CII Conference on Competition Law and Practice

(Friday, the 4th August, 2017, Mumbai)

Speech

It's indeed a pleasure to be here once again at this Conference on Competition Law and Practice organised by the CII. I can see that, best minds have congregated in the field of competition law and practice, once again like last year, to deliberate on the important facets of this evolving piece of legislation. This is extremely satisfying because brainstorming would help uncover the minutiae of the law further. In that sense, this annual Conference provides an excellent platform for an exchange of ideas that can inform the evolution of the law and contribute to its wider and effective enforcement.

2. You all know that a lot has happened on the economic reform front since the last time we met. The intervening period has witnessed a slew of economic reforms, which have the potential to transform the crucial macro aspects of the Indian economy. Measures such as GST; bankruptcy code; India Stack; increasing use of the JAM trinity; and demonetisation have changed the entire business environment. While demonetisation was thought to be necessary to realign the incentive structures, GST is slated to achieve various economic goals in one stroke:

i. promoting the manufacturing sector
ii. boosting exports by making production more competitive
iii. creating more jobs, improving the investment climate

iv. cutting down tax evasion and lowering the compliance cost to businesses.

More importantly, both demonetisation and GST have created conditions for greater formalisation and digitisation of the economy. Digital invoicing for GST will help freer movement of goods, services, capital and will ensure more accurate matching of revenues and expenses across the entire supply chain. This is being mediated and would be made easier through the wide-ranging digital payments infrastructure established through the India Stack, which builds on Aadhaar and UPI. Apart from these the GST frees up the movement of goods, service and capital allowing competition to flourish that lifts the veil of protection that the incumbents enjoyed from a fragmented tax system. The Insolvency and Bankruptcy Code has put in place the much-sought legal framework for speedier, transparent and efficient resolution of corporate insolvencies.

3. All these moves, I believe, will dismantle the *status quo* and will help laying the foundation for a cleaner economic organisation of the nation. As the market regulator, the Commission, is conscious of the larger policy milieu, and is carefully gauging its implications for markets as they unfold. However, my *priors* are that with the economy becoming more dynamic, legacy issues that had tempered competition, will slowly fade away providing a much larger canvas for the instrumentality of competition law.

4. Competition law if implemented properly can promote business dynamism and ensure that competitive pressures between firms make

them achieve productive efficiencies. It is only then we will be able to harness competitive capitalism, which can then become the source of India's structural change and growth. Competition law will ensure that the forces of capitalism are not generating incentives to accumulate excessive market power accompanied by economic entrenchment of the winning firms and leading to problems of anti- competitive agreements, abuse of dominance etc. If the latter happens, liberalization would create a new rent-seeking environment and potentially sap business energy, with adverse consequences for growth in the medium to long term and, hence, competitiveness.

5. In the past eight years, our endeavour has been to build a culture of competition in markets through effective enforcement of the law and proactive outreach. The task, no doubt, is arduous, given that the scope of the Competition Act is overarching with a cross-sector and pan-India mandate.

6. We have sufficient reasons to believe that stakeholders are increasingly reposing their trust and confidence inthe Commission as a forum for redressal of competition related concerns. In terms of number, the cases filed with the Commission have seen a secular rise since 2010-11. Cumulatively, we have so far received and reviewed 895 antitrust cases from diverse sectors of the economy ranging across pharmaceuticals, real estate, civil aviation, financial sector, railways, electricity, digital markets, sports and entertainment and also public

procurement.[1] We have passed final orders in 669 of these cases. But what is more important is the impact these orders have made in terms of positive outcomes in markets.

- Pursuant to our orders in the coal sector, pharmaceutical distribution, entertainment, public procurement, to mention a few, businesses and business associations have revised their policies and practices to bring them in accord with the principles of competition.

