antitrust cases based on so-called effects doctrine.

- The protection of international competition is governed by international competition agreements. In 1945, during the negotiations preceding the adoption of the General Agreement on Tariffs and Trade (GATT) in 1947, limited international competition obligations were proposed within the Charter for an International Trade Organization.

- These obligations were not included in GATT, but in 1994, with the conclusion of the Uruguay Round of GATT Multilateral Negotiations, the World Trade Organization (WTO) was created. The Agreement Establishing the WTO included a range of limited provisions on various cross-border competition issues on a sector specific basis.

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Competition Law – General

- Competition law, also known as anti-trust law in some jurisdictions is that branch of law which is designed to protect the interest of the consumer by protecting 'competition' in the market.
- This 'competition' is protected by protecting trade and commerce from restraints, monopolies, price-fixing, and price discrimination. A perfect competition exists in "a completely efficient market situation characterized by numerous buyers and sellers, a homogenous product, perfect information for all parties, and complete freedom to move in and out of the market (Black's Law Dictionary)".
- Even though the history of competition law can be traced back to Roman empire, the modern day competition law has its genesis in the American antitrust statutes like Sherman Act of 1890 and Clayton Act of 1914. But it was only after the Second World War that the American concept of Competition law became widely accepted.
- European Community incorporated the provisions of Competition law in Articles 81 and 82 of Treaty of Rome, signed in 1957. Subsequently most of the major countries, like China, Brazil, Russia, Singapore, South Korea and Japan established their own competition regimes.
- Today, over hundred jurisdictions have their competition regimes in place and any enterprise having aspirations to go multinational cannot afford to ignore this law.

Competition Law – Indian

- Competition Act 2002 has come into force to replace the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969.

- After the economic reforms of 1990, it was felt that MRTP has become obsolete pertaining to international economic developments relating to competition law and there was a need of law which curbs monopolies and promotes competition.

- In 1990s India saw substantial increases in the value and volume of international trade in goods and services, in foreign direct investments (FDI), and in cross border mergers and acquisitions (M&A). Over the period of time, trade barriers fell and restrictions on FDI were reduced.

- The Competition Act, 2002 has been enacted with the purpose of providing a competition law regime that meets and suits the demands of the changed economic scenario in India and abroad.

- Indian Parliament passed the Competition Act in 2002 and it received the President’s assent in January, 2003. To fulfill the objectives of the Act, government established CCI with effect from October 14, 2003.

Need of Competition Law

Is there any need of Competition Law in India?

India being a Global Market has to compete with the other developed countries. Perhaps, India is the only developing nation to compete the Global Market on a large scale.

Developing economies like India need to use competition law to compete with the west. The practice of the competition law in US has proved counter-productive and has made the law firms the only winners. So while US experience is of enormous learning value to us we must blend it with needs of emerging economies who use competition law to spur innovation as a fuel to fire their engines of growth. We need to constantly challenge competition law itself to ensure it fulfils the real objectives of enactment.

Major Objectives of Competition Act, 2002 (CA02)

- Prevent practices having adverse effect on competition;
- Promote and sustain competition in the market;
- Protect the interests of consumers; and
- Ensure freedom of trade carried on by participants in markets.

Main Features of Competition Act, 2002 (CA02)

I. Prohibits Anti-Competitive Agreements. (Sec 3)
II. Prohibits abuse of Dominant Position. (Sec 4)
III. Provides for Regulation of Combinations. (Sec 5,6)
IV. Enjoins Competition Advocacy. (Sec 49)

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Highlights of Competition Act, 2002

- It provides for the establishment of a Competition Commission of India "**CCI**" to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect interests of consumers and to ensure freedom of trade carried on by other participants in markets.

- CCI prohibits enterprises to enter into anti-competitive agreements, abusing their dominant position and forming combinations.

- **Scope of CCI -** CCI shall look into any alleged violations under the Act, (a) either on its own motion, or (b) on receipt of a complaint from any person, consumer or their trade association, or (c) on references made by the Central Government, State Governments or any statutory authority.

- **Exclusion of jurisdiction of civil courts -** No civil court has the jurisdiction to entertain any suit or proceeding which CCI is empowered by or under the Act to determine. Also, no injunction can be granted by any court or authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act.

- CCI is not bound by the procedure laid down by Code of Civil Procedure, 1908 and must only follow the principles of natural justice. CCI, thus, has the power to regulate its own procedure.

