

New Kid on the Block **Indian Competition Law**

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A Comparison

International Conference

on

“ Evolution and Future of Indian Competition Law”

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Disclaimer

- The Views Expressed Are Of The Author And Not Of The Commission. Convergence , If Any, Is Merely Co-incidental.

Benefits of Competition

- Promotes efficiency and innovation
- Ensures abundant availability of goods and services of acceptable quality at affordable / lower prices
- Offers wider choice to consumers

Rationale

- Resources are limited/ finite
- Economic well being
 - Better off Or Worse off societies
 - Effective utilization of Scarce Resources
- Society should maximize welfare
 - Allocative efficiency
 - Productive efficiency
 - Dynamic efficiency
- Welfare maxima is limited by finiteness of resources

Democracy and Competition

- Earliest Form Of Competition-Democracy
- Compete For Constituents' Good Opinion
- Resources and Allocative Efficiency
- Opportunities-Indian Example
- Re-distribution of Resources
- Unification On Rise-Divisiveness On Decline
- Unique Examples of Harmony
- A Great Mosaic Structure

Linkages

- How To Promote Competition
- Through Law- No Competition Before ?
- No Law Is Absolute
 - Physical World
 - Understood , Enforced and Interpreted
- Competition Law
 - Can't Be Divorced From Markets
- Markets
 - Can't Be Divorced From Socio Political Realities

Environment

- Social ,Political and Economic Framework
- Relative Empowerment of Different Sections
- Political Class of The Day - Its Will
- Existing Institutions
- Interplay Amongst Institutions
- Stakeholders- Organization & Strengths
- Final Outcome

The Foundations

- Separation of powers-Executive, Legislative & Judiciary
- Founding Pillars For A Mature and Lasting Democracy
- Time Proven Political System
- Put To Test -Number of Occasions
- Rule Of Law
- Equality Before Law
- Free Media

Basics

- Power Corrupts and Absolute Power Corrupts Absolutely
- Democracy Not Only Tolerates Dissent But Welcomes It
- Plurality Does Create Noise
- Checks and Balances
- Sound Ground For Implementation

Socio-Political Reality

- Law Mooted -Feb 99
- Law Enacted -Jan 03
- Not Implemented
 - Legal Challenges
- Amended -Sept 07
- Commission Constituted -March 09
- Part Enforcement -May 09
- Full Enforcement -June 11
 - Announced March 11
- Brisk Pace -12 Years

First Principles

- Have Due Regards to Experience of Others
- May Not be Blindly Followed
- Begin From First Principles

Salient Features : Law-I

- Autonomous Body
- Transparent Selection Process
- Competition Fund
- Exclusive Competition Jurisdiction
- Independent Investigation
- Harmony Amongst Regulators
- Latest Clarity from SC-Expert Body

Salient Features : Law-II

- Neutrality [S 2(h)/2(l)]
- Extra-Territoriality
- Adequate Powers
- Regulates its Own Procedure
- Not Bound By Rules of Civil Procedure
- International Co-operation (S 18)
- Exclusive Jurisdiction (S 53B/ 53T /61)
- Confidentiality (S 57/GR 38)

Salient Features : Law-III

- Failing Firm Defense In Law
- Explicit Efficiency Consideration
- Power To Issue Interim Orders
- Factors For Determination-All or Any
- Highest Ever Merger Thresholds
 - Self Adjusting- With Time
- Simplest Ever Filing
- Compensation Mechanism
- Competition Advocacy Provided

Salient Features: Regulations-I

- No Filing
 - Every day Business Transactions and
 - Combinations with Insignificant Nexus with Markets in India etc.
- Most Simple Form Ever
 - No Horizontal or Vertical Overlap
 - Engaged Predominantly in Exports of Goods/Services From India

Salient Features: Regulations-II

- Horizontal Overlap But Combined Market Share Not Exceeding 15%
- Acquisition Resulting From Gift or Inheritance
- Instances of Failing Firms
- Having Vertical Relationship But The Market Share Not Exceeding 25% etc. etc.

Salient features: Regulations-III

- Clarity about deals in transition as on 1.6.2011
- Facility for accepting belated notices.
- Filing Fee drastically reduced from earlier Rs.4 Millions (\$ 80,000) to Rs.50,000/- (\$1000) for all the filings in Form-I, the default form
- Even for the Form-II, the fee has been reduced by 75%

Salient Features: Regulations-IV

- An Elbow Room for Enterprises Wanting to Notify Early
- Pre Merger Consultation Introduced
- Calculation of Turnover and Assets Clarified
- Clearance in Less Than 30 Days.
- Electronic Transmission Accepted
- Tough Confidentiality Standards

Salient Features: Regulations-V

- Opportunity of being heard introduced
- Independent agencies to oversee modification
- Appeal to Competition Appellate Tribunal by the parties to the proceedings and aggrieved by any direction/decision or order introduced.
- Enabling power to the Commission for issuing general or sector specific directions, guidelines, clarifications or circulars for regulation of combinations.

