Jindal Global Business School, Sonipat
Keynote address on
"The Emerging Dimension of Economic Regulation and Competition Law Compliance"
Thursday, 17th April 2014

1. Hon'ble Vice Chancellor, Professor (Dr.) C. Raj Kumar, Hon'ble Dean of the Business School, Professor (Dr.) C. Gopinath, distinguished ladies and gentlemen and, above all, the young students of Jindal Global University.

2. I am thankful to the University for providing me with an opportunity to deliver the key note address of today's seminar on "Competition Law and the Business Environment: Challenges and Opportunities". It is indeed a privilege to address and share my thoughts with such a dynamic group of young students and scholars.

3. This morning, I am going to talk about: "The Emerging Dimension of Economic Regulation and Competition Law Compliance." Let me begin by speaking briefly about the need for economic regulation. There are two main theories regarding the rationale for economic regulation. The first is "public interest" – regulation is required to balance the free play of market forces between consumer and producer impulses. The aim is to maximize welfare and bring about societal equity.

4. The second main theory of economic regulation has its genesis in managing the conflicting demands of interest groups within the political economy. It aims at balancing the unequal bargaining powers of different interest groups operating in the market.

5. So in theory, the purpose of "economic regulation" is to prevent market failure, by either regulating the free play of market forces or by balancing unequal bargaining powers, or both. Interestingly, if one reads the Preamble of the Competition Act, 2002, one will find a parallel between objectives of the Competition Act and the aforesaid rationale for economic regulation.

6. The preamble of the Competition Act states that the Act aims to *protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets.* The Competition Commission of India (CCI), in achieving the aforesaid mandate, has to, on the one hand, balance undue bargaining power to ensure free trade, and, on the other, establish checks and balances to regulate the free play of market forces. Thus, broadly, the purpose of 'economic regulation' and that of 'competition law' is similar. The objective is the creation of a level playing field for all market participants.

7. Ladies and gentlemen, the landscape of Indian economic regulation changed with the ushering in of the liberalization reforms from 1991. Post independence, India had adopted a mixed economy framework consisting of a "command and control" regime. Under this regime, several areas of production were reserved for the public sector or for small-scale enterprises.

8. Since the commanding heights of the economy remained in the realm of government and parastatal enterprises, there was no apparent need for independent economic regulations or regulators. In-fact, the economic policy of the Government, in pre-liberalized India, resulted in restricting competition.

9. With an acute financial crisis looming on the Indian economy in the early 1990s, the Government dismantled its controls from most sectors. Following the liberalization reforms of 1991, India adopted a new industrial and economic policy where 'markets' replaced 'licensing' as a method of resource allocation. 'Efficiency' rather than 'government intervention' became the hallmark of market regulation.

10. This shift necessitated a change in the approach to economic regulation. While policy making, framing legislation, rule making and the ownership of enterprises had all converged in the relevant Government department/ministry, such functions were dispersed in the new regulatory environment. The independent sectoral regulatory regimes emerged as the new tools for economic regulation. The regulator is positioned between the legislature, executive and judiciary on the one hand and the market on the other.

11. Starting with the telecom sector in 1994, the Government created several sectoral regulatory regimes to govern the newly liberalized sectors of the Indian economy. The governing regime for each of these sectors was by an independent agency, including sectoral regulators for power, telecommunication, port, oil and natural gas, airports, highways, securities markets, insurance, microfinance. The idea was that each sectoral regulator, with 'in-house' technical expertise, would determine the nature of regulations for such sector. They would set the 'rules of the game' by regulating entry conditions, licensing requirements, tariff, safety standards, access, control over price, quantity and quality etc.

12. Let me talk a little about some of the post-liberalized sectoral economic regulations.

13. A few years after opening of the telecom sector in 1994, the Telecom Regulatory Authority of India Act was enacted. The preamble of this Act provides for the Telecom Regulatory Authority of India (TRAI) to, *inter alia*, '*facilitate competition and promote efficiency*'. Further, one of the stated missions of TRAI is to promote a level playing field and fair competition among the various Indian telecom service providers. In fulfillment of its mandate, TRAI has taken several measures. For instance, in 2004 TRAI adopted the Broadband Policy which provides for non-discriminatory access to content providers for delivery and distribution of television (TV) channels across India. TRAI also routinely issues consultation papers asking for inputs from stakeholders to better competition in various segments of the Indian telecom market.

14. Similarly, the parent statutes of other regulators, including the Central Electricity Regulatory Commission (CERC), the Petroleum and Natural Gas Regulatory Board (PNGRB) imbibe the principles of competition and mandate the respective regulatory body to promote competitive markets and foster competition amongst the entities.

