



The Quarterly Newsletter of Competition Commission of India

# Fair Play

PROMOTING AND SUSTAINING COMPETITION IN MARKETS

VOLUME 2 : JULY - SEPTEMBER 2012

**GOOGLE'S ALLEGED ABUSE OF DOMINANCE**

**CHEMISTS AND DRUGGISTS ASSOCIATIONS PENALISED**



Chairperson CCI with his counterparts signing India US MOU on antitrust cooperation

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# From the desk of the Chairperson

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We brought out the first issue of FAIR PLAY with the usual trepidation associated with a new birth. It has been well received. We have received many valuable and constructive suggestions. Our grateful thanks to all those who helped us in improving our efforts.

The Competition Commission of India (CCI) continued its efforts to couple enforcement with advocacy. An area of focus which suggested itself based on matters which were enforced is the role of trade associations. Industry and trade bodies are, understandably, as old as businesses. They serve a very useful purpose in that they provide a platform for stakeholders to meet, discuss and join together to protect their legitimate commercial interests. However, the trade associations can also, either due to ignorance or deliberately, get involved in acts of commission or omission which can fall foul of various economic legislations. In particular, this may be true of the Competition Act, 2002, which is a relatively new statute and familiarity with its provisions may thus be limited. We are, therefore, making special efforts to sensitize the trade bodies. This quarterly issue carries a focus story on this subject. We also propose to engage with the larger trade associations in the form of a physical dialogue some time in December 2012.

Capacity building of human resources within the Commission is one of the key focus areas. In addition, helping to build a *strong knowledge base in the field of competition law and policy in the country is equally critical. This calls for involvement of academic institutions in this endeavour.* We are, therefore, pursuing the idea of a Knowledge Partnership Initiative with institutes of excellence in the field of law, management and economics. The first such meeting with the heads of law schools was held during this quarter. This was indeed a very useful engagement and a broad plan of action for the future was considered. A similar meeting with reputed schools of management and economics is scheduled to be held later this year. Based on these discussions, we will be able to build an architecture of continuous engagement with some of the schools in the field of research and academics. As part of this exercise, we would be open to assisting some students in the area of competition law. If all goes well, we could in the future look at setting up at least one Chair on competition law.

With a view to getting cross section of views and ideas, CCI has set up an Eminent Persons Advisory Group (EPAG). It will serve as a sounding board for the Commission Members and also as a pool of talent and expertise which we can dip into periodically. The idea is to engage with this group twice or thrice a year. The first such interaction took place on July 23, 2012.

The world is getting smaller and integrated in business and finance. Accordingly, we are developing formal partnerships with mature competition jurisdictions. In pursuance, a Memorandum of Understanding was signed in Washington DC on September 27, 2012 between the Indian competition authorities and US antitrust agencies. This will help us elevate the technical cooperation with the US Federal Trade Commission and the Department of Justice.

A handwritten signature in black ink, which appears to read "Ashok Chawla". The signature is written in a cursive style and is underlined with a single horizontal stroke.

Ashok Chawla

## Trade Associations: An Antitrust Challenge



Trade associations (also known as industrial association or business association) are unique forums, in which competitors from the same industry or sector meet to discuss issues of common interest, find common solutions and further their common commercial/professional interests. Their activities have, however, been subject to close scrutiny by competition jurisdictions across the world.

Trade associations play an important role in modern economies. There are activities and functions which cannot be pursued efficiently by single firms on their own but are better suited for a collective effort. These activities, which in many instances advance consumer welfare, can be pursued collectively by market players through trade and professional associations. Product standardisation and harmonisation to improve product quality and

Trade associations perform plethora of legitimate functions that promote competitiveness of the industry as a whole and also enhance consumer welfare. Despite their many pro-competitive aspects, they remain vulnerable to stepping outside the boundaries placed by competition law.

safety, promotion of good business practices, advocacy of industry interests before governments and public agencies, determination of ethical rules for professions etc. are examples of functions that can only be pursued if businesses cooperate and collaborate. In addition, trade

associations perform other beneficial functions such as providing a platform to discuss industry specific issues, collecting and disseminating aggregate market information to help members make informed decisions, carrying out market research, publishing trade journals/reports and organizing conferences /periodic meetings. Thus, trade associations perform plethora of legitimate functions that promote competitiveness of the industry as a whole and also enhance consumer welfare.

Despite their many pro-competitive aspects, they remain vulnerable to stepping outside the boundaries placed by competition law. This is because by definition, trade associations offer opportunities for repeated contacts between direct competitors and involve cooperation amongst competitors in the same trade. In

1776, Adam Smith observed in *The Wealth of Nations*, “*People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices*”. Casual discussions of prices, quantities, customers, territories, market shares, terms of sales and advertising restrictions and future business strategies can lead to agreements or informal understanding. This could easily spill over into illegal coordination, so called cartelisation. In addition, to the extent that the legitimate operations of an association may involve some sort of regulatory function, an association may contribute to the creation of barriers to entry or restrict the ability of competitors to compete in a given market such as through exclusive or closed discriminative industry standards. At the same time, trade association may distort the market competition by boycotting a member or product or colluding to raise price or limit supply of goods and services. In highly concentrated markets, such probability is higher but even in fragmented markets, trade associations have been found to indulge into anti-competitive conduct.

