NATIONAL CONFERENCE ON ECONOMICS OF COMPETITION LAW

"A horse never runs so fast as when he has other horses to catch up and outpace."

– Ovid, Roman poet.

This national conference on 'Economics of Competition Law' is contextually very relevant. Relevant both globally and in the Indian context as well. First and foremost, we have encountered a pandemic not only for the first time in our life, but in many lives—the last pandemic, the Spanish Flu, left us around 1918. In an interdependent world, this has unintended far reaching consequences. A world critically dependent on the broad philosophy of liberalisation and value-added chain

was forced to go back to the drawing board. It was forced to revisit many areas hitherto taken for granted like social security systems, pedagogy in imparting education skills, the protocols on the health systems, employment, migration and the structure of the economy itself. It has forced us to push the Reset Button not to say of the broader issues of Social Contract as it has historically been evolved.

In the Indian context, apart from the necessity to balance and optimize issues of life and livelihood, it necessitated the fast tracking of many features of economic reforms, which were long overdue. It has shaken us up from a period of prolonged complacency on key economic parameters. These were the overdue Structural Reforms. Illustratively, say, the transit from an era of a socialist hangover to a newer regime, which believes in maximising the value of embedded assets in the large number of public sector undertakings to improve logistics and infrastructure. Equally, tinkering with holy cows

like the nationalisation of banks and insurance by looking at the privatisation of two public sector banks to begin with and one insurance company. The disinvestment and privatisation program while unfreezing unproductive assets would unleash a new momentum in the strategy not only for privatisation but competition as well. How will the present regulatory framework governing competition laws deal with these emerging challenges?

What is competition?

Generally in economics, competition is seen as rivalry among firms for a larger share of the market, which leads to internal efficiency and lower prices for the consumers. Competition can be defined as a process through which cost efficient production is achieved with easier entry and exit, a reasonable number of players (producers and consumers) and close

substitution between products of different players in a given industry. It is necessary and important in any normal economic activity pattern because it helps promote safety, an innovation quest and lower prices for consumers. It creates additional gainful employment opportunities.

Why is competition necessary?

A competition policy is a critical component of any overall economic policy framework. It is intended to promote efficiency and to maximize consumer/social welfare. It also helps to promote the creation of a business environment which infuses dynamic efficiencies, leads to efficient resource allocation and the abuse of market power is mitigated.

All stakeholders (producers and consumers) benefit from competition as opposed to, say, a monopoly. In a monopolistic market, there is only one firm that dictates the price and

supply levels of goods and services and that firm has total market control, with serious entry and exit barriers. Similarly, market duopoly or even market oligopoly have disabilities in securing wider benefit from enhanced competition. Competition is thus necessary especially if the objective is for maximising societal good.

Benefits of competition policy in an economy

Both competition and market, thus, have numerous multiplier benefits. At the same time, markets have infirmities. They cannot play God. It is said, "Markets are imperfect. So you do need regulation, knowing that the regulators are also human." Equally, unbridled competition can become counterproductive without going through the economics of what is sometimes called natural monopolies or controlled competition. Both

public and private entities have an important role to play to maximize societal good.

A review of cross-country literature suggests that there is a positive association between GDP growth and enhanced competition. Empirical studies of select industries in several OECD countries suggest that competition enhances productivity at industry level, generates more employment and lowers consumer prices. Illustratively, in the Indian context, the opening up of increased liberalisation and competition has, in many cases, brought about enormous multiplier gains. Take for instance, modes of communication. Tele-density in India has risen from mere 2.32 in 1999 to 11.32 in December 2005. Currently, India's teledensity has reached 86.37%. Equally, from the consumers points of view, there has been a dramatic fall in telecom tariffs from Rs. 16 per minute to Rs. 1 or less per minute with increased competition in this sector. Free Talk Time is normal and data

is priced at affordable rates. The proliferation of Technology Platforms has enhanced the bouquet of consumer choice. Thus, intense competition amongst the various service providers has resulted in improvement in availability of service at affordable price to the consumers. Similarly, consumers have benefited from competition in other sectors of important economic activity such as civil aviation, automobiles, newspapers and consumer electronics.

