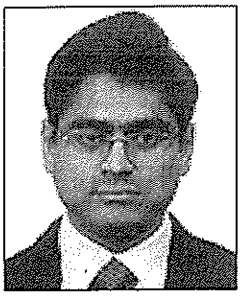

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The Competition Act – Overview

Introduction

The Competition Act, 2002 ('Competition Act') was enacted when India had integrated with the world economy and when Government of India was seeking to divest its shares in several State Owned Enterprises ('SOEs'). Although the Competition Commission of India, constituted under the Competition Act ('Competition Commission') has been in existence for less than five years, in its short duration the Competition Commission has played a crucial role in addressing issues relating to freedom of contract[1] and applying principles of the Competition Act even to State Owned Enterprises – in a marked and conscious departure from the earlier legislation, the Monopoly and Restrictive Trade Practices Act ('MRTP Act'). Under the Competition Act, an appeal against orders of the Competition Commission lie to the Competition Appellate Tribunal ('COMPAT'), however, there aren't many notable rulings of COMPAT. In spite of the fact that these are relatively early stages for the Competition Act, the orders of the Competition Commission demonstrate that the Competition Act in its application and the orders of the Competition Commission are of extreme relevance to business entities in India. Business entities must be aware of the significance of the Competition Act and the implications of the same, whether it relates to innocuous transactions such as franchisee agreements, dealer agreements or mergers and acquisitions.

Background

The foundation for independent India's economy was set in a planned economy which envisaged planned utilisation and consumption of resources. The MRTP Act was passed at a time of strict regulation and licensing of industries which was aimed at achieving the objectives of the MRTP Act, namely, to prevent (a) economic power concentration in a few hands and curbing monopolistic behaviour, (b) prohibition of monopolistic, unfair or restrictive traded practices. The intention behind this was both to protect consumers as well as to avoid concentration of wealth.[2]

1. The Competition Commission has generally accepted exclusive clauses in the context of dealers and franchisees – clearly recognising the right of a business entity to impose reasonable restrictions on its dealer. The Commission has also examined mergers and acquisitions across various industries and also addressed issues of cartelisation and applied the Competition Act to Public Sector Undertakings.

2. Subsequent to the 1991 amendment to the MRTP Act, there was a shift in emphasis towards prohibition of monopolistic, unfair or restriction trade practice rather than on concentration of wealth and control of monopolies. See Jaivir Singh, Monopolistic Trade Practices and Concentration of Wealth : Some conceptual problems in MRTP Act, Economic and Political Weekly, Vol. 35, No. 50 (Dec. 9-15, 2000), pp. 4437-4444.

MRTP Act to Competition Act

In contrast, the objectives of the Competition Act are to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets. Therefore, while the emphasis in the MRTP Act was to prevent concentration of economic power and monopolistic behaviour, the Competition Act, in contrast focuses on positive acts of engendering competitive spirit and free enterprise.

While there are certain elements common to MRTP Act and the Competition Act, fundamental distinctions between the enactments are the objectives of the respective statutes and the intent of the legislature. The significance of these objectives are realised in the course of interpretation and enforcement of the relevant statutes when a court considers objects of a statute to interpret a particular provision of law and analyse transactions that have been brought before it.[3]

In spite of the laudable objectives of the MRTP Act, it was unable to achieve its objectives both in terms of enforcement of the law and enforcement of its rulings. From a jurisprudential perspective, the MRTP Commission took a fairly narrow view of private contractual rights. The Supreme Court of India ('Supreme Court') upheld restrictive clauses in agreements[4] and applied the test of rule of reason in respect of such clauses in agreements.[5] The MRTP Amendment Act, 1984, brought in response to the above judgments sought to re-establish restrictions set out in section 33(1) of the MRTP Act, such as resale price maintenance, were restrictions, exclusive dealing as being restrictive and in contravention of the MRTP Act. The Supreme Court in *Voltas Ltd vs. Union of India*[6] held that in view of the general definition of restrictive trade practices under section 2(o), practices other than those listed under Section 33 (1) could be examined under rule of reason analysis.

