Competition Commission of India: Institutional Design and Decision Making

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Over the last few decades, an increasing number of countries have taken legislative measures coupled with effective enforcement initiatives to foster competition. In India, the enactment of The Competition Act, 2002, the principal legislation governing competition law in India, along with the establishment of the Competition Commission of India as its chief enforcement authority was one of the biggest transformations witnessed by the Indian regulatory space in the recent times. In this article we note how competition law and enforcement has evolved and brought India a step closer to unification with mature antitrust jurisdictions. We also argue that it is imperative that India continue to take lessons from global experiences in competition law enforcement to improve its effectiveness.

I. HISTORY AND BACKGROUND: COMPETITION LAW IN INDIA

Over the last few decades, an increasing number of countries, including India, have taken legislative measures coupled with effective enforcement initiatives to foster competition. The benefits of introducing competition into a market include significant price reductions, better product development, and innovation. The (Indian) Competition Act, 2002 (as amended) ("Act"), replaced the (Indian) Monopolies and Restrictive Trade Practices Act ("MRTP Act"), 1969, which contained provisions dealing with cartelization and unfair trade practices, but not merger control.

The enactment of the Act, the principal legislation governing competition law in India, along with the establishment of the Competition Commission of India ("CCI") as its chief enforcement authority, was one of the biggest transformations witnessed by the Indian regulatory space in the recent times. The Act seeks to promote and sustain competition in markets, protect consumer interests, and ensure freedom of trade. The substantive test and benchmark for analysis under the Act is to prohibit practices that have an appreciable adverse effect on competition ("AAEC") in India. While competition law and enforcement is an evolving field in India, the introduction of the Act was desirable since it brought India a step closer to unification with mature antitrust jurisdictions. However, it is imperative that India continue to take lessons from global experiences in competition law enforcement to improve its effectiveness.

IN THE WAKE OF LIBERALIZATION AND PRIVATIZATION, IN ORDER SUSTAIN AND PROMOTE COMPETITION IT HAD BECOME INCREASINGLY IMPORTANT FOR INDIA TO SHIFT ITS FOCUS FROM CURBING MONOPOLIES TO DEVELOPING A COMPREHENSIVE AND ROBUST COMPETITION POLICY

The Act was brought into force nearly a decade after its inception. In 1999,[2] the Government of India appointed a High Level Committee on Competition Policy and Competition Law ("Raghavan Committee") to conceptualize a modern competition law for India, drawing from international trends and developments. In addition, the Committee was to recommend a legislative framework entailing a new law or appropriate

amendments to the then existing MRTP Act, given that the provisions of the MRTP Act had become obsolete in light of initiatives taken by the Government of India in 1991.[3]

In the wake of liberalization and privatization, in order sustain and promote competition it had become increasingly important for India to shift its focus from curbing monopolies to developing a comprehensive and robust competition policy. Further, the enactment of the Act was not only considered necessary, but also desirable, to better realize economic reforms, curb high levels of concentration (since wealth and assets were controlled by a small number of businesses), and promote good governance.

II. COMPETITION LAW FRAMEWORK

After undergoing several rounds of consultations with the relevant stakeholders, the Indian Parliament ultimately enacted the Act in December 2002. However, on account of legal impediments as well as skepticism and opposition among the business fraternity, the effective provisions of the Act only came into force in a phased manner, with provisions relation to anticompetitive agreements (Section 3) and abuse of dominance (Section 4) coming into effect on May 20, 2009 and merger control provisions (Sections 5 and 6) coming into effect on June 1, 2011.

Akin to other jurisdictions, competition law enforcement under the Act adopted a three-pronged approach:

(a) *Anticompetitive agreements*:[4] The Act prohibits agreements which are anticompetitive in nature, i.e. agreements which cause or are likely to cause an AAEC in India. For instance, price-fixing, market sharing, output restriction, and cartels;

(b) *Abuse of Dominance*:[5] The Act prohibits a dominant enterprise from abusing its dominant position in the market. For instance, predatory pricing, excessive pricing, unfair conditions in sale, tying, leveraging, denial of market access, and limiting production; and

(c) *Regulation of Combinations*:[6] The Act regulates all acquisitions of an enterprise and mergers or amalgamations of two or more enterprises, where the asset or turnover thresholds prescribed under the Act are met ("Combinations"), to ensure that such Combinations do not cause an AAEC in the relevant market in India.

III. INSTITUTIONAL FRAMEWORK UNDER THE ACT

The Act provides for the establishment of the following enforcement agencies:

(a) the Office of the Director General ("DG") is the investigative arm of the CCI and is authorized to investigate contraventions of the Act;

(b) the CCI is the nodal authority established under the Act; and

(c) the Competition Appellate Tribunal ("COMPAT") is the appellate authority under the Act.

Appeals from decisions made by the CCI can be filed with the COMPAT within a period of 60 days from the date on which a copy of the order made by the CCI is received by the parties.[7] Further appeals from the COMPAT lie with the Supreme Court of India, the apex court of the country, and such appeals need to be filed within 60 days from the date of communication of the COMPAT's order.[8]

A. CCI and COMPAT

For the purposes of the Act, the Central Government established the CCI with effect from October 14, 2003. Under the scheme of the enactment, the CCI was established as a quasi-judicial body and has been conferred with all the powers of a corporate personality. The CCI comprises a Chairperson and six other members, who have specialist knowledge and professional experience in areas such as international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs, and competition matters and are appointed by the government on the recommendations of a selection committee.[9] Further, each of the members supervises specialist cells such as the Investigation, Economic, Combination, Anti-trust, and Legal Divisions.

The merger notifications filed with the CCI are first scrutinized by case officers allotted to specific cases. Although the members of the CCI are approachable, and the CCI positions itself as a progressive regulator willing to engage with industry, as the competition regime has steadily gained ground the regulator has started taking strong views and positions and is pro-actively conducting market research, tracking M&A deals through deal announcements, and undertaking several *suo motu* investigations for cartelization.

UNDER THE ACT, THE CCI IS VESTED WITH "INQUISITORIAL, INVESTIGATIVE, REGULATORY, ADJUDICATORY AND TO A LIMITED EXTENT EVEN ADVISORY JURISDICTION."