Thus, there is no doubt that trade associations do add value to industry/sector where they operate but they may also turn out to be facilitator of anti-competitive conduct – inadvertently or deliberately. This may be because trade associations significantly lower the organisation cost of coordinated behaviour in the markets. They not only lower the cost of meetings and coordination of activities among firms in a market but also facilitate establishment and sustenance of a cartel.

## Trade Associations and Competition Law

Competition law treats the activities of trade associations much like any other form of cooperation between competitors. For competition law purposes, decisions or recommendations of trade associations are treated as agreements between its members and law may be breached even when they are not binding on the members. Competition enforcement is getting increasingly focussed on trade associations' practices that facilitate collusion among the members. A fair number of the cartel cases brought by competition agencies around the world directly or indirectly involve a trade association.

The Competition Commission of India (CCI) has not been an exception to the global trend and the very first case investigated by CCI related to actions of a trade association. CCI imposed a nominal penalty of Rs. 1 lakh each on 27 film producers on charges of colluding through an association to exploit multiplex owners. Similar orders were passed by the Commission in the cases of Reliance Big Entertainment and UTV Software against Film Chambers of Commerce and Motion Picture Associations operating in various states in India. The first time CCI used its powers under Section 33 of the Competition Act, 2002 (hereinafter, the Act) also happened to be against a trade association i.e. Paper Merchant Association. In cases against film associations, CCI found that rules regarding compulsory registration of films before release as well as rules restricting business by members with non-members were anti-competitive in nature and violated Section 3(3) of the Act. Similarly, in the Travel Agents Association case, refusal to deal by

Competition law treats the activities of trade associations much like any other form of cooperation between competitors.

way of boycott was held as violation of Section 3(3) (b) of the Act. The Commission also imposed hefty penalty against cement manufacturers as well as Cement Manufacturers Association. The Commission has recently imposed penalty on Chemists and Druggists Associations for violation of Section 3(3) (a) (b) of the Act.

Thus, it may be seen that in a short span of three years, CCI has found a number of practices and conducts of trade associations as anti-competitive. Many practices of associations, which they thought as their legitimate right such as compulsory membership, price determination, commission and discounts, imposition of arbitrary rules etc., have been found to be in breach of the Act. These orders of CCI are a clear message to the trade associations that they must use the opportunity of coming together to further the legitimate interests of their business community and consumers and not indulge in anti-competitive activities.

The Act does not create any exception for trade associations. Trade associations find explicit mention in Section 19(1) of the Act. Furthermore, trade associations may be covered under Section 2 (k) (v) of the Act under the heading “Association of Persons”. Association of enterprise as mentioned in Section 3 of the Act may also be considered as trade association. Thus, it is plausible to assume that legislative intent has been to curb anti-competitive conduct of trade associations. Since the membership

of trade associations comprises of competitors, every decision, direction or recommendation of an association is generally required to be arrived at by consensus amongst the members. This meeting of minds amongst competitors may be construed as an 'agreement' within the meaning of the Act attracting provisions of Section 3 of the Act. Most of the prohibited conduct of trade associations may fall in the category of cartelisation and the Act provides for stringent penalty for cartel behaviour. The penalty provided is ten per cent of the turnover or three times the profits, whichever is greater. There is also a whistle-blower type provision for lesser penalty on a party to a cartel that comes clean with full and true disclosure that yields vital information, and cooperates with CCI.

## Compliance

As the English maxim goes, prevention is better than cure. In view of the serious risks of violation of competition law, it becomes imperative for the trade associations to know the boundaries of their legitimate conduct to ensure compliance with the competition law. Compliance with the law not only reduces the incidence of anti-competitive practices, but substantially reduces the need for enforcement action, thus saving cost both for the affected party and the Commission.

Trade associations are advised based on the experience CCI has gained since 2009 that often by-laws, rules and regulations framed by trade associations contain clauses, which are restrictive and market distorting in their impact. When members of trade association agree among themselves to enforce such clauses, they may be committing breach of Section 3 of the Act. CCI has

Trade associations have a major responsibility in promoting compliance to competition law and develop a strong competition culture in the country.

ordered trade associations found in breach of Section 3 of the Act to amend such by-laws etc and they are complying by removing anti-competitive clauses from their memorandums and by-laws. Given the length and breadth of the country and thousands of trade associations existing in various sectors of Indian economy, voluntary compliance is solicited from trade associations to remove the anti-competitive clauses from their statutes.