- If any party to such agreement is outside India; or if any enterprise abuses its dominant position is outside India; or a combination has taken place outside India; or any party to combination is outside India; or any other matter or practice or action arising out of such agreement or dominant position which causes an appreciable adverse effect on competition in the relevant market in India.

- **Powers of CCI -** CCI has the power • to grant interim relief award compensation • impose penalty and • to grant any other appropriate relief. • to levy penalty for contravention of its orders making of false statements or omission to furnish material information, etc.

Highlights of Competition Act, 2002 (contd..)

Can CCI initiate inquiry suo-moto?

Yes, the Commission can initiate inquiry on its own on the basis of information or knowledge in its possession; or On receipt of information or reference, if the Commission is of the opinion that there is a prima facie case, it shall direct the Director General, appointed under the Act, to investigate the matter and report his findings to the Commission.

- **Division of dominant enterprise -** CCI can recommend the Central Government division of a dominant enterprise to ensure that it does not abuse its position. On the recommendation, the Central Government under Section 28 may direct division of such an enterprise.

- **Extent of penalty -** For abusing its dominant position or entering in anticompetitive agreements, CCI can levy penalty to the extent of 10 per cent of the average of the turnover for the preceding three financial years. The penalty is higher in case of such abuses by cartels and penalty can be equivalent to three times of the amount of profits made out of such agreement by the cartel or ten per cent of the average turnover of the cartel for the preceding three financial years.

- **Appeal from CCI** - Any person aggrieved by any decision or order of CCI may file an appeal to the Supreme Court within 60 days from the date of the communication of the decision or order.

Anti-competitive Agreement

An anti-competitive agreement is an agreement having appreciable adverse effect on competition. Anti-competitive agreements include, but are not limited to:-

- Agreement to limit production and/or supply;
- Agreement to allocate markets;
- Agreement to fix price;
- Bid rigging or collusive bidding;
- Conditional purchase/sale (tie-in-arrangement);
- Exclusive supply/distribution arrangement;
- Resale price maintenance; and
- Refusal to deal.

Kinds of Combinations

CA02 also empowers CCI to regulate Combinations. Combination has not been defined in the act but includes the following, when they exceed the threshold limits specified in CA02 in terms of assets or turnovers:

- Acquisition of controls, shares, voting rights or assets;
- Acquisition of control by a person over an enterprise where such person has control over another enterprise engaged in competing business;
- Merger or amalgamation between or amongst enterprises

Any entity which proposes to enter into a Combination has to notify CCI and seek its approval before entering the Combination. If CCI concludes that the proposed combination will cause or is likely to cause an appreciable adverse effect on competition within the relevant market in India, it can either prohibit it or propose suitably modification to the proposal.

Abuse of Dominance

- Dominance refers to a position of strength which enables an enterprise to operate independently of competitive forces or to affect its competitors or consumer or the market in its favour.

- Abuse of dominant position impedes fair competition between firms, exploits consumers and makes it difficult for the other players to compete with the dominant undertaking on merit.

- Abuse of dominant position includes imposing unfair conditions or price, predatory pricing, limiting production /market or technical development, creating barriers to entry, applying dissimilar conditions to similar transactions, denying market access and using dominant position in one market to gain advantages in another market.

At what stage can the commission initiate inquiry?

On Its own on the basis of information and knowledge in its possession, or

- On receipt of an information, or
- On receipt of a reference from the Central Government or a State Government or a statutory authority.

Who can provide information?

Any person, consumer, consumer association or trade association can provide information relating to anticompetitive agreements and abuse of dominant position.

- A person includes an individual, Hindu undivided family (HUF), company, firm, association of persons (AOP),
- body of individuals (BOI), statutory corporation statutory authority, artificial judicial person, local authority and body incorporated outside India.

- A consumer is a person who buys products (goods and services) for personal use or for other purposes.
- Intermediate customers can also provide information.

Common Violations under Competition Law

Bid Rigging: An agreement, between enterprises or persons engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding (Source: Sec 3 of CA02).

Bid rigging is a particular form of collusive price-fixing behavior by which firms coordinate their bids on procurement or project contracts (Source: OECD Glossary of Statistical Terms).

Bundling/Tied Selling: A marketing strategy in which a dominant enterprise sells one product in proportion to another as a requirement for the sale. It is quite common in the Software industry. For instance bundling operating system with media player or bundling of channels by cable operators.

