

# Legislative Brief

## The Competition (Amendment) Bill, 2006

The Bill was introduced in the Lok Sabha on March 9, 2006.

The Parliamentary Standing Committee on Finance [Chairperson: Maj. Gen. (Retd.) Bhuwan Chandra Khanduri] submitted its report on December 12, 2006.

The government business proposed to be taken up in Budget Session 2007 includes the withdrawal of this Bill, and the introduction, consideration and passing of The Competition (Amendment) Bill, 2007. The new Bill is not yet in the public domain, and this Brief is based on the 2006 Bill.

### Recent Briefs:

The Code of Criminal Procedure (Amendment) Bill, 2006  
March 26, 2007

The Foreign Contribution (Regulation) Bill, 2006  
March 22, 2007

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### Highlights of the Bill

- ◆ The Competition (Amendment) Bill, 2006 seeks to amend the Competition Act, 2002 to prevent anti-competitive practices and promote competition.
- ◆ The Bill proposes to divide the powers of the competition authority between two bodies: (a) Competition Commission of India (CCI) and (b) Competition Appellate Tribunal (CAT).
- ◆ The CCI may inquire into any agreement that is likely to have an adverse effect on competition in the country or any enterprise abusing its dominant position in the market.
- ◆ The CAT can adjudicate on certain decisions made by the CCI. They include the decision that an agreement is not causing adverse effect on competition or an enterprise is not abusing its dominant position and the decision on whether a combination is having an adverse effect on competition.
- ◆ A Selection Committee headed by the Chief Justice of India would suggest a panel of names to the central government for appointing members of the CCI and CAT.

### Key Issues and Analysis

- ◆ Both the CCI and certain sectoral regulators are mandated to deal with anti-competitive practices. Such overlap could lead to turf issues between these bodies.
- ◆ Although one of the main functions of the CCI is to promote competition, it does not have the power to give its opinion on competition related issues to the central and state governments on its own accord.
- ◆ The CCI can grant reduced penalty to any member of a cartel who is willing to disclose vital information. However, the Bill does not lay down the extent of the reduction in penalty or what kind of information would be considered as vital.
- ◆ Enterprises can impose reasonable conditions to protect their intellectual property rights. However, the term "reasonable conditions" has not been defined.
- ◆ The employees of MRTPC are to be absorbed in the CCI or the CAT after two years. This differs from the Principal Act, which placed the onus of absorbing these employees on the central government.

## PART A: HIGHLIGHTS OF THE BILL<sup>1</sup>

### Context

The Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) provided for an economic system that essentially controlled monopolies.<sup>2</sup> It prohibited firms from entering and expanding in any sector except those listed in the Industrial (Development and Regulation) Act, 1951 (IDR Act). The IDR Act empowered the state to channel private investment through the extensive use of industrial licensing. From early 1990s, the liberalisation of the economy saw the removal of licensing requirement in most sectors. A High Level Committee on Competition Policy and Law was constituted in 1999 to suggest measures to ensure that companies did not indulge in practices that would prevent fair competition. This Committee recommended a new law to replace the MRTP Act.<sup>3</sup>

The Competition Act, 2002 repealed the MRTP Act and established the Competition Commission of India (CCI) to (a) prevent any practice having adverse effect on competition; (b) promote competition in markets; (c) protect consumers' interests; and (d) ensure freedom of trade for other market participants.