Trade associations are not only at the risk of violating the competition law, but can also benefit from it. They need to be aware of how they can take advantage of opportunities offered by the Act for the benefit of the industry. They can identify marketplace issues and can often assist in resolving these issues by acting as the liaison between CCI and the industry. For example, trade associations of final producers, may furnish information to CCI for institution of enquiry if they suspect cartelisation amongst manufacturers of raw/intermediate materials. Recent example is information filed by Builders Association against the cement producers. Association can also take class action by filing application with the Competition Appellate Tribunal for award of compensation to offset loss/damages caused to its members. They may draw attention of the Commission to anti-competitive practices emanating from government laws /

policies to take up with government as part of advocacy. In Korea, over 150 laws have been amended pursuant to advice rendered by Korean Competition Body. In addition to the various beneficial functions performed for their members, the associations can also act as a vehicle to promote pro-competitive activities amongst their members. They are the first line of defence for preserving competition in the economy because advice given by them to their members to comply with law amounts to far more effective law enforcement than prosecuting violators after the fact.

In line with the market friendly approach, CCI has been interacting with associations on a continuous basis right from the inception. The associations are encouraged to visit Commission's office, interact with the officials and invite them to speak to their members on ways to comply with the law. They can also be a good vehicle to help CCI in the advocacy efforts for reaching out to their members. The Commission would encourage all associations and their members to put in place a Competition Compliance Programme available on the Commission's website. Associations may also try to develop best practices guidelines for their members to create awareness of acceptable and unacceptable behaviour under the Act. Such guidelines by trade and professional associations are commonplace all over the world.

To sum up, trade associations have a major responsibility in promoting compliance to competition law and develop a strong competition culture in the country. It is hoped that these associations will address this issue with the seriousness it deserves and help the Commission to carry forward the agenda of competition in India.

## SECTION 3 & 4 ORDERS

# CCI Penalises Chemists & Druggists Association, Goa (CDAG) and Chemists & Druggists Association, Baroda (CDAB) for their Anti-Competitive Practices



Availability of adequate quantities of medicine, a life-saving commodity, is essential. Any market practice that impinges supply or availability of medicines is a serious matter. The present case emanated from a complaint filed by Varca Druggist & Chemist through its proprietor along with proprietors of two other pharmaceutical firms before the Director General, Monopolies and Restrictive Trade Practices Commission (MRTPC) alleging restrictive trade practices by the Chemists and Druggists Association, Goa (CDAG). The Commission received this case as a transfer case under Section 66 (6) of the Competition Act, 2002 (hereinafter, the Act). The Commission found a *prima facie* case and ordered an investigation under Section 26 of the Act.

Pursuant to investigation carried out by the DG CCI, the Commission imposed a penalty of Rs. 2 lakhs on CDAG. The penalty imposed is ten per cent of the average of the receipts for financial years 2008-09

and 2009-10. The Commission observed that the imposition of guidelines by CDAG, that fixes the margins for wholesalers and retailers is anti-competitive and against the interests of consumers. The Commission directed CDAG to remove the clauses from its circulars, MOUs and guidelines and file an undertaking to this effect within 60 days from the date of receipt of the order.

The Commission observed that the guidelines of CDAG appear not to be in line with the public programmes that supply medicines to common man at an affordable rate. The Commission also observed that CDAG limits and controls the supply of drugs in the market through a system of seeking mandatory Product Information Service (PIS) approvals. Further, the number of players is limited and controlled by insisting on obtaining its "No Objection Certificate (NOC)" for appointment of stockists. CDAG by way of its guidelines, also fixes trade margins for the wholesalers and retailers which, in turn, determines the sale price of drugs in the market. The Commission thus held that CDAG had violated the provisions of Section 3(3) (a) (b) and Section 3(3) (b) of the Act.

The Commission directed CDAG and its members to cease and desist from indulging in anti-competitive practices. The order further directed CDAG to file an undertaking that guidelines and MOUs with respect to various aspects of supply of medicines shall be done away

within 60 days from the date of receipt of the order. These aspects relate to the following:

- non-appointment of a stockist or a wholesaler from amongst the non-members of the CDAG;
- requirement of NOC from the CDAG for appointment of stockist or wholesaler;
- limit on the number of stockist of pharmaceutical companies;
- clauses mandating compulsory PIS approval from CDAG for introduction of drugs in the territory of Goa; and
- requirement for routing of bids for supply of drugs to the government and the hospitals through authorised stockist only.

