

Competition Commission of India

International Competition Law Conference

'Ex-Ante' and 'Ex-Post' Regulation

by

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Views Are Personal

- The Views Expressed in This Presentation Are Personal and Not of The Commission
- Similarities, At Any Stage, Either In Past or Future , Between These Views And The Practices Appearing To Be Followed In The Commission, If Any, May Be A Mere Coincidence

Scheme of Presentation

- Regulation
- 'Ex-Ante' Regulation
- 'Ex-Post' Regulation
- Challenges before 'Ex-Ante' Regulation
- Threats to 'Ex-Ante' Regulation
- Handicaps of 'Ex-Ante' Regulation
- Competitors of 'Competition'
- Other Differences

Regulation

- Who likes regulation
- Who wants regulation
- How to do regulation

Simply Means

- 'Ex-Post' regulations relate to regulations 'after the event has started occurring/occurred'
- 'Ex-Ante' regulations refer to regulation 'before the occurrence of event'

'Ex-Ante' Examples

- Insurance
- Traffic
- Building-Architectural approvals
- Academic Standards
- Other Standards
- Access Facilitators
- Societal Order
- Natural Monopolies etc
- And Regulation of Combinations ?

'Ex-Ante' Regulation-I

- The competition agency, generally, does 'Ex-Post' regulation with the exception of 'merger review' which is *called* 'ex-ante' in majority of the competition law jurisdictions
- This 'Ex-Ante' is not exactly 'Ex-Ante'
- This is comparably a difficult task
- Evidence can be inferred/hypothesized-prospective
- Gazing at the Crystal Ball

'Ex-Ante' Regulation-II

- Subjective by its very nature; not fool proof
- Prone to be criticized - either way
- The background sector information is of help
- The CA 02 accentuates travails of 'merger review' staff by no express access to anything else except the notification 'form' for forming the first opinion – a tough job
- Even in second stage, the tight mechanism of review makes it considerably tough for the regulator

'Ex-Post' Regulation

- Otherwise, the competition agency does 'Ex-Post' regulation- both in 'Prohibition of Anti-Competitive Agreements' and/or 'Prohibition of abuse of dominant Position'
- Evidence can be found-retrospective
- Proscribe Vs. Prescribe

Tell , If You Can

- “Prediction is very difficult, especially about the future.”.....Niels Bohr
- Could you have predicted before the evening of October 19 that this conference would a success?

Answer

- 'Yes' and 'No'
- Reputation and Track Record
- Same is True of 'Ex-Ante' Regulation

Reputation and Track Record

- Self determination
- Transparency
- Non-discrimination
- Procedural fairness
- Efficient, timely, and effective
- Coordination
- Convergence
- Confidentiality

Guiding Principles of ICN

- Sovereignty
- Transparency
- Non-discrimination
- Procedural fairness
- Efficient, timely, and effective review
- Coordination
- Convergence
- Protection of confidential information

Challenges

- Delay should not become 'Deal Breaker'
- Short run or long run
 - "In the long run, we are all dead"..J M Keynes
- Differential Development of Jurisprudence
- Comparison between two future events
 - One with 'event' having been allowed
(in future ;not in reality)
 - Other 'event' not having been allowed
(in future)

Threats

- 'Dynamics' of Economy
- 'Continuing Viability' of the transaction

Handicaps

- As regulation precedes the 'actual happening', it presupposes 'in-depth' knowledge of functioning of markets or the 'pretention' of it
- Job would be easier if 'competition' had no other competition
- Unfortunately, even 'competition' has competitors

Competitors of 'Competition'

- National/Regional Pride
- Investments or perceptions thereof
- Employment or Otherwise
- Competition Policy vs. Industrial Policy
- Undoing the Connection may be Impossible
 - Despite perceived lessening of competition, merger of Boeing and Mc Donnell Douglas, approved by FTC/DOJ¹
 - Eleventh hour clearance by EC- speculated to have been given to maintain good relation with US

Other Differences

- Extent of Proof
- Standard of Proof
- Time for Investigation/Review
- Transparency in Review
- Early Clearance in Majority of Cases
- Appellate Journey
- Development of Jurisprudence

Future

- Economics should rise to the occasion
- Fill in the gap of understanding
- Convergence of models
- Reduction of assumptions
- Must not learn from Lawyers
- Loss would be of Economics

Need of Sector Regulators

- Technical expertise necessary to determine access, maintain standards, ensure safety, determine tariffs, ensure Universal Service Obligation (USO)
- Structural compulsions
 - natural monopolies-economies of scale/ scope
 - network industries

Sector Regulator

- 'In-market'
- Usually ex-ante
- Sets 'rules of the game'
- Entry conditions, technical details, tariff, safety standards, access, etc
- Direct control on price/quantity/ quality
- To prevent inefficient use of resources, meet USO and protect consumers

Commonly Present

- Sectors having natural monopolies
- Sectors needing USOs
- Network industries
- Infrastructure sectors
- Utilities

Examples:

Water, Electricity, Telecom etc.