Cartelization: An act of forming a cartel. A Cartel includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services. (Source: Sec. 2(c) of CA02).

A cartel is a formal agreement among firms in an oligopolistic industry. Cartel members may agree on such matters as prices, total industry output, market shares, allocation of customers, allocation of territories, bid-rigging, establishment of common sales agencies, and the division of profits or combination of these. (Source: OECD Glossary of Statistical Terms)

Conscious Parallelism/Tacit Collusion/ Price Leadership: Price-fixing strategy followed by the competitors without explicit verbal or written, discussion or agreement. One of the competitors, called the Price Leader will raise the prices and others will simply follow trend without undercutting each other. It is difficult to prosecute such acts because of lack of evidence.

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Common Violations under Competition Law (contd…..)

Exclusive Dealing/Exclusive Territory: Exclusive Dealing can be in two forms. It can be an agreement by which a single distributor is the only one who obtains the rights from a manufacturer to market the product (Source: OECD Glossary of Statistical Terms). Or it can be an agreement requiring a buyer to purchase all needed good from one seller (Black's Law Dictionary, Seventh Ed.).

Leveraging: Leveraging in a strategy in which a monopolist uses its dominance in one market to leverage its product in another market. For instance, consider two markets, one of ink and other of Pen. Firm A has monopoly in the market for ink but there are many competitors in the market for pen. Leveraging would occur when Firm A starts selling its ink on the condition that the buyer also purchases the pen manufactured by Firm A. Such a strategy would can kill competition in the market for pens.

Predatory Pricing/ Destroying Price/ Dumping: Predatory Pricing is a strategy for driving out competitors by selling goods at prices which are less than their cost of production.

Price Discrimination: It is the practice of offering identical good or service to customers in different segments of market for reasons unrelated to costs (Source: OECD Glossary of Statistical Terms).

Price-fixing: Price fixing occurs when two or more firms agree to raise or fix the prices in order to increase their profits by reducing competition. It is an attempt at forming a collective monopoly.

Refusal to deal: The practice of restricting persons or class of persons to whom the goods are sold or from whom the goods are bought.

Resale Price Maintenance/ Markups: It is a situation in which the supplier forces the distributor/retail seller to sell the good to the customer at prices stipulated by the supplier.

Competition Law – Banking Sector

Whether the provisions of competition law overrides Section 44A of the Banking Regulation Act, 1949 OR is it that, the act which is later enacted over rides the former act? – This issue needs clarity.

Under the provisions of Section 44A of the said Banking Regulation Act the scheme of amalgamation is required to be approved by a majority in number representing at least 2/3 in value of the shareholders of each of the amalgamating banks present either in person or proxy at the respective general meetings of the said banks convened separately for consideration of the scheme. Section 44A of the Banking Regulation Act, 1949 also requires that after the scheme of amalgamation is approved by the requisite majority of shareholders in accordance with the provisions of the Section, it shall be submitted to the Reserve Bank for sanction.

Therefore, when two Banks merge, the provisions of the Companies Act are given a go bye.

Diverse economic and strategic factors have caused banking institutions to merge over the past several years. These factors include:

Greater efficiency: Banks often are able to operate more cost effectively by increasing their size, as the costs of many functions are not directly proportional to the scale of operations. As a result, mergers are one way to keep costs and prices down.
Accessing technology: Banks and their customers have become increasingly accustomed to the advantages of new and expensive technologies. Mergers are often necessary to allow banks to introduce and maintain the technologies, which are in demand by spreading costs over a large number of customers.
Diversification: One effective method of controlling risks inherent in bank lending is to diversify operations across different geographic regions and different types of customers. Mergers can help diversify such risks.
Broader array of products: Mergers may give banking institutions an opportunity to offer a broader array of services as a merger of two banks with different expertise can result in a combination, which offers more variety to customers.

Competition Law – Banking Sector (Contd…)

Understanding the concept of Prudential Regulations:

- Generally, financial regulations can be classified into prudential and systemic regulations. The division is not clear-cut, with some regulatory methods overlapping the two and some objectives falling into either or both categories.

- Prudential regulation is an appropriate legal framework for financial operations and it is a significant contributor to preventing or minimizing financial sector problems.