On similar grounds, the Commission also found Chemists and Druggists Association, Baroda (CDAB) in violation of the provisions of the Act, with respect to anti-competitive agreements. The case was initiated on a complaint dated April 28, 2009 filed by Mr. Uday Joshi of Vedant Bio – Sciences, Baroda before the MRTP Commission against CDAB. The case was transferred to the Commission under Section 66 (6) of the Act, wherein it imposed a penalty of Rs. 53,837 @ ten per cent of the average of the income for preceding three financial years 2006-07, 2007-08 and 2008-09. CDAB has been directed to pay the penalty amount within 90 days from the receipt of the order.

# SECTION 5 & 6 ORDERS

## CCI Keeps Promise of Fast Track Clearance of Combination Filings

*The Commission approved 18 combination filings during this quarter. All filings were cleared within a period of 30 days from the date of filing the notice under Combinations Regulations 2011. It was held in all these cases that the proposed combinations were not likely to cause appreciable adverse effect on competition in relevant markets in India.*

## CCI Approved Sony's Acquisition of Additional Stake in Multi Screen Media Private Limited

A notice was jointly filed by SPE Mauritius Investments Limited and SPE Mauritius Holdings Limited (both collectively referred to as "Acquirers") to acquire equity shares in Multi Screen Media Private Limited ("MSM India"). The transaction comprised acquisition of 20.28 per cent and 12.11 per cent of the equity shares in India from Grandway Global Holdings Limited ("Grandway") and Atlas Equifin Private Limited ("Atlas"), respectively. The Acquirers are both entities belonging to the Sony Group and stated to already hold 62 per cent of the equity shares in MSM India.

It was contended in the notice that the shareholders of MSM India had an agreement among themselves and the rights of Grandway and Atlas under the agreement were only for limited minority investor protection. Further, the same did not rise to the level of joint control as the Acquirers already had sole control over MSM India.

Accordingly, further acquisition of shares in MSM India would not result in transfer from joint to sole control.

The Commission approved the proposed combination vide its order dated August 9, 2012 issued under sub-Section (1) of Section 31 of the Act. It was observed that joint control over an enterprise implies control over the strategic commercial operations of the enterprise by two or more persons. In such a case, each of the persons in joint control would have the right to veto/block the strategic commercial decision(s) of the enterprise, which could result in a deadlock situation. Joint control over an enterprise may arise as a result of shareholding or through contractual arrangements between the shareholders.

The Commission in its order found that Grandway and Atlas were under common control and were acting together in enforcing their

rights in MSM India. Considering the collective shareholding of the sellers to the extent of 32.39 per cent and their rights pursuant to the shareholders agreement, the Commission held that the facts and circumstances of the case envisaged joint control by the Acquirers and sellers over MSM India.

Therefore, the proposed acquisition would result in transfer from joint to sole control. The Commission also noted that combinations resulting in transfer from joint to sole control may give rise to adverse competition concern in certain circumstances. In the present case, Indian broadcasting sector is characterised by large number of channels, broadcasters and aggregators, who provide enough choice to consumers and accordingly, approved the combination under Section 31(1) of the Act.



# INVESTIGATIONS INITIATED

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## Google's

## Alleged Abuse of Dominance

Google is currently battling antitrust probes in five continents

The Competition Commission of India has initiated an investigation against the global internet giant Google, for its alleged involvement in anti-competitive practices in India. Google is a global player in online search and online search advertising. Online search advertising is very important for e-commerce websites as this provides a better reach to the consumers in a targeted manner at the earliest possible opportunity.

It has been alleged that Google, being dominant in the search engine market, is leveraging its position in the generic search to specialised search market, by way of discriminatory and retaliatory practices relating to AdWords. The AdWords are one of the major sources of revenue for Google. Google sells keywords to advertisers and then displays them on search engine result page in the form of short advertisements.

The Commission found *prima facie* evidence that the internet giant may have abused its dominant position under the Competition

Act, 2002, and directed the Director General (DG) to investigate the matter.

Subsequently, another complaint has been received from CUTS International, a prominent NGO, against Google. This information has also been directed for investigation along with the earlier case.

It is pertinent to note that currently Google is under scanner of several competition authorities such as in US, EU, Australia, South Korea, Brazil and Argentina.

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## Alleged Abuse of Dominant Position by Coal India Limited



Coal is the basic raw material for power generation by a thermal power plant. As electricity is a critical infrastructural input for economic development, any market distorting operation or control on coal production and distribution may have serious anti-competitive impact on the markets and adverse consequences for economic growth.

In the above backdrop, an information was filed by the Maharashtra State Power Generation Company (MAHAGENCO) against Coal India Limited (CIL), the coal behemoth

in the country and two of its subsidiaries, Mahanadi Coalfields Limited (MCL) and Western Coalfields Limited (WCL) for their alleged abuse of dominant position. MAHAGENCO is engaged in generation of electricity and coal is the primary raw material for its thermal plants. It is therefore, dependent on CIL, which is the only producer and supplier of coal in the country. It has been alleged

that CIL is abusing its dominant position by supplying MAHAGENCO with low-grade coal at inflated prices. Due to the monopoly position of CIL, it has been able to indulge in abuse of its monopoly power by way of enforcing a non-transparent contract regarding the quality and other parameters of coal. While implementing the terms of the contract, CIL is supplying poor

quality coal, which is lumpy, sticky and wet. The international practice of washing coal is also not being followed.

