VI BRICS Competition Conference
'10 years of cooperation between the BRICS Competition Authorities: results and prospects'
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PLENARY 1: Development of competition policy and legislation in the BRICS countries

1. Ladies & Gentlemen. A very Good Morning to all of you. I am happy to be back in Moscow as I have had the privilege of visiting Moscow several times as part of official engagements in my previous assignments. At the outset, I take this opportunity to thank FAS Russia for hosting the 6th BRICS International Competition Conference. We meet here in Moscow to celebrate 10 years of cooperation between the BRICS competition authorities. Coincidentally, this year, the Competition Commission of India also completed 10 years since the notification of the substantive provisions of the Competition Act. We have participated in the first BRICS ICC at Kazan in 2009 and all the subsequent conferences.

2. Our five nations, with a joint estimated GDP of $20.2 tn (nominal) in 2018 [1], are considered as locomotors of global growth. As per IMF projections, between 2016 and 2021 the BRICS nations will have accounted for

[1] Computed form World Development Indicators, World Bank

about half of world growth. On the sidelines of G20 meetings in Osaka, the BRICS countries, committed to have "transparent, non-discriminatory, open, free and inclusive international trade".

3. An important characteristic of the current state of global development is the significance of knowledge and other intangible assets. What is common for the BRICS jurisdiction is that they are all in transition and are in need of a solution that would allow them to shortcut the developmental track. As a consequence of which they are characterised by abundance of experimentalist energy and creativity.

4. These experimentalist energy and creativity need to be extended to the area of **Antitrust enforcement.** Antitrust doctrines were developed in the western countries keeping in consideration the economic conditions prevailing in their countries. However, these may not necessarily be suitable for developing nations. The economic structures, infrastructure, expectations of the citizens, institutional, political, ideological and legal conditions present in the developing countries are different. The crafting and enforcement of competition law needs to take into consideration these inherent characteristics.

5. In spite of different governance and political structures, we have in the past shared a common philosophy of development - the belief that governments have a significant role in the growth and development process. However, the BRICS economies are moving away from this and are at varying degrees of transition in which the State is relinquishing the driving seat in economic matters to markets. There is an increased belief in the ability of markets to allocate resources in an efficient manner, so as to realise the growth potential of an open economy.

6. The enforcement of the Competition Act and the establishment of the Competition Commission of India was a clear signal to the corporate world that the State is relinquishing the allocation of resources to market. Be it the gradual withdrawal of state controls over business activities, dismantling of trade and investment barriers and embracing of the process of globalisation, the underlying rationale is to unleash competitive forces of markets for higher growth, greater efficiency, better innovation and larger consumer welfare.

7. However, there may still remain a chasm between the intent and the outcome if the playing fields in markets are not even, if the beneficial workings of the market forces are blocked, restrained or distorted by actions of

the market actors themselves. And hence the need for a robust legal framework that would undergird market economies with clearly defined ground rules of fair play and competition.

8. Coming to enforcement, 'Cartels' remain CCI's top priority. So far, the Commission has found contravention in 89 cases involving cartels. Considering the egregious nature of cartel conduct, the legislature has provided for presumptive rule for assessment and carved out stricter penalty provisions for punishing cartel participants.

9. Public procurement constitutes about 30% of GDP. Bid rigging cartels in public procurement deprive the public entities and ultimately the society of the benefit of the best deals in terms of price, quality and innovation of the goods and services purchased. The range of sectors touched by public procurement is as wide as the needs of a government to properly function and deliver services to its citizens including construction of schools, purchase of hospital supplies, construction of public infrastructure, transportation etc. Thus, efficacious and efficient management of public procurement is a non-negotiable priority for any government in order to act in the best interest of its citizens in terms of price, quality and service delivery. The Commission has

unearthed a large number of bid rigging cases which has not only penalised the guilty, but has also created deterrence for others and the much-needed awareness amongst procurement officials about anti-competitive practices. We have also come out with a diagnostic toolkit, which is a useful guide for procurement teams to detect red flags as also to structure tenders in a more pro-competitive manner.

