INDIA – COMPETITION LAW WRAP 2018

The Competition Act, 2002 (the "**Act**") sets out the regime for anti-competitive practices and merger control in India. While the Competition Commission of India (the "**CCI**") is a fairly young regulator, over the last few years, the jurisprudence on Indian competition law and the merger control regime has developed substantially. This update highlights a recent amendment to the merger control regulations and some orders on competition law matters.

Amendments to the merger control regulations

Recently, the CCI has amended the CCI (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (the "**Combination Regulations**"), which regulate the procedure for pre-merger notifications. The key amendments to the Combination Regulations are as follows:

- Prior to issuance of the *prima facie* opinion of the CCI on the effect of a combination, the parties can request the CCI that they wish to withdraw a pre-merger notification and substitute it with a new notification. In this case, the fee paid by the parties along with the original notification can be adjusted against the fee payable for the subsequent notification if it is filed within three (3) months from the date of withdrawal.

- Prior to issuance of the *prima facie* opinion of the CCI on the effect of a combination, the parties can make modifications to the combination, and the CCI can approve the combination on the basis of such modifications. The time taken by the CCI to assess the modifications is to be excluded from the time limit of thirty (30) working days for issuance of a *prima facie.*

- If the CCI issues a notice with the *prima facie* opinion that the combination may have an adverse effect on competition in India, the parties can make modifications to the combination, and the CCI can approve the combination on the basis of such modifications.

- The CCI has the power to appoint expert agencies to monitor implementation of any modifications to a combination, if deemed necessary.

The ability of the parties to propose modifications or make voluntary commitments to mitigate anti-competitive effects of the combination at any time during the assessment will help parties adapt to the CCI's findings rather than awaiting the Director General's report and then following the procedure under the Act, which usually delays the transaction timelines a fair bit. Also, while parties were permitted to notify any changes in the combination (such as the transaction structure) to the CCI in the course of the assessment, there was no provision to replace the filing in its entirety. In such instances, the parties would have to withdraw the filing, make another filing and pay additional fees. All of the above changes are laudable and indicate that the CCI is open to adopting a more collaborative approach to approve combinations rather than issuing adverse orders based on its own evaluation.

Acquisition of Fortis Healthcare Limited by IHH Healthcare Berhad

On July 13, 2018, Northern TK Ventures Pte. Ltd. ("Northern"), an indirect wholly-owned subsidiary of IHH Healthcare Berhad ("IHH") executed a share subscription agreement for acquisition of Fortis Healthcare Limited ("FHL") by way of subscription to 31.10% shares of FHL. On account of the foregoing acquisition, Northern also made open offers to the shareholders of FHL and Fortis Hospital Limited (on account of the indirect change in control). In the event of full acceptance of the open offers, Northern would hold 57.10% of FHL and 88.90% of Fortis Hospital Limited.

In its assessment, the CCI noted that while Northern is an investment holding company, its parent companies, i.e., IHH and Parkway Pantai Limited were engaged in provision of healthcare services, including operating a hospital, medical centres and diagnostic clinics, similar to FHL. Further, IHH had a 50:50 joint venture with Apollo Hospitals Enterprises Limited to operate the Apollo Gleneagles Hospital in Kolkata, India (the "**Apollo JV**"), and a 50% stake in Khubchandani Hospitals Private Limited for construction of a greenfield hospital in Mumbai.

In course of the assessment, Northern submitted voluntary commitments to the CCI with regard to control over the Apollo JV, including that: (i) no common directors would be appointed by Northern in FHL and the Apollo JV; (ii) the directors of appointed by Northern in each of FHL and the Apollo JV would submit undertakings prohibiting disclosure of commercially sensitive information or day-to-day operations to the directors of the other party or to any third party; and (iii) a rule of information control would be implemented at Northern and the Apollo JV to mitigate exchange of sensitive information. Northern also undertook to submit an annual compliance certificate to the CCI for the foregoing.

On the basis of the foregoing commitments, the CCI did not foresee an appreciable adverse effect on competition in India on account of the proposed acquisition of FHL by Northern. This order reflects a practical example of the recent amendments to the Combination Regulations, which permit parties to suggest modifications voluntarily to the CCI at any time during the assessment proceedings.

Telecom Regulatory Authority of India has jurisdiction over competition law matters in the telecom sector

In 2016, Reliance Jio Infocomm Limited ("**Reliance**") filed a complaint of cartelization against various telecom operations, including Idea Cellular Limited, Bharti Airtel Limited and Vodafone India Limited (the "**Telecom Operators**") before the CCI. Reliance contended that the Telecom Operators had entered into anti-competitive arrangements and denied point of interconnection access to Reliance at the time of commencement of its operations in India. Further, Reliance alleged that the Telecom Operators denied mobile number portability requests from customers who wanted to port to Reliance. Lastly, it was alleged that the Cellular Operators Association of India was facilitating the cartel arrangement between the Telecom Operators. Based on the preliminary findings, on April 21, 2017, the CCI ordered the Director General to investigate and submit a report on the allegations.

The Telecom Operators filed a writ petition before the Bombay High Court (the "**Bombay HC**") on the grounds that the CCI did not have the ability to deal with telecom matters, and the Telecom Operators pleaded for quashing of the CCI's order. The Bombay HC held that the telecommunications sector is regulated and controlled by the Telecom Regulatory Authority of India ("**TRAI**") and that the interpretation of any interconnection agreements should be settled by TRAI or the Telecom Disputes Settlement and

Appellate Tribunal and not by the CCI. It further held that the Act was not sufficient to decide and deal with issues arising out of the provisions of the TRAI Act, 1997, and therefore, the CCI had no jurisdiction to decide and deal with aspects of development of the telecommunications sector. On this basis, the Bombay HC set aside the CCI's order of investigation.

The Supreme Court dismissed the appeal filed by Reliance against the Bombay HC's order but did not confirm the Bombay HC's view that the TRAI had the sole jurisdiction to decide on competition law issues involving telecom companies. On the contrary, the Supreme Court has held that the CCI could investigate on this matter once the TRAI has dealt with it and decided the jurisdictional aspects.

The Supreme Court's order aims to strike a balance between the predicaments of sector regulator's jurisdiction over competition law matters versus the CCI's jurisdiction on regulated sectors. While the sectoral regulator has been given precedence in this matter, the CCI has an equal say on the competition law aspects as well.