Salient Features: Regulations-VI

- Cooperation with other agencies or statutory authorities.
- The transactions with no effect on market in India exempted from filing notice with the Commission.
- Total harmonization with SEBI's takeover code after following a fully consultative approach with SEBI. Where some improvements are still possible, these have been communicated to SEBI.

Virtue Out of Necessity

- Late Starter
- A Look At Jurisprudence As Evolved
- Incorporated In Law-Reverse Engineering
- Comprehensive Law
- But Progressive
- Flexible

Objectives-I

- **USA**
 - **Sherman Act 1890**
 - To protect trade and commerce against unlawful restraints and monopolies
- **Canada**
 - **Competition Act 1985**
 - to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy,

Objective-II (Canada Contd..)

- to maintain in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada,
- in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and
- in order to provide consumers with competitive prices and product choices.

Objectives-III

- **EU**
 - **Treaty on the Functioning of the EU(TFEU) 1.4.2010**
 - To make EU markets better , by ensuring that all companies compete equally and fairly on their merits to benefit consumers , businesses and the European economy as a whole.

Objectives-III

- **Brazil**
 - **Law #8884 of June 11, 1994**
 - Free enterprise, open competition , social role of property, consumer protection, and restraint of abuses of economic power
- **China**
 - **Anti Monopoly Law of PRC 1.8.2008**
 - For preventing and restraining monopolistic conducts, protecting fair competition in the market, enhancing economic efficiency, safeguarding the

Objectives-IV

- interests of consumers and social public interest, promoting the healthy development of the socialist market economy.
- **South Africa**
 - **Competition Act,1998**
 - Promote and maintain competition in order to
 - Promote efficiency, adaptability and development of economy
 - Provide consumers with competitive prices and product choices

Objectives-V (SA Contd.)

- Promote employment and advance the social and economic welfare of South Africans
- Expand opportunities for South African participation in world markets and recognize the role of foreign competition in the Republic
- Ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy and
- Promote a greater spread of ownership stakes of historically disadvantaged persons.

Objectives-VI

- **Australia**
 - **CCA 2010- 1.1.2011(TPA 1974)**
 - To enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

Objectives-VI

- **UK**
 - **Enterprise Act 2002**
 - Free enterprise, open competition , social role of property, consumer protection, and restraint of abuses of economic power.

Objectives-VII

■ India

■ Competition Act 2002

- To prevent practices having adverse effect on competition
- To promote and sustain competition in 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

Coverage-I

- **South Africa**
 - All economic Activity within , or having an effect within, the Republic except
 - Collective Bargaining/Labour Relations
 - A collective agreement/ Labour Relations
 - Concerted Action for achieving a non-commercial socio economic objective
- **China**
 - To monopolistic conducts in economic activities within PRC
 - To conduct outside PRC if they eliminate or have restrictive effect on competition in PRC

Coverage-II

- **India**
 - All enterprises- Private and Public
 - Except sovereign functions including Atomic Energy, Defence, Space and Currency
- Progressive Approach in line with mature jurisdictions- evolved with time

Obligation to Notify-I

- United States
 - Mandatory- after 1976- if not in exemptions
- South Africa
 - Mandatory – according to category
- European Union
 - Mandatory- 1989- if meets the community thresholds
- India
 - Mandatory- 1.06.2011 – above thresholds

Obligation to Notify-II

- Canada
 - Mandatory if falls within thresholds
- China
 - Mandatory above thresholds
- Brazil
 - Mandatory if within thresholds
- Russia
 - Mandatory(Pre and Post)
- UK
 - Voluntary
- Australia
 - Voluntary

Obligation to Wait-I

- UK
 - Enterprise Act 2002
 - No Waiting Period
 - OFT may seek interim undertakings or impose an interim order before it makes a decision on a reference preventing the parties from taking any action
- USA
 - 30 days- Indefinite
- India
 - 210 days/30 days

Obligation to Wait-II

- SA
 - 20-40 business days
 - CAT may extend period not more than 15 days at a time.