Historical Perspective – Cross-country Comparisons

Over the past 25 years, the world has witnessed an unrelenting trend towards economic liberalization. Many countries have put an emphasis on decentralized competition rather than centralized state direction as a means of determining the production and distribution of goods and services.

Competition law is a body of legislation designed to smother market distortion caused by anti-competitive practices on the part of businesses. It is thus also additionally called antitrust legislation. The purpose of competition law is to guarantee a good marketplace for customers and producers by discouraging unethical practices designed to garner larger market share than what can be reasonably accomplished through honest competition. The consequences of anti-competitive practices include difficult entry and exit for smaller firms, poorer service quality and a waning innovation drive.

In the 1800s in the US, large manufacturing conglomerates began to emerge in great numbers and were perceived to have excessive economic power. Thus, various antitrust laws such as the Interstate Commerce Act of 1887, the Sherman Antitrust Act of 1890 and the Clayton Antitrust Act of 1914 to mention a few were enacted. The Federal Trade Commission

(FTC) Act was adopted in 1914 to create the FTC, an independent agency of the US federal government, charged to give the government a full complement of legal tools to use against anticompetitive, unfair and deceptive practices in the marketplace. The act was designed to achieve two goals: (1) to ensure fair competition between business and (2) to protect consumers against fraudulent business practices.

In the UK, competition law is affected by both British and European entities. For cases that are within the national sphere, the Competition Act of 1998 and the Enterprise Act of 2002 are the most important statutes. But for cases that reach across the border, the European Commission has competence to deal with the problems and EU law would be exclusively applicable. However, post BREXIT, this overlap would need to be re-examined; this is a dynamic process. The Competition and Markets Authority (CMA) enforces the competition law. It merged the Office of Fair Trading with the Competition

Commission after the Enterprise and Regulatory Reform Act of 2013. The main objectives of the CMA are to protect consumer welfare and public interest. Competition law in the UK is closely connected with laws on deregulation of access to markets, state aids and subsidies, the privatisation of state owned assets and the establishment of independent sector regulators.

In Japan, competition law consists mainly of the Antimonopoly Act (AMA). Prior to World War II, Japan had no antitrust laws. The AMA was, therefore, introduced during the post-war US occupation of Japan in which President Harry S. Truman issued a presidential directive to dissolve Zaibatsu structures. It generalised prohibitions against three types of anticompetitive conduct: private monopolization, unreasonable restraints of trade, and unfair methods of competition. The AMA led to the formation of the Japan Fair Trade Commission (JFTC), which is a commission of the

Japanese government responsible for regulating economic competition as well as enforcement of the AMA.

Evolution of competition law in India

India adopted its first competition law way back in 1969 in the form of Monopolies and Restrictive Trade Practices Act (MRTP). The Monopolies and Restrictive Trade Practices Bill was introduced in the Parliament in the year 1967 and the same was referred to the Joint Select Committee. The MRTP Act, 1969 came into force, with effect from, 1 June, 1970.

The enactment of MRTP Act was based on the socio – economic philosophy enshrined in the Directive Principles of State Policy contained in the Constitution of India. The MRTP Act, 1969 underwent amendments in 1974, 1980, 1982, 1984, 1986, 1988 and 1991. The amendments introduced in the year 1982 and 1984 were based on the recommendations of the

Sachar Committee, which was constituted by the Govt. of India under the Chairmanship of Justice Rajinder Sachar in the year 1977.

However, as the times changed, the need was felt for a new framework on competition law. With introduction of new economic policy and opening up of the Indian market to the world, there was a need to shift focus from curbing monopolies to promoting competition in the Indian market. The focus of public policy changed fundamentally from curbing monopolies to regulating a new framework of Competition laws. Needless to say, monopolies are the anti-thesis of competition.