CCI found that there exists a *prima facie* case in the matter and directed the DG to investigate the same. Informants prayed for an interim relief, however, CCI rejected such relief at this stage of proceedings.

## ADVOCACY INITIATIVES

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### Second National Level Essay Competition 2012

CCI organised its second national level "Annual Essay Competition", taking cognizance of the fact that students are important stakeholders in the realm of competition law. Like the previous year, the competition was open to all the students across the country. This year a new category of students of class 11<sup>th</sup> and 12<sup>th</sup> was added in addition to the existing categories of under-graduate and

post-graduate/professional students. The announcement for competition elicited overwhelming response from students across the country. Students spanning from remote corners of the country to the metro cities participated in the competition. The overwhelming response to the competition can be gauged from the fact that even Indian students studying in foreign universities sent their entries for

the competition. Notably, students from smaller cities and towns fared very well in the competition and have figured among the top prize winners. The details of the competition and result thereof are available on the Commission's website at

[www.cci.gov.in/May2011/Advocacy/EssayResults2012.pdf](http://www.cci.gov.in/May2011/Advocacy/EssayResults2012.pdf)



# NEW INITIATIVES

## Eminent Persons Advisory Group Constituted

The Commission has constituted an Eminent Persons Advisory Group (EPAG) to get inputs and expert advice from eminent persons in various fields on a broad range of issues relevant for effective fulfillment of CCI's mandate. The first meeting of the EPAG was held on July 23, 2012 at

CCI office. The EPAG discussed ways to deepen the process of competition in various sectors of the economy.

Dr. M. Veerappa Moily, Union Corporate Affairs Minister, addressed the EPAG and stressed the need for imbibing a strong competition culture in the country

for achieving efficiency, innovation and maximising consumer welfare. The group discussed inter-alia ways to carry out effective advocacy, importance of capacity building within the Commission and need to intensify cooperation with the experienced jurisdictions.



### Members of EPAG

- Mr. Deepak S. Parekh, Chairman, HDFC
- Mr. V. N. Kaul, former CAG
- Dr. Rakesh Mohan, ex Dy. Governor, RBI
- Ms. Kiran Mazumdar Shaw, CMD, Biocon
- Dr. Bakul H. Dholakia, former Director, IIM Ahmedabad
- Dr. S.L. Rao, ex Chairman, CERC and ex Director General, NCAER
- Dr. N.L. Mitra, former Director, NLSIU Bangalore
- Ms. Rohini Nilekani, NGO activist, Bangalore
- Mr. Gurcharan Das, eminent thinker & writer
- Ms. Rama Bijapurkar, Management Consultant

# Knowledge Partnership Initiative (KPI) Launched

CCI has launched a new initiative "Knowledge Partnership Initiative (KPI)" with the objective of helping to build a strong knowledge base in the field of competition law, promoting competition law compliance and expanding the outreach of competition law in the country. Under this initiative, a meeting with the prominent law schools in India was organised on September 14, 2012 in CCI. List of participating law schools included NLSUI Bangalore, NALSAR Hyderabad, West Bengal National University of Juridical Sciences Kolkata, National Law School Delhi, National Law University and Judicial Academy Guwahati, O.P. Jindal Global University Sonapat, ILS Law College Pune, National University of Study and Research in Law Ranchi, National Law University Jodhpur and Rajiv Gandhi National University of Law Patiala. The participating law schools outlined the work being done in the area of competition regulation at present and gave their views on how the partnership could be carried forward. It was decided that law schools will partner with CCI in various identified areas relating to research, education and advocacy. It is also proposed to soon include leading management and economics schools in India in this initiative.

KPI is a new initiative to help build a strong knowledge base in the field of competition law, promote competition law compliance and expand the outreach of competition law in the country.



# EVENTS

## Distinguished Visitor Knowledge Sharing Series (DVKS)

Mr. U.K. Sinha, Chairman, Security & Exchange Board of India (SEBI) delivered the fourth lecture under the “Distinguished Visitor Knowledge Sharing Series” on “Securities Market Regulations – An Overview” on September 10, 2012 in CCI. Such lectures play an instrumental role in capacity building of CCI officials.



## Capacity Building

Knowledgeable and well trained professionals are vital for effective enforcement of the Competition Act. The Commission has been regularly organising capacity building events during last three years in collaboration with mature jurisdictions like US and EU.