- The Commission's recent order in the case of Hyundai Motor India Limited has earned appreciation from the stakeholders. This being the Commission's first substantive order on Resale Price Maintenance, the analytical framework for assessing RPM has been laid down. The order has made a clear distinction between prudent/standard business practices and anti-competitive conduct. The decision has been premised on an effect analysis for each allegation in the relevant market, thereby making it clear that vertical restraints are not anti-competitive *per se*. Rather in certain instances, they may be fundamental part of doing business, thus warranting a case-by-case, rule of reason approach.

7. Our interventions over time have also led to an increased awareness of the Act and the Commission. This is discernible from the cases being filed from across geographies. Let's take a look at this.

[1] In 2015, 2016 and 2017 (till 30th June), 37 final orders have been passed in cases of anti-competitive agreements and 116 such orders in abuse of dominance cases. 95 of the AoD cases were closed under section 26(2).

Cess have been received from Namakkal, Sagar, Dhanbad, Bareilly and Bulandshahar. These have been filed by small businesses, associations and individual consumers. Recently, we had an information filed by a small association of fly-ash based brick manufacturers against a state government for alleged restrictions in civil construction in the state. We envisage this to grow further in the times to come. With our advocacy efforts which we have intensified, we wish to reach out to more and more people in the country in the near future. We are also poised for initiating more *suo moto* cases, particularly in areas of the economy where competition hindrance or lack of fair play can significantly affect the common man.

8. Ladies and Gentlemen, the last one year has seen a number of important and positive developments in the areas of evolving jurisprudence, lesser penalty and merger regulations and compliance. These developments would provide tailwinds to the competition regime in India. Let me recapitulate them for the benefit of all of us.

- **First**, with the two judgements of the Hon'ble Supreme Court, jurisprudence on a few long-standing issues has been settled, providing much sought clarity and certainty to the stakeholders.

- **Second**, the Commission issued its first order in a lesser penalty matter, laying down the criteria to determine the extent of reduction in penalty as also regarding the treatment of individual liability. To provide further impetus to the lesser penalty regime,

leniency regulations have been amended, following an intensive and extensive consultation process.

- **Third**, two major notifications relating to combinations have been issued by the Government in Ministry of Corporate Affairs. Vide the first notification, the *de-minimus* exemption has been revised. The other notification has done away with the 30-day period from the specified trigger events for notifying a transaction to CCI.

- **And further**, in a bid to provide a fillip to compliance, the Commission has brought out a comprehensive competition compliance manual, which wouldhelp the enterprises navigate the complex legal-economic architecture of the Competition Act.

These issues, I understand, are listed for discussion in the technical sessions. But let me briefly share with you the Commission's thinking in these areas.

9. Ladies and Gentlemen, there can be no quibble over the fact that certainty and predictability are the two pillars on which rests effective enforcement of any legislation. The Commission has acknowledged this imperative since inception. However, evolution of jurisprudence organically by superior judiciary takes time and it is a challenge typical to any new agency during the nascent stage. Being a new law, the Commission did not have a ready harvest of precedents to apply. In these early years, pending decisions of the apex court on several interpretational, procedural and jurisdictional issues, the Commission, have drawn upon the case law generated in mature foreign

jurisdictions. This, of course, has been possible since our law is structured on the best global templates.

10. But with the recent Supreme Court judgements, few issues have now attained finality, including the critical issue of whether the basis for computation of penalty under Section 27(b) of the Act should be total/entire turnover of the enterprise or "relevant turnover" relating to the product in question. Invoking the principle of proportionality, the Hon'ble Court has held that the penalty should be determined on the basis of the "relevant turnover".

11. The judgement has laid down the foundation for penalty imposition under the competition law regime in India, leading to greater certainty on determination of appropriate penalty. This will benefit all the stakeholders functioning within the framework of the Competition Act and will make the penalty regime equitable. Particularly, this will provide relief to the large multi-product enterprises where their infringement may relate to one or two product lines.