In October 1999, the Government of India constituted a High Level Committee under the Chairmanship of Mr. SVS Raghavan to advise a modern competition law for the country in line with international developments and to suggest

legislative framework, which may suggest a new law or suitable amendments in the MRTP Act, 1969. The Raghavan Committee presented its report to the Government in May 2000.

With the changing nature of business and behaviour, market, economy both in India and elsewhere, there was felt a necessity to replace the obsolete law by the new competition law. The MRTP Act was replaced with the Competition Act of 2002.

The Competition Act provides for establishment of a Competition Commission of India (CCI) which will be a quasi-judicial body bound by principles of rule of law (i.e. predictability in reasoning and uniform and consistent application of law) in giving decisions and the doctrine of precedents.

The CCI has all the powers of a civil court for gathering evidence. There are three major elements in the Competition Act: anti-competitive agreements, abuse of dominant positions and combinations.

The Act empowers CCI to order remedial measures including prohibitory direction to cease & desist, impose penalties, award compensation, direct modification of agreements, recommend division of a dominant enterprise and pass such other order as it may deem fit to mention a few. The range of powers given to CCI allow it to structure remedies to the facts of each case and the need thereof to be used judiciously.

State and Competition

The basic tenets of democracy and of market competition are ingrained in the same value system - freedom of individual

choice, abhorrence of concentration of power, decentralized decision making and adherence to the rule of law.

The common goal of both democracy and market competition is the same—to enhance public welfare. While the nature of market mechanism is judged by its ‘allocative efficiency’, the democratic institutions are judged by the degree of equity they create. The concepts of working for the benefit of the weaker sections and the greater good of greater numbers are of prime importance in both democracy and competitive market mechanism. The concepts of ‘consumer sovereignty’ in economic literature and ‘voter rights’ in democracy have the same philosophical groundings. ‘Equality of opportunity’ and the ‘freedom to trade’ are sacrosanct in both the systems.

The Constitution of India guarantees certain basic freedoms that include the fundamental right to carry on any occupation, trade or business under Article 19(1)(G). Competition law

reinforces this fundamental right by prohibiting unreasonable restraints on the exercise of this right through anticompetitive practices.

Economists such as Amartya Sen have consistently maintained that a democratic state makes it much harder for the ruling government to be unresponsive to the needs and values of the population at large. Competitive markets and democratic governments are, therefore, considered complementary and need to interact in a manner that maximizes the larger public interest.

Joseph Stiglitz also believes in the necessary complementarities of markets and democratic governments to achieve social and economic justice to protect the interests of the society. However, he also maintains that there are ‘government failures’ also as there are ‘market failures’ and as

markets need to be made more efficient, the governments also needs to be made more effective.

Competition law and policy is also a tool towards better governance since it advocates lesser control and discretionary powers in the hands of Government functionaries. At the level of the enterprises, compliance with competition law is akin to good corporate governance. Corporate governance, as normally understood, is ethical conduct within the internal environment of the company. Similarly, compliance with competition law is akin to ethical conduct in the external environment of the company, principally in the market place. These cover a wide gourmet of subjects like trade, industry, privatisation, IPR, taxation and environment.

Key Issues and challenges in the functioning of competition

Indi will inevitably enhance its global interdependence. In the process, its harmonious functioning and symmetry has some challenges. Let me mention a few:

First, The multiplicity of sectoral regulators

There have been perceived conflicts between CCI and the sectoral regulators. This could be caused by legislative ambiguity or jurisdictional overlap or both. Interpretational bias could aggravate the conflicts. Conflicts between two may also be generated by the market players and legal arbitrators.

Conflicts and uncertainties magnify investment risks and onerous costly delays. Allocation of specific areas of work for sectoral regulators, does not appear to have been done very carefully. The tangled understanding of framers of the legislation is evident in multiple legislations.

