

WHY IS INDIA'S NEW COMPETITION LAW NOT AS YET IN FORCE?

The Competition Act, 2002 (the "Act") was to have ushered in a new regime for competition law in India this year. However, inspite of being enacted some time back, the Act has not been fully notified, and the existing Monopolies and Restrictive Trade Practices Act, 1969 (the "MRTP Act") continues to be the law. Currently, sections 1, 2, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 22, 23, 36, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63 (except clause (n) of sub-section (2)), 64, and 65 of the Act, pertaining to constitution of the Competition Commission of India ("CCI"), etc., have been notified. Sections 3, 4, 5 and 6, which contain the crux of the Act with regard to anti-competitive activities, abuse of dominant position, combinations and pre-merger notification provisions, have not been notified.

The Act provides for the establishment of the CCI in place of the MRTP Commission constituted under the MRTP Act. To this end, the rules for selection of the Chairperson and the members of the CCI were notified on April 4, 2003. The Government of India appointed Mr. Deepak Chatterjee, the former Commerce Secretary, as the Chairman of the CCI. Unfortunately, this appointment of a bureaucrat as the head of the CCI has created a ruckus and has been challenged by way of a public interest litigation filed in India's Supreme Court.

It has been contended by the petitioner that only a judicial person should head quasi-judicial bodies such as the CCI. India's Attorney General, in defending the Act, has argued that commissions such as the CCI often comprise of bureaucrats not only in India but also in other countries.

In this regard, the Supreme Court has expressed serious concern over the CCI being headed by a non-judicial person and has described this act of appointment of a retired bureaucrat as the head of the CCI to be a "direct attempt" to encroach upon the jurisdiction of the judiciary. Further, the Supreme Court has found problems in section 39 of the Act, which, in its current form, provides that orders of the CCI may be executed by the High Court or any principal civil court, thereby creating a situation where the High Court or a principal civil court is regarded as below the CCI, a quasi-judicial body. Therefore, the Supreme Court has directed the Indian Government to amend or repeal this provision and has obtained an undertaking from the latter.

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It is surprising that the Supreme Court has come down heavily on the appointment of a bureaucrat as the head of the CCI considering that antitrust authorities have more market regulatory functions as opposed to legal functions. Moreover, individuals with administrative experience head other Indian regulators, such as the Securities & Exchange Board of India and the Insurance Regulatory and Development Authority.

The hearing of the petition has been adjourned to December 16, 2003 in order to enable the Indian Government to take appropriate action. Notwithstanding these initial hiccups, the Act will most likely come into force fully in early 2004.

For additional details, please contact Mr. Akil Hirani.