However, in spite of certain notable rulings of the Supreme Court under the MRTP Act, from a regulation and enforcement perspective, the MRTP Act failed to achieve its objectives. Against this background, the Finance Minister of India in its budget speech in February, 1999 made the following statement in regards to the then existing MRTP Act."

> *"The MRTP Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. The Government has decided to appoint a committee to examine this range of issues and propose a modern competition law suitable for our conditions."*

The Raghvan Committee[7] was constituted to recommend a suitable legislative framework

3. Burakar Coal Co Ltd. vs. Union of India, AIR 1961 SC 954.

4. TELCO vs. Registrar of RT Agreement 2 SCC 55 (1977) and M & M Limited v. Union of India 2 SCC 529 (1979).

5. The Supreme Court propounded the following ratio : "The definition of restrictive trade practice is an exhaustive and not an inclusive one. The decision whether a trade practice is restrictive or not has to be arrived at by applying the rule of reason and not on the doctrine that any restriction as to area or price will per se be a restrictive trade practice, every trade agreement restrains or binds persons or places or prices. The question is whether the restraint is such as regulates and thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine this question three matters are to be considered. First, what facts an peculiar to the busmen to which the restraint is applied. Second, what was the condition before and after the restraint is imposed. Third, what is the nature of the restraint and what is its actual and probable effect."

6. AIR 1995 SCC 1881.

7. http://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf

relating to competition law for the country. It was felt that although the MRTP seemingly had provisions regulating anti-competitive practices, in comparison with competition laws of many countries it was inadequate for promoting competition in the market and trade and for reducing, if not eliminating, anti-competitive practices in the country's domestic and international trade.

One of the biggest shortcomings of the MRTP Act was the inadequacy of MRTP Act to provide adequate remedy to complainants. Except for orders directing a respondent to 'cease and desist' from the alleged monopolistic, restrictive or unfair trade practices the Commission could not impose penalties for breach of law; no other penalty or fine could be imposed.[8] Secondly, it is a generally accepted principle that competition law has extraterritorial application in all the cases where the overseas conduct of defendant distorts the competition in the domestic market. However the Supreme Court repeatedly refused to acknowledge this principle and had held that the wording of MRTP Act did not provide for the extraterritorial jurisdiction.[9] Thirdly, the MRTP Act did not define certain key provisions[10] such as abuse of dominance, cartels, collusion, price fixing, bid rigging, boycotts, refusal to deal and predatory pricing. It is often argued that lack of definition was immaterial. Because the general nature of the MRTP Act could have covered all anti-competitive practices e.g. restrictive trade practices were defined in a fairly general terms to include all trade practices that prevents, distorts or restricts competition and therefore there was no need for a new law.[11] It is true that the generic nature of MRTP Act was very wide but this generic nature caused ambiguities in the interpretation and application of MRTP Act and ambiguities resulted into atmosphere of general business uncertainty on key issues.[12] Given the above, it was felt that drafting a new law would be more beneficial. This led to the enactment of the Competition Act.

The Competition Act

The Competition Act prohibits or regulates (i) Anticompetitive agreements (section 3 of the Competition Act) (ii) Abuse of dominant position (section 4 of the Competition Act) (iii) Combinations (under section 5 and section 6 of the Competition Act).

As a quasi-judicial body, the Competition Commission is bound by principles of rule of law in giving decisions[13] and the doctrine of precedents. As per the Competition Act the Competition Commission is duly empowered to receive documents and testimonial by way of evidence and therefore is well suited to adjudicate disputes before it on the basis of material adduced by parties and by application

8. See, Chakravarthy S MRTP Act metamorphoses into Competition Act. www. Cuts-international.org/doc01.doc;

9. See American *Natural Soda Ash Corporation (ANSAC) vs. Alkali Manufacturers Association of India (AMAI) and Others (1998) 3 CompLJ 152 MRTPC. ANSAC*, a joint venture of six USA soda ash producers attempted to ship a consignment of soda ash to India. AMAI complained, to the MRTPC to take action against ANSAC for forming a cartel to exports to India. SC did not go into the allegations of cartelisation, it held that the MRTP Act did not give the MRTPC any extraterritorial jurisdiction therefore MRTPC therefore could not take action against foreign cartels.