The CCI undertakes a quasi-judicial adjudicatory function in deciding whether or not any particular agreement, practice, or conduct is in violation of the substantive provisions of the Act, or whether a Combination notified to it under the merger control provisions is likely to cause an AAEC or not. Under the Act, the CCI is vested with "inquisitorial, investigative, regulatory, adjudicatory and to a limited extent even advisory jurisdiction."[10] The CCI is vested with powers of wide magnitude and can pass orders having serious outcomes, including modification of agreements, division of dominant enterprises, modification of Combinations, disapproving a particular Combination, and dealing with complaints or information filed. Moreover, the CCI can evolve its own procedure and is vested with powers akin to those of a civil court.[11]

It is well-established that principles of natural justice must apply to quasi-judicial proceedings as well. However, in *SAIL*,[12] while deciding upon the question of whether the opposite party has a right to notice and

hearing when the CCI forms a *prima facie* opinion, the Supreme Court observed that based on larger public interest and compelling reasons, it can be stated there is no absolute proposition of law that the right to notice and hearing is a mandatory requirement under principles of natural justice. The Supreme Court further held that even though the CCI is required to conform to the principles of natural justice which have been enunciated by the courts, the scope of the duty of the CCI should not be rendered nugatory by imposition of "unnecessary directions or impediments which are not postulated in the plain language of the section itself."

While examining the effect of the provisions with respect to the establishment and composition of the CCI, the Supreme Court in *Brahm Dutt*[13] observed that the CCI is an expert body which has been created in consonance with international practice. The Supreme Court further stated that it might be appropriate "to consider the creation of two separate bodies, one with expertise that is advisory and regulatory and the other adjudicatory." Accordingly, the COMPAT (i.e., the appellate body) was created by the Competition (Amendment) Act 2007 with a judge of the Supreme Court/ Chief Justice of a High Court as its Chairperson, and was established by the Central Government by notification dated May 15, 2009. It comprises a three-member panel headed by a retired representative of the judiciary.[14] The functions of the COMPAT as envisaged under the Act are to hear and dispose of appeals against the directions of the CCI and to adjudicate on claims for compensation.[15]

IT IS PERTINENT TO NOTE THAT THE CCI, FOR ALL PRACTICAL PURPOSES, CONTINUES TO PERFORM BOTH FUNCTIONS, I.E. ADVISORY/ REGULATORY AND ADJUDICATORY

The COMPAT embodied the concept of separation of power as envisaged by the Supreme Court in *Brahm Dutt*. However, it is pertinent to note that the CCI, for all practical purposes, continues to perform both functions, i.e. advisory/ regulatory and adjudicatory.

B. *Office of the DG*

The Act, for the purposes of investigation, provides for the establishment of a specialized wing of the CCI known as the DG; comprising the DG and Additional DGs. Under the scheme of the Act, the DG is required to assist the CCI in investigating any contravention of the provisions of the Act or its regulations.[16] Based on the holding of the Supreme Court in *SAIL*,[17] the purpose of the DG's investigation is two-fold: (a) to collect material and verify information and thereafter submit a report based on its findings; and (b) to enable the CCI to examine the DG report and pass an order subsequent to hearing from the concerned parties.

IT IS PERTINENT TO NOTE THAT THE DG DOES NOT HAVE *SUO MOTO* POWERS FOR INITIATING INVESTIGATIONS UNDER THE ACT.

The DG undertakes detailed time-bound investigations and provides a scheme of reference for such investigations after the CCI has taken cognizance of a matter and decided, without entering upon any adjudicatory or determinative process, that there is sufficient preliminary evidence to show a *prima facie* violation. Typically, the DG's investigation includes written submissions, depositions, interviews, meetings with the party(s) who filed the information with the CCI, the opposite parties, and third-party stakeholders (such as competitors, suppliers, customers, etc). Pursuant to the investigation, the DG is required to submit a

report, containing its findings on each of the issues raised in the information, supported by all the evidence, analysis, documents, and statements collected during the course of the investigation.[18]

In contrast to the powers conferred to a police officer for conducting an investigation under the Code of Criminal Procedure, 1973 ("CrPC"), it is pertinent to note that the DG does not have *suo moto* powers for initiating investigations under the Act. In this regard, the Delhi High Court observed that:

> an investigation by the DG, pursuant to the CCI forming an opinion that prima facie there exists a contravention of the provisions of the Act and directing investigation by the DG, cannot be treated at par with the investigation by a police officer into a cognizable offence... the Act gives no power, to carry out suo motu investigation to the DG, but as opposed to the CrPC, the Act envisages the application of the rule of audi alteram partem during the course of investigation by the DG.[19]

The Competition Amendment Bill, 2012 ("Amendment Bill")[20] proposed providing the DG with search and seizure powers, similar to those provided under the CrPC. However, the Amendment Bill has now lapsed and it remains to be seen whether it will be re-tabled before the Indian Parliament. In the event that the changes proposed by the Amendment Bill are given effect, subsequent to obtaining proper authorization from the Chairperson of the CCI, the DG would be able to conduct dawn raids and investigations with ease. Although there have been no dawn raids thus far, the new powers of the DG, if conferred, will be actively used in conducting dawn raids for cartel investigations, creating a fear of quicker detection among cartel members.

It is useful to note that the Supreme Court[21] has distinguished between the concepts of "inquiry" and "investigation" provided under the Act. "Inquiry" commences when the CCI, in exercise of its powers, issues a direction to the DG. The DG is thereafter expected to conduct an "investigation" in accordance with the directives of the CCI. "Inquiry" continues with the submission of the report by the DG until the time the CCI passes its final order in accordance with the law. Thus, while the term "inquiry" encompasses the overall inquisitorial and adjudicatory function undertaken by the CCI, the "investigative" functions of the CCI are specifically undertaken by the DG.