Let me illustrate some of the examples of overlapping jurisdictions:

A. Petroleum regulator

The Petroleum and Natural Gas Regulatory Board (PNGRB) is mandated to be mindful of competition while dealing with access to common carriers or contract carrier as well as distribution networks. Specifically, if PNGRB is interested in declaring existing pipeline or distribution network as a common carrier, it still needs to be guided by the principles of competition.

B. Electricity regulator

The Electricity Act was passed on May 26, 2003, which was after the enactments of the Competition Act, 2002 on January 13, 2003. One of the objectives behind the Electricity Act is that of promotion of competition, a function primarily of the Competition Commission. Indeed, the framers of the

legislation also conferred power upon the regulator to deal with anti-competitive agreements, abuse of dominant position and mergers related to impediment to competition in electricity.

C. The Airport Economic Regulatory Authority of India (AERA)

The objective of AERA is to regulate tariff for the aeronautical services, determine other airport charges for services rendered at major airports and to monitor the performance standards of such airports. The operating environment in the domestic airline industry has become extremely competitive over the last few years with increase in the number of players leading to a fragmented market share, growing competition and pricing pressure on players. The scope for competition in provision of air navigation services is limited and direct competition between different air

navigation service providers within the same airspace is not a practical possibility. Therefore, to protect the user from abuse of dominant position, greater transparency is inescapable.

D. Telecom regulator

The telecom regulator is perhaps another interesting instance. It was established, inter alia, in order to ensure orderly development of telecom sector. Accordingly, one of the critical functions of the telecom regulator is to 'facilitate competition and promote efficiency'. Nevertheless, the appellate authority established to adjudicate telecom disputes excludes competition matters, albeit those arising under the old, MRTP Act[1].

[1] *In the case of Consumer Online Foundation v. Tata Sky Ltd. & Other Parties [2009], Dish TV submitted that the CCI could not claim jurisdiction over this matter as Telecom Regulatory Authority of India (TRAI) and Telecom Disputes Settlement and Appellate Tribunal (TDSAT) were already vested with the "jurisdiction and responsibility to govern and regulate the telecommunication industry covering telecom, broadcasting and cable TV services…". CCI held that any matter that raises competition concerns would fall within the purview of the Competition Act, 2002 enabling CCI to exercise its jurisdiction.*

Second, issues of inter-sectoral regulatory conflicts

Having settled for some sort of framework overseeing business conduct, the Indian policy makers will face the dilemma of choice between sectoral regulation and competition law. In order to foster symmetry of approach between sectoral regulators and competition authorities, there are three board options available:

(a) Clear separation of competition enforcement functions from technical functions: Sectoral regulator may be vested with powers of ex ante control and the competition authority may be given the ex post authority. For instance, fixation of electricity tariffs may be left to the electricity authority constituted under the Electricity Act unless the prices are claimed to be excessive or predatory which then may require an ex post review by the competition authority.

(b) The competition authority substitutes sectoral regulator: Another option is to make the competition authority responsible for both sector specific regulation as well as overarching competition enforcement. This approach is advantageous as this reduces the problem of multiplicity of regulators and enhances domain expertise. Indeed, Australia has taken this approach to settle for an economy-wide economic regulator that integrates technical and competition regulation. However, experts have expressed their concern that this may lead to complex bureaucratic structure. There is also a lingering danger that the regulator may prefer using direct regulatory power over indirect competition enforcement powers.

(c) Concurrent existence of competition authority and sectoral regulator: Institution-building is a complex, time-consuming exercise. At a pragmatic level, sector specific regulators are here to stay as it would be practically impossible to abolish

the authorities that have already come into existence. Further, experiences of other countries are not valuable guidance. There is a wide diversity in models that are available. While Australia on one hand, privileges competition authority, the UK grants explicit concurrent powers to sectoral regulators.

