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Expectations from the CCI after Five Years of Existence and a Change in Federal Government

KK Sharma
KK Sharma Law Offices

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I. INTRODUCTION

After a long spell of ten years and passing through phases which, sometimes, were associated with a number of scams and policy paralysis—being a reference to the fear psychosis which gripped the bureaucracy at one point of time—this year there was a change in the Indian Government at the federal level. A long marginalized right wing party, the Bharatiya Janata Party ("BJP"), under the leadership of its new dynamic leader Mr. Narendra Modi, rose to the helm—for the second time—of the Indian government.

Its first stint of governance, under the leadership of Mr. Atal Bihari Vajpayee, the flowery orator, was from 1998-2004. Interestingly, despite an economy that was doing quite well at the time of the 2004 elections, and relying on the catchy slogan of "India Shining," the party was not reelected. Either call it the innate wisdom or the fickle mindedness of the Indian electorate, the party, which headed a coalition called National Democratic Alliance ("NDA"), unexpectedly lost the elections despite there being a good number of economic performance parameters on an upswing. Mr. Atal Bihari Vajpayee, who was conferred Bharat Ratna, the highest Indian Civilian Honor by the Government of India only a couple of weeks back, was the only non-Congress party Prime Minister to have completed a full five-year term in the history of the country after independence.

This loss paved the way for a two-term stay in power for the Congress Party and its Allies, going by the name of United Progressive Alliance ("UPA"). But the Indian electorate decided to give a clear majority to one party after a rather long era (two decades) of coalition politics, an era having its own unstable dynamics.

Looking at the run up to the elections before the present Government came to power, it can be safely said that the markets were quite buoyant in anticipation. As an indication of market sentiment, the sensex (an index configured to track stock exchange movement on Indian bourses) went up, reasonably proving that the markets and the general public alike had great hopes from the new Government led by Mr. Narendra Modi. It was aptly reflected in the slogan of the incoming leadership, "Achhe Din Aane Wale Hain" (Good days are going to come).

Coincidentally, the author was a part of the event in which this catch phrase took birth, in an event in December 2013 called "Pravaasi Bhartiya Diwas 2013"—an annual event for Indian

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[1]Chairman, KK Sharma Law Offices & ex-Director General, Competition Commission of India. For further details, visit www.kkslawoffices.com; the author can be reached on kksharma@kkslawoffices.com or kksharmairs@gmail.com.

Diaspora—where the present Prime Minister, in his capacity as the Chief Minister of the state of Gujarat, was to address the gathering. He was to speak immediately after the then Prime Minister, Mr. Manmohan Singh. Being an economist, Mr. Singh spoke at length on economic cycles—cycles being the law of nature and economics. He exhorted people not to worry as economic cycles are a reality and good tides would follow bad tides.

Being an astute politician with a way with the words, the present Prime Minister (Mr. Modi), who was the then Chief Minister of Gujarat, seized an opportunity presented by the earthy economic wisdom just handed out in good faith by the Prime Minister, Mr. Man Mohan Singh, who did not realize the devastating effect it could be put to by the following speaker.

Mr. Modi, speaking immediately after Mr. Singh, started with saying in the vernacular that he completely agreed with the Honorable Prime Minister. After pausing for a couple of seconds for good effect, he said "I agree, ache din aane waale hain (I agree, good days are going to come) …. you only have to wait for a few months." Connecting this cool and cryptic remark with the impending general elections, the audience immediately caught the import of what he was hinting at and roared with laughter. A new slogan, which was put to good effect in the election that followed, was born.

II. THE NEW REGIME'S APPROACH TO THE ECONOMY

While early in its first term, the new regime has been perceived as "market friendly." And these perceptions of market friendliness have only gone up more notches despite all attempts by the opposition to portray the present regime as favoring crony capitalism and not caring for the common man. These accusations are based on Mr. Modi's track record when he served in his earlier capacity as the Chief Minister of Gujarat, where he unleashed market forces to be a potent force of state development. No wonder all types of industry flocked to his state and its unending concessions to encourage investment.