IT IS USEFUL TO NOTE THAT THE SUPREME COURT HAS DISTINGUISHED BETWEEN THE CONCEPTS OF "INQUIRY" AND "INVESTIGATION" PROVIDED UNDER THE ACT

C. Powers of the CCI and the DG

The scope of the DG's investigation is limited to the information considered by the CCI. The Delhi High Court in *Grasim Industries*[22]noted, "the formation of an opinion that prima facie there is a contravention of the provisions of the Act, is a sine qua non, for investigation by the DG." In contrast, the powers of the CCI are much wider in their ambit and, therefore, the CCI can treat evidence collected by the DG as information and subsequently direct the DG to conduct investigation. This is also in line with the observations of the Bombay High Court in *Kingfisher Airlines Limited v. Competition Commission of India*,[23] where the Court

directed the CCI to enquire and investigate into every complaint received under the Act and not to stifle investigation, except in account of compelling reasons.

Further, under the scheme of the Act, the recommendations made by the DG do not bind the CCI, which is entitled to take a contrary view and proceed accordingly. Thus, if the DG reports that there is no contravention of the provisions of the Act, the CCI has the following three options: (i) to close the matter forthwith; (ii) to direct further investigation by the DG or to conduct further quasi-judicial inquiry on its own; or (iii) in case it does not agree with the DG and does not feel the necessity of any further investigation or inquiry, to pass an appropriate order, as provided in Section 27 of the Act.

On the other hand, if the DG reports contravention of the provisions of the Act, the CCI can: (i) close the proceedings forthwith if, in its opinion, no contravention of the provisions of the Act is made out and no further inquiry was called; (ii) undertake quasi-judicial inquiry into the contravention reported by the DG; or (iii) accept the report without directing any further inquiry and proceed to pass orders in accordance with the provisions of the Act. As stated above, the CCI's final decision may be appealed before the COMPAT within a period of 60 days

IV. INSTITUTIONAL ARRANGEMENTS: SECTORAL REGULATORS AND THE CCI

In the policy changes introduced in 1991, several specialized sector-specific regulators were also established to deal with, among other matters, market failures, the existence of natural monopolies,[24] the need for the creation of a level playing field, and the promotion of competition in the given sectors. Although it might appear that sector-specific regulators and competition authorities share a similar set of objectives, they, however, have different functions, perspectives, and areas of oversight, which make their relationship unique and their interface critical. While sector-specific regulators focus on specific sectors of the economy and identify behavioral issues *ex ante*, a competition authority takes a holistic view of the economy and addresses behavioral issues *ex post*,[25] presumably on account of failures by the sector-specific regulator or by virtue of limitations on the power of a particular sector-specific regulator.

A holistic reading of the provisions of the Act confers the CCI with the crucial responsibility of managing economy-wide competition issues on a sector-agnostic basis. However, a number of independent regulators such as the Telecom Regulatory Authority of India, the Central Electricity Regulatory Commission, the Insurance Regulatory Development Authority ("IRDA") and the Petroleum and Natural Gas Regulatory Board established under specific legislations also appear to be bestowed with the power to oversee and regulate competition in their respective sectors. Accordingly, the interface between competition policy and sector-specific regulation poses complex questions, particularly concerning the underlying relationship between the two sets of regulators. The reasons for this apparent conflict in jurisdiction between competition authorities and sector-specific regulators have been attributed to the lack of legislative clarity in relation

A HOLISTIC READING OF THE PROVISIONS OF THE ACT CONFERS THE CCI WITH THE CRUCIAL RESPONSIBILITY OF MANAGING ECONOMY-WIDE COMPETITION ISSUES ON A SECTOR-AGNOSTIC BASIS

to the powers vested in such authorities and the fact that sector-specific regulation was introduced a long time before competition law.

A. Legislative Ambiguity

The edifice of the relationship between sector-specific regulators and the CCI lies in the interplay among Sections 18, 21, 21A, 60 and 62 of the Act, which are unfortunately shrouded in uncertainty.

Section 18 of the Act makes it obligatory for the CCI to regulate activities that raise competition concerns by: (i) eliminating practices having an adverse effect on competition, (ii) promoting and sustaining competition in the market to protect the interests of consumers, and (iii) ensuring freedom of trade carried on by other participants in the market.[26] Further, while Section 60[27] of the Act is sector agnostic and provides for a typical non-obstante clause emphasizing the supremacy of the Act over all competition related matters, Section 62[28] of the Act, in essence, provides that the Act ought to work in consonance with other enactments.

IRONICALLY, IT IS NOT NECESSARY FOR THE STATUTORY AUTHORITY TO ABIDE BY SUCH OPINION.

Interestingly, both these provisions are mandatory in nature. The inherent inconsistency between the two ought to be resolved by way of a harmonious construction to the effect that all other laws for the time being in force continue to have effect in so far as the provisions of such laws do not directly contradict the provisions of the Act. To the extent that the intent and purpose of the Act and similar existing laws can be reconciled, both shall co-exist and continue to complement each other.

This ambiguity is further illustrated by the interaction between Section 21[29] of the Act, which states that a statutory authority may refer an issue to the CCI, in any proceeding before it, if the need arises. Thereafter, the CCI is bound to deliver its opinion within a stipulated period of 60 days. Ironically, it is not necessary for the statutory authority to abide by such opinion. On the other hand, in relation to any conflict between the provisions of the Act and a particular statute, Section 21A[30] of the Act provides for non-binding reference by the CCI to the statutory authority entrusted with the implementation of such statute. Further, Section 54 of the Act adds to the ambiguity and leads to a conflict by providing that the ambit of the CCI's powers extends to all sectors and it is only the Central Government which can exempt any enterprise or class of enterprises or particular conduct from the application of the Act. It must be noted that this power of the Central Government has been used very sparingly so far.[31]

The Central Government, in an attempt to reconcile the interests of the two sets of regulators and address the jurisdictional overlap, has proposed to introduce an amendment by way of the Amendment Bill to Section 21 and 21A of the Act, requiring statutory authorities to *mandatorily refer* matters relating to "competition" to the CCI and vice-versa. While the banking sector and insurance sector are not wholly exempt from the purview of the Act, ailing banks or insurers shall continue to be dealt with under the Banking Regulation Act, 1949 and the Insurance Act, 1938, respectively.

B. Competition Law Overlap Example 1: The Insurance Sector

An instance of the overlap between sector-specific regulators and the CCI is illustrated by the interface between the Act and the IRDA (Scheme of Amalgamation and Transfer of Life Insurance Business) Regulations, 2013 ("IRDA Regulations"), which vests the IRDA with the power to regulate Combinations[32] in the insurance sector. The insurance sector in India is regulated under the Insurance Act, 1938 read with the Insurance Regulation and Development Authority Act, 1999 ("IRDA Act") under which the sector-specific regulator IRDA was established to regulate, promote, and develop the insurance and re-insurance sector.