10. See Study of Cartel Cases in select Jurisdiction at http:// www.cuts-ccier.org/CARTEL/pdf/FinalReport.pdf

11. Ibid

12. Both Supreme Court and MRTP Commission had in various cases such as: *Haridas Exports vs. All India Float Glass Manufacturer Association (AIFGMA), 6 SCC 600 (2002), AIFGMA vs. PT Mulia Industries, 2000 CTJ 252 (MRTPC), Union of India vs. Hindustan Development Corporation 16 SCC 499 (1993), DG (I & R) vs. Modern Food Industries, 3 Comp LJ 154 (1996)*, had not been able to give any guidance to the business community as to what will constitute predatory price under MRTP Act. In the Modern Food Case mentioned above, SC did mention Matsushita but missed matsushita's significance with respect to the market structure and the theory recoupment.

13. These are (a) predictability in the judicial reasoning (b) uniform and consistent application of law

of the principles of evidentiary proof under the Evidence Act. This is important since unlike the United States, a suit for anti-competitive practices cannot be brought in a civil court. Nor does intent in cartel like conduct take the case outside the jurisdiction of the Competition Commission. Further, the scope of investigation of the Federal Trade Commission and the Department of Justice are slightly different;[14] however in India all cases relating to anti-competitive practices can only be investigated by the Competition Commission.

Section 27 of the Act lays down remedies for the violation of sections 3 and 4 of the Competition Act. The Competition Commission may issue a "cease and desist' order, or impose a penalty not exceeding '10 per cent of the average turnover during the preceding three years' from the date of order. In cartel cases Competition Commission could impose a penalty that could be higher of either up to 10 per cent of the turnover or three times the amount of profit derived from the cartel agreement. In the cases of 'contravention by companies', Competition Commission may under the provision of section 48 of the Competition Act proceed against and punish any person who, at the time of the violation, was in charge of the company, unless that person can show that the violation was committed 'without his knowledge' or that he had exercised 'all due diligence to prevent the violation'. Section 43A provides that in case of a failure to notify a combination, the Commission shall impose a penalty of 1% of the total assets or turnover of the combination. Section 42A of the Competition Act provides for the compensation in case of contravention of orders of the Competition Commission. This section provides that a person may make an application to the COMPAT for recovery of compensation from an enterprise for any loss or damage suffered by him for violating the directions of Competition Commission under sections 27, 28, 32, 33 and 41 of the Competition Act.

Restrictive covenants

Section 3 of the Competition Act defines anti-competitive agreements also provides that no enterprise, association of enterprises, person, association of persons shall enter into an agreement which causes or is likely to cause an appreciable adverse effect on competition.

The rulings of the Competition Commission in matters under section 3 and section 4 of the Competition Act show keen sense of understanding of current day business transactions.[15] The reasoning of the Competition Commission in Automobiles Dealers and Lamborghini is balanced and recognises changes in business models without placing dealers in a vulnerable or disadvantageous position. The Competition Commission in these rulings has relied on the criteria provided in section 19 of the Competition Act and has also recommended that all the factors mentioned therein be examined and has sought to ensure uniformity in outcomes and predictability in application of the Competition Act. The Competition Commission has stressed on the need to rely on all factors set out in section 19(3), namely, whether:

a. there was creation of barrier to entry;
b. competitors were driven out of the market;
c. competition was restricted by hindering entry into market;
d. there was accrual of benefits to customers;
e. there was improvement in production or distribution of goods or services;
f. there was promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

14. See for instance Theoretical and Practical Observations on Cartel and Merger Enforcement at the Federal Trade Commission, Remarks of J. Thomas Rosch, Commissioner, FTC at the George Mason Law Review's 14th Annual Symposium on Antitrust Law, February, 2011.

15. *Automobiles Dealers Association vs. Global Automobiles Limited & Anr.* Case No. 33 of 2011 ('Automobiles Dealers') and *Exclusive Motors Pvt. Ltd. vs. Automobili Lamborghini S.P.A.* ('Lamborghini') Case No. 52 of 2012.