Perhaps he believes in the philosophy that, unless there is a growing pie, it cannot be shared, whether equitably or otherwise and, therefore, the growth of the pie is as important, if not more so, than as our keenness to divide it equitably. If this proposition is believed, the second proposition is that growing the pie will be an uphill task unless the establishment is tolerant enough of or, at least, benignly disposed towards the possibilities of the agents (read the entrepreneurs) of this growth being allowed to take a part of this pie, even though their share may appear to be disproportionate in the short run.

This economic proposition may appear to be simple enough but its simplicity may be misleading when we keep in mind the long-term historic socialist leanings of the Indian State and the traditional expectations by the general masses of looking to the State for all benefits, including employment, as well as their almost genetically ingrained susceptibility to be suspicious of any activity in which the private sector is involved. To that extent, the philosophy of Prof. Ajit Singh of University of Cambridge finds an echo in the present establishment. Readers may recall that Prof. Ajit Singh strongly advocates the possibility of entrepreneurs earning some above competitive profits to help a developing country leapfrog the distance by which they have been left behind in the race towards development.

It's informative to look back at the posturing of different political figures in the run up to the election, as this provides insight into the minds of these different contenders to the top job in one of the most vibrant democracies in the world. When all others were competing with each other to offer all kind of freebies to the electorate—like power, water, internet (free Wi Fi), waiver of debts etc.—the winner, Mr. Narendra Modi, never offered such largesse to the public.

On the contrary, he emphasized the availability of various necessities which, when added up, improve the standard of living for a nation. If these are available in abundant supply, a nation is called a developed nation, but if not available, or available only in small quantities and intermittently, a nation is called less-developed or under-developed. He defined these necessities as availability of power, infrastructure, and ease of doing business. Thus even while electioneering, he was speaking the language of competition law.

And Mr. Modi has walked the talk after coming to power. Initiating the process for such infrastructural projects as bullet trains, some cities have started to achieve those amenities that will make them modern cities. He has started "Swachh Bharat Abhiyan" to spread the word of cleanliness. So when nearly all others were offering free power, here was a candidate offering, instead, an uninterrupted supply of power. He did not talk of supplying power either at half the price or free for that matter. And this approach applied to all other basic, or basic plus, amenities (like Wi Fi)—amenities/ favors being doled out by different parties and their candidates.

Interestingly, India has long been a victim of competitive populism. There are instances galore when some goodies or the other—such as free rice, saris (a traditional woman's garment in India), power, waiver of debts, laptops, cash gifts, etc. etc.—are offered to either some segments of populations or the other and usually just prior to elections. What is surprising is not that these goodies are being offered, but that these offers actually work in a democracy.

It is not clear if all the democracies have to suffer this fate before becoming mature but, perhaps, the Indian democracy is paying a heavy price for universal adult suffrage in absence of much less than full literacy. Maybe it is due to the lack of literacy and education that the vast segments of populations can be taken for a ride by such a large number of hollow slogans and offer of freebies that cannot be produced out of thin air. Thinking minds would immediately question and not be swayed by such promises.

This lack may be why many elections have been won on misleading representations like "vital power from water was taken out by the previous regime in the form of electricity through hydro power generation upstream, which is why any water you get for irrigation is useless." Similarly, many slogans for winning elections such as "Garibi Hatao" (eliminate poverty), "Corruption free governance," etc. have remained only slogans, even after the completion of the term which was won on such slogans. Indian democracy has had to struggle with such misleading slogans almost on a daily basis. Imagine a polio immunization drive failing because of some vested interests spreading the canard that the polio drops were intended to cause infertility. In such an environment, it was indeed refreshing that a potential leadership candidate was not making such hollow promises but was offering what was eminently possible by appropriately harnessing market forces.

While offering continuous power, water supply, or good roads for connectivity what was left unsaid was the fact that availability of good quality goods was more important and realistic than just talking of providing free things—which was not possible without straining an already excessively burdened state exchequer. There is an old saying, "money does not grow on trees." It is really difficult to believe if any sane living being does not understand that basic truth. If someone pretends otherwise, he is either insane or attempting to drive the general population insane.