The IRDA Regulations provide for a mandatory "in principle" approval of the IRDA prior to implementation of a Combination. Further, the parties intending to enter into a scheme (i.e. a Combination) are required to provide a "notice of intention" to the IRDA describing the nature of transfer or amalgamation at least a month before the date of application. Moreover, Regulation 8(3)(d) of the IRDA Regulations require the transacting parties to seek any other regulatory approvals, including that of the CCI, only after receipt of the "in-principle" approval from the IRDA.

As such, based on the IRDA Regulations, the 30-day trigger for filing the merger notification with the CCI would begin *on the day the 'in-principle' approval is received from the IRDA*. This is in stark contrast with the position adopted by the CCI in *Exide Industries Limited/ING Life*[33] (which related to the acquisition of the remaining 50 per cent. equity stake of ING Life by Exide from the existing shareholders of ING Life), wherein the CCI held that the 30-day trigger for filing a merger notification to the CCI, under Section 6(2) of the Act, would begin on *the day the transacting parties submit the "notice of intention" to the IRDA*. Thus, it appears that compliance with one set of regulations could lead to a breach of another set of regulations, thereby leading to confusion and risk of penalties for non-compliance. Given that the Act prescribes the highest economic penalties in India, it is important to resolve such apparent conflicts between the CCI and sectoral regulators.

THUS, IT APPEARS THAT COMPLIANCE WITH ONE SET OF REGULATIONS COULD LEAD TO A BREACH OF ANOTHER SET OF REGULATIONS, THEREBY LEADING TO CONFUSION AND RISK OF PENALTIES FOR NON-COMPLIANCE

It has been argued that while sectoral regulators wield their sphere of influence in relation to their specific sectors, the CCI possesses the necessary expertise and understanding to evaluate anticompetitive practices and apply competition law principles in relation to the economy as a whole. Therefore, competition law enforcement is the exclusive domain of the CCI and the same cannot be usurped by regulatory authorities. In order to strike a balance, it is crucial for sectoral regulators and the CCI to establish a proactive interface without impinging upon their respective jurisdictions.

C. Competition Law Overlap Example 2: Mismatch in Timelines Between CCI and Securities Exchange Board of India

The Securities & Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations,

2011 ("Takeover Regulations") mandate that a public announcement for: (i) exercising 25 per cent. or more of the voting rights in a target company; (ii) acquiring within any financial year additional shares or voting rights in a target company entitling the acquirer to exercise more than 5 per cent. of the voting rights; or (iii) acquiring, directly or indirectly, control over the target company shall be *made on the date of agreeing to acquire shares or voting rights in, or control over the target company*. Thereafter, an acquirer must make payment to public shareholders who have tendered their shares in the open offer within 15 days from the date of closure of an open offer, a stage which is likely to be reached within 70 days to 90 days from the date of the public announcement. If such a payment is not made, an obligation is imposed on the acquirer to pay interest on the amount due to the public shareholders.

HOWEVER, THUS FAR, THE CCI HAS DISPLAYED A LACK OF UNIFORMITY IN ITS DECISION-MAKING PROCESS

Therefore, the CCI has a period of 210 days under the Act (excluding clock stops) to clear a transaction and, pending such clearance, no implementation activities (including payment to public shareholders) can be undertaken. Accordingly, the mismatch of timelines between the date on which payment obligation under the Takeover Regulations arises and the date of CCI's approval can result in a mismatch between the Act and Takeover Regulations timelines in instances of a merger notification being filed by a listed company which has undergone an extensive Phase I review. And, thus, it can result in the imposition of a large amount of interest on the acquirer.

V. DECISION MAKING UNDER THE COMPETITION LAW FRAMEWORK

The CCI, being a quasi-judicial body is not necessarily bound by its own precedent; how ever, certainty is a pre-requisite for any good regulatory regime and industry generally has a legitimate expectation that regulators such as the CCI will abide by their own past decisional practice. Accordingly, a fair, consistent, and transparent decision-making process is essential in order to uphold the authenticity of a competition authority's actions.

However, thus far, the CCI has displayed a lack of uniformity in its decision-making process, because of the following reasons:

(a) there are no guidelines on important aspects of decision making such as definition of relevant market, calculation of assets and turnover to determine notifiability, treatment of horizontal agreements, safe harbors while assessing competition law concerns emanating from an agreement, and, most importantly, determination of penalties; and

(b) most of the CCI orders (especially Combination approval orders) are not speaking orders.

A. Lack of Guidelines

Since 2011, the CCI has already amended the Combination Regulations multiple times, and while the CCI has used these opportunities to close the loop on several structuring innovations employed by industry to avoid merger control, certain technical and practical issues continue to baffle industry and require to be addressed.

1. Determination of Relevant Market:

Under the Act, the relevant market is defined as the market determined by the CCI to be the relevant product market, the relevant geographic market, or both the product and geographic markets.[34] Further, the relevant product market is defined as the market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices, and intended use.[35] The relevant geographic market is the market comprising the area in which the conditions of competition for the supply of goods or services or the demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas.[36]

Owing to the absence of any guidelines on the determination of relevant market, the CCI has, in its past decisional practices, been extremely inconsistent with the manner in which relevant market is defined. It is well accepted that determination of relevant market is the most important tool in a competition inquiry, especially in abuse of dominance and merger control cases. A narrow definition of relevant market will inflate the market share figures of the concerned entity and vice versa.

The "Small but Significant Non-transitory Increase in Price" ("SSNIP") test is the most accepted and common tool used by competition law regulators for defining the relevant market, both on the product side as well as the geographic side. However, its application has often been questioned on account of an inherent price distortion in markets dominated by a single or a handful of enterprises, referred to in the antitrust literature as the "cellophane fallacy." Therefore, antitrust scholars have warned against the use of SSNIP test in an abuse of dominance case because the definition of relevant market in a dominance case is for analyzing the conduct of a dominant enterprise which has happened in the past (*ex ante* analysis) and a SSNIP test will not reveal correct results for defining the market where the market has been distorted because of the pricing behavior of the dominant undertaking. As such, a SSNIP test is a preferable test to be used in a merger analysis because merger analysis is a future-looking exercise (*ex post* analysis) and the market is not distorted prior to the merger.