By taking into consideration tangible factors rather than mere interpretive analysis of sections[16], the Competition Commission has ensured a fair and reasonable outcome to the application of the provisions of the Competition Act. The application of rules relating to burden of proof and onus of proof would also ensure that even at the preliminary stage, an informant who approaches the Competition Commission, does soon the basis of real and tangible evidence and not on conjectural or hypothetical circumstances. This would also help to put an end to frivolous complaints and abuse of the process of law.[17]

Abuse of dominant position and SOEs

A party is said to be in apposition to abuse its dominance if the party has the power to:

a. impose unfair /discriminatory conditions on sale or purchase of goods,

b. limits production and supply and development of goods,

c. denies market access to goods/services,

d. makes acceptance of contract conditional upon other obligations imposed on a party,

e. uses dominant position in one market to enter into another market.

The Competition Commission has had occasion to consider this aspect in several rulings, particularly cases where trade associations and similar bodies were involved. The Competition Commission is acutely cognisant of limitations of proving certain aspects such as agreements and intents. However, the general trend of the Competition Commission has been a more pragmatic approach by carefully weighing the attending circumstances. However, prior to ascertaining whether there is abuse of dominance, the Competition Commission is first required to make a conclusion on the relevant market. The Competition Act sets out the conditions for ascertaining the relevant market and once the same has been identified, the Competition Commission thereafter examines the behaviour of the party against whom the allegations have been made.

The Competition Commission has had occasion to examine this issue in several cases, apart from those relating to entities and trade associations exercising such power, but also allegations against SOEs[18] and in the context of mergers and acquisitions. The cases examined therein shows that while in some cases, trade associations actively agreed to exclude parties[19] or not transact with a particular party.[20] In one particular case, the Competition Commission has also had occasion to examine issues relating to obligations of a dominant party to compulsorily transaction with other parties in the market.[21] Although the Competition Commission has not emphatically ruled in any of the cases that a party will have to compulsorily transact with any party in the market, the Competition Commission has clearly recognised freedom of contracts and has ensured that no party is wrongfully excluded from a particular market.[22]

16. See Hindustan Lever Limited supra.

17. For a detailed analysis, see Competition Commission in India rules on restrictive clauses in dealership agreements CLR, Feb, 2013 Vol. 1, Part 2, page B-33 by M.S. Ananth.

18. For a detailed analysis, see Competition Law in India, Jurisprudential Trends and the way forward, Nishith Desai Associates, April 2013.

19. FICCI – Multiplex Association of India Federation House v. United Producers / Distributors & Ors. CCI Case No. 1 of 2009.

20. Uniglobe Mod Travels Pvt. Ltd vs. Travel Agents Federation of India, CCI Case No. 3 of 2009.

21. M/s. Kansan New Pvt. Ltd. vs. M/s. Fast Way Transmission Pvt. Ltd. & Ors. Case No. 36 of 2011.

22. Sajjan Khaitan vs. Eastern India Motion Pictures Association & Ors., Case No. 16 of 2011.

The rulings of the Competition Commission therefore clearly demonstrate that wrongful exclusion is an actionable claim and a party which is able to exercise influence in a manner as set out in section 4 of the Competition Act can be held guilty of abusing its dominant position. However, it must be noted that the Competition Commission has never ruled that merely because a party has a dominant position or exercises significant control in a relevant market that by itself is a violation of the Competition Act. This is indeed a salutary feature of the enforcement of the Competition Act.

SOEs

Although the Competition Commission has passed rulings against oil and gas distribution companies and Coal India Limited and its subsidiaries[23], these rulings have been appealed against before COMPAT. The Competition Commission in Coal India's case unequivocally and emphatically held that the Competition Act would apply to SOEs as well. Admittedly this is the position in law – however, the Competition Commission rejected contentions on the non-applicability of the Competition Act to SOEs. It remains to be seen how the appellate court reviews these orders.

What emerges from this analysis is that all entities will have to comply with the provisions of the Competition Act. Further, entities with significant influence in a relevant market will also have to ensure that terms and conditions in contracts are not seen to be oppressive or incorporated with an intention to take advantage of the weak bargaining power of the other party. Although this is a general aspect under the Competition Act, such clauses can change the nature of an allegation when a party exercises significant influence in a relevant market.