Efficiencies Considered

- Proviso to Section 3 JVs
- S 19 (3) (d), (e) and (f)
- S 19 (4) (k), (l) and (m)
- S 20 (4) (l), (m) and (n)

Extra territoriality

- Section 32
- What evolved over a long period of time is in Law

Remedies in stage I

- Introduced Through Regulations

Stages of review

- Most Jurisdictions- Two
- India-Four
 - Clearance
 - Before Show Cause
 - After Reply To Show Cause
 - After Reply To Show Cause And DG's Report
 - After Publications Of Details Of Combinations

Appellate provisions

- Only Two Levels of Appeal

Review Period (s)

Country	Stage One	Stage Two
EU	25-35 W days	90-125 W days (35+125=160 W days or 224 days in the least)
France	5-8 weeks	Additional 4 months. Further extended by 4 more weeks (thus 5 ½ Months in total)
Spain	1 month	7 months
Singapore	30 W days	120 W days (30+120=150 W days)
China	30 W days	90-150 W days
Mexico	40 C days	145 (in complex cases)
Japan	30 C days	120 C days (more if information is late)
USA	30/15 C days	-----
Germany	1 month	3 months (1+3= 4 months)
India	30 c days (regulations)	210/180 C days (150/130 w days)

Indian time caps not very different from major jurisdictions

Thresholds* in INR and \$

		Assets Total (In India)	Turn over Total (In India)
Only in India	No Group	Rs. 1500 cr	Rs. 4500 cr
	Group	Rs. 6000 cr	Rs. 18000 cr
In and outside India	No Group	US \$ 750 m (Rs. 500 cr)	US \$ 2250 m (Rs. 1500 cr)
	Group	US \$ 3000 m (Rs. 500 cr)	US\$ 9000 m (Rs. 1500 cr)

*After Notifications of 4.03.2011

Where does India stand



Except where indicated otherwise, figures, rounded to full numbers, are in US dollars 1\$ = Rs 40/-

Country	Domestic Turnover	World Wide Turnover	Group
Belgium	145 m (DN 58 m)	---	---
Canada	---	---	400 m*
E.U.		7236 m (DN 362 m – Community)	---
France	---	218 m (DN 73 m)	---
Germany	---	724 m (DN 36 m)	---
U.S.A.	200 m	---	---
U.K.	141 m	---	---
India	750 m	2250 m	9000 m (World Wide)

- m = million
- DN = Domestic Nexus
- *= Canadian dollar

Indian law in global context

- WTO : *"Law is broadly comparable to those of other jurisdictions with effective laws in this area and, for the most part, embodies a modern economics - based approach"* (Trade Policy Review of India 2007)
- OECD : *"close to state-of-the-art"* (Economic Survey India Report 2007)

Wide consultations

- An international conference on “India’s New Merger Notification Regime (INMNR)” held on 15/16, March, 2008 in New Delhi, by IBA & others
- Delegates from ICN, EU, FTC, ACCC, IBA, ABA & leading legal firms across the world attended
- Benefitting from the experience of mature, functioning jurisdictions



**Comparison
with
the
Best
(Practices)**

Recommended **Best Practices of ICN-I**

- Nexus to Reviewing Jurisdiction
- Notification thresholds
- Timing
- Review periods
- Requirements for initial notification
- Conduct of merger investigations
- Procedural fairness

Recommended **Best Practices of ICN-II**

- Transparency
- Confidentiality
- Inter Agency Coordination
- Remedies
- Competition Agency Powers
- Review of Merger Control Provisions

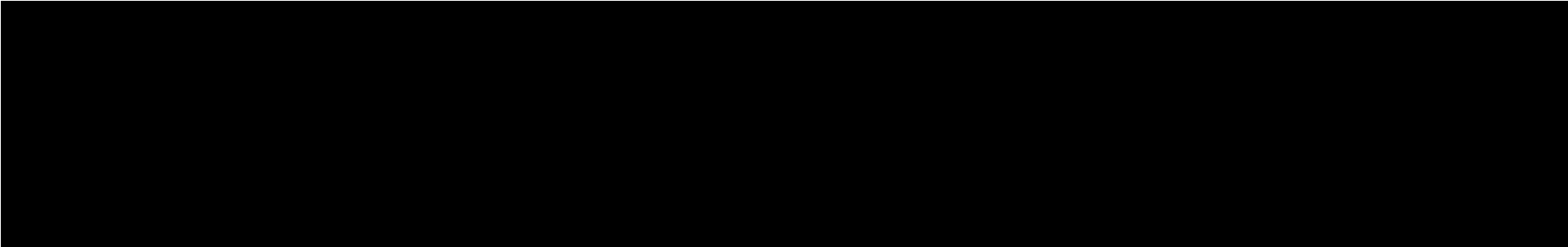
Future Prospects-I

Four T s

- Tools of enforcement-Good Law
- Training -Theory and Practice
- Traditions -Rich Judicial Precedents
- Timely Review -Being Done

Future Prospects-II

Very
Bright



Thank you

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