THE INDIAN MARKET, IN PARTICULAR, POSES INTRINSIC ISSUES WHICH MAKE THE APPLICATION OF THE SSNIP TEST DIFFICULT

In India, the SSNIP test has been used by the CCI on multiple occasions but its approach has not been uniform. The Indian market, in particular, poses intrinsic issues which make the application of the SSNIP test difficult; for instance, lack of market data, difficulties in conducting consumer surveys and determining an appropriately representative sample group, extreme price sensitivity of consumers, etc. Furthermore, the

characteristics of certain sectors do not permit the application of the SSNIP test, particularly in those sectors where quality of service, and not price, exerts a greater influence on customer choice.

In the absence of economic tests capable of application in the Indian market, determinations of "relevant market" are often guided by pure public perception and the wisdom of CCI members, without adequate statistical data to support the same. For example, while in *Belaire Owner's Association v. DLF Ltd*[37] the CCI restricted the relevant market to a mere suburb of the National Capital Region, in *Consumers Guidance Society v. Hindustan Coca Cola Beverages Pvt Ltd*[38] the CCI held that the relevant geographical market cannot be confined to the closed market inside the premises of multiplexes and considered the relevant market to be the market for all multiplex theatres across India.

HOWEVER, AS WITH THE CASES CITED ABOVE, CCI'S APPROACH WITH RESPECT TO DEFINING RELEVANT MARKET IN MERGER CONTROL CASES HAS NOT BEEN CONSISTENT.

In *Surinder Singh Barmi v. Board of Control of Cricket in India,* ("*BCCI case*")[39] the Board of Control of Cricket in India ("BCCI") was alleged to be abusing its dominant position in relation to the grant of franchise rights, media rights, sponsorship rights, and commercial contracts related to the organization of the Indian Premier League. However, the CCI arrived at a simplistic definition of the relevant market as the "market for the organization of private professional cricket leagues/events in India."

By contrast, in the case of *Dhanraj Pillay v. M/s Hockey India*,[40] the CCI undertook a far more detailed analysis and considered it appropriate to define the relevant market on the basis of each specific allegation against the association. Moreover, the CCI adopted an application of the "effects" based test in this case in order to determine the actual effect of the conduct of Hockey India. It is notable that in the *BCCI* case,[41] although the CCI's order states that it employed the SSNIP test for determination of the relevant market, the decision did not present any empirical analysis to indicate how the SSNIP test was applied and what the conclusions of such analysis were.

HOWEVER, IN INDIA, CONTRARY TO INTERNATIONAL NORMS, THE PENALTIES IMPOSED BY THE CCI ARE SOLELY AT ITS OWN DISCRETION

Finally, in the case of *Ajay Devgn Films v. Yash Raj Films Private Limited*,[42] while the informant alleged that the relevant market should be considered to be the "film industry in India," the CCI did not completely accept the same in its order and, as such, left open the definition of what the relevant market ought to be.

The relevant product market may be defined by conducting an economic analysis of demand-side substitutability (i.e. substitutability from a consumer perspective) and supply-side substitutability (i.e. ability of potential suppliers or producers to switch to the production of the relevant product) as well. In the European Union and the United States, demand-side substitutability is considered to be the more important of the two and also finds specific reference in the Act. However, as with the cases cited above, CCI's approach with respect to defining relevant market in merger control cases has not been consistent. In *NHK Automotives/ BBTCL*,[43] the CCI considered demand-side substitutability and end-use of various types of springs in order to delineate the relevant product market. In *Diageo Plc./ United Spirits Limited*,[44] the CCI, with regards to the highly

differentiated alcoholic beverages market, considered not only price-point differentiation but also the effect of supply-side substitutability.

2. Lack of penalty guidelines

Competition jurisprudence in India suffers from the absence of penalty guidelines which are intended to elucidate and provide guidance as to how the CCI ought to calculate penalties for violations of competition law. Given that CCI has become very aggressive in its enforcement activity, levying fines to the tune of INR 120 billion to date, it is essential that CCI announce detailed penalty guidelines. The trend so far has been that the CCI has applied differential standards for imposing penalties, without providing any coherent reasons and justifications in relation to the process or formulae adopted to calculate the penalties imposed.

For instance, the CCI imposed a penalty of 7 per cent. in the *DLF* case[45] while it imposed a penalty of only 3 per cent. in *Coal India*.[46] With respect to merger filings, an interesting development—reflecting the keenness of CCI in enforcing the mandatory, suspensory merger control regime—is the imposition of penalties for gun-jumping, despite the Act does not contain any charging provision. In *Etihad Airways/ Jet Airways*,[47] the CCI imposed a penalty of INR 10 million on the acquirer, Etihad, for allegedly implementing certain aspects of the Commercial Co-operation Agreement entered into with Jet Airways early, as well as not notifying the sale and lease back of Jet Airways' prime landing slots in London's Heathrow airport. Therefore, for companies in India, the calculation of penalties remains a highly contentious issue.

THE COMPAT ALSO OBSERVED THAT THE ADJUDICATORY ROLE OF THE CCI NECESSITATES THAT IT CONSIDERS RELEVANT FACTORS BEFORE DETERMINING A PARTICULAR PENALTY AMOUNT LINKED TO THE ENTERPRISE'S TURNOVER

It is pertinent to note that antitrust jurisdictions such as Pakistan and Singapore have guidelines on the imposition of financial penalties. Most recently, Malaysia has also issued draft penalty guidelines which are presently undergoing a public review process. However, in India, contrary to international norms, the penalties imposed by the CCI are solely at its own discretion. Earlier, the Competition Commission of India (General) Regulations, 2009 ("*General Regulations*") had a regulation which allowed for a show cause hearing with the concerned parties before the CCI levied any penalty. However, even that regulation has been deleted, which makes the whole issue of penalty even more murky.