During the second quarter, the following training programmes were organised in collaboration

with US Federal Trade Commission (FTC):

- Four-day workshop on “Economics and Financial Analysis for Merger Review” during July 16-19 at CCI office.
- Four economists from the Commission participated in a five-day training programme on “Advanced Economics of Mergers” during August 27-31

at US FTC in Washington DC. The event also included exposure at Antitrust Division, Department of Justice (DOJ).

- Four-day workshop on “Advance Issues in the Analysis of Anti-Competitive Agreements” during September 24-27 at CCI office.

# ENGAGING WITH THE WORLD

## Memorandum of Understanding (MOU) with the US Antitrust Agencies Signed

### MOU is expected to strengthen the existing friendly relations between Indian and US competition authorities

A Memorandum of Understanding (MOU) between India and the United States on competition law cooperation was signed on September 27, 2012 in Washington DC. CCI Chairperson Mr. Ashok Chawla and the Ambassador of India signed for the Indian side and FTC Chairperson Mr. Jon Leibowitz and the US Department of Justice Acting Assistant Attorney General Mr. Joseph Wayland signed for the US side. The signing took place in the presence of senior officers from the Embassy of India as well as the US Department of State, the US Federal Trade Commission and the US Department of Justice.

The MOU establishes a framework for voluntary cooperation between

the US antitrust agencies and the Indian competition authorities. The signing of MOU is recognition on both the sides that the two countries can effectively cooperate for mutual benefit in the field of competition law enforcement and policy. Key provisions of the MOU address the following:

- Communication - The MOU establishes a framework for the Indian competition authorities and the US antitrust agencies to consult on matters of competition enforcement and policy. It also contemplates periodic meetings among officials to exchange information on policy and enforcement priorities.

- Cooperation - The MOU provides that the Indian competition authorities and the US antitrust agencies will work to keep each other informed of significant competition policy and enforcement developments in their jurisdictions, and establishes a framework for technical cooperation. The MOU also recognises that when the Indian and the US competition authorities are investigating related matters, it may be in their common interests to cooperate.

MOU is expected to strengthen the existing friendly relations between the Indian competition authorities and the US antitrust agencies by further facilitating cooperation on policy and enforcement. The Indian competition authorities and the US antitrust agencies also plan to evaluate the effectiveness of the cooperation under this memorandum on a regular basis to ensure that their expectations and needs are being met.



# Chairperson was a key speaker at Ninth India Investment Forum

Ninth India Investment Forum organised by Institutional Investor Forum was held in New York during September 24-25, 2012. The forum generally takes place on the side-lines of the United Nations General Assembly. The objective was to celebrate progress made in US-India trade and investment relations and to discuss work needed to further strengthen US-India bilateral economic ties. The Forum brought together top political, government and business leaders from India and US. The

conference discussed the key issues relevant for foreign investors including legal, regulatory and tax matters.

CCI Chairperson delivered a speech on "Challenges of ensuring level-playing field" wherein he discussed the importance of a pro-competitive environment for investment and growth. He also discussed the role played by competition law enforcement in ensuring fair play for all players in the markets. He informed that competition law in India was

equally applicable to all enterprises – whether private or state-owned, domestic or foreign, small or large and was being enforced towards all the market players in an equitable manner.

Other eminent speakers reinforced the conviction that the Indian growth story remains a strong and compelling one.



# International Bar Association Annual Conference



CCI Chairperson attended the Annual Conference of International Bar Association (IBA) organised in Dublin during September 30 - October 5, 2012. He participated in a panel discussion on "Competition issues in the BRICS countries". Heads of competition jurisdictions from BRICS countries and senior lawyers were other panelist in the session. A book on "Competition Laws in BRICS Countries" was also released on the occasion. The Commission has contributed a chapter in the book. The book provides insights on various aspects of competition law in BRICS countries. It is pertinent to mention that India would be hosting "Third International BRICS Competition Conference" in November 2013.

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## CCI Chairperson Elected to Chair UNCTAD's Twelfth Session of Intergovernmental Group of Experts (IGE) on Competition Law and Policy

UNCTAD is the focal point of all competition related activities within the UN system. UNCTAD has been providing technical cooperation to CCI in the field of competition law and policy. A CCI delegation led by CCI Chairperson participated in the competition and consumer protection related events of UNCTAD organised in Geneva during July 8-13, 2012.

In the first event, i.e. annual meeting of Research Partnership Platform (RPP), CCI delegation presented research findings of its on-going research project on "Competitive Neutrality in India".

For the second event, viz, twelfth

session of IGE on Competition Law and Policy, CCI Chairperson was unanimously elected the chair of the session. His name was proposed by the Chairperson of Competition Commission of Pakistan. This group is a specialised intergovernmental forum based on consensus building and voluntary cooperation for developing countries' competition authorities and government agencies. Every year, UNCTAD hosts the Group for consultations on competition issues and informal exchange of experiences and best practices.

A delegation member discussed competition aspects of proposed

bill on public procurement in India in the roundtable on "Competition Issues in Public Procurement".