12. Here I must add that the Commission has consistently maintained that it is not in favour of imposing harsh penalties that could destabilise enterprises and have a debilitating effect on markets in the long-run. Penalties, we believe, should reflect the gravity of the infringement and should create sufficient deterrence. But the Commission is conscious of the fact that it is not the severity of penalties alone but their certainty and efficacy that would determine to what extent the intended objective of correcting market malfunctions, has been achieved. Now,

with the Hon'ble Supreme Court having clarified 'relevant turnover' to be the basis of calculation of penalty, the Commission is in a position to formulate its internal Penalty Guidelines which will in due course be shared with the stakeholders to bring complete transparency and predictability in the process of determination of appropriate penalty.

13. While on this, let me also allude to the lesser penalty provisions of the Act. Cartels being the most pernicious of antitrust offences, the Act carves out stricter penalty provisions for the infringers. At the same time, the legislature, in its wisdom, also provides enterprises with the opportunity to approach the Commission for lesser penalty. In case the colluding enterprises come forward and make vital disclosure of cartel activity to the Commission, they can get up to 100% immunity.

14. This is important since cartels are conceived and executed in secrecy. Forms of explicit collusion are fast dwindling. Competitors no longer meet to fix prices in broad daylight. In absence of any direct evidence, the regulator faces an uphill task of piecing together all the bits and complete the chain by inferring from a number of *indicia* which, taken together, in the absence of any other plausible explanation, constitute evidence of the existence of cartels.

15. The lesser penalty provision helps penetrate the cloaks of secrecy and uncover evidence which are vital for detection and conviction of a cartel. Leniency programmes have proved to be a vital tool in the arsenal of the competition authorities and has led to the detection of numerous cartels around the world. In the United States, more than

90% of cartel cases emanated from leniency applications. In the European Union also, there is a high dependence of cartel enforcement on leniency.

16. In India, while cartelization is not a criminal offence, the extent of pecuniary sanctions and the risk of individual liability provide incentives to come forward. In the recent years, lesser penalty applications have been on the rise. The Commission, in order to address the practical difficulties that came in the way of smooth implementation of the provision, have amended the lesser penalty regulations after inviting comments from the stakeholders in March this year. The consultation has been extensive and in-depth, with comments coming from the academia and the legal fraternity, both from within India and abroad. We are thankful for the interest shown by the international legal community which speaks of the increasingly inter-connected markets and multi-jurisdictional implications of cartel prosecution. I am happy to share that majority of the suggestions have been incorporated in the final amendments.

- The benefits of lesser penalty has been extended to individuals involved on behalf of enterprises;
- The scope of confidentiality has been defined in accordance with the principle of natural justice. The Director General, may confront the information furnished under Regulation 5 to the Parties for reasons to be recorded in writing.
- Post DG investigation, the Parties have been granted the right of on-site inspection of the information submitted by the LP.

17. Let me now turn to combinations. The two notifications issued by the Ministry are welcome moves, in perfect sync with the efforts that the Commission over these years have been making through amendments of regulations to remove ambiguities, reduce compliance costs and to make filings simpler.

18. The requirement of notifying a transaction within 30 days of the execution of specified trigger documents gave rise to an array of practical issues. In adhering to the timeline, parties often submitted incomplete information and the Commission had to either invalidate notices or issue defect letters which prolonged the review process and strained the resources of the Commission as well as the Parties.

19. The exemption would now reduce the burden on parties, would allow them to provide comprehensive and complete notifications to us. This will be greatly helpful for us also. We will require lesser time and resources to examine various aspects of the transaction and its impact on the relevant market. However, going forward, an amendment to the Act to this effect will be called for.

20. The Notification relating to *de-minimus* exemption is a step further in relaxing and reducing the requirement for a merger control filing and is in congruence with the government's larger policy goal of increasing the ease of doing business in India. The Notification has extended the ambit of target exemption to all forms of combinations under Section 5 of the Competition Act where assets or turnover being acquired are less than the *de-minimus* thresholds. This is consistent

with the principle of 'substance over form'. Further, relevant turnover/assets, i.e. "the assets/turnover of the portion of business being acquired or merged/amalgamated or taken control of" has been made the basis for computation of jurisdictional thresholds instead of total turnover/assets.