Notably, the COMPAT has attempted to provide guidance on the manner in which penalties ought to be calculated, but its guidance does not find a basis in any legal provision. Pertinently, in several instances, such as *Gulf Oil Corporation Ltd* [48]and *MDD Medical Systems*,[49] while upholding the decisions of the CCI, the COMPAT has significantly reduced the penalty imposed on the parties and also cited reasons for such reductions in penalties. This reiterates the grave necessity for the CCI to, first, extend the benefit of a lucid and standard methodology guiding the imposition of penalties and, second, give detailed reasoning in its orders for arriving at a particular penalty amount.

3. Concept of turnover

In addition to the above, a related topic of contention has been the "turnover" which ought to be taken into account while levying financial penalties under the Act. Companies in India that are active across multiple product lines are often housed under a single entity and, as such, companies lack clarity as to how CCI calculates penalties for infringing conduct. This has become a matter of grave concern and uncertainty.

The Act provides that a maximum penalty of 10 per cent. of the average turnover for the preceding three years can be levied for abuse of dominance/vertical agreements. For cartels, the maximum penalty is up to three times the profit or 10 per cent. of turnover for each year of existence for cartels (whichever is higher). But the Act fails to clarify whether "turnover" for calculating such penalties is only the relevant turnover, i.e. the turnover that can be attributed to the business in which the violation of competition law took place, or the general overall turnover of the contravening enterprise.

The concept of relevant turnover was introduced in India for the first time by the COMPAT in *Aluminium Phosphide Tablets*.[50] This opportunity came before the COMPAT in an appeal against the decision of the CCI penalizing three aluminium phosphide tablet manufacturers for bid-rigging under Section 3(3) of the Act. The CCI had levied a total penalty of INR 3170 million, but this penalty was significantly reduced by the COMPAT. In its analysis, the CCI had not given any basis for the amount of the penalty, and had calculated the penalty based on the total turnover of the enterprise.

The COMPAT held that the CCI should have only considered the "relevant turnover" while calculating the penalty, since the infringing enterprises in this case were multi-product companies. Further, in its formal orders, the COMPAT reprimanded the CCI for the lack of reasoning and elucidated that the CCI must consider the doctrine of proportionality while imposing penalties. The COMPAT also observed that the adjudicatory role of the CCI necessitates that it considers relevant factors—such as the financial health of the company, its reputation, and the likelihood of the company being closed down due to the harsh penalty—before determining a particular penalty amount linked to the enterprise's turnover. The COMPAT's order is currently on appeal before the Supreme Court of India where it waits to be seen whether the COMPAT's guidance will be upheld.

HOWEVER, THE CCI ORDERS CONTINUE TO BE DEVOID OF ANY COGENT THEORIES OF HARM OR ECONOMIC ANALYSIS WHICH CAN SET PRECEDENT VALUE FOR FUTURE MERGER NOTIFICATIONS.

Given that Indian competition law is largely patterned on EU law, the CCI should take a leaf out of the EU's practice and publish detailed guidelines on important aspects to give appropriate guidance and also to ensure that there is consistency in stances adopted by the CCI. One of the primary reasons for the European Union becoming a mature antitrust jurisdiction is that enterprises have, at their disposal, important guidelines on all important facets of competition law. Further, the EU Commission undertakes a periodical assessment of each of its guidelines and makes modifications to the same from time to time, keeping it up to date.

B. Lack of Reasoned Orders

The Supreme Court, through a plethora of its decisions, has interpreted the doctrine of natural justice to include issuance of reasoned and speaking orders by any authority exercising judicial function.[51] The Supreme Court, in *SAIL,*[52] directed the CCI:

> In consonance with the settled principles of administrative jurisprudence, the Commission is expected to record at least some reason even while forming a prima facie view. However, while passing directions and orders dealing with the rights of the parties in its adjudicatory and determinative capacity, it is required of the Commission to pass speaking orders, upon due application of mind, responding to all the contentions raised before it by the rival parties.

Further, emphasizing the importance of the quasi-judicial functions exercised by the CCI and the COMPAT, which can have far reaching consequences, the Supreme Court reiterated the necessity of supporting orders with reasons in *Rangi International Ltd v. Nova Scotia Bank and Ors*.[53]

Despite this well-settled proposition of law, and the Supreme Court's explicit directives, the CCI's orders continue to be criticized due to lack of reasoning. As discussed above, the COMPAT has tried to fill the gaps in the CCI's orders by listing mitigating/ aggravating factors taken into account to reach conclusions regarding contravention of the provisions of the Act and imposition of penalties.[54]

Further, the CCI's orders under Section 27 of the Act not only lack a comprehensive economic analysis of relevant market, but also display ambiguities and inconsistencies. Even in merger control cases, though the CCI issues several information requests, the definition of the relevant market and the competition impact assessment they give in the orders are minimal and do not contain either specific delineations of the relevant market or an overview of all the information considered by the CCI in its merger evaluation process.

As a general practice, the parties, while filing merger notifications, undertake self-assessments of the relevant market and, typically, in its order, the CCI tends to accept the market definition put forth by the parties or leaves the same open for interpretation. There have been very few known instances where the CCI has asked parties to further drill down into the relevant market to analyze the impact on the market on account of a proposed transaction. However, the CCI orders continue to be devoid of any cogent theories of harm or economic analysis which can set precedent value for future merger notifications.

Given that the CCI is at an extremely nascent stage and is in the process of developing the competition law jurisprudence, which will go a long way in determining how businesses are carried out in India, it is imperative that the CCI issues speaking orders. This will not only lead to the CCI establishing a regime of certainty and predictability, as a result of which stakeholders, i.e. enterprises and practitioners, can arrive at accurate conclusions, but will also be of utmost importance in the event its orders are challenged before higher authorities.

VI. POLICY MAKING FUNCTION UNDER THE COMPETITION LAW FRAMEWORK

A. Draft National Competition Policy

In 2011, the (Indian) Ministry of Corporate Affairs constituted a Committee for framing a National Competition Policy ("Committee"). This Committee took feedback from various stakeholders, including chambers of industries, corporations, law firms, and members of civil society and subsequently issued a draft National Competition Policy Statement ("Draft Policy"), which aimed at integrating principles of competition in various economic policies of the government and, thereby, promoting a competitive market structure in the economy.