15. The CERC, while fixing tariff levels, is to be guided by the principle of competition and efficiency. The PNGRB is mandated to be mindful of competition while dealing with access to common carriers and other distribution networks. The PNGRB, while determining transportation tariffs, is expected to keep considerations of competition and efficiency at the back of its mind. Similarly, TRAI is mandated to adopt measures to

facilitate competition and promote efficiency in the operation of telecommunications services in India.

16. These sector specific economic regulations balance conflicting interests, facilitates investment and ensures overall development of the sector, all the while promoting competition and efficiency of such sectors. In sectors where competition is prospect but not present, economic regulation was adopted as a proxy for ensuring effective competitive markets. In 2006 the Planning Commission, emphasizing the role of economic regulation noted:

    > *"Economic Regulation is seen to be that part of regulation which seeks to achieve the effective functioning of competitive markets and where such markets are absent, to mimic competitive market outcomes to the extent possible."*

17. Therefore, ladies and gentlemen, the emerging dimension of economic regulation in India has been – for lack of a better term, "*competition based economic reforms*". Its aim is to enhance economic efficiency while contributing to overall economic growth of the country. Such competition enhancing economic reforms matured the Indian economy heralding it into its next phase of growth.

18. With the advent of globalization, the competition based sectoral regulations that I have discussed above, alone were no longer seen to be adequate. Sectoral regulations aim to competitively structure a particular sector, but it cannot ensure that market participants do not distort such competitive markets through conduct. Hence, the need for an expert

body to regulate the process of competition in all aspects of the Indian market.

19. It is in this background that the Government conceptualized the new Indian Competition law regime in 2002. Given certain judicial roadblocks, the Government enforced the various provisions of the Competition Act in phases from May, 2009 to June, 2011. The basic objectives of the new Act was: (a) to prevent practices having adverse effect on competition; (b) to promote and sustain competition in markets; (c) to protect the interests of consumers; and (c) to ensure freedom of trade. The Act created a specialized regulatory agency, the Competition Commission of India, to fulfil the aforesaid objectives. The CCI has three main enforcement functions: (i) prohibition of anti-competitive agreements, (ii) prohibition of abuse of dominant position, (iii) regulation of combinations. Let me discuss each of these enforcement functions briefly.

20. The law against anti-competitive agreements is contained in section 3 of the Competition Act. It prohibits agreements which cause or are likely to cause an appreciable adverse effect on competition. Any such agreement shall be void. The prohibition against anti-competitive agreements includes: (a) agreements between or among competitors, typically known as horizontal agreement and (b) agreement between members of the same production chain, e.g., a manufacturer and its distributor commonly called vertical agreements. Some examples of horizontal agreements prohibited under the Act, include agreements aiming to fix prices, limit or control production or markets, or share markets or sources of supply. Horizontal anti-competitive agreements also includes 'cartels'.

21. Examples of 'vertical agreements' include tie-in arrangements, exclusive supply agreement or exclusive distribution agreements etc. The Competition Act provides that horizontal agreements are *presumed* to be anti-competitive and void, while vertical agreements could be declared void only if such agreements lack any efficiency justification and actually cause anti-competitive harm to market. It is important to note that for the purposes of competition law, an agreement does need to be written or intended to be enforceable in a court of law. Thus, "a wink or a nod" among competitors would suffice.

22. Section 4 of the Competition Act prohibits abuse of dominant position by a company. A company shall be dominant if it can operate independently of its customers and competitors in the relevant Indian market. The Competition Act provides the various factors based upon which a company may be determined to be dominant. These include, market shares of a company, size and resources of a company, entry and exit barriers, dependence of consumers on the enterprise, structure and size of market etc. Under the scheme of the Act, dominance is not considered bad *per se* -- but its abuse is. Examples of such potentially abusive practices include: predatory pricing, excessive pricing, imposition of unfair purchase conditions, refusal to deal with existing or new customers, and royalty rebates.

23. The Competition Act uses the term 'combination' to denote transactions for the acquisition of shares, assets, voting rights or control and merger and amalgamation of companies. Such transactions may be subject to prior evaluation by the CCI if monetary thresholds, set under section 5 of the Competition Act, are met. Notifiable combinations cannot be

implemented unless a merger clearance order has been obtained from the CCI or a period of 210 days has elapsed, whichever is earlier.

24. Combinations are subjected to review because of their possible adverse effect on competition in the Indian market. Such adverse effect could be as a result of: (a) unilateral conduct; where one of the parties to the combination becomes a dominant firm as a result of such combination, or (b) coordinated conduct between two or more firms facilitated by a combination. It is important to note that failure to report a notifiable combination to the CCI would run the risk of a monetary penalty and also of having the combination declared null and void.