The CCI was established on October 14, 2003 but could not be made operational because two writ petitions were filed – one in the Madras High Court and another in the Supreme Court.<sup>4</sup> The essential challenge in the writs was that the CCI envisaged by the Act was more of a judicial body having adjudicatory powers. In the background of the doctrine of separation of powers recognised by the Constitution of India, the Chairman of the CCI should be a retired Chief Justice or Judge of the Supreme Court or of a High Court, to be nominated by the Chief Justice of India or by a Committee presided over by the Chief Justice of India. Further, the right to appoint the Judicial Members of the Commission should also rest with the Chief Justice of India or his nominee.<sup>4</sup>

The Supreme Court stayed the functioning of the CCI in 2003. The central government declared that it intended to make certain changes in the Competition Act in the light of the issues raised in the writ petition. The Supreme Court in its judgement on January 20, 2005 observed that “if an expert body is to be created as submitted on behalf of the Union of India consistent with what is said to be the international practice, it might be appropriate for the respondents to consider the creation of two separate bodies, one with expertise that is advisory and regulatory and the other adjudicatory. This followed up by an appellate body as contemplated by the proposed amendment, can go a long way, in meeting the challenge sought to be raised in this Writ Petition based on the doctrine of separation of powers recognized by the Constitution.” The Supreme Court left open all questions regarding the validity of the Competition Act, 2002 to be decided after the amendments were made.<sup>4</sup>

The Competition (Amendment) Bill, 2006 seeks to address the legal issues and to make the CCI fully operational. It establishes separate regulatory and adjudicatory bodies, in line with the observations of the Supreme Court.

### Key Features

The Competition (Amendment) Bill, 2006 amends 41 out of 66 clauses in the Competition Act, 2002 (Principal Act). In this section, we discuss the main amendments of the Bill.

#### Competition Commission of India

- The CCI would consist of a Chairperson and a minimum of two and a maximum of six whole-time members. A Selection Committee would recommend the central government on the appointment of all members. The Committee would consist of the Chief Justice of India; the Secretary in the Ministry of Company Affairs; and the Secretary in the Ministry of Law and Justice.
- The term of office of each member is five years. All members of the CCI superannuate at the age of 65.
- A member cannot take employment in any enterprise (except under the central or state government, local authority, or any statutory authority or any corporation established under any central, state or provincial Act or a government company) which has been a

#### Glossary of Terms

**Anti-competitive agreement:** Any agreement between enterprises which is likely to cause an appreciable adverse effect on competition within India is an anti-competitive agreement. It includes agreement between enterprises engaged in similar trade of goods and services which determines purchase or sale prices; controls production, supply, markets of services; or shares the market by allocating geographical area.

**Abuse of dominant position:** An enterprise would be abusing its dominant position if it imposes discriminatory condition or price in sale or purchase of goods or services, limits production of goods, indulges in practices that results in denial of market access in any manner or uses its dominant position in one relevant market to enter into another relevant market.

**Combination:** The merger or acquisition of enterprises would be termed as a combination if parties to an acquisition or merger jointly have (a) assets of more than Rs 1,000 crore or turnover of more than Rs 3,000 crore in India; or (b) assets of \$500 million or turnover of more than \$1,500 million in India or outside India.

- party to a proceeding before the CCI for two years after he ceases to hold office.
- The CCI may appoint a Secretary and any number of experts and professionals as it deems necessary to assist it in performing its duties. The central government may appoint a Director General for assisting the CCI in conducting an inquiry into any contravention of the provisions of the Act.
- The CCI may inquire into anti-competitive agreements, abuse of dominant position by an enterprise, and combinations (see Glossary of Terms). The CCI may conduct an inquiry if it receives any information about an alleged contravention of the prescribed provisions.

### Reference to Statutory Authority

- The Principal Act states that during any proceeding before a statutory authority (i.e. another regulator), if a party claims that the decision of the authority violates any of the provisions of the Act, the statutory authority may refer the issue to the CCI. The Bill adds that the statutory authority can refer an issue to the CCI of its own accord. The CCI has to give its opinion within 60 days and the statutory authority has to record the reasons for its final decision. The CCI's recommendation is not binding.