THE CCI IS ENCOURAGING CORPORATE INDIA TO INITIATE COMPETITION COMPLIANCE PROGRAMS

The Draft Policy also aimed at promoting good governance by bringing in greater transparency and accountability. It contemplated that where a separate regulatory arrangement is set up in different sectors, the functioning of the concerned sectoral regulator should be consistent with the principles of competition as far as possible and there should be an appropriate coordination mechanism between the CCI and sectoral regulators to avoid overlap in interpretation of competition related concerns. Further, any deviation from the principles of competition should be made only to meet desirable social or other national objectives, which should be clearly spelled out. The following initiatives were proposed as part of the Draft Policy:

ANY ANALYSIS/OPERATION OF THE REGULATORY FRAMEWORK GOVERNING A PARTICULAR SECTOR WILL IMPLICITLY INVOLVE A COMPETITION LAW ANALYSIS OF THE SECTOR WITH THE END GOAL BEING A PRO-COMPETITIVE STRUCTURE LEADING TO CONSUMER WELFARE

- institutional separation between policy making, operations, and regulation;

- a review of existing policies, statutes, and regulations of the Government (which may restrict or undermine competition) from a competition perspective with a view to removing or minimizing their competition-restricting effects;

- a procedure for making a competition impact assessment of proposed policy, law, and regulations before they are finalized;

- "competitive neutrality," such as adoption of policies which establish a "level playing field" where government businesses compete with private sector;

- national, regional, and international cooperation in the field of competition policy enforcement and advocacy; and

- in order to ensure effective competition, third party access to essential facilities in the infrastructure

sector, owned by a dominant enterprise, to be provided on reasonable and fair terms.

While the Draft Policy has not yet been put into effect, its mandate and intent rings loud and clear and any analysis/operation of the regulatory framework governing a particular sector will implicitly involve a competition law analysis of the sector with the end goal being a pro-competitive structure leading to consumer welfare.

B. Leniency Program

In the context of the difficulty in securing evidence to prove the existence of cartels, a leniency program has been introduced, whereby leniency may be granted by the CCI under the Competition Commission of India (Lesser Penalty) Regulations, 2009 ("Leniency Regulations") to the first three cartel participants who apply to the CCI and provide such information as may constitute "vital disclosures" as defined under the Leniency Regulations.

Thus far, market sources indicate that the leniency program has been utilized in three instances but an order on the basis of such an application is still awaited. It is, however, unfortunate that the identity of a leniency applicant in the conveyor belt sector was made public during the CCI's investigation into this sector.[55] Going forward, the CCI will have to ensure that the identity of applicants is not compromised in order for people to have faith in this process. Nonetheless, the CCI is aggressively promoting its leniency program in order to better investigate cartelization and it is likely, given the high penalties being imposed under the Act, that cartel participants will come forward under the leniency program and assist the CCI in its investigations.

THIS GREATER COORDINATION BETWEEN THE CCI AND GLOBAL COMPETITION REGULATORS WILL SIGNIFICANTLY IMPACT GLOBAL CARTEL INVESTIGATIONS AND CROSS-BORDER M&A MERGER CONTROL NOTIFICATIONS

C. Competition Advocacy and Compliance Programs

While the CCI has indicated that it intends to continue to monitor markets and investigate either *suo motu* or on the basis of complaints/information received, as a part of its responsibility to undertake competition advocacy, the CCI is encouraging corporate India to initiate competition compliance programs. On account of the CCI's investigative zeal and the headline penalties being imposed, Indian companies are gradually coming to realize the importance of ensuring that their business practices are in compliance with competition law and that strong and comprehensive competition compliance programs could serve as mitigating factors in the event of a CCI investigation.

THE CCI HAS NOT BEEN SHY IN INVOKING ITS EXTRATERRITORIAL JURISDICTION

In early 2013, the CCI Chairperson, Mr. Ashok Chawla, met with the heads of 100 of the largest

listed companies in India in a move to improve awareness of the competition law regime in India and, also, to impress upon them the importance of competition compliance and emphasize how the existence of a competition compliance program could possibly act as a mitigant for contravening companies. Mr. Chawla, as well as the members of the COMPAT, regularly speak at various industry events to increase awareness about the CCI's enforcement priorities and the benefits of a strong competition culture in the market.

Further, the CCI, consistent with international best practices, has been offering informal consultations on procedural aspects relating to the Act. The CCI recently announced that they will expand the scope of this facility to provide consultations on substantive issues, including pre-filing consultation.[56] This will undoubtedly help create greater awareness among market participants and allow them the facility to set their house in order on the basis of guidance received from the CCI.

D. Coordination With Other Competition Regulators

The CCI is also looking to increase interaction and cooperation with global competition law regulators. The CCI signed an antitrust memorandum of understanding ("MOU') with the Federal Antimonopoly Service (Russia) on December 16, 2011. The U.S. Federal Trade Commission and the Department of Justice also signed a MOU with the Government of India, Ministry of Corporate Affairs, and the CCI to promote increased cooperation and communication among competition agencies in both countries. On June 3, 2013, the CCI signed a similar MOU with the Australian Consumer and Competition Commission. The CCI also signed an MOU with the Directorate General for Competition of the European Commission (DG, Competition) on Cooperation in the field of competition laws.

In addition to these MOUs, the CCI is actively engaging with several competition law authorities from the United Kingdom, Japan, Korea, and others to enter into arrangements for cooperation in the field of competition law. This greater coordination between the CCI and global competition regulators will significantly impact global cartel investigations and cross-border M&A merger control notifications.

VII. CONCLUSION

The success of Indian competition law and its effectiveness depend on a variety of factors including initial architecture of law, institutional design (including independence of the CCI), resources, manpower, economic training, and governmental support in promoting competition, as well as the balance of power between proponents and opponents of the Act. Given that the Act and its enforcement is still at a very nascent phase, it is very critical that the CCI adopts international best practices, in order to provide more clarity to the industry and practitioners.

