

Competition Law and Policy in India: Issues for Research

Dr. Geeta Gouri

Member, Competition Commission of India

1. Dr. Nair, Dr. Pushpangdan, my friends Sunil Mani, Balakrishnan, and all the esteemed scholars, some of whom I have had the opportunity of interacting while with other I look forward to future interactions, it gives me great pleasure and honour to be among this distinguished audience in this workshop organized by the Centre for Development Studies on "Recent Developments in Competition Analysis: Study and Practices". CDS has been a pioneer in the field of academic research and as envisaged by its architect the renowned economist late K.N.Raj for empirical research in industry and market functioning. The work of the Institute on tyre, rubber, automotive, contract labour to mention a few are well known but now with a shift in economic paradigm towards market functioning economic research itself must shift in its focus and questioning towards the new paradigm. The timing of the Workshop is most appropriate.
2. The Competition Commission of India became fully operation only from May 2009, nine years after the Competition Act was past and two years after it was amended. It is only appropriate that at this august audience of renowned economists and research scholars I take the opportunity to present several concerns that have arisen in enforcing the Act and in doing so provide inputs that could be taken up in the design of future research.
3. The preamble of the Act which lays out the objectives of the Competition Act and defines the role and scope of the Commission leaves much thought when enforcement and implementation are involved. The preamble :

"An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission 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 India"

Sections 3 & 4 which deal with Anti-competitive Agreements and Abuse of Dominance have been notified. Hopefully, Sections 5 & 6 dealing with mergers and acquisitions will follow shortly.
4. Very clearly the Competition Act with its focus on economic objectives defines the role of the Commission as an economic instrument where dispensation of justice is primarily to promote and sustain competition in markets while

protecting the interests of consumers. The onus on the Commission is very heavy and in the debate between law and economics there are many areas of judgment which are not so clear and obvious as one would want to believe in the first reading of the Act. Often a simplistic economic analysis could lead to naïve conclusions defeating the very purpose of the Act and requires sharpening of economic tools.

5. Prof. Richard Whish, a noted authority on competition law and professor at Kings College London, commented recently in a lecture at Delhi.

Quote:

The legislation (*referring to Competition Act of India*) is drafted, as are most of the competition laws in the world (of which there are now more than 100), in fairly general terms. Some examples of the types of agreement that might violate Sec. 3 – price fixing between competitors, exclusive supply and exclusive distribution agreements between suppliers and dealers – are specifically referred to in the Act; similarly we are told that the denial of access to markets and the ‘leveraging’ of a dominant position from one market to another can amount to an abuse of a dominant position. However, these examples of practices that might be unlawful suggest simplicity about the legislation which is apparent rather than real. As a general proposition enterprises can harm competition – and inflict harm on customers and ultimately consumer’s – only **where they possess some degree of market power**. In practice the assessment of market power, meaning the ability to raise price, to reduce output, to reduce the quality of products, to limit the choice available to customers or to degrade the products of rivals without fear of a damaging competitive response by other enterprises, is technical and complex. There are no simple solutions: each case requires careful economic analysis, and lawyers and their business clients **often need input from economics and econometrics in order to reach robust and defensible determinations**, the same, of course, is true of competition authorities, in India’s case the CCI”

Unquote.

6. The lecture of Prof Whish was titled “Competition law policy in India and the grey areas”. Defining, limiting and assessing market power is often not easy. At present there are nearly 50 cases before the Commission, some of them under Sec 3 and others under Sec. 4. Categorical assessment and establishment of market power evades easy solutions presenting several dimensions of grey areas. Let me take you to some of these grey areas and present the nature of questions that arise in the exercise of defining and assessing market power.
7. Section 3 of the Act deals with cartels – horizontal and vertical. In the case of horizontal cartels (Sec 3(3)) the judgment is *per se* which would suggest that if

there is a cartel there is no requirement of assessing whether the cartel has market power or not and more significantly whether market power is exercised or not. On the face of it, the approach is appropriate as even in economic theory cartels are the most pernicious. Moreover if cartels are known to exist it is best to act quickly. But let me leave with you the grey area that can arise for although the decision is *per se* it is a rebuttal decision even if the rebuttal is from the respondent.