### Penalties

- Under the Principal Act, if any order or condition of approval of the CCI is violated, the guilty person can be punished with imprisonment for a maximum term of one year, unless the CCI directs his release. He is also liable to pay a penalty of upto Rs 10 lakh. The Bill states that if a person violates CCI's directions related to dominant position, combinations or acts taking place outside India but having an effect on competition in India, he is liable to a maximum fine of Rs 10 lakh or imprisonment for a maximum of one year or both, as deemed fit by the Civil Court having jurisdiction in the matter.
- Under the Principal Act, CCI can issue directions for the implementation of the order. In case of non-compliance, CCI may detain the person in civil prison for maximum term of one year and impose a maximum penalty of Rs 10 lakh. The Bill provides for CCI to refer the issue to a civil court having jurisdiction in the matter. The civil court would entertain complaints only if they are filed by the CCI.
- The Principal Act allows the CCI to impose a reduced penalty on a member of a cartel, which allegedly has an adverse effect on competition, if he makes full disclosure of the alleged violation and such disclosure is vital to the case. However, the Act states that reduced penalty cannot be imposed if an investigation has already been launched on the alleged offence. The Bill, on the other hand, states that the CCI can impose a reduced penalty unless the report of the investigation has been received before such disclosure is made.

### Competition Appellate Tribunal

- A Competition Appellate Tribunal (CAT) is established to hear and dispose of appeals against certain decisions made by the CCI. Some of the decisions that can be challenged include: (a) the CCI's decision that an agreement is not causing adverse effect on competition or an enterprise is not abusing its dominant position; (b) the CCI's order to discontinue the abuse of dominant position, modify agreements or divide an enterprise; (c) the CCI's decision on whether a combination is having an adverse effect on competition, and if so, the steps to be taken to rectify the matter.
- The CAT would consist of a Chairperson and a maximum of two members, appointed by the central government from the panel of names proposed by the Selection Committee. The Chairperson would have to be a Judge of the Supreme Court or the Chief Justice of the High Court. Every appeal has to be filed within 60 days from the date on which a copy of the decision of the CCI is received by the central or state government, local authority or any person aggrieved by any of the above mentioned decision of the CCI. The CAT would attempt to dispose of the case within six months.
- The CAT can adjudicate on claim for compensation that may arise from the findings of the CCI.
- If any person violates any order of the CAT, without reasonable grounds, he can be detained in civil prison for a maximum period of one year and fined upto Rs 10 lakh.
- Any person can appeal the decision of the CAT in the Supreme Court within 60 days from the date on which the order of the CAT is communicated to the person.

### Repeal of MRTP Act

- The Bill repeals the MRTP Act, 1969 with the provision that the MRTP Commission may continue to exercise its powers for two years in respect of all cases filed before the commencement of the new legislation. After two years, all cases pertaining to monopolistic trade practices or restrictive trade practices would be transferred to the CAT. All cases pertaining to unfair trade practices would be transferred to the CCI. The repeal of the Act would not affect the previous operation of the Act or any penalty or punishment imposed under the Act. Also, the employees of MRTPC would be absorbed by CCI or CAT.

## PART B: KEY ISSUES AND ANALYSIS

### Purpose of a Competition Law

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The purpose of formulating a competition law in India was to shift the focus from curbing monopolies to promoting competition. Some critics point out that the legislation focuses on preventing excesses that can emerge in a competitive process rather than promoting competition. The reason is India's competition law is based on laws in countries such as the U.S., U.K. and Australia where the principle of free competition is already embedded in their economies.<sup>5</sup> However, others are of the opinion that such a law is a step in the right direction although there are issues that need deeper scrutiny.<sup>6</sup> These issues have been discussed in the remaining part of the brief.