10. Majority of the infringement findings of the CCI reveal certain striking characteristics (i) existence of a strong trade association forming the fulcrum of the cartel; (ii) the participants of these associations are often small or micro enterprises with low turnovers; and (iii) these participants operate in the informal sector, with a high degree of self-regulation. The trade associations may perceive self-regulation as a genuine necessity to address various inefficiencies associated with the informal economy. However, some of their legacy practices now overstep the boundaries stipulated by the competition law.

11. Commission's interventions in such sectors have led to course corrections. Trade associations have revised their policies and practices to bring them in alignment with the principles of competition. For instance, pursuant to the order of the Commission, All India

Organisation of Chemists & Druggists and its regional constituents withdrew anti-competitive restraints and issued a circular to the pharmaceutical companies and State Chemists & Druggists Associations sounding them to restrain from indulging in anti-competitive practices. The sheer fact of decreasing number of cases in these sectors speaks volume of the impact that CCI's orders have brought in these sectors.

12. In the initial years, the investigations could unearth direct evidence, such as circulars issued to members of trade associations, minutes of trade association meetings and resolutions passed under the charter documents of the trade associations. Though direct evidence is preferred in cartel cases, the difficulty of finding such evidence shifted CCI's reliance on circumstantial evidence. In most cases, CCI employs an optimum mix of communication evidence with economic evidence to determine whether a cartel indeed exists.

13. However, with passage of time, it has become increasingly difficult to discover smoking gun evidence owing to over-sophistication with which cartels operate. To lure discovery of evidence that could meet the evidentiary standards required for establishing a cartel, the Commission focused on an effective leniency

regime, which could become a significant source of information and evidence. Recently we have shifted gear and resorted to dawn raids. Our strategy has been successful and we are getting a number of leniency applications. This way we can expedite our investigation and do faster market correction.

14. When effective, leniency can provide both detection and deterrence—the two pillars that could ensure sustenance of a successful cartel enforcement. Defining a clear leniency policy, providing certainty on the application of the leniency programme and educating stakeholders on the vital aspects of leniency have formed integral part of laying foundation for an effective cartel enforcement system. The kind of evidence revealed by leniency applicants has given us impetus to further refine our leniency regime to make it more attractive for prospective applicants. So far, we have decided 10 cases under leniency regime.

15. Markets are not static; they are ever changing. A regulator's task is much like hitting a moving target. Therefore, the regulatory stance needs to be periodically nuanced and the enforcement toolbox needs to be adapted to these changes so that the instrumentality remains 'fit for purpose'. The

competition authority's challenge is compounded on account of its cross-sector remit.

16. Each sector has its own specificities, and its own pace of evolution. Competition enforcement must be seated in appreciation of the sector-specific dynamics, one-size-fits-all approach won't work. The Commission has already shown sagacity and calibrated its regulatory mechanism to meet the needs of the sector in question.

17. The Commission, in pursuance of its mandate, has decided to initiate a series of market studies especially in emerging industries and in sectors where the competition landscape is undergoing a rapid change. The E-commerce market study was one of them, where business practices of online platforms and other market participants that avail the platforms' intermediation services and their implications for competition are being looked into through a stakeholder survey and workshop.

18. There is an ongoing debate on how digital markets should be looked at, how distinct are these ecosystems from the traditional market configurations, what should be the parameters of competition analysis, whether regulations or case-by-case application of competition

law would suit the needs better. As the competition authority, we want to make this debate less abstract and more driven by practical insights. The study, including the workshop held thereafter on 30th August, was a step in that direction.

19. Let me now discuss the regulatory philosophy of the Commission in regulation of combinations. The Commission is conscious of the need and significance of inorganic growth in order for enterprises to attain size, scale and efficiency required for surviving and succeeding in domestic and global markets and against global giants.

