

Past, Present and Future of Competition Law in India

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The Competition Act 2002, enacted on 13th January, 2003, paved the way to bring into existence the Competition Commission of India (CCI), established on 14th October, 2003. Due to several reasons, the enforcement of the provisions of the Act, including the ones incorporated vide amendment in the year 2006, could not begin for quite some time. The enforcement provisions of the Act, other than the review of combinations, could commence only from 20th May, 2009. The commencement of provisions relating to review of combinations, leading to the full implementation of the competition law in India, could begin only from 1st June, 2011 only. In Manupatra's Q&A session, the former Director General & Head of Merger Control, Competition Commission of India, Kaushal Kumar Sharma, IRS, shared his views on the journey of CCI so far since it became functional, its future and also his role as Director General, and later as Advisor (Law) in-charge of formulating Merger Control Regulations, his experiences and major achievements.

1. CCI has come a long way since its establishment in 2002. How has the journey been so far?

Answer: The competition law in India, the Competition Act, 2002 (the Act), was enacted on January 13, 2003. Under that law, the Competition Commission of India (CCI) was established on 14th October, 2003. For various reasons, only the advocacy functions, enshrined under section 49 of the Act, of the Commission could be brought into force. As a sequel to the reasons for delay in the enforcement of the provisions of the Act, the Act was amended in September 2006. However, the enforcement provisions of the Act could commence - that too partly - only from 20th May, 2009. The provisions relating to review of combinations, leading to the full implementation of the competition law in India, could be brought into force effective from 1st June, 2011 only. This, in short, has been the story of the competition law in India. No doubt, there has been considerably delay in achieving the fully functional competition law in India but, in a democratic polity, this is not unusual. Almost without exception in all the jurisdictions such as EU, USA, Canada, etc. the enforcement of competition law has met with resistance from different stakeholders because, essentially, of misconceived notions about this modern piece of economic legislation. However, time has proved those fears wrong. On the contrary, the effective implementation of this law has, generally speaking, helped growth in the economies and let the pass-on benefits of innovation and efficiencies reach the consumers.

In India, after this law came partly into force with effect from 20th May, 2009, it was seen as a

new tool to deal with not only with anti-competitive practices such as horizontal and/or vertical restraints of trade but also the competitors. The later part arose because of over enthusiasm to experiment with the new law as well as under appreciation of the philosophy behind this legislation. This led to a large number of business rivalries landing on the door steps of the CCI in the garb of either "abuse of dominant position" or "anti-competitive agreement" cases. A look at the orders under section 26(2) of the Act, available on the website of the CCI, would show that, mostly, the CCI has avoided falling into the trap and rightly dismissed the information arising not from competition issues but other reasons. Nonetheless, forwarding of many such matters to the Director General (DG) and subsequent dropping of the matters would indicate that there was scope for the resources of the CCI being used more efficiently. The present wording of section 26 of the Act indicates that a more efficient and effective usage of the resources is expected. With passage of time and accumulated experience, more effective use of the resources is expected.

In comparison, the CCI has won international accolades for proving to the world that the CCI can deliver what it promised in review of combinations. In all the four cases of combination review so far, the decisions of the CCI have been crisp and delivered with electric speed matching the most mature jurisdictions and faster than the jurisdictions where this was introduced in last couple of years ahead of India in the Asian neighbourhood. In totality, the journey has been of intense involvement in the evolution of the law and continuous learning of all the stake holders - the CCI and its staff included. For me, personally, it has been an extremely rewarding journey. Being at a particular juncture of history, I had the unique opportunity to create and lay down the Standard Operating Procedures (SOPs) for the investigation as the first DG of a functional CCI and later for review of combinations as the Head of the Combinations Division. In between, I was also given the opportunity for course correction in the Antitrust Division for a period of about three months. On the whole, it has been the evolution of the competition law in the right direction for the country.

2. What are the primary objectives and key functions of CCI?

Answer: The primary objectives and key functions of the CCI have been eloquently stated in the preamble as well as Section 18 of the Act. These are :

- To prevent practices having adverse effect on competition,
- To promote and sustain competition in the markets,
- To protect the interests of consumers and
- To ensure freedom of trade carried on by other participants in markets

..... in India, and for matters connected therewith or incidental thereto.

Both the preamble as well as Section 18 echo the same sentiments.