### Role of CCI vis-à-vis Sectoral Regulators

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#### Overlap of Functions

In India, independent regulators have emerged to meet certain objectives such as effective functioning of competitive markets, ensuring universal and equitable access to goods and services, and protecting consumer interests. Some of the major regulators include the Insurance Regulatory and Development Authority (IRDA), the Petroleum and Natural Gas Regulatory Board and the Telecom Regulatory Authority of India (TRAI). The regulators in the telecom, electricity and securities sectors function as quasi judicial bodies while appeals against their orders are heard by Appellate Tribunals.<sup>7</sup>

The CCI is mandated to deal with anti-competitive practices. However, except for the telecom sector in which the TRAI Act clearly demarcates the jurisdiction of Telecom Dispute Settlement and Adjudicatory Tribunal and MRTPC<sup>8</sup>, no such clear cut demarcation exists for other regulators. There is a view that the competition authority and the regulators should be given precise roles in any regulated sector.<sup>7</sup> There is another view that any dispute where violation of competitive principles is not central to the case should be dealt with by the sectoral regulator.<sup>9</sup>

#### Incentive to Refer a Case to CCI

The Bill states that a sectoral regulator can refer a case to the CCI on its own discretion as well as at the request of one of the parties. Although the recommendation of the CCI is not binding, the sectoral regulator would have to state its reasons for its final decision. In such a scenario, there is no incentive for the sectoral regulator to refer a case to the CCI even if it is related to competition issue. Some countries require mandatory consultation between regulators and competition authority before any action in regulated industries. For example, the law in France provides for mandatory consultation between radio & television sector regulator and competition authority.<sup>10</sup>

### Functions of CCI

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#### Authority

Although one of the main functions of the CCI is to promote competition, it does not have the power to give its opinion on competition related issues to the central and state governments on its own accord. It can make recommendations only if the central and state governments consult the CCI while formulating competition policies. Also, the recommendations of the CCI are not binding on the central government.

#### Autonomy

The central government can, under certain circumstances, supersede the CCI for a period of six months and there is no restriction on the reappointment of former members. In such a case, the central government can remove a member who is not willing to follow its orders while retaining the other members. This provision differs from that of some other regulators such as TRAI, in which case the central government does not have the power to supersede the regulatory authority.<sup>11</sup>

#### Dilution of powers of CCI

The Principal Act provided CCI with the powers to enforce its orders, including imprisonment of offenders. The Bill amends this, and removes such powers of enforcement. Instead, if a party does not comply with its directions, the CCI has to approach a civil court to enforce its orders.

## Regulation of Combinations

Any party to a combination (acquisition or merger of enterprises) can voluntarily disclose the details of the combination to the CCI. The Standing Committee on the Competition (Amendment) Bill, 2006 has suggested that it should be mandatory to refer every combination to the CCI.<sup>12</sup>

Acquisitions or mergers are called combinations when they cross a certain threshold limit of assets or turnover prescribed in the Bill.<sup>13</sup> Specifying these thresholds in the Bill rather than in the rules reduces flexibility to update them in line with inflation and market growth.

## Penalties

### Reduced penalty for informers

The Bill provides for allowing the CCI to grant lesser penalty to any member of a cartel who is willing to disclose vital information. However, the Bill does not lay down the extent of the reduction in penalty or what kind of information would be considered as vital.

The Standing Committee has recommended that the first informer who provides vital evidence be given complete amnesty while other informers be given reduced penalties, provided they continue to collaborate in investigations against the remaining cartelists.<sup>12</sup> In the European Union and the U.S., leniency programmes were revised to guarantee complete amnesty to the first firm that gave enough evidence to commence an investigation and reduced penalty for those providing useful evidence subsequently, provided they continued to collaborate in investigations against the remaining cartelists.<sup>14</sup> Such provisions motivate cartel members to become informers.