Mergers and Acquisitions

Section 5 of the Competition Act explains combination as:

> *'.....acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises......'*[24]

section 6 provides for regulation of combinations. As per section 6, any person or enterprise entering into a combination shall mandatorily give notice to the Commission of any such acquisition, merger or an amalgamation.[25] The objective behind regulating such combinations is to assess the appreciable adverse effect on competition in India while looking at the factors like level of competition, extent of barriers to entry into the market, market share, etc.[26] However, all amalgamations and mergers are not covered in the definition of section 5 of the Competition Act. Only those acquisitions and mergers which cross the specified assets and turnover criteria as set out in the Competition Act are regulated.

The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011[27] ('Combination Regulations') provides for the procedure for compliance of such combinations. Any person or enterprise

23. See for instance http://www.financialexpress.com/news/price-fixing-hc-stays-cci-action-against-oil-cos/1198436. See also *M/s Maharashtra State Power Generation Company Ltd. vs. M/s Mahanadi Coalfields Ltd. & Ors.* 2. *M/s Maharashtra State Power Generation Company Ltd. vs. M/s Western Coalfields Ltd. & Ors,* 3. *M/s Gujarat State Electricity Corporation Limited vs. M/s South Eastern Coalfields Ltd. & Ors, Case No. 03/2012, 11/2012,* 59/2012.

24. Section 5, Competition Act, 2002

25. Section 6(2), Competition Act, 2002

26. Section 20(4), Competition Act, 2002

27. The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011, as amended up to 4th April, 2013

proposing a combination within the meaning of section 5 of the Act shall file a notice under section 6(2) of the Act read with Regulation 5[28] and 8[29] of the Combination Regulation.

Since all the Acts of acquisitions cannot be said to have an appreciable adverse effect on competition in India, certain acts of combinations are normally exempted from the reporting requirement by Regulation 4 of the Combination Regulations under Schedule I.[30]

Once a company makes a notification, the Competition Commission has the power to make enquiries with respect to the proposed combination and to examine if the same would cause or is likely to cause an appreciable adverse effect on competition. The Competition Act provides for the examination of these factors as set out in section 20(4) of the Competition Act to ascertain if there is likely to be an appreciable adverse effect on competition:

(a) actual and potential level of competition through imports in the market;

(b) extent of barriers to entry into the market;

(c) level of combination in the market;

(d) degree of countervailing power in the market;

(e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;

(f) extent of effective competition likely to sustain in a market;

(g) extent to which substitutes are available or are likely to be available in the market;

(h) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;

(i) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;

(j) nature and extent of vertical integration in the market;

(k) possibility of a failing business;

(l) nature and extent of innovation;

(m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;

(n) whether the benefits of the combination outweigh the adverse impact of the combination, if any.

Two such transactions are discussed below.

Jet-Etihad deal

Etihad Airways PJSC (a company incorporated in the United Arab Emirates and its national airline) was acquiring 24% equity interest in Jet Airways (India) Limited and other rights and benefits which the parties mutually agreed upon by the shareholders' agreement, commercial co-operation agreement and investor's agreement, valued at ₹ 2060 crores. Jet and Etihad jointly gave a notice under section 6(2) to the

28. Regulation 5, Combination Regulation, 2011 – Form of notice for the proposed combination

29. Regulation 8, Combination Regulation, 2011 – Failure to file notice

30. Annexure I, The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 – An acquisition which does not result in holding 25 per cent or more of total shares or voting rights of the company, whether directly or indirectly; an acquisition of not more than 5 per cent in any financial year where the acquirer is already holding 25 per cent or more of of total shares or voting rights of the company, but not exceeding 50 per cent; An acquisition of stock-in-trade, raw materials, stores and spares, trade receivables and other similar current assets in the ordinary course of business; A combination referred to in section 5 of the Act taking place entirely outside India with insignificant local nexus and effect on markets in India; etc.

Commission.[31] Interestingly, in the order of the Competition Commission, it has not been set out as to on what basis the Competition Commission exercised jurisdiction and examined the transaction. There is no discussion on either the assets of the entities or the financials arising from the proposed transaction.