- Prudential regulation ensures that regulated entities are financially sound and promotes their prudent behavior. The key aim of prudential regulation is protecting the interests of consumers and the quality of an institution's systems for identifying, measuring and managing the various risks in its business.

- Thus, competition cannot be improved without establishing safeguards to ensure that competition does not result in the loss of consumer welfare.

- Prudential regulation is the mandate of the central banks, such as the Reserve Bank of India. The RBI initiates policy measures which are aimed at enhancing the prudential standards of the banking system in order to make it more resilient and align these with the international best practices while ensuring customer protection.

Competition Law – Banks Merger

- The guidelines of the RBI specify the prudential regulations with respect to bank mergers. They do not look at the issues which the CCI looks at. CCI only checks whether a combination will likely result in dominance or likely facilitate cartelization. They will not go beyond this to check on prudential regulation, which they do not have the mandate nor competence to do.

- RBI on the other hand will only check whether the banks will remain sound and whether public money will remain safe after a combination. They will not go further and assess whether a dominant position will be created or whether cartelization is likely, which is what CCI does.

- A distinction should be made between prudential regulation of banks by RBI and competition regulation of the whole economy, including financial sector, by CCI.

- Prudential regulation is largely centered on laying and enforcing rules that limit risk-taking of banks, ensuring safety of depositors' funds and stability of the financial sector. Thus regulation of M&As by the RBI would be determined by such benchmarks.

- Competition regulation of M&As in the banking sector on the other hand is a different matter.

- While CCI does not have either the expertise or the remit on prudential regulation, RBI does not have the expertise or remit to regulate anticompetitive behavior.

Competition Law – Banks Merger (contd….)

- Competition policy and prudential regulation, to the extent that both seek to prohibit undesirable behavior, are mutually compatible.

- In particular, as long as both prudential and competition authorities confine themselves to blocking undesired (rather than forcing or requiring) mergers, banks will have no difficulty abiding by both agencies' merger decisions.

- As regards certain mergers, prudential regulation and competition policy can be complementary. A prominent example is mergers creating "too big to fail" banks, i.e. banks that are so large that market participants assume the government would take whatever steps might be necessary to preserve their solvency in a crisis.

- Such banks might be inclined to take what regulators regard as excessive risks. Banks seen by consumers as too big to fail could also give rise to competitive distortions since they may have an artificial advantage in raising funds, especially in markets where deposit insurance is inadequate.

- There is a limited potential for conflict between prudential and competition policy goals when it comes to mergers designed to shore up a failing or weakened bank. Even in such cases, however, it will normally be possible to avoid competition problems by choosing the right partner, or by structuring the merger so as to minimize its effects on local market concentration. In any case, conflict between prudential and competition policy goals can be reduced by close co-operation, including prior consultation between the pertinent agencies.

- The International Competition Network has also advocated that the States should ensure there is a proper separation between the enforcement of prudential regulation and of the general competition rules.

Bank Mergers: To Exempt or Not?

- The proposed exemption of bank mergers from the ambit of the CCI has triggered demands of exemption from other sectors, especially by those, which have their own regulators.
- In March this year the heavily debated sections 5 and 6 ("Sections 5 & 6") of the CA02, which regulate 'Combinations', were notified to come into effect from June 1, 2011.
- Simultaneous to this, CCI published a draft of the regulations setting out the scheme for implementing the 'Combination' control provisions which have been finalised on May 12, 2011.
- Consequently, all non-exempted mergers, acquisitions or amalgamations (which are referred to as 'Combinations' in the Competition Act) will be scrutinized by the CCI.
- There is of course the moot issue as to which of the 'Combinations' which are under implementation will be 'grand fathered' and therefore not have to suffer delays due to the scrutiny process.

Bank Mergers: To Exempt or Not?

- The notification of the Sections 5 & 6 has met with mixed reactions with some quarters raising concern as regards CCI's ability to vet 'Combinations'. Re-fuelling the old debate, the Reserve Bank of India, which regulates, inter alia, the RBI has once again objected to applicability of the Sections 5 & 6 to 'Combinations' in the banking sector.

- Interestingly, the Banking Laws (Amendment) Bill, 2011 tabled in the Lok Sabha (lower house of the Indian parliament) in March 2011 exempts Bank Mergers from CCI's scrutiny. Perhaps the enactment and coming into force of this statutory exemption not happening in the near future is what RBI be worried about.