Third, the financial domain

In the financial domain we have a multiplicity of regulators as well: the Reserve Bank of India (RBI) is one of the oldest regulators, there is also the Securities and Exchange Board of India (SEBI) and the Insurance Regulatory and Development Authority (IRDA). There is no overarching super regulator. This has created some ambiguity. For instance, there has been a lack of clarity as to which regulator—the RBI or SEBI—will regulate the National Stock Exchange. Even regulation of the debt market has suffered in which banks are getting

regulated by the RBI but SEBI has a mandate to regulate financial markets. The current Financial Stability Forum chaired by the Finance Minister, which has all other finance regulators, is a coordinative entity. It does not have a legislative reach but is a high level coordinative entity.

Fourth, inter-corporate rivalries

We need to address issues of inter-corporate rivalries for ensuring a level playing field. Rivalry in business can influence varied aspects of an organization or their products and services. For instance, while rivalry can encourage managers to seek externalities of scale, it can enhance the possibility of unethical behaviour. Are these inter-corporate rivalries to be resolved by the CCI? What role can the CCI play to enforce ethical behaviour?

Fifth, issues of mergers and acquisitions

Combinations like mergers and acquisitions are common practices to business entities and the purpose of the combinations is to accelerate economic growth and enhance trade practices which are beneficial to the consumers. However, combinations may not always be beneficial and may cause socio-economic disruptions. It could be designed to bridge competition and lead to dominance in future.

By a 2007 amendment to the competition act, issues like mergers, acquisitions and amalgamation was made integral to the act. This invested immense responsibility on CCI to mitigate any adverse which are detrimental to the interest of consumers. To fulfil this obligation, the CCI is encouraged to take assistance of various experts in diverse fields as the economy, business and technology of which are moving parts at an unprecedented pace. The Commission needs to invest

significantly in broadening and deepening of training and capacity building of its personnel. It needs to be ahead and not behind the Curve. The pace of technology is dramatic and identifying detrimental business practices will be a dynamic challenge.

Sixth, foreign investment by big companies

Globalisation inevitably entails and confers multiple advantages. Equally, it poses more difficult choices. E-commerce is a reality and will increasingly seek greater space in our economy. It has great advantages from the viewpoint of making goods and services available at more efficient, cheaper cost and less onerous logistics. But how does one ensure that this does not lead to displacement of a number of small retail shops, “mom and pop shops” as they are called, which were a huge repository for employment and livelihood

for the informal sector. How does one balance out the gains to the consumers with the overall gains of the economy in terms of facility and access which e-commerce provides? What are best international benchmarks? Will this abuse of market dominance be mitigated by balancing interest of consumers and all other stakeholders in a fair and equitable manner.

Seventh, strategic disinvestment and creating of fiscal space for private sector

There has been a tectonic shift in our approach to central public sector undertaking (CPSU). This is regarding the policy decisions that except in strategic sectors all CPSUs would over a period of time be progressively privatised. The embedded value in these can be utilised for financing infrastructure and improving the overall competitive efficiency of the economy. On the basis of some calculations

done by NITI Aayog, I believe 77 strategic units will remain as public entities. Out of the balance, there are 439 CPSUs including subsidiaries in the initial phase. 151 nonstrategic CPSUs would progressively face the contours of the new approach. Out of this, 83 are holding companies while 68 are subsidiary entities. These are huge numbers.

In the course of time, apart from freeing valuable financial resources, creating fiscal space for the government for its priority capital expenditure both physical and social infrastructure and improving logistics will also generate enhanced competition. The nature of the disinvestment and ensuring that market dominance and market abuse can be obviated in the process will be a continuing challenge for years to come. How is the CCI equipping itself to fulfil the broad mandate of—while fostering competition—preventing its abuses to multiple forms of financial engineering. This will

be an on-going dynamic but an important obligation for an overarching entity like the CCI.

Road Ahead – A few lingering issues to be addressed

First, is reconciling issues of market dominance with optimizing externalities of scale. When does dominance become abusive and when is that point reached? These need to be balanced with advantages to the consumer given externalities of scale in terms of cost, quality and delivery efficiency.