21. These changes are in alignment with international best practices and will reduce the burden of filing for industry. This is becoming evident from the drop in merger filing from an average of 9-10 per month pre-notification to 6-7 now. This will significantly improve the bandwidth of the CCI by weeding out transactions that should not normally warrant the attention of an anti-trust regulator.

22. Nevertheless, the revisions in the *de-minimus* exemption brings to fore certain issues that merit attention and deliberation.

- The exemption is provided to enterprises subject to **either** their relevant assets **or** turnover values. The upshot is that even when parties to a transaction have substantial sales in India with turnover way above the threshold but with insignificant presence in terms of assets in the country, they would not be required to notify. This may be a likely scenario in import markets or in cases involving intellectual property rights, where assets thresholds are not likely to be met, while turnover may be substantial thereby having a potential of affecting competition.

- This, in conjunction with **'relevant'** assets now being the criteria instead of 'total' assets and the substantially high thresholds that we have, may increase the chances of critical transactions remaining out of the ambit of the merger control regime.

- In this context, we may keep in mind the fact that jurisdictions such as the **United States and the United Kingdom**, which consider the values of 'relevant' assets/turnover for threshold determination, have other notification criteria to ensure that all those transactions which have the potential to impact competition, are notified. For example, United States uses the **size of transaction** criterion; UK uses the **share of supply** criterion.

- Specifically, in certain sectors such as digital services, the traditional asset/turnover criteria may fail to capture potentially anti-competitive transactions. This is because the targets in these sectors may have limited actual turnover or physical assets. Thus, asset/turnover-based notification thresholds may have a **'blind spot'**, if relied on solely.

- For the merger control regime in India to achieve its intended goals across sectors, it's probably now time to **revisit the desirability of uniform thresholds** across sectors and also the **need to include alternative notification criteria** such as 'size of transaction', as available in other mature jurisdictions, which

better reflects the potential of a transaction to impact competition in certain sectors.

23. I hope this forum will mull over these issues. We will welcome your suggestions in this regard.

24. We solicit your views and partnership also in furthering the Commission's agenda of building a compliance culture in the country. The Commission uses its limited resources to spread awareness of the law and supports businesses wishing to comply with competition law. We recognise that the majority of businesses want to comply with competition law. We also realise that the law being young, the compliance know-how is inadequate. Keeping this in view, a comprehensive compliance manual has been recently brought out by the Commission. We hope that this will help design robust compliance programmes which should then be effectively implemented. Compliance must go beyond empty formality; it needs to be internalized and imbibed by the firms. Forums such as this, help remove disconnects between business realities and the law. I invite CII and its members to tell us about the practical challenges faced in ensuring compliance. This alliance will be successful when the accepted jargon of the industry would be the stereotype of compliance rather than defiance.

25. Here I must also mention that we deeply appreciate the role that the legal fraternity is playing in the Commission's outreach efforts. The competition law bar association has partnered us in putting together the compliance manual. Eight Non-Governmental Advisers, drawn from

the legal fraternity and academia, have been engaged to provide inputs for the country submissions to be made at international forums and for organisation of 2018 ICN Annual Conference in New Delhi. I take this opportunity to compliment the law firms who formed part of the Indian contingent at the ICN Annual Conference held in Porto this year. The NGAs actively participated in the forum as speakers and contributed to a constructive and productive exchange of antitrust ideas with the international antitrust community. This, I am sure, has been mutually beneficial and will enrich the antitrust discourse in India. The NGAs will now be instrumental in carrying out the ICN Special Project 2018 on Cartel Enforcement and Competition, which shall be presented at the ICN Annual Conference 2018 to be held in Delhi.

26. At the end, I would like to say that interactions such as this should not be just an annual affair. We must engage in constructive dialogue throughout the year. We all stand to gain by keeping the markets competitive and the playing fields level. The CCI, industry, academia, the consulting firms, the legal fraternity – all must make collective endeavour on a continuing basis to place this law and its practice on a robust foundation so as to ensure fair competition for greater good.

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