THE 8TH NLSIR SYMPOSIUM ON COMPETITION LAW

Since the enactment of the Competition Act in 2002, the competition regime in India has witnessed several interesting developments. Despite the emergence of a vibrant jurisprudence however, the law remains far from lucid. In light of this, the 8th NLSIR Symposium hopes to assess the development of the law and bring some clarity for practitioners and academics alike. *Day One* focuses on the core aspects of anti-competitive agreements and abuse of dominance. *Day Two* focuses on emerging issues and the dialogue between competition law and other regimes.

SESSION I: SECTION 3 AND DETERMINING ANTI-COMPETITIVE AGREEMENTS

The law of anti-competitive agreements, governed by Section 3 of the Competition Act, 2002 ["the Act"], has been the subject of several decisions of the Competition Commission of India ["CCI"]. Many of these however, have not been consistent. At the very outset, the precise legal test to determine whether an agreement is anti-competitive poses problems. It is unclear whether the Indian test is more closely aligned to that followed in EU (which requires showing price parallelism in conjunction with facilitating information sharing) or in the USA (which follows the 'parallelism plus' test). Conflicting judicial decisions and the lack of clarity as to the exact parameters of these tests, as observed in cases such as the *Glass Manufacturers* case, have left this area in a lurch. Can factors such as movement in prices be properly considered in the purported 'plus factors' analysis? Or does this run into the danger of conflating correlation with causation, thereby making it economically unsound?

A related concern is the nature of evidence that is considered sufficient to establish such an agreement. So far, the analysis has been restricted to overt conduct such as meetings of trade associations. But in the *Tyre Federation* case, for instance, the CCI opined that circumstantial evidence such as the market and conduct of participants would be sufficient. While the respondents here were found not to have engaged in anti-competitive conduct, this could open the door for ordinary oligopolistic market behaviour such as 'price leader' and 'price follower', to be treated as evidence of tacit collusion against a respondent.

Further, once a violation of Section 3 is found, the Act gives CCI the power to impose staggering penalties with the penalty in the *Cement Manufacturers* case extending to a whopping Rs. 6500 crores in total. Understandably, this has evoked strong responses from the industry. There has been some reprieve via the decision in *Excel Corp.* The COMPAT has presumably gone against the text to imply that it is only the relevant turnover that counts. Here again, there are principled arguments of deterrence (based on law and economics) to be made on one hand, and

proportionality on the other. Indeed, this pervades through the Act with the same being applicable for Section 4 violations as well.

With the CCI having initiated probes against airlines, telecom companies, oil marketing companies and decided cases that would be heard under appeal, these issues gain significant contemporary relevance. And without any clarity on the legal position, there remains much to be debated and discussed on these issues.

SESSION II: THE ABUSIVE CONDUCT OF DOMINANT ENTERPRISES

Section 4 of the Act, dealing with the abuse of dominance, has been the subject of much controversy. *DLF* and other cases decided by CCI under this section have raised multiple issues at each stage of the two-step process: determining 'dominance' and finding 'abuse'. Although the Raghavan Committee in 2000 indicated support of the effect doctrine, the dilemma between adopting a "per se" approach and the "rule of reason" approach continues to persist. The minority order in *NSE,* which took a decidedly "effects" based approach using an economic analysis of market dynamics is a telling instance of this existing tension. The Competition Appellate Tribunal ["COMPAT"] now seems to have adopted the "rule of reason", as evidenced in the *Kapoor Glass v. Schott Glass India* order, where the issue of whether discounts were a form of discriminatory pricing was approached using the effects doctrine.

The issue of what constitutes abuse has also seen several developments, sometimes with similar facts (such as in the *BCCI* and *Dhanraj Pillai* cases) leading to opposing results. Especially in the ever-widening area of exclusionary abuses, several decisions such as the *NSE* case have emerged and are bound to throw light on the interpretation of Section 4(2)(a)-(c). It is worth noting however, that the specific issue of whether every non-protesting party to a vertical anti-competitive agreement is affected by an order against the dominant party has not been conclusively resolved as yet.

Another interesting issue with practical ramifications is how the concept of 'relevant market' is to be determined. In this regard, lip service to the 'SSNIP' test (small but significant non-transitory increase in price) is widely followed as a matter of international practice. However, it is not clear whether this test is applied in its true spirit and whether courts refrain from considering irrelevant factors.