The CCI has made substantial headway in rolling out the competition regime in India. The CCI, in spite of being hamstrung by certain shortcomings such as shortage of manpower, has been very aggressive in its enforcement outlook which has made the industry sit up and take notice of the CCI. The CCI has shrugged

off the image of the previous antitrust regulator, MRTP Commission, which was dubbed by scholars as a "toothless tiger" because of its weak enforcement structure and legislative intent. The CCI has gone a long way in ensuring that practices by enterprises which distort the competitive effect of the market are curbed. However, there are still areas of antitrust jurisprudence, like compensation to claimants and their interplay with the scope of compensation under the Consumer Protection Act, 1986, which are yet to be tested.

Given India's place as one of the world's fast growing economies, the world is closely watching the evolution of the Indian competition regime. The CCI has not been shy in invoking its extraterritorial jurisdiction, including penalizing foreign acquirers such as Titan International and Temasek, for belated merger notifications and Google Inc. for non-cooperation with the DG during the process of investigation. This again emphasizes the need for the CCI to adopt international best practices and provide clarity while establishing a regime of certainty and predictability. ▲

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[2] S.V.S. Raghavan Committee.

[3] Moreover, the MRTP Act did not allow for the imposition of penalties or grant sufficient powers of regulation, thereby rendering the MRTP Commission ineffective.

[4] Section 3 of the Act.

[5] Section 4 of the Act.

[6] Sections 5 and 6 of the Act.

[7] Section 53B of the Act.

[8] Section 53T of the Act.

[9] Sections 8 and 9 of the Act. Prior to the Competition (Amendment) Act, 2007, the language of the provision read as follows: "The Chairperson and every other member shall be a person of ability, integrity and standing and who has been, or is qualifies to be a judge of a High Court, or, has special knowledge of, and profession experience of not less than 15 years in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs, administration or any other matter, which, in the opinion of the Central Government may be useful to the Commission."

[10] *Competition Commission of India v. Steel Authority of India Ltd. and Anr.* (2010) 4 CompLJ1 (SC).

[11] Section 36 of the Act.

[12] *Supra* note 10.

[13] AIR 2005 SC 730.

[14] Section 53C and 53D of the Act.

[15] Section 53A of the Act.

[16] Section 41 of the Act.

[17] *Supra* note 8.

[18] Regulation 20(4) of the Competition Commission of India (General) Regulations, 2009.

[19] *Grasim Industries v. Competition Commission of India, High Court of Delhi*, WP(C) 4159 of 2013.

[20] The Competition Amendment Bill is currently tabled before the Parliament of India.

[21] *Supra* note 10.

[22] *Supra* note 18.

[23] (2010) 4 CompLJ 557 (Bom).

[24] A natural monopoly is one that arises from the nature of the industry, where the presence of one effective player in a particular market proves most cost-efficient.

[25] It should be noted that the merger control review process under the Act is ex-*ante*.

[26] Preamble to the Act.

[27] Section 60 of the Act.

[28] Section 62 of the Act.

[29] Section 21 of the Act.

[30] Section 21A of the Act.

[31] On December 11, 2013, the Central Government exempted Vessel Sharing Agreements ("VSAs") in the liner shipping industry from the purview of Section 3 of the Act for a period of one year. However, VSAs continue to be subject to the supervision of the Director General, Shipping, Ministry of Shipping and all existing and new VSAs that are claiming this exemption are required to be registered with the Director General, Shipping.

[32] An acquisition of shares, assets, voting rights, or control of one or more enterprises or merger or amalgamation of enterprises.

[33] Combination Registration No. C-2013/01/08.

[34] Section 2(r) of the Act.

[35] Section 2(t) of the Act.

[36] Section 2(s) of the Act.

[37] Case no. 19 of 2010.

[38] Case no. UTPE 99 of 2009.

[39] Case no. 61 of 2010. By way of disclosure, the authors are representing BCCI in the appeal filed against CCI's order.

[40] Case no. 73 of 2011.

[41] *Supra* note 41.

[42] Case no. 66 of 2012.

[43] Combination Registration No. C-2011/10/05. By way of disclosure, the authors represented NHK Automotives in this filing.

[44] Combination Registration No. C-2012/12/97. By way of disclosure, the authors represented USL in this filing.

[45] *Supra* note 39.

[46] *Coal India Ltd v. Gulf Oil Corporation Ltd and Ors*, Case no. 6 of 2011.

[47] Combination Registration No. C-2013/04/122. By way of disclosure, the authors represented Etihad and Jet before the CCI and COMPAT in relation to the merger notification.

[48] Appeal nos. 82 to 90 of 2012. The COMPAT agreed with the CCI's conclusion that the collective boycott of auction conducted by Coal India Limited for the tender of explosive supplies amounted to

bid-rigging. However, taking into consideration mitigating factors, such as first breach by the appellants, intention of the parties, etc, the penalty was reduced to 10 per cent. of the penalty imposed by the CCI.

[49] Appeal nos. 93 to 95 of 2012. The COMPAT upheld the conclusion of CCI with respect to bid-rigging in the matter of supply and installation of the modular operation theatre and medical gases manifold system at Sports Injury Centre, Safdarjung Hospital, New Delhi. However, based on mitigating factors, the COMPAT decided to reduce the penalty from 5 per cent. to 3 per cent. of the turnover of the parties (i.e. from INR 30 million to INR 18 million).

[50] *M/s United Phosphorus Limited & Ors v Competition Commission of India & Ors*, Appeal no. 79, 80 and 81 of 2012.

[51] *See, Siemens Engineering & Manufacturing Co. of India Ltd. v. Union of* India, (1976) 2 SCC 981; *Babubhai & Co. v. State of Gujarat*, (1985) 2 SCC 732; *Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing, Kota v. Shukla and Brothers*, (2010) 4 SCC 785.

[52] *Supra* note 10.

[53] 2013 (7) SCALE 228.

[54] *See, Gulf Oil Corporation Ltd* v. *Competition Commission of India & Ors, supra* note 49; *MDD Medical Systems India Private Limited & Ors.* v. *Competition Commission of India & Ors, supra* note 50; *M/s United Phosphorus Limited & Ors v Competition Commission of India & Ors, supra* note 51.

[55] http://articles.economictimes.indiatimes.com/2014-02-27/news/47739680_1_alleged-cartel-competition-commission-regulator

[56] Press Release, Amendment to Combination Regulations - 28 March 2014, *available at* http://www.cci.gov.in/images/media/Regulations/Press%20Release.pdf.