III. THE COMPETITION COMMISSION OF INDIA, FIVE YEARS IN

Given this background, and with a Government that believes in market forces, the spotlight has naturally shifted to the market regulator, i.e. the Competition Commission of India ("CCI"). If we look back, the last five years have been quite eventful for CCI. From the time the CCI officials had to entertain requests for help by young students preparing for different competitive examinations, to a time when there was hardly a day when the business papers were not carrying stories on the market regulators and how their orders touched different aspects of the economy, awareness of competition law has come a long way. It has also come to command a respect of the consumer class on account of many judgments appreciating their plight and, sometimes, holding big companies accountable for their deeds.

Having begun to exercise its enforcement powers back in May 2009, the CCI has been able to touch nearly all the sectors of the economy. The journey began with the first case of FICCI Multiplex Association against the collective decision of the United Producers and Distributors Forum ("UPDF") for not supplying film prints to multiplex theatres. Along the way, the CCI has imposed penalties of U.S.$9.25 million on the National Stock Exchange (NSE);U.S.$105 million on DLF, a reality major; U.S. $1.05 billion on cement companies; and U.S.$295.5 million on Coal India Limited, a state owned enterprise.

Merger reviews are soon going to celebrate their four-year anniversary; and they have gained considerable praise from a spectrum of stake-holders by way of prompt and transparent review track records. Recently, by actually taking two mergers—one relating to pharma and the other to cement—to full Stage II reviews and clearing the reviews with modifications (as the remedies in Indian competition law are called), the CCI has shown the maturity it has achieved.

With a Prime Minister who believes in market forces, there are huge expectations regarding the Market Regulator. The functioning of the CCI in the last five years, wherein it has enforced provisions relating to anticompetitive conduct and merger reviews to varying degrees, has been commendable despite the many constraints faced by a new agency.

The new Government has shown that it means business—as far as business is concerned. For example, there was considerable uncertainty over what was being called by many as "retrospective taxation" in the aftermath of Vodafone tax matter. The Government moved quickly to generate an atmosphere of confidence by taking the exceptional decision of not appealing against the order of the Bombay High Court, which quashed the penalty imposed.

Not only is the competition agency expected to curb with an iron hand any cartelization or bid-rigging activity, but it will also have to keep a constant vigil that this forum is not abused by vested interests to settle personal scores, which can be very tricky. Expectations to successfully discriminate the vital from trivial will also be certainly very high. While it is true that not pursuing leads on cartelization may encourage anticompetitive forces to be emboldened to carry on their nefarious activities, entertaining complaints filed with ulterior motives may adversely affect the "ease of doing business" which the present government is guarding very carefully.

Optimal harnessing of market forces means first that the deviant has to be controlled and, if need be, penalized to set an example. But, at the same time, it also implies that the compliant operator be suitably protected from the malicious abuse of the process of law and rewarded for compliant behavior if, inadvertently, it gets into the cross hairs of the implementation of competition law through no fault of its own.

In a developing economy in transition, where the awareness of this new law is still growing, and where many anticompetitive conducts have been treated as simply the way of doing business, such instances may not be uncommon. In particular, there are instances of the heads of state owned enterprises ("SOEs")acting on the directions of the designated functionaries in the Government, even those these may be board-controlled enterprises in terms of company law. These board members, being appointed by the shareholders, are fully controlled by the state or its nominees. The top executives, i.e. the Chairman and Managing Directors ("CMDs") may consider it absolutely necessary to follow the directions of the owner, i.e. the State in these cases. In fact, there have been written directions to these executives to follow the instructions or else face serious action. Some of these written directions may even go to the extent of requiring complete consultation before bidding for different projects, which—strictly speaking—falls beyond the bright line in competition law. Some two years back, leading financial dailies dealt in detail with one such written direction, which had the potential of being called cartelization.

IV. CONCLUSION

The CCI's task, which is already complex, becomes even more complex when it is highly expected to neither be sparing to those who violate the law, nor too overzealous in its approach lest it should disturb economic progress by any negative sentiments. Therefore, the best course for the regulator should be to ensure compliance of the law while evoking caution, but not fear, while dealing with the realities of the economy. And it will need to remember that the economy has been in the tight grip of the State, with many state-controlled giants still holding sway despite appearing to be legally independent enterprises. A tough job indeed!