- As per reports, the CCI has expressed displeasure over the proposed exemption of bank mergers. Even then, players from other sectors (and their trade associations) like telecom, insurance and shipping are also reportedly lobbying for similar exemptions claiming that similar exemption from CCI's scrutiny is necessary in these sectors as well.

- The proposed exemption of the banking sector is not an exemption for a specified period as provided for in section 54 of the CA02.

- Section 54 enables the Central Government to exempt by way of a notification certain class of enterprises from the applicability of the Act, in public interest or in the interest of security of the State. Granting of such exemption is to be for a specified period.

Bank Mergers: To Exempt or Not? (contd….)

- The RBI as the regulator of the banking sector has been vested with certain powers under Section 44A of Banking Regulation Act, 1949 ("BR Act") in relation to bank mergers. This power is parallel to the generic powers of the High Courts to approve any scheme of arrangements including mergers under Section 391 to 394 of the Companies Act, 1956.

- This power, not just for approving but to actually give effect to 'shotgun marriages' without lengthy court processes, is a clear reflection as to the critical nature of the banking sector.

- Hence, RBI's case for exempting bank mergers from the purview of the Competition Act and CCI oversight is not at all surprising. RBI's key concern could well be that a period of 210 days for approval of bank mergers is excessively long! Bank mergers can be approved at breakneck speed in an emergency. RBI has imposed, in the past, moratoriums on weak banks and then within a month or so have an acquirer identified which in turn completes the 'Combination' in a month or two.

- The proposed statutory exemption of bank mergers has triggered demands of exemption from other sectors, especially by those, which have their own regulators.

- The justification advanced in the case of the telecom sector is that the regulator has in place clear norms for 'Combinations' which have been tried and tested.

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Bank Mergers: To Exempt or Not? (contd….)

Key Concerns

- Section 54 provides for exemption on the grounds of "security of the State or public interest". While the proposed exemption of 'Combination' in the banking sector can be justified on the grounds of 'public interest', the banking laws are being amended to effect this and not pursuant to Section 54.

- Public interest is akin to, but not necessarily the same as, public policy. However, the description of 'public policy' as "an unruly horse which one never knows where it will take us" equally holds good for 'public interest'.

- While statutory exemptions on the lines of those proposed for the banking sector would (notionally at least) be debated in the parliament, executive actions under Section 54 can be done in an opaque manner and worse, as best exemplified by the '2G telecom scandal'.

- Regulation of any sector has multiple dimensions including technical, and competition. The moot issue is: Can these elements be carved out between the sectoral regulators and competition authority?

- There is no reason why the sectoral regulators cannot have concurrent jurisdiction with the CCI if there is clarity as to the contours of their respective jurisdictions. Therein lays the rub, as even within the financial services arena, there has been regulatory turf wars carried out in full public glare.

- The manner in which the CCI exercises its powers (especially the discretionary ones), interfaces with sectoral regulators, and the extent to which the executive interferes, will all have a direct bearing on how the CCI and therefore competition law evolves in India. One can only hope that there is no compounding of the early missteps.

Case Study - CCI Order in the case of DLF Ltd.

DLF fined Rs. 630 Crores (INR 6.3 billion) by CCI for abusing the dominant position

Introduction: CCI vide an order dated August 12, 2011 in *Belaire Owner's Association vs. DLF Limited and HUDA. (Case no. 19/2010)* has, *inter alia,* imposed a penalty at the rate of 7% of the average of the turnover for the last three years on DLF Ltd. The penalty amounting to Rs. 6.3 billion has been imposed for abuse of dominant position for imposing unfair conditions in the agreements made by the Co. with flat buyers.

Allegations against DLF: It was alleged by the Informant (i.e. Belaire Owner's Association) DLF has imposed "arbitrary, unfair and unreasonable conditions" on the apartment – allottees (of the housing complex 'Belaire' located in Gurgaon, being constructed by DLF), which amounted to abuse of its dominant position, in the so called relevant market of "high end" customers in Gurgaon.

Initial Order by CCI: CCI after considering the Information formed an opinion that a *prima-facie* case exists and directed the Director General ('DG') to investigate the matter. The DG in his Investigation report concluded the allegations as proved. The order of CCI under section 26(1) of the Act was challenged by DLF before the Competition Appellate Tribunal (COMPAT), *inter-alia,* raising the issues of jurisdiction. COMPAT vide order dated 18.08.2010 observed that the DLF can raise these issues before the CCI and disposed off the appeal without granting any relief, accordingly.