25. Ladies and gentlemen, success of any law is directly linked with the acceptability by those people to whom it is applicable or who are affected by it. Therefore, the CCI under the Competition Act has a statutory responsibility for competition advocacy and public awareness. The CCI regularly organizes and participates in several competition advocacy programs, besides publishing relevant competition advocacy literature. I will invite you to visit our website at www.cci.gov.in for more details on such competition advocacy initiatives of the CCI.

26. Now that I have mentioned that a common theme of 'competition' runs through both the sectoral economic regulations and the provisions of the Competition Act, you may wonder where such market regulation differ. While sectoral regulations provide *ex-ante* specialized technical regulation with the aim of enhancing competition in a particular sector, the CCI *ex-post* penalizes behaviour which distorts such competition. Further, sectoral regulators address the question of market power directly. For example, it may restrain the possibility of pricing a

monopoly service above a certain threshold. The CCI, on the other hand, restrains market power indirectly -- for example, by prohibiting a merger which will result in monopolizing a particular product or service market. Simply put, the Competition Act tells the market participants *what they should not do*, while sector regulation tells market participants *what to do*. The mandate of the CCI and the sectoral regulators are, therefore, complementary to each other.

27. Since becoming functional in May 2009, the CCI has reviewed anti-competitive practices in diverse sectors such as stock exchanges, infrastructure, travel, automobile manufacture, real estate, pharmaceuticals, financial sector, publishing, manufacturing, mining and entertainment and has gone on to impose more than Rs.8000 crores in financial penalties. Penalties for completion law violations can amount to a mind-numbing 10% of a company's turnover and for participants of a cartel up to three times the profit for each year of the existence of the cartel. In addition, the directors or officers responsible for the affairs of a company that is found guilty of any anti-competitive conduct may be personally penalized by the CCI. Therefore, firms will be well advised to adopt competition law compliance programs which are designed to identify, and mitigate a company's competition law risks, with a view of reducing the exposure of a company and its managers to competition law violations.

28. Further, when firms are competition law compliant they pay attention to the environment in which their business is conducted, including the degree of competition among firms, entry and exit rules, and the openness of the economy. Such business environment ensure adoption of practices which result in competitive prices, better quality goods, product innovation, efficient access to finance and reduction of rent-

seeking behaviour by corporate managers. More competitive firms in a given industry in turn help the industry to become more competitive. *A bottom –up approach*. On the other hand, a competitive industry forces its firms to keep production and administrative costs below prevailing market prices. This enhances cash-flows and operational efficiency of such firms, further enhancing their ability to compete. *A top-down approach*.

29. Corporate managers by adopting efficient competition law compliance programs not only reduce competition law risks but also create an appropriate business environment for firms to seamlessly comply with the applicable sectoral regulations. This is because competition law compliance programs allow corporate managers to establish processes to prevent the adoption or perpetuation of anti-competitive behaviour within the firm. This, in turn, ensures that such firms adopt structures which are conducive to comply with the pro-competitive sectoral regulations. For example, sectoral regulators, in order to ensure adequate competition in a sector may, *ex-ante* specify terms for 'grant of licenses' in a particular sector. Such licensing terms may be aimed to curb the accumulation of market power or the ability of firms to enter into collusive practices. Adoption of a robust competition law compliance program allows firms in the regulated sector to internalize such licensing terms into its business practices.

30. Ladies and gentlemen, most of you will go on to become tomorrow's leaders of corporate India. You will be required to manage companies within the framework of many of the regulations that I have mentioned today and at the same time ensure that your firms remain competitive and profitable. Therefore, compliance with competition law is crucial. This

is more so because tomorrow's corporate managers will have to operate in a regulatory climate which is more challenging and has 'zero tolerance' for any non-compliance. The ongoing saga between Sahara group of companies and the SEBI before the Supreme Court of India is a concrete and live example of how judicial and regulatory bodies have increasingly become averse to regulatory non-compliance.

31. Friends, I will end with a quote from Thomas Friedman's book "The World is Flat". This sums up the age in which India's next generation of corporate managers will operate.

> *"Every morning in Africa, a gazelle wakes up. It knows it must run faster than the fastest lion or it will be killed. Every morning a lion wakes up. It knows it must outrun the slowest gazelle or it will starve to death. It doesn't matter whether you are a lion or a gazelle: when the sun comes up, you'd better be running."*

I am sure, given your excellent education at the Jindal Global University, all of you will become very good runners. But you will only win if you run on the right track, remain focussed on end line and follow the rules of the game.

Thank you, ladies and gentlemen.