

# Adoption of Competition Law—the Indian experience

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## Adoption of Competition Law The Indian Experience

- Competition law in India is on **introducing markets** with its nuances while assessing exercise of market power
- As an economics based law it tends to be marked with tensions with a preference for legal regulatory interventions than of economics of facilitation
- Changing business paradigms which define and redefine market need to be **contextualized in the larger goal** of globalized knowledge based digital India
- My presentation deals with
  - A brief introduction to the Competition Act, 2002 – its origins and focus
  - Adoption of the law in the formative stages
  - Experience of implementing the law
  - How prepared is the law for emerging digital India

## Introduction to competition law in India Committee Approach

- ‘Committee Approach’ is the mechanism for any change in policy, law and regulation
- Several committees preceded the shift from a relatively closed economic model to liberalization in 1991
- Emphasis was on market forces and competition for consumer welfare
- Structured pattern of liberalization (delicensing) and of new regulatory mechanisms
- A long history prior to adoption of competition law – another review in the offing of the prevailing Competition Act

## Markets and Regulation Stages Approach

- Delicensing and of private sector participation initially in telecom and the electricity sector – Telecom Regulatory Authority and the Electricity Regulatory Commission
  - Unbundling the government monopoly into natural monopoly and competitive
- The defining moment was the WTO meet at Singapore subsequent to setting up a high level Committee ( Raghavan Committee) on competition policy
- Competition Act ,2002 emerged and became operationalized in 2009 replacing the structuralist MRTP.
- Existing mechanism of intervention and regulations expanded with new regulatory authorities as also changes in fiscal and monetary policies as part of the larger macro framework of trade and business

## Objective of the Competition Commission

- Objective of Competition Act defined and restricted - competition for consumer welfare
- As in most international competition laws, the Indian Competition Act seeks to:
  - prohibit anti-competitive agreements, horizontal and vertical (S.3);
  - prevent abuse of dominant position (S.4); and
  - regulate mergers and acquisition above the specified threshold (S.5 and 6)
- A separate section on Advocacy
- Competition is not defined in the Act and neither is appreciable adverse effect on competition.
- While consumer is defined there is scope for an amorphous categorization of consumer

## Process of Adoption of the Law

- Early years on developing rules and regulations of procedures and practices
- Transaction of Business concentrated on Mergers and Acquisitions (2011) - a continuous process of creating trust
- Regulations on lesser penalty, recovery of monetary penalty and cost of production in the area of cartels and abuse of dominance.
- Related developments may require to redefine the spaces of the Commission:
  - Patents and Copyright Act; IBC ; Data Protection and Privacy Act
  - Redefining boundaries of 'natural monopoly' and the interface between CCI and sector regulator – telecom and electricity sector

## Experience with Implementing the Law

- During the last nine years, the CCI has received over 800 matters alleging violations of Sections 3 and 4 of the Act in diverse sectors pertaining to the emergent areas of high tech , neural markets and IPRs
- With regard to mergers and acquisitions the century mark has been crossed.
- Penalties have been imposed where warranted and leniency is more common as also structural modifications more so in cases of M&A
- Experience has varied – perspective of an economist and perspective of the Competition Act for meeting the current challenges

## Experience and Observations

- Mergers non-adversarial intent in the law – economic analysis limited to market share and behavioral and structural remedies but more outward looking
- Cases of significance
  - Jet Eithihaad – origin to origin
  - Sun Ranbaxy – Molecule market
  - Reliance and Transmission Towers – passive infrastructure
  - Walmart and Flipkart – ecommerce and platforms
- Antitrust has adversarial enforcement content needing clarity in approach of market behavior and market structure –regulatory or adjudicatory limited economics
- Cases of significance of cartels – horizontal agreements
  - Cement – evidence of probability of possibilities
  - Association or Retail Traders in the Pharma Sector
- Cases of significance in Abuse of Dominance (extending to vertical restraints)
  - MCX-SX v NSE – defining a stock exchange and network effects
  - Springer v Printwell – geographical market
  - Hiranandani and Stem cell Research – verticals in a hospital
  - Kataria v Hyundai and 14 others – verticals in the spares market; IPRs
  - Bharat Matrimony v Google – redefining the relevant market of abuse
  - Prima Facie – Ericsson v Micromax