Second, how does one deal with the issue of, within the overall regulatory framework, large foreign investments either in Indian corporates or other institutions which alter the market equilibrium? Often subtle forms of market engineering alter the pace and flow of such investments from abroad. The

alacrity with which issues of competition are addressed invariably need reliable data and judgment calls.

Third, given inevitable sectoral regulators, what kind of an organisational forum would be appropriate for intersectoral regulatory coordination? Since all laws enacted by Parliament stand on an even key, what kind of a role can the overarching noneconomic regulator like the CCI play? Will this require legal changes or can, through practice, consultative mechanisms and forums be created to promote harmonious coordination. The CCI and the sector regulators could meet on regular basis through this forum with a view to promote policy level coordination and make sector regulation as much competition driven as possible. Unlike in the case of the Financial Stability Forum, this coordination here must be done at the technocratic level.

Formal schemes for coordination can also be considered, as is done in various countries, for example: a) The right to participate/observe proceeding before the other; b) Formal referrals; c) Appeal to a common authority; d) Non-interference in other's jurisdiction; e) Delineation of jurisdiction; and f) Presence of competition authority on sectoral regulator agency.

As a matter of policy, formal and informal exchanges between various sectoral regulators and CCI should be encouraged. The consultation process could be at two levels, one, at the policy level and two, in respect of individual cases.

Other mechanisms for coordination should also be explored such as: (a) Use of experts from each other for facilitating enquiry/investigations. (b) Exchange of personnel on deputation or internship basis. (c) Participation in each other's training programmes, workshops, seminars, etc. (d)

Conducting regular training programmes by CCI for representatives of the sector regulators so that they are in a better position to appreciate various competition issues.

Fourth, given the fact that significant privatisation of central public sector undertakings are underway, how will this alter the overall milieu for orderly competition? How does one promote the maximum realisation of the embedded values? At the same time, how does one ensure that their sale or divestment does not distort broad principles of fair competition? How does one enhance on data quality for exercising judicious functions? Data, data availability and data dynamics in terms of a real time data must be an important tool for guiding pronouncements.

Fifth, apart from central public sector undertaking, state governments are being encouraged to adopt similar practice. In many state governments, they have independent regulators

in some key sectors like power. How does one ensure uniformity in the application of the working of state level regulators with not only the central regulator but under the overarching coordinative role of the CCI?

Finally, pressing the reset button in the post-pandemic era. The interface between emerging technologies and harnessing technological possibilities alter the way in which not only technological based companies function but in the radical changes which their application will make in multiple spheres of economic activity. The role of technology in this reset button needs careful delineation. The CCI, which deals with technology companies with the competitive implications of the workings and the investment of technology companies, would need to be mindful of its broader implications to multiple facets of economic activity.

Path Forward

We undoubtedly need greater awareness and education on the role of independent regulators. Therein lies the importance of the CCI in being the super overarching regulator. This is necessary and the CCI Act needs to be strengthened in this manner. It may not be appropriate to have an overarching regulator to override all sectoral business but what about new issues of competition coming into play? Who would be the final arbitrator?

Conclusion

As the government takes major steps towards disinvestment, giving a new impetus to privatization, the role of CCI becomes more significant to ensure that these discussions enhance competition and economic efficiency and gain for all. The design of privatization should allow us optimum room for

competition. Moreover, the strategic disinvestment programmes should be incentivised by the Centre to extend this reform to the myriad of State-owned public sector enterprises to create the much needed fiscal space. **Competitive federalism** of this kind can be a force multiplier to achieve the objective of cooperative federalism.

The world is at the cusp of change. So is India and so is the CCI. Many of these aspects would be covered and are integral to pressing the Reset Button. The Reset Button must address the challenges which have been outlined earlier. We must prepare India to meet the next pinnacles of growth.

“Regulation needs to catch up with innovation.” – Henry Paulson