## Composition of CCI and CAT

The Selection Committee for both CCI and CAT is headed by the Chief Justice of India. However, the CCI (unlike CAT which is a quasi-judicial body) is intended to be an expert body in the field of competition, where expertise is required not only in law but in areas such as economics, commerce, finance, management, accounts, consumer welfare etc. Selection Committees in regulatory bodies such as IRDA and Securities and Exchange Board of India are headed by experts and not the Chief Justice.<sup>12</sup>

The mandate of the Selection Committee is to propose a panel of names for the various posts in the CCI and CAT. In order to broaden the scope, the Standing Committee has recommended that the Selection Committee could be renamed as a Search-cum-Selection Committee so that it can consider candidates who are eminently suitable for the post but have not formally applied for the same.<sup>12</sup>

The Bill proposes to reduce the maximum number of members of CCI (including the chairman) from 11 to six. It also provides for the CCI to take decisions collectively as a collegium, rather than in benches of at least two members as in the Principal Act. The provisions for regional benches and at least one specialised merger bench in the Principal Act are to be deleted. However, it might make the CCI inaccessible to parties in other parts of the country. Also, every member might not have the specialised expertise required for dealing with mergers.<sup>14</sup>

## Inconsistency in Option of Appeal

The CAT can hear and dispose of appeals against any order by the CCI regarding prima facie evidence against anti-competitive agreements or abuse of dominant position. However, it may not do so in case of combinations.

## Protection of Intellectual property rights

Enterprises can protect their intellectual property rights by imposing reasonable conditions, which would not be viewed as anti-competitive. However, the term "reasonable conditions" has not been defined.

## Employees of MRTPC

The employees of the MRTPC are to be absorbed in the CCI or the CAT after two years, when MRTPC ceases to exist. The Principal Act had placed the onus on the central government, and not the CCI, to absorb these employees. The Standing Committee has recommended that the MRTPC staff be either given voluntary retirement or appropriate training before they are transferred to the CCI.<sup>12</sup>

## Transparency

The Electricity Act, 2003 states that the Central Commission “shall ensure transparency while exercising its powers and discharging its functions.” There is a similar provision in the TRAI Act. However, the Bill does not have such a clause.

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### Notes

1. This Brief has been developed on the basis of the Competition (Amendment) Bill, 2006 introduced in Lok Sabha on March 9, 2006. The Bill was referred to the Parliamentary Standing Committee on Finance [Chairperson: Maj. Gen. (Retd.) Bhuwan Chandra Khanduri] which submitted its report on December 12, 2006.
2. The Monopolies and Restrictive Trade Practices Act, 1969.
3. Report of the High Level Committee on Competition Policy and Law (Chairperson: S.V.S. Raghavan), Government of India, May 2000.
4. Standing Committee Report on Competition (Amendment) Bill, 2006, submitted on December 12, 2006.
5. Note of Dissent by Sudhir Mulji in the Report of the High Level Committee on Competition Policy and Law, May 2000.
6. Standing Committee Report on the Competition Bill, 2001, Presented on November 21, 2002.
7. “Approach to Regulation: Issues and Options,” Planning Commission, Government of India, August 2006.
8. Telecom Regulatory Authority of India Act, 1997.
9. Sea TV Network Ltd. vs. Star India Pvt. Ltd. and Moon Network Pvt. Ltd. [Petition No. 41 (C) of 24<sup>th</sup> August, 2005], Telecom Disputes Settlement & Appellate Tribunal.
10. Relationship between competition authority and sectoral regulator, Presentation by Amitabha Kumar, Competition Commission of India, 25-26 March, 2006 (see [http://www.competition-commission-india.nic.in/speeches\\_articles\\_presentations/9-PPT\\_Lahore\\_06.pdf](http://www.competition-commission-india.nic.in/speeches_articles_presentations/9-PPT_Lahore_06.pdf)).
11. The Telecom Regulatory Authority of India Act, 1997.
12. Forty Fourth Report on Competition (Amendment) Bill, 2006, Standing Committee on Finance, December 12, 2006.
13. For example, if two firms are merging, the limit is Rs 1,000 crore of assets or Rs 3,000 crore of turnover within India. Other limits are specified for international assets, group holdings etc.
14. Aditya Bhattacharjea, “Amending India’s Competition Act,” Economic and Political Weekly, October 14, 2006.

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