Interim order under Section 33 of the Act: CCI vide an interim order dated September 20, 2010, restrained DLF from cancelling the allotment of the 'apartment allottees' and further restraining DLF from creating third party rights without the leave of the CCI.

Director General's (Investigation) Report: The DG after conducting an in-depth investigation of various allegations made in the information held that, DLF in exercise of its market power and dominance has imposed unfair conditions of sale on consumer in violation of Section 4(2)(a)(i) of the Act.

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Issues involved and findings of CCI: CCI after considering the DG report and submissions made by the Respondents framed the following issues for consideration and held that:-

Issue 1: Do the provisions of Act apply to the facts and circumstances of the instant case?

CCI decision: Competition Act applies to all the existing agreements and covers those also which though entered into prior to the coming into force of section 4 of the Act but are sought to be acted upon now. In addition to that, in the present matter, the documents filed by the informant show that indeed in some cases the agreement was entered into between DLF and the allottees after the date of commencement of section 4 of the Act.

Issue 2: What is the "relevant market", in the context of section 4 read with section 2 (r), section 19 (5), section 19(6) and section 19(7) of the Act?

CCI decision: That, a small i.e. 5 % increase in the price of an apartment in Gurgaon would not make the person to shift his preference to Ghaziabad, Bahadurgarh or Faridabad on the peripheries of Delhi or even to Delhi in a vast majority of cases. Therefore, CCI held that the 'relevant market' is the market for services of developer / builder in respect of 'high-end 'residential accommodation in Gurgaon.

Issue 3: Is DLF Ltd. dominant in the above relevant market, in the context of section 4 read with section 19 (4) of the Competition Act?

CCI decision: Due to the sheer size and resources, market share and economic advantage of DLF over its competitors, DLF is not sufficiently constrained by other players operating on the market and has got a significant position of strength by virtue of which it can operate independently of competitive forces (restraints) and can also influence consumers in its favor in the relevant market in terms of explanation to Section 4 of the Act.

Issue 4: In case DLF Ltd. is found to be dominant, is there any "abuse" of its dominant position in the relevant market by the above party?

CCI decision: After considering the various factors and replies from the parties concerned, CCI held that DLF Ltd. has contravened the section 4 (2) (a) (i) of the Act by directly or indirectly, imposing unfair or discriminatory condition in "sale of services", as mentioned below :-

o Commencement of project without sanction/ approval of the projects
o Increase in number of floors mid-way
o Increasing of Floor Area Ratio (FAR) and Density
Per Acre (DPA)
o Inordinate delay in completion and possession and
forfeiture of amounts
o Clauses of the agreements are heavily biased in favor of DLF Ltd. and against the consumers.

Penalty imposed: CCI after considering the above alleged abuses by DLF Ltd. has imposed a penalty of a Rs. 630 Crores or INR 6.3 billion. (USD 132 Million) on DLF Ltd., which is calculated on the basis of 7 percent of the average of the turnover of the Group for the last three years. CCI has also directed DLF to 'cease and desist' from formulating and imposing such unfair conditions in its agreements with buyers in Gurgaon and to suitably modify unfair conditions imposed on its buyers within 3 months of the date of receipt of this order.

It is to be noted that as per media reports, CCI, on August 30, 2011, has also disposed off 10 more complaints pending against DLF. CCI found DLF guilty of abuse of dominant position in its other Gurgaon projects and passed only a "cease and desist "order against DLF.

Case Study - NSE moves tribunal against CCI order

- NSE has filed a petition against a CCI order, wherein the stock exchange was held guilty of abusing market dominance and asked to pay a fine of Rs. 55.5 crore.
- In its appeal, filed the NSE has asserted that it was wrongly charged of leveraging its dominance in equity and other segments for benefit in currency derivatives market.
- The exchange has further claimed that the Competition Act did not envisage low price, which is not predatory, as an abuse of dominance and the charges leveled on it had no basis either in facts or laws.
- NSE is believed to have further contended that the order from CCI was "antithetical" or contradictory to the principal purpose of the Competition Act, which was to protect and promote consumer welfare.
- In its order dated June 23, CCI had imposed Rs. 55.5 crore fine on NSE for abusing its dominant market position and asked the bourse to stop unfair trade practices like subsidizing its services with a zero-price regime in currency derivatives segment. Imposing a penalty equivalent to 5 per cent of the bourse's three-year average turnover, CCI had said that there was "a clear intention on the part of NSE to eliminate competitors in the relevant market".
- The CCI order followed months-long probe by it into the matter after a complaint from NSE's younger rival MCX-SX. NSE has said that it has mostly been number two in this market and zero-pricing strategy has developed the market, which was evident from growth in trading volumes so far.
- The exchange has sought relief from Competition Appellate Tribunal (COMPAT) on payment of penalty, as also from the requirement of maintaining segmented accounts and from any compensation claims that might be filed by MCX-SX or any other third party.
- After the CCI order, MCX-SX had said it would look at claiming compensation for the losses and damages suffered by it due to NSE's anti-competition business practices.