Thereafter, in terms of Regulation 14, the parties were required to remove certain defects and provide necessary information and documents for which the parties sought extensions and furnished information in terms of Regulation 16. Further information was sought by the Competition Commission under Regulations 5 and 19 for which repeated extensions were given taken and information was furnished and in the due course substantial changes were also made to the governing documents like SHA (Shareholders' Agreement), CCA (Commercial Co-operation Agreement) and CGC (Corporate Governance Code). Further, Air India also furnished its views and comments on the proposed combination under regulation 19(3). After analysing the entire framework of this acquisition which was proposed for enhancing their airline business through joint initiative, the Competition Commission gave a clearance to this deal stating that *prima facie* there was no competition concern in the transaction.

It is pertinent to note that the Commission had also issued show cause notice to Etihad under Regulation 48[32] of the Competition Commission of India (General) Regulations, 2009 read with Section 43A[33] of the Competition Act stating that the parties consummated and implemented certain parts of the composite combination namely LHR Transaction (London Heathrow Airport transaction) and CCA; and Etihad, being the acquirer in the combination, failed to give notice in accordance with section 6(2) of the Act. In view of this, the Commission imposed a penalty of ₹ 1 crore on Etihad as the obligation to give notice to the Commission, as per Regulation 9[34] of the Competition Commission of India (Procedure in regard to the Transaction of Business relating to Combinations) Regulations 2011, was on Etihad.

In this case, Competition Commission was examining a merger or arrangement in the context of airlines for the first time. Although Competition Commission did not quote any international pronouncements in the ruling, the approach of Competition Commission was similar to the approach followed by the European Commission in making a competition assessment in the context of mergers and operational arrangements between airlines in Europe. For instance, in the merger between British Airways and Iberia, the European Commission concluded that the merger would not affect competition and the merged entity would continue to face competition from other entities.[35] In the case of merger between Northwest Airlines and Delta Airlines, the European Commission allowed the merger and noted that both airlines had benefit of

31. Combination Registration No. C-2013/05/122 dated November 12, 2013.

32. Regulation 48, Competition Commission of India (General) Regulations, 2009 – Procedure for imposition of penalty under the Act

33. Section 43A, Competition Act, 2002 – Power to impose penalty for non-furnishing of information on combinations

34. Regulation 9, Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011, Obligation to file the notice – (1) In case of an acquisition or acquiring of control of enterprise(s), the acquirer shall file the notice in Form I or Form II

35. European Commission – IP/10/938 14-7-2010, available at http://europa.eu/rapid/press-release_IP-10-938_en.htm.

complementarity in their resources.[36] In the case of acquisition of Martinair by KLM[37] the European Commission directed investigation and approved the same thereafter. Interestingly, in the case of the takeover of SN Brussels Airlines by Lufthansa[38] after the European Commission highlighted apprehensions, Lufthansa made several commitments and concessions. After examining these concessions and commitments, the European Commission approved the acquisition subject to Lufthansa complying with the conditions.[39]

This is a landmark ruling as Competition Commission has examined in far greater detail the impact of the proposed transaction on air passenger services for Etihad and Jet and its consequential impact on competition in India than it has in other cases. The approach of the Competition Commission provides clarity regarding the steps to be followed to analyse whether a combination is likely to cause appreciable adverse effect on competition and this analysis would help companies identify whether a proposed transaction would be permissible or not under the Competition Act. The reasoning and conclusions of this ruling were grounded in uncontroverted facts and this is an extremely important aspect as it clearly places the onus on parties to substantiate their claims before Competition Commission.

This pragmatic and balanced approach augurs well for companies that intend to enter into combinations either at the vertical or horizontal level and whether at the domestic or international level.

It is important to note that the issue of foreign investment in India is regulated primarily by the regulations under the foreign exchange laws. As a listed company, Jet is also required to comply with various regulations issued by SEBI apart from compliance with requirements under the Companies Act, 1956 and possibly the Income-tax Act, 1961. The ruling of Competition Commission only approves the proposed transaction from the perspective of competition in the market. Although the issue relating to conflicting jurisdictions by different regulators has not been addressed by the Supreme Court of India, the approval of one regulator is not binding and not an indication of compliance for the purpose of another regulator.