8. The definition of cartel in Sec. 2 (c) has the phrase “...*limit, control or attempt to control* the production, distribution, sale or price of or, trade in goods or provision of services”. Section 3(3)(b) the phrase “attempt to control” does not figure. Market power is taken as given. As an economist the concern is with establishing how ‘attempt to’ translates into actual reality or successful action namely, assertion of market power. This is where economics and data analysis becomes critical.
9. Market studies on cartel normally start with the measurement of concentration using the HHI Index. But the index reflecting concentration can pose a concern regarding the formation of a cartel for without defining market power concentration itself as a feature of a cartel can be misleading. Price parallelism is then necessary to establish but eludes measurement either on account of i) paucity of data; ii) it (the cartel) is a temporary phenomenon and iii) spontaneous market response of prices falling in line. Concrete evidence of an ‘agreement’ to fix prices/quantities is critical. Proving the existence of a cartel is often not a simple exercise.
10. The problem is more complex where trade associations are concerned. Trade associations that are created by businesses involved in a specific industry to join together for furthering their common interest and naturally can be classified as a cartel. The potential of trade associations to be useful to consumers and industry with overtones of a trade union is in as much as their potential to be in conflict with the competition law has several grey areas. There are often multiple trade associations also.
11. Trade Associations, *per se*, are not cartels as defined under Section 2(c) of the Competition Act 2002. Trade associations consist of individuals and firms with common interests in trade, which join together to further their common commercial or professional goals. The activities of a trade association usually span across a variety of issues, many of which may fall outside the ambit of competition law entirely, or be fully compatible with the competition rules, provided cooperation between members’ remains within certain defined boundaries. However, because these activities involve a degree of horizontal

cooperation between firms, organizations of this nature remain vulnerable to stepping outside the boundaries placed by competition law.

12. Several questions need to be examined while attempting to evaluate the market power inherent in the 'attempt to control' (Sec. 2(c)) and the 'actual limit or control' of Sec. 3(3)(b).
 - What are the conditions/circumstances when a Trade Association is presumed as likely to indulge in anti-competitive practices?
 - How to distinguish between the legitimate role of an association and an association acting as a cartel?
 - What factors need to be looked into while determining whether a particular activity of a trade association as having stepped beyond the limits placed by competition Law?
 - Is absence of profit motive a sufficient defense mechanism for claiming exemption as a cartel?
 - What are the indicators to quantify interest of consumers and trade freedom by the market participants while looking at the impact of structure and behavior of trade associations?
 - What is the relevant product/service market in trade associations' issue?
 - If there are multiple trade associations operating in the same sector, do they form cartel of cartels?

13. The problem gets more complicated when trade association indulge in collective boycotts often in the name of public interest the issues then are : i) what constitutes 'public'? ii) if collective boycotts by trade associations are for 'legitimate' cause as per other statutes, does it become anti-competitive practice? And iii) what are the likely adverse effects on contract negotiations due to collective boycotts.

14. A related issue is the aspect of levy of fines if a trade association is found guilty of anti-competitive practices. In the Competition Act Sec. 27(b) fines and penalties are with reference to the turnover/profits. The measurement of the penalty will then have to reference to each individual company's turnover or with regard to the aggregate turnover as the liability of the members of the Association.

15. Trade Associations as the monopoly in their sector or industry are liable to scrutiny under Sec. 4 also and their interventions into the functioning of markets can constitute abuse of dominance.

16. Defining the relevant market be it the product market or the geographic market is required for complaints under Sec. 4. Complexities arise in case of monopolies on account of legal provisions or statutes such as distribution licensees under the Electricity Act, 2003 or a government company or a public sector unit. These monopolies come under Sec. 19)4)(g) but does the legal sanctity give them the right to indulge in abuse of dominance? The abuse of dominance here can be as a monopsonist and not as a monopolist. Defining and determining market power only gets more complex starting with simple questions of dominance for whom and what. It maybe noted that under the definition of enterprise under Sec 2(h) enterprise includes government department, enterprises unless related to sovereign function of the Government and is therefore under the purview of the Competition Act.

17. Let me leave with these few thoughts and only conclude by saying that we look forward to greater association with the academia and are always open to ways this could be done.

Thank You

August 10, 2010