Case Study - NSE gets stay on competition commission's Rs 55-cr penalty (Contd..)

- The COMPAT on September 8, 2011 granted an interim relief to the NSE from payment of Rs. 55.5 crore penalty imposed on it by competition watchdog CCI.

- The tribunal sought replies within four weeks from CCI and MCX-SX, whose complaint against NSE related to anti-competition practices, led to a probe by the competition watchdog.

- The COMPAT it said that the next date of hearing would be notified after expiry of these 10 weeks being given to various parties for their replies. The tribunal also observed that it was taking note of the CCI order being a "split-verdict".

- COMPAT has also asked the NSE to file an undertaking with regard to compliance with the CCI's June order, in which the competition watchdog had asked the bourse to cease and desist from unfair pricing, exclusionary conduct and unfairly using its dominant position in other markets to protect the relevant currency derivatives market.

- CCI order had also directed NSE to modify its zero price policy in the relevant market and ensure that appropriate transaction costs are levied.

- Besides, CCI had also asked NSE to maintain separate accounts for each segments with effect from April 1, 2012, to stop its zero-price policy within 60 days of the order and to allow its members a free choice in trading software selection.

- Granting a stay on payment of the penalty, the tribunal, however, ruled that , NSE would have to give an undertaking that it would have to pay the full penalty, along with interest at the rate of 9 per cent per annum, if it loses the case. The interest would be payable from one month after the date of the CCI order till the date of the payment.

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RBI pre-payment advisory: Banks say will toe the line:

- Reserve Bank of India, through an advisory, asked banks not to levy pre-payment charges in the case of floating rate loans, most banks are gearing up to implement the decision.
- RBI had said that banks should not recover a charge on pre-payment of floating rate loans after a decision was taken to this effect at the Annual Conference of Banking Ombudsmen on September 5, 2011.
- The Banking Ombudsmen had suggested that banks need not impose any charges for pre-paying loans taken under floating rates by customers.
- Many banks charge a pre-payment penalty ranging from 2-3% if a borrower chooses to pre-pay personal or home loan, irrespective of the nature of the loan contract-floating or fixed rate loans, citing as part of their cost of servicing their own loans.
- "Floating rate loans pass on the interest rate risk from banks, which are much better placed to manage it, to borrowers and, thus, banks only substitute interest rate risk with potential credit risk," the Ombudsmen noted.
- The banks will, however, be free to recover or charge appropriate pre-payment penalties in the case of fixed rate loans, the 10 action points to improve customer service.

RBI pre-payment advisory: Banks say will toe the line (contd…):

- The housing finance companies, regulated by the National Housing Bank (NHB), however, are already following this norm and the banking industry is lagging behind on the same.

- The NHB had issued a circular on October 18, 2010, advised the housing finance companies from charging prepayment charge in cases where the borrowers pre pay from their own sources.

- "It is advised that pre-payment levy or penalty should not be collected from the borrowers when the housing loan is pre-closed by the borrowers out of their own sources. All HFCs are advised to ensure compliance of the above with immediate effect," said the NHB in its circular.

What the RBI wants

- RBI has directed banks not to recover pre-payment charges in floating rate loans.
- The decision on home loans was taken at the Annual Conference of Banking Ombudsmen held in Mumbai on September 5, 2011.
- RBI has said that customers should not be levied pre-payment charges as banks are better placed to manage interest rate risks.

Though the suggestion of the Banking Ombudsmen are morally suggestive in nature, it is generally accepted by the banks. Technically , their suggestions have to be followed up by a circular from the RBI after the press release published on September 6, 2011 and the Banks are looking forward to implement the said decision of RBI.

Thank You