The Competition Commission's order holding that the proposed transaction did not have appreciable adverse effect in the relevant market has been challenged before COMPAT by the Former Air India Executive Director Jitender Bhargava. This appeal is pending adjudication.[40]

United Spirits Ltd. – Diageo Plc deal

Relay B.V., (an indirect wholly-owned subsidiary of Diageo Plc., hereinafter referred as Diageo) and United Spirits Limited (USL) jointly gave a notice under section 6(2) for the proposed

36. European Commission – IP/08/1245 6-8-2008, available at http://europa.eu/rapid/press-release_IP-08-1245_en.htm. The European Commission noted similar commercial principles in the case of merger between United Airlines and Continental Airlines, European Commission - IP/10/1010 27-7-2010, available at http://europa.eu/rapid/press-release_IP-10-1010_en.htm.

37. European Commission – IP/08/1995 17-12-2008, available at http://europa.eu/rapid/press-release_IP-08-1995_en.htm,

38. European Commission – IP/09/129 26-1-2009, available at http://europa.eu/rapid/press-release_IP-09-129_en.htm.

39. Case No. COMP/M.5335- LUFTHANSA/ SN AIRHOLDING, available at http://ec.europa.eu/competition/mergers/cases/decisions/M5335_20090622_20600_229007_EN.pdf.

40. See http://businesstoday.intoday.in/story/compat-to-hear-appeal-against-jet-etihad-deal/1/202198.html

acquisition of shares and control of USL. The notice was given pursuant to the execution of (i) Preferential Allotment Agreement (ii) Share Purchase Agreement and (iii) Shareholder's Agreement on 9th November, 2012 (PAA, SPA and SHA respectively). In terms of Regulation 14, the parties were required to remove certain defects and furnish the required information/ documents and additional information under Regulations 5(4) and 19(2) of the Combination Regulations, which were furnished.

As part of the deal, Diageo would acquire 27.4 per cent stake for ₹ 5,725.4 crore through a combination of share purchase from existing promoters and preferential allotment of shares. In addition, it had offered to acquire an additional 26 per cent stake for ₹ 5,441.07 crore through an open offer for public shareholders.

The execution of the SPA and the PAA triggered an obligation on the part of Relay B.V. to make a mandatory tender offer to the public shareholders of USL under the SEBI Takeover Regulations[41]. If the mandatory tender offer was fully subscribed, Relay B.V. would hold 53.4 per cent of the USL's enlarged equity share capital.

After doing a detailed assessment of the relevant product market and relevant geographic market, Competition Commission observed that post-combination, the market share of the combined entity will not change much. There are multiple brands of other players who are present and effectively competing with the brands of USL and Diageo in those segments, and the proposed combination may bring new products and more variants of the existing brands at different price points which would ultimately enable the consumer to expand his choice set.

On February 26th 2013, Competition Commission had given a green signal to Diageo Plc, the UK spirits company, for acquiring majority stake of 53.4% in United Spirits Ltd. of the UB Group for a total consideration of ₹ 11166.5 crores. Despite getting several clearances, the Karnataka High Court had struck down the transaction on the ground of undervaluation of shares and lack of *bona fides* on a plea by a host of creditors seeking to recover money from Kingfisher Airlines (of the UB Group). This order of the Karnataka HC has been recently challenged in the Supreme Court by Diageo Plc and the United Breweries.[42]

An analysis of the rulings relating to mergers and acquisitions would reveal that companies would need to demonstrate that even if they are covered within the threshold set out in section 5 of the Competition Act, it is important that companies are prepared to demonstrate to the satisfaction of the Competition Commission that the proposed transaction does not cause appreciable adverse effect on competition. The ruling of the Competition Commission in the Jet Etihad case serves as a good indicator of the factors that the Competition Commission would consider in the case of a proposed transaction.

41. Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011

42. 'Diageo moves Supreme Court against High Court order on United Spirits deal' The Economic Times, January 21, 2014, available at http://articles.economictimes.indiatimes.com/2014-01-21/news/46411322_1_united-spirits-diageo-ub-holdings