Put together, the jurisprudence of the CCI and COMPAT has thrown open the field of discussion with regard to several dimensions of abuse of dominance, for private and public entities alike. Indeed, the *Coal India* case has alerted PSUs to the fact they are not inert to regulation. At the same time, other issues such as discretionary grant of rights constituting abuse

(in *BCCI* case) and collective dominance (envisaged in the now elapsed amendment bill) need to be discussed fully. With DLF's appeal having been admitted by the Supreme Court in August, another one likely in the *NSE* case, possible investigation against e-retailers especially Flipkart for alleged predatory pricing and the prospect of a fresh amendment bill, these issues are ripe for debate.

SESSION III: MERGERS AND ACQUISITIONS: CLEARING THE CCI HURDLE AND THE COMPETITION BETWEEN REGULATORS

In early 2014, the Jet-Etihad deal provided the first opportunity to CCI to comprehensively analyse the law relating to combinations in India with most previous deals being summarily approved. Even here, the CCI found that the deal (and the resultant combination) had no appreciable adverse effect on competition (AAEC). Yet, the unease felt by companies in clearing the CCI hurdle is apparent today. Indeed, CCI's practice has significant strategic implications for companies considering M&A transactions.

This may be attributed to the lack of clarity on how the CCI considers the various factors at play in determining AAEC. CCI's enquiry and its extent tend to differ from industry to industry and deal to deal, with pharmaceutical deals traditionally being viewed more strictly. In fact, in the *Sun Pharma-Ranbaxy* deal, CCI also utilised the power to take into account public opinion for the first time.

Curiously enough however, one issue which has not attracted much attention is the validity of non-compete clauses in such deals. While such clauses are industry-practice, they have been viewed in the European Union as potentially having adverse effect on competition. The few CCI orders in *Orchid* etc. involving this issue are bereft of any analysis.

Further, the acquisition of 'control' which triggers the requirement of notification also highlights the interaction of the Indian competition regime with other regulatory regimes. In fact, SEBI's scrutiny of the Jet-Etihad deal was prompted by CCI's observations that Etihad had acquired joint control over Jet. This dialogue gives rise to some important questions, which remain unanswered as of now: How is the explanation of 'control' under S.5 of the Competition Act to be interpreted? As SEBI suggested, is this different from 'control' under the Takeover Regulations keeping in mind the different purpose of the two regimes? How should these inter-regulator variations be resolved in the interests of business certainty?

With the CCI bringing about regular amendments to the Combination Regulations and amendments to the Competition Act also possibly on the anvil, these aspects deserve much greater discussion to allow for clarity to prevail.

SESSION IV: THE INTERFACE OF INTELLECTUAL PROPERTY RIGHTS AND COMPETITION LAW IN INDIA

In 2013, presumably in response to the infringement suit by Ericsson in the Delhi High Court, Micromax filed a complaint against Ericsson with the CCI alleging that Ericsson had refused to license its Standard Essential Patents relating to 2G and 3G technology at FRAND terms. While CCI found a *prima facie* violation of Section 4 of the Competition Act and directed an investigation, the Delhi High Court stayed the release of the DG's report on the ground that the Controller under Section 84 of the Patents Act has jurisdiction (*prima facie*).

In August of this year, it has also been reported that the CCI may examine details of patent settlements (Hoffan Roche – Cipla and MSD – Glenmark) following litigation between foreign drug manufacturers (patent holders) and local generic manufacturers.

These investigations bring the interface of intellectual property rights and competition law to the fore in the Indian context. Until the 1990s, the two regimes were considered to be at 'loggerheads' but since then, scholars and practitioners have persistently attempted to deconstruct this interaction on the premise that both regimes seek to promote innovation, and through it, economic growth. But a lot of (even theoretical) questions still remain which are equally present in these investigations: Should intellectual property rights be circumscribed like ordinary property rights? Why, as coexisting systems of law, are they not subject to a compromise which accommodates both regimes? In practice, how does one delineate the applications of these two regimes and determine the appropriate jurisdiction?

Section 3(5) of the Competition Act specifically considers the interest of intellectual property ('IP') holders as granted under various Indian statues and exempts any "reasonable conditions, as may be necessary for protecting any of his (IP) rights…" Thus far however, the Competition Commission of India ('CCI') had not fully adjudicated upon the interface between IP and Competition Policy in India. In this context, CCI's order in *Kataria*, given on 25 August 2014, India's first spare parts case, gains much significance. Besides its relevance for spare parts, CCI has also made general observations about the scope of the IP defence which has significant practical implications. While CCI has categorically stated that it would not question the validity of the IP, it also essentially held that mandatory licensing would not infringe the IP itself. If this is so, what is the limiting principle to such an observation? If there is no limiting principle, would any exercise of intellectual property rights (which is not royalty based) exempted under Section 3(5)? On Section 4, if the CCI's observations on no intellectual property defence therein are correct, will the CCI still adopt an 'essential facilities' test in future refusal to deal cases?