## Experience and Observations

- Dominance remains the overriding criteria – the continued legacy of MRTP
- Half century of socialist oriented anti-market orientation still finds comfort in phrases such as ‘social forbearance’ and ‘social responsibility’
- Is it appropriate in the context of the objective of the Act?
- Is it appropriate for a digital India

## Way Forward

- Competition Act is under review – timely and critical call for a modern regulatory framework “*in view of changing business environment and bring necessary changes, if required* (press release)”.
- The Competition Act surprisingly has several clauses that cloud thinking on basic issues pertinent to a changing business environment
- To mention a few
  - how to define a market;
  - how to measure dominance and assess market power in the face of competitive constraints
  - on who the consumer is and the harm to consumers.
- Recent decisions based on inappropriate understanding of internet and virtual markets impact heavily on the ecosystems that nurture innovations and technological development.

## Call for Clarity in Objectives

- Clarity in objectives that necessitated the replacement of MRTTP by the Competition Act has been diluted.
- Competition and consumer welfare as the twin objectives of the Act, the Preamble in asserting competition and consumer interest includes the rider '*keeping in view the economic development of the country*'.
- Innocuous as the statement is its interpretation is open to protection of domestic producer strengthened by the definition of consumer in Section 2(f) of the Act.
- Consumer includes both producer and the end consumer as 'consumer' when a purchase is *either for commercial use or for personal use*.
- Most cases of antitrust abuse roughly over 50% have been filed by producers. To claim that these filings are on behalf of the end consumer is stretching the definition.

## Consumers and Consumer Welfare

- Wide definition of consumer has had two outcomes for antitrust action
  - Encouraged producers to 'fire **from the shoulders of the Commission**' as a strategy for meeting competition.
  - Emergence of perverse situations where 'maximization of producer welfare' is equated with maximization of total welfare against the well-established tenet of economics 'maximization of consumer welfare'.
- Pricing schemes be it predatory pricing (*MCX-SX V NSE*) or royalty fixation of Standard Essential Patents (*Micromax V Ericsson*) is viewed from the perspective of a producer rather than of the benefits/harm accruing to end consumers.
- Implications for business on platforms in defining consumer
  - varied pricing schemes zero pricing on one side of the platform or both sides
  - creating depth of markets and network effects,
  - the revenue model for an aggregator from advertising.
- Redefining dominance as measured by standard metrics of market share
- To associate market power with dominance rather than look for the presence of entry barriers

## Dominance and Market Power

- The Act defines dominance and market power in terms of the '*ability to operate independently of competitive forces prevailing in the relevant market*'
- Section 19 (4) list out 13 factors that define dominance including any other factor the Commission wishes to consider
- Dominance' the conditionality for market power reduced to one of mere dominance and not of competitive constraints
- Modern business if of dominance and not necessarily of market power
  - Difficulties of assessing new technological developments
  - The emergence of AI and of Patents and Royalty Pricing

## Defining the Relevant Market

- The relevant market (product) in the Act is with reference to substitutability or inter-changeability in terms of *characteristics, their prices and intended use* (Section 2(t)). My concern is slightly different.
- The definition has no reference to the concept of market as a place or mode for transacting business.
  - Decision of antitrust violation in a 'non-market' the classic example is the decision of *Bharat Matrimony, CUTS v Google*.
  - Two-sided markets and multi-sided markets in a mesh of networks require delayering to assess the market of transaction – defining consumer and defining the antitrust market
  - Issues of data and its overlap more with privacy – is it of access or of anonymity

## Conclusions

- Business paradigms keep shifting but the speed of change in the last few years is phenomenal
- Could be the initial splurge of destructive innovation
- Redefining the Act and of Regulatory Mechanism - the question whether a detailed Act is necessary when business conditions are so fluid.
- Sometimes as a former Commissioner I have wondered whether we re-imagine the market as we envisage rather than accept quirkiness of market evolution
- Convenience of intervention versus facilitation