The beauty in the above mandate given to the CCI is sequence of the priorities set for the CCI by the legislature. The first one is to prevent the anticompetitive practices, followed by promotion and sustaining the competition. Not that these are to be followed sequentially in series but it shows the mindset of the legislature. The anticompetitive practices are like virus in a market economy towards which we have been continuously moving subject to the compulsions of our aim of an equitable society. So long as there are anticompetitive practices, there is hardly any hope of promotion and sustaining of competition in the market. So, first the CCI has to prevent the anticompetitive practices, only then can the CCI be in a position to promote and sustain competition. After these two objectives are achieved, the interest of the consumers is to be protected. The CCI has to keep in mind the interest of all the consumers and not a single consumer alone (unlike Consumer protection Act, 1986). Even if information arises from the issue relating to a single consumer, the impact of the decisions of CCI are expected to be very wide ranging. On the contrary, if a consumer approaches a consumer court, the matter relating to that consumer is addressed but the issue remains. If a second consumer faces a similar problem, the consumer has no choice but to approach the consumer court again.

Section 2 (d) of the Consumer protection Act, 1986 defines "consumer" as under :

Section 2 (d)

"consumer" means any person who :

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purposes;

Explanation.- For the purposes of this clause, "commercial purpose" does not

include use by a person of goods bought and used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self-employment;

In contrast, Section 2 (f) of the Act defines consumer as under :

Section 2(f)

"consumer" means any person who :

(i) buys any goods for a consideration which has been paid, or promised, or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, whether such purchase of goods is for resale or for any commercial purpose or for personal use;

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first-mentioned person whether such hiring or availing of services is for any commercial purpose or for personal use.

(Emphasis Added)

The important distinction is the highlighted portion of the above definitions. The "consumer" as defined in the consumer law, essentially, is the person who buys a good or services for his or her own consumption. There is a specific exclusion of the person who buys any good or services for resale. On the contrary, not only there is no such exclusion in the definition of "consumer" given in the Act but also it is specifically covered.

Thus, the definition of the consumer as given in the Act is much wider and so are the implications for the economy.

The last limb of the objective and key functions of CCI is to ensure freedom of trade carried on by other participants in markets. Any competition analysis whether for abuse of dominant position or review of combinations greatly hinges on the existence or otherwise of

barriers to entry and exit. This is critically dependent on the freedom of trade carried on by other participants in the market. Thus, the Act has weaved the objectives and duties of the CCI in a holistic web. In addition, the Act has given ample freedom to the CCI to reach a decision in the light of the present economic status of the country. This is unique to our law. There are a number of instances in the world where the political executive can overrule the decision of the competition agency arrived at on competition principle. In India, the political executive can only give broad policy directions but is not expected to give directions in any individual matter. In that respect, our law is very modern.

3. How do you see CCI as an effective tool to curb the anti-competitive practices?

Answer: The focus of the question is on the plan of CCI to curb the anti competitive practices. It is a tough question. To my mind, it is similar to some guest sitting on dining table for dinner and be served with the traditional Indian "thali" consisting of a number of dishes. Till the food is finished, it is very difficult to predict (by anyone other than the guest) as to which dish would be consumed first. Unless, a pattern is dictated by custom and traditions, it is nearly an impossible task. In some of the cultures the sweet dish is taken last. In some cultures, the "papad" is taken first. In still many others the rice is either taken in the end or in the beginning. Guest may be the right person to give a hint of the sequence of consumption of dishes. So far, no such exercise into prioritisation has been done in the CCI. However, if done, such a road map would help a young agency to wade through the muddled area of enforcement.

In my personal view, to have maximum impact, the first priority of a competition agency in an economy in transition such an India should be first to focus at the anti-competitive practices including cartels. These are at the core of impairment of competition culture in the economy. If these are taken care of, a large number of potential cases of abuse of dominant position would be nipped in the bud. The second focus area should be development of an expertise to astutely review the combinations coming before the agency with minimal compliance burden on the combining enterprises and its judicious exercise without fear or favour. Simultaneously, the cases of abuse of dominant position coming before the agency should also be dealt with in such a way that the decisions of the CCI have an exemplary impact but too many resources of the agency need not be spent on this part of the enforcement and the agency should be selective in picking cases deserving its limited resources.

Interestingly, this is the topic of my dissertation for Ph.D. in Competition law from Bangor University, UK, which is underway. At the end of this research work, we should have a roadmap for enforcement for a young competition agency in an economy in transition.

