

INDIAN PARLIAMENT PASSES COMPETITION BILL

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Introduction

On September 10, 2007, the Indian Parliament passed the Competition (Amendment) Bill, which amends the Competition Act of 2002, and provides the Competition Commission of India with the statutory powers necessary to adequately protect consumers and competitors.¹ The Government is now in the process of receiving assent from Indian president Pratibha Patil. According to Corporate Affairs Minister Prem Chand Gupta, who first introduced the Bill on August 29, 2007, “The Commission will be fully operational by mid-2008.”

A Long Time Coming

The Competition Commission of India was originally established on October 14, 2003 under the Competition Act of 2002. The purpose of the Commission was to “prevent practices having an adverse effect on competition, 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 in India, and for matters connected therewith or incidental thereto.”² However, the 2002 Act, which seemingly granted the Commission with broad authority in protecting consumers, failed to do just that.

The 2002 Act, and the Rules promulgated thereunder, provided that the Government was to appoint the key members of the Commission. The Commission was to consist of: 1) a retired

¹ The Competition (Amendment) Act, 2007, No. 70 of 2007; India Code (2007), available at http://www.cuts-ccier.org/pdf/IndianCompetitionAmendmentBill_2007.pdf

² The Competition Act, 2002, No. 12 of 2003; India Code (2003), available at http://www.cuts-ccier.org/pdf/CompetitionAct_2002.pdf

Judge of the Supreme Court or a High Court or a retired Chairperson of a Tribunal established under an Act of Parliament or a distinguished jurist or a Senior Advocate for five years or more; 2) a person with 25 years of professional experience in international trade, economics, business, commerce or industry; and 3) a person with 25 years of professional experience in accounting, management, finance, public affairs or administration.³

The 2002 Act essentially remained dormant due to the filing of a writ petition before the Supreme Court, which objected to the Rule allowing the government to select the key members of the Commission.⁴ According to the petitioner, “the Competition Commission envisaged by the 2002 Act was more of a judicial body having adjudicatory powers” and thus, in keeping with the constitutionally recognized doctrine of separation of powers, “the right to appoint the members should rest with the Chief Justice of India or his nominee.”⁵

The Court ultimately dismissed the writ on January 20, 2005, noting that it would be in the best interest of the Government to create two separate bodies, one with expertise for advisory and regulatory functions, and the other for adjudicatory functions.⁶ Following the dismissal of the writ, the Indian government took action to adopt a bill that would protect consumers from anticompetitive conduct, while remaining true to the doctrine of separation of powers.

The New Commission

The new Bill finally provides the Commission with the broad statutory powers necessary to protect consumers. The Commission will not only act as the market regulator of anti-competitive conduct, but will serve in advisory and advocacy roles as well. A selection committee will be established to appoint the members to serve on the Commission. In keeping

³ See *Brahm Dutt v. Union Of India*, Writ Petition (civil) 490 of 2003, Jan. 20, 2005, available at <http://www.globalcompetitionforum.org/regions/asia/India/CASE%20NO490%20brahmdutt.pdf>

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

with the opinion of the Supreme Court in *Brahm Dutt v. Union of India*, the selection committee will include the Chief Justice of India or his nominee, one member from the ministries of corporate affairs and law, and two experts in the fields of law and accounting. The Commission itself will consist of a chairperson and not less than two or more than ten members.

While the Commission will serve as an expert body to prevent and regulate the misuse of market dominance, the Bill also provides for a three member “Competition Appellate Tribunal,” which will carry out essential judicial functions, as recommended by the Supreme Court in *Brahm Dutt*. The Tribunal will be headed by a current or former Supreme Court Justice or Chief Justice of a High Court and will hear or dispose of the appeals stemming from any decision of the Commission. Appeals from the Tribunal will be heard by the Supreme Court.

The Bill makes few changes to the actual substantive provisions of the 2002 Act, which serve to proscribe anticompetitive behavior. The Act prohibits any agreement between enterprises relating to production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition. The Bill expressly bans tie-in arrangements, exclusive supply agreements, exclusive distribution agreements, refusals to deal and resale price maintenance if such agreements have an adverse effect on competition. However, the Bill does anticipate possible justifications for some agreements and provides an exemption where those who entered into the agreements did so to increase efficiencies in production, supply, distribution or acquisition of goods.

Addressing unilateral anticompetitive conduct, the Bill provides that no enterprise shall abuse its dominant position. An abuse occurs when an enterprise directly or indirectly imposes

unfair discriminatory conditions on (1) the purchase or the sale of goods or services; or (2) the price in purchase or sale, including predatory price of goods or services.

Consumers and competitors are protected from the possibility of anticompetitive mergers, as the Bill requires mandatory notice to the Commission of any merger or combination of any person or enterprise within thirty days of the merger. Failure to notify the Commission will result in a penalty of up to one percent of the total turnover of assets. The Commission is also authorized to penalize all violators of its decrees with fines or imprisonment.

Effects on Preexisting Consumer Protection Laws

The new Bill does not make entirely moot the Monopolies and Existing Restrictive Trade Practices Act of 1969. The MRTCP, the commission responsible for hearing cases under that Act, will continue to try pending cases for two years after the full establishment of the Competition Commission. After two years, the Monopolies and Existing Restrictive Trade Practices Act will be fully dissolved, as its purpose is fully served by the new Competition Act.

However, the new Bill will not stand alone in protecting consumers of India. Although the Monopolies and Existing Restrictive Trade Practices Act will dissolve with the passing of time, the Consumer Protection Act of 1986 remains in full effect and serves as the dominant force in protecting Indian consumers.⁷ The Act, or COPRA, recognizes six factors essential to consumer protection: 1) safety; 2) information; 3) choice; 4) representation; 5) redress; and 6) consumer education. COPRA brought about a movement for judicial reform, which resulted in the creation of quasi-judicial courts that solely hear the grievances of consumers.⁸

⁷ The Consumer Protection Act, 1986, No. 68 of 1986; India Code (1986)

⁸ *Consumer Rights and its Expansion: Rights and Responsibilities*, CUTS International, available at <http://www.cuts-international.org/Consumer-Rights.htm>

With the procedural and constitutional hurdles finally behind them, the Competition Commission of India is now fully equipped to protect Indian consumers and competitors from the dangers of anticompetitive behavior and dominant market abuse.