20. In eight years of the combination review regime, a total of 670 notices have been filed before the Commission and out of which 663 notices have been decided with an approval strike rate of 99%. The Commission has focussed on quick approval of M&As that do not cause appreciable adverse effect on competition. The average number of days to approve the notices under combinations has come down to 18 only.

21. Based on the experience gained and our dialogue with stakeholders, the combination regulations have been amended to remove ambiguities, reduce compliance

costs and to make filings simpler. Combination notice has been dispensed with for categories of transactions that are not likely to have appreciable adverse effect on competition. The Government has twice revised the financial thresholds in Section 5 of the Act to avoid compliance burden on smaller transactions.

22. Further, I am happy to share with you that the Commission has introduced automatic approval for combination that do not require in-depth competition assessment. The parties to the combination may self-assess, based on specified criteria and pre-filing consultation with the CCI, whether they qualify for the automatic approval under Green Channel. If they qualify, they will have the option to notify the proposed combination and consummate it based on a deemed approval.

23. I would also like to share that in pursuance of its objective of ensuring that competition law is in sync with the needs of emerging Indian economy, the Government had constituted a Competition Law Review Committee (CLRC) to review the Competition Act/ Rules/ and Regulations, The committee has submitted its recommendations and we hope to have very progressive amendments to the law very soon.

24. The committee deliberated that the Commission's jurisdiction to review combinations is limited to those transactions that meet the asset/turnover threshold stipulated in the Act. It is now widely recognised across jurisdictions that the asset/turnover criteria may fail to capture potentially anti-competitive transactions in new age markets. In these markets, transactions are often driven by the motive to have access to the target's data. This is a reality and no longer a theoretical possibility.

25. Keeping the above in mind, the Committee recommended that an enabling provision empowering the Government to introduce necessary thresholds, including a deal-value threshold for merger notification, may be introduced in the Act. Any new threshold must account for clear and objectively quantifiable standards for computing the necessary figure as well as local nexus criteria. This will ensure that only those transactions that have a significant economic link to India are caught by the threshold and neither the CCI nor the parties are burdened with unnecessary notifications. We are also working to bring enabling provisions for Commitment & Settlement so that cases can be decided faster.

26. Reflecting on the challenges and responsibilities of the Commission in the years to come, Hon'ble Minister of Finance at our 10 year celebrations stated that CCI will have to gear itself up to deal with the challenges of an era of competition *sans frontiers*. She observed that markets increasingly have no geographical boundaries but the impact of the firm's conduct reverberates in Indian markets. Regulators, thus, have to constantly work towards assessing these impacts and take measures accordingly. She added that CCI must keenly observe market developments around the globe and conduct in depth market studies. She further emphasized that CCI should also take *suo motu* action and even guide the government for dealing with challenges related to the new economy.

27. Thus, to deal with the challenges of antitrust enforcement in an increasingly globalized economy what form should cooperation amongst BRICS regime take? Does it necessarily imply a convergence of antitrust governance structures across the BRICS nations? Is such a convergence really desirable, given the institutional and ideational hybrids of a liberalised economic order that we have adopted to make it compatible with our domestic context.

28. Multi-polarity and legal pluralism will predictably form essential features of the global governance of antitrust. However, effective cooperation between BRICS nation-states to fructify competition laws is becoming essential to overcome the challenges such as trust, different legal systems, gathering evidence and implementing leniency and immunity programme being faced in cross-border investigations and mergers.

29. I sincerely hope that the deliberations at this BRICS ICC will provide a fillip to approaches and mechanisms for greater cooperative governance of antitrust.

30. To conclude, there are many challenges that all the BRICS countries face. Our authorities have not had decades to develop a competition policy, yet the world looks at us and expects us to establish a credible enforcement practice sooner rather than later. We have been thrust onto the world stage and now need to prove ourselves. Our first steps have been promising but much remains to be done.

Thank you very much for your attention.