4. What would you say have been the major achievements and challenges faced by CCI since it has come into force?

Answer: The major achievement of the CCI has been to exist as a harmonious body. There have been regulators in India where the interpersonal equations have proved to be very burdensome on the regulator and its functioning. India is not unique in this. Many agencies including some of the competition agencies in erstwhile USSR had also suffered on that count. Therefore, this is a major achievement in my personal view. The quick pace of effective investigations, despite limited resources, has been another major achievement. Some of the initial investigations had been completed in extremely tight time limits surpassing the broadly known timelines for similar investigations in mature jurisdictions. Partly that can be attributed to the rampant anti-competitive practices in the country where the practitioners of the anticompetitive practices were very naïve and collection of evidence was not that difficult. However, we have to give credit to the CCI to have created an atmosphere of purpose and dedicated team efforts to make it possible. The challenge is to keep up the momentum. Sustained focus on skill enhancement through various means is another achievement.

As regards the challenges, to keep up the momentum of the effective investigations is one. Ensuring that the staff gets training from the sources where it is available but does not get indoctrinated into the ways of functioning of those agencies has been another. Effective follow up of the investigation reports and delivering quick decisions has been the third challenge.

5. Is CCI different from MRTP Commission in terms of powers and functioning?

Answer: Certainly. Both are, essentially, different creatures. The MRTP Commission was born in the era of licensing and capacity restrictions. The CCI was born from the realisation, as stated by the then Finance Minister on the floor of the house, that amendments to the MRTPC Act were not going to be enough and India needed a new law to bring its economy in alignment with the global economy. The procedure of the investigations, the powers and the functions of the investigation arm- DGI&R in case of MRTPC and DG in case of CCI- are totally different. Similarly, the basic penal provisions which were not there in the MRTPC are there in the Act. The MRTPC Act was based on dominance as a perceived evil. Under the new law, the dominance, per se, is not frowned upon but its abuse is. Explicit definition of 'cartel', mandate for competition advocacy, extra-territorial jurisdiction, regulation of combination above certain thresholds and not government approval above certain market share, exclusion of unfair trade practices from the Act, the determination of dominance based on a number of factors and not simply above a particular market share are the other features which distinguish the MRTP Commission from CCI. Thus, the structure, functioning and the ethos behind both the laws are totally different.

6. How does CCI plan to resolve conflicts arising out of alternate legal forums available to a common man - like High Court/Supreme Court/Compat/Consumer court - Does this have any affect on CCI rulings?

Answer: No, this is not going to effect the functioning of the CCI. The areas of each are well defined but there may be some cases where the overlap may come. So far the judiciary, the sectoral regulators and the COMPAT all have shown great maturity in understanding these matters. Hopefully, this should continue. It is not going to affect the CCI rulings.

7. Some recent rulings of CCI like the NSE order passed in May 2011 have received widespread criticism as being a major error of judgment. What are your views on this?

Answer: All the rulings of the competition watch dog are neither expected to be treated with bouquets nor it is possible. Not all the decisions of FTC/ DOJ in USA or EU competition regime or any other competition agency in the world have been lauded. "Error of judgment" is an interesting phrase. The power to exercise judgment on certain issues is given to some person or a body of persons. This is based on the suitability of that person or that body of persons for the job. The appointing authority, in the present case the Central Government, is the sole arbiter of this suitability. It does not make these persons either clones of each other or someone else who may be making such claims of being all the depository of knowledge and competent to come up with an "error free judgment". Any judgment, by definition, cannot be error free. A judgment is a judgment.

Period - At a particular point of time on certain set of facts and circumstances. A different set of persons may come with different judgment on the same set of facts and circumstances. This is not unusual in the higher judiciary too in India or elsewhere. Even the Supreme Court of India has power to review its own judgments. What is more important is that there should be avenues of review. The Act offers two such avenues after the judgment of the CCI. The parties are free to approach the Competition Appellate Tribunal (COMPAT) under section 53 B of the Act. Even if it is feared that the COMPAT may also make an error of judgment, the concerned parties can approach the Supreme Court under Section 53 T of the Act. Even if someone claims that there has been an "error of judgment", I can only say that the buck has to stop somewhere.

It is for this reason that either the dissenting judgments or the so called "error of judgment" should not be the worry in the evolution of the competition law in the country. Once a judgment has been passed by the CCI, it would be inappropriate to pass any judgment on that. That is the judgment. The involved parties, on the other hand, should look for approaching higher forum for appeal in case of disagreement. What should worry us far more are the inefficient allocation of resources and delay in decision making. These are the only factors which may retard the progress of the competition law in India and not the so called "error of judgment". However, India being a free democracy, the people and the media have a right to express their view and are welcome to do so.

8. One of the major challenges faced in the competitive market in India is the monopoly

of Government. How does CCI plan to handle such matters, if challenged?