Competition Authority

- 'Off-market' regulator
- Usually *ex-post*
- Referee
- Relies on market forces
- Independent and objective – less prone to influence of market players 'capture'
- Specialized forum for deciding competition issues
- Applies competition principles uniformly across all sectors

Competition Oversight

- Maximum impact with minimal intervention
- Uniform competition outcomes across sectors
- Independent and objective — not prone to influence of incumbents

Synergy

- Sectoral regulations prevent inefficient use of resources and protect consumers
- Competition law aims at prevention of market power and thus ensures efficiency and enhances consumer welfare

Comparison

- While sectoral regulation is ex-ante, competition law is, mostly, ex-post
- Competition law consists of negative commands while industry-specific regulations provide positive commands
- Sectoral regulations are more direct and concerned with structure while competition law is indirect and more concerned with conduct and behaviour

Overlap / Conflict

Can arise on account of

- Conflicts in Laws (legislative ambiguity/overlap/ omission)
- Interpretational bias (bureaucratic bias)
- Conflicting approaches – market vs. regulation. Regulatory intervention itself may generate or protect anti-competitive situation
- Inevitable in the absence of clear delineation of jurisdiction
- Spurred by turf 'warriors'
 - Market players
 - Enforcers
 - Legal arbitrators

Harms of Overlap / Conflicts

- Loss of neutrality – “regulatory capture”
- Delay in delivery – “forum shopping”
- Adverse effects on investments, mergers & acquisitions
- Lessening of effective competition resulting in decrease in productivity, efficiency, economic growth and consumer welfare

Possible Solutions

- 'Sunset' clauses
- Expertise available with either is unique and cannot be acquired easily by the other – healthy respect
- Competition law enforcement can overcome insufficiencies in regulations – e.g. predatory pricing
- A sectoral regulator can do what a competition authority cannot- e.g. situations might warrant price fixation in public interest, setting standards etc.

Conflict Resolution

- Informal
 - contacts, meetings and exchange of information
 - exchange of officials
 - setting up of joint working groups
- Formal
 - right to participate in proceedings before the other
 - formal referrals - optional or mandatory
 - appeal to a common authority
 - no interference in the other's territory
 - delineation of jurisdiction –by statute

Relative Roles

- Regulators have strength in technical areas
- Competition authorities have strength in economic/competition matters; principles set by them apply across all sectors
- Regulation should fade away or minimise as competitive markets emerge
- Appropriate coordination mechanisms at working level are important. Respect and consideration for each others' roles/strengths
- As far as possible, laws may delineate jurisdictions, and provide for consultation/coordination procedures

Indian Position

- Formal referrals – S 21 & 21A
- Any statutory authority
 - may make a reference to CCI
 - CCI to give opinion in 60 days
- Opinion of CCI is not binding
- CCI may also refer to statutory authorities
- Reference is not mandatory
- No provision for CCI to take up *suo motu*
- No corresponding provision in sectoral regulatory laws
- Referrals by Central / State Govt. – S 49

The Electricity Act, 2003

- S 79 Functions of Central Commission-
 - (1) The Central Commission shall....
 - (2) The Central Commission shall advise the Central Government on all or any of the following matters, namely:-
 - (i) ..
 - (ii) Promotion of competition, efficiency and..

[S 86(2) says the same for state Commissions]

The TRAI Act, 1997

- S 11 Functions of Authority:

(1),the functions of the Authority shall be to-

(2) Make recommendations, either suo motu or on a request from the licensor, on the following matters, namely:-

(iv) measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;

The PNGRB Act, 2006

- S 11 Functions of the Board- The Board shall-
 - (a) Protect the interest of consumers by fostering fair trade and competition amongst entities;
 - Fair Trade not defined; Unfair trade defined under MRTP Act, 1969 in S 36A ; repealed

Competition Act, 2002

- S 18

.....it shall be the duty of the Commission to....., promote and sustain competition, protect the interest of consumers and ensure freedom of trade carried on by other participants, in the markets in India;

Some Questions

- Whether regulations is motivated by increasing welfare and making the scare resource available to the users or by protecting those who are to be regulated?
- Opposition to entry of foreign lawyers in different countries
- Opposition to medical practitioners duly qualified in one country to practice medicine in another country without passing requisite regulatory tests
- Requirement of passing separate exam in the same profession to practice in another country- CPA/ CA etc.



Thanks

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