Another delegation member discussed aspects of human resources and knowledge management and the strategy followed by the Commission in the roundtable on "Human Resources and Knowledge Management".

The third event was the first meeting of Ad-hoc Group of Experts on Consumer Protection. A member of CCI delegation made a presentation on "Interface between Competition Policy and Consumer Protection Policy in India".



# DEVELOPMENTS IN OTHER JURISDICTIONS

## Visa, Master Card Settle Antitrust Case in US

After a seven year long legal battle, these companies have agreed to pay US retailers US\$ 7.25 billion. If approved by the judge, this pay-out will be the biggest private antitrust settlement in the US.



In 2005, merchants accepting payments through credit cards alleged that Visa Inc., MasterCard Inc. and credit card issuing banks violated antitrust law by fixing the swipe fees, which averaged two per cent of the purchase price. Proceeds generated were more than US\$ 40 billion a year for US banks. List of banks includes JP Morgan Chase & Co., Bank of America Corp., Citigroup Inc., Wells Fargo & Co. and Capital One Financial Corporation.

After a seven year long legal battle, these companies have agreed to pay US retailers US\$ 7.25 billion. If approved by the judge, this pay-out will be the biggest private antitrust settlement in the US history under the Sherman Act. The proposed settlement involves: a) a payment of US\$ 6 billion to a class of stores; b) a temporary

reduction in swipe fees by an equivalent of ten basis points for eight months for a total consideration of US\$ 1.2 billion and an option for Visa and MasterCard to make adjustment to the fees after eight months; and c) an additional payment of US\$ 525 million to stores suing individually.

Swipe fees, charges to cover processing credit and debit payments, are set by the card companies and deducted from the transaction by the banks that issue the cards. Previously, Visa and MasterCard prohibited sellers from charging more for credit card transactions. Under the new terms, merchants will be free to pass the cost of swipe fees to their customers although they will not be able to charge more than the fee.

# Telkom SA Penalised for Abuse of Dominance in South Africa

The Competition Commission of South Africa received complaint from the SA Vans Association and twenty other internet service providers against Telkom SA. Telkom is Africa's largest fixed-line operator but has been battling in the face of growing competition from the mobile phone industry. It was alleged that Telkom refused to supply essential access facilities to independent value added network service (VANS) providers. Telkom induced independent providers' customers not to deal with them and charged their customers excessive prices for access services. It also discriminated in favour of its

own customers by offering discounts on distance related charges, which it did not advance to customers of the independent VANS providers.

The Commission referred the matter to the Competition Tribunal in 2004. Tribunal found that Telkom had abused its dominance in the telecom market between 1999 and 2004, when it was the monopoly provider of facilities to VANS providers. Telkom leveraged its upstream monopoly in the facilities market to advantage its own subsidiary in the competitive VANS market. This anti-competitive conduct caused harm

to both competitors and consumers. Tribunal further stated, *"Through this strategy, which involved the freezing of its competitors' networks, Telkom impeded the growth of its competitors and retarded innovation in the market place"*.

The Competition Tribunal imposed a penalty of Rand 449 million (US\$ 53 million) on Telkom for abusing its dominance in the telecommunications market between 1999 and 2004. Half of the penalty is to be paid within six months of the Tribunal's decision while the balance is payable within twelve months thereafter.



# KNOWING YOUR COMPETITION LAW

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## The Competition Architecture in India

India was one of the first developing countries to have a competition law in the form of the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969, enacted on the recommendations of the Monopolies Inquiry Committee (MIC). MIC had found that there was a high concentration of economic power in over 85 per cent of industries in India at that point in time. This was outcome of restriction of freedom of entry in Indian markets due to the system of controls in the form of industrial licensing. This also led to emergence of monopolistic industries and consequently their indulging in restrictive trade practices, which was detrimental to the consumers and the economy. The MRTP Act was enacted to ensure that the operation of the economic system does not result in the concentration of economic power in the hands of few, to provide for the control of monopolies and to prohibit monopolistic and restrictive trade practices. The Act drew its inspiration from Directive Principles enshrined in the Constitution of India, which aims at securing social justice with economic growth. Thus, the Act was a product of "control and command economy". The MRTP Act was amended twice - in 1984 and in 1991. The 1984 amendments brought unfair trade practices in its ambit in order to protect the consumers.

In the early 1990s, India initiated economic reforms and embraced a market driven economy with competition as the key driver. Most of the sectors meant hitherto exclusively for public sector were opened to the private sector. The process of competition is however not automatic. Vested interest groups, incumbent large (monopolistic) firms and other stakeholders may distort the process of competition or capture the benefits of market-oriented economic reforms. Their malpractices may not only adversely affect end-consumers but also business enterprises, whose viability is undermined by anti-competitive conduct such as artificially rigged prices. Thus, there was a need for well-designed and effectively implemented competition law to discipline such market behavior in the larger interest of consumers and the economy, and to provide a level playing field.