Answer: The Act being administered by the CCI is clear enough in its approach. It is enterprise neutral. It does not differentiate between the private and public enterprises. This is already happening. A large number of information are against the public enterprises. What can help matters is the advocacy with the different organs and constituents of the government. There is an appreciation in the CCI about it and, subject to the limitation of resources, it is being done and taken up more vigorously now. CCI is already admirably handling it.

9. What further steps need to be taken by CCI to ensure more effective functioning and how does CCI plan to overcome the challenges faced by it?

Answer: The steps are common for all the agencies. First and foremost is the resource allocation which has to be done judiciously. Whatever is due to the Members and Chairperson for an effective functioning should be given. In Higher Judiciary, there are judicial clerks attached to the judges. The CCI can have a system to attach one such person with the law background to all the Members. It is necessary as they come from diverse backgrounds and need sustained assistance. In absence of such an institutionalised arrangement, there is a fear of the entire divisions under the respective Members serving the job of that single judicial clerk. Except these attached judicial clerks, all the staff in all the divisions, even if working under any Member for administrative reasons, should be available to the CCI. The respective members of the staff should know that their inputs are reaching the CCI. This would greatly enhance the morale of the staff working in the Commission.

The CCI can take a cue from the functioning of the Combination Division in CCI itself. There should be a standard procedure of decision making from the word "go" till the disposal of the case in the form of the dispatch of the order with firm accountability and tight deadlines. Such an internal procedure has been prepared for the Combinations Division. After making such a procedure, it has to be religiously followed up without exception.

10. In your role as Director General and later as Advisor (Law) in-charge of Merger Control, how has been your experience and what have been your major achievements and challenges faced.

Answer: It is indeed extremely difficult to talk about achievements. It is for others to Judge. I can certainly share my experience and challenges. The time I joined the CCI, hardly anyone knew about it. It was an interesting office having about two senior officers besides one Member at that time. The office, looking brand new, was sparsely populated but neatly maintained. On my first visit, I was ushered into a room (which, later I discovered, was the conference room of the CCI in its Bhikaji Cama Place office) where there was a presentation from one gentleman from ACCC. There was animated discussion about the competition law and policy in Australia and India and the usual

comparisons. As is expected, it looked fascinating but all the stuff hardly made any sense to me. Perhaps, somewhere in the subconscious mind a resolve was taken to really understand the entire competition stuff. Within four months, I was enrolled for Masters in Economics and completed that in due course. However, that was pure economics and I actually wanted to understand the interplay between the economics and law. The CCI helped me by nominating me to a course on this interplay, PG Diploma in Economics for Competition Law. Later, I enrolled myself in another course PG Diploma in Intellectual Property Rights (IPRs) too from National Law School, Bangalore. On completion of my PG Diploma in Economics in Competition Law, I was offered the higher course of MA in Economics of Competition Law. I am in the process of writing dissertation for that course. After I was asked to draft the Combination Regulations, I had to go through the competition law of all the major countries along with the implementing regulations. I had a keen desire to formalize the grilling through which I was put by CCI. This led to my enrolment for Ph. D. in competition law with Bangor University, UK, with a generous scholarship offer. The first milestone of which, on completion of first year, has just been completed.

As regards my experience, I must confess that the working environment was such that it challenged you and, if you had any self respect, you had no escape route but to rise to the occasion or else leave the organization. I opted for the former. I dare not say that I was a great scholar of the competition law or any other subject for that matter. But it was the working environment which made you run for your dear life and you learnt running in the process. Nor can I make any claims to any great aptitude towards learning. So I owe everything to the CCI as far as my growth, if any, is concerned.

So the experience was that you were given task and you had to perform even if you did not know how to do and, in the process, you actually came to know. Whether it was organizing a conference, doing research, legal drafting - all kinds of work suddenly presented themselves with ruthless regularity. These assignments, no doubt, scared you to the bones while you were suffering them but these sufferings, if we may call those assignments by that name, helped build confidence and the capacity.

As regards the challenges, there were many and one almost every day. Suddenly, you would get a task and nobody in the Commission or even outside knew about it. What options you had except trying hard which I did. You end up contacting rank outsiders and try to know about this new subject. If they are kind enough, they may entertain you. If they are not, please be prepared for a royal ignore. Many were kind enough. Thus, we formed camaraderie in the competition community across the globe. When the task of first investigation was given, it was an almost a one line order of the CCI to conduct investigation. Nobody knew how. And you could ask nobody. We read the law and devised the entire procedure de -novo. My background in tax investigation helped me a lot.

The entire journey from 2006 till this far has been very exciting. To sum up we can say that achievements are personal value addition and challenges have been to lay down a path when none existed to the satisfaction of all the stake holders.

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