In the above scenario, it was realised that the MRTP Act had outlived its utility and the dynamics of the economic reforms initiated in the early 1990s called for a new law in line with the needs of market based economy. The Finance Minister in his budget speech in 1999 announced the appointment of Raghavan Committee to propose a modern competition law suitable to the

needs of Indian economy. He stated, "*We need to shift focus from curbing monopolies to promoting competition*". The Raghavan Committee recommended replacing the MRTP Act with a modern competition law for fostering competition in the markets and reducing anti-competitive practices in the economy.

In accordance with the recommendations of the Raghavan Committee, the Competition Act, 2002 was passed. While the MRTP Act had focused on curbing monopolies, the Competition Act focuses on promoting competition. The Competition Act is a state-of-the-art modern legislation based on international best practices and provides for a level playing field for all enterprises in the markets. No exception has been carved out for any enterprise- big or small, domestic or foreign, private or state-owned unlike the MRTP Act which did not apply to state-owned enterprises (the MRTP Act was made applicable to state-owned enterprises only in 1991).

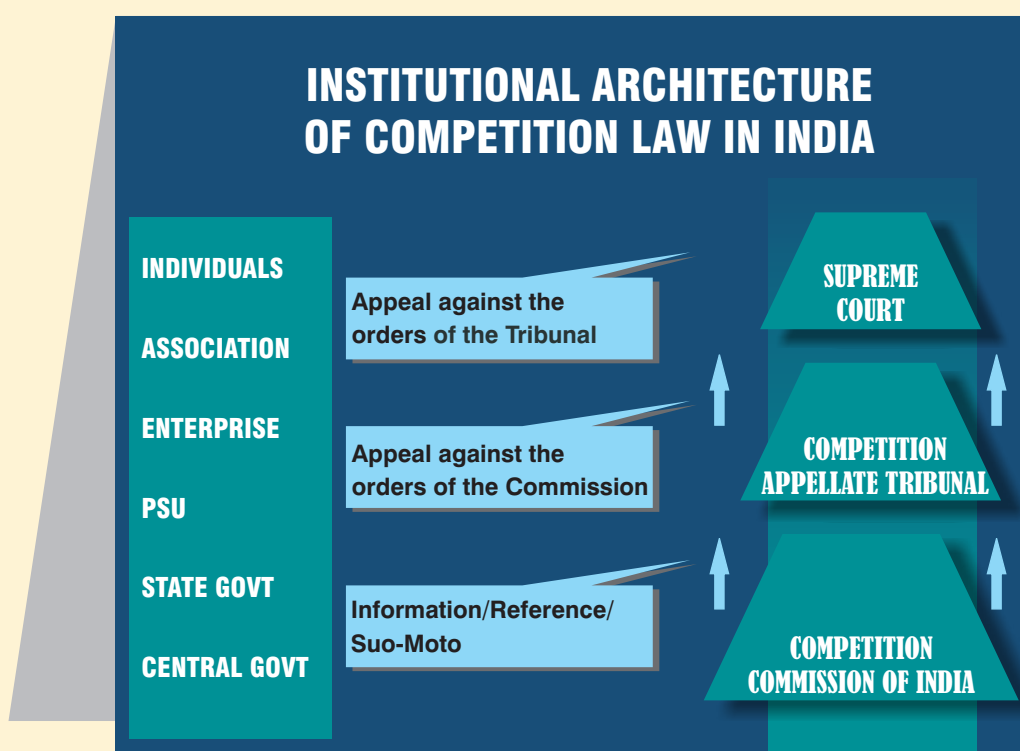
The Competition Commission of India (CCI) was set up in October 2003 but legal challenge prevented full constitution and enforcement and only its advocacy function could be notified. The Competition Act was amended by the Competition (Amendment) Act of 2007. The Competition Act as

amended, follows the philosophy of modern competition laws. The Competition Act prohibits anti-competitive agreements and abuse of dominant position by enterprises and regulates combinations (acquisition, acquiring of control, and M&A), which cause or are likely to cause an appreciable adverse effect on competition within India. In addition, Indian competition law mandates competition advocacy to promote competition, create awareness and

impart training about competition issues.

Pursuant to the provisions of the Amendment, CCI was established on March 1, 2009, as an autonomous independent body comprising of a chairperson and six members. In 2009, the MRTTP Act was repealed and the MRTTP Commission established under that act was abolished. An appellate body called the Competition Appellate Tribunal was set up in

May 2009 to hear and dispose off the appeals against the decisions made by the Commission. Final appeal lies to the Supreme Court against the order of the Competition Appellate Tribunal. MRTTP Commission's pending cases were transferred to CCI. The following diagram schematically shows the three tier structure of present competition architecture in India:



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