Some Thoughts for CCI-II: *Participatory Competition Law Enforcement*

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Carrying forward, the theme of an earlier article, the author looks at the authorised representation before the Competition Commission of India ('Commission') and whether it continues the way it was envisaged in the Act or tilting in favour of any particular profession. He also examines the newly started practice of the Commission calling the opposite parties during the preliminary hearings with the informant to fully understand the matter. There were certain amendments introduced to the Competition Act, 2002('Act') in September, 2007. The issue being examined in this article also includes the point if this practice is compatible with the amendments of 2007 to the Act.

The author who not only was closely involved in amendments of 2007, drafting regulations for the functioning of the Commission and headed the Antitrust Division of CCI but was also the first Director General of the functional Commission discusses the compatibility of this new practice with the probability of success of investigation process in this article.

The readers may recall an article amongst the previous issues wherein the author had penned down some of his thoughts for making the competition law enforcement more relevant to the country's economy. In this sequel to that article, the author looks at certain practices which, apparently, show some possibilities of a room for improvement. As asserted in Section 18 of the Competition Act, 2002 ("Act"), relating to the duties of the Competition Commission of India ("Commission"), the legislature had an extremely lofty aim for getting the economy rid of anti-competitive practices from across the face of the nation through this instrument of legislation. It is indeed an extremely idealistic assertion for a nation. For an economy dreaming to reach a point where it can be treated as an economic super power, this is only natural and there cannot be any two views about this being the natural aspiration of all the stakeholders in the economy including the Government, businesses, consumers, civil society organisations and all other market players. These are the high ideals which the framers of the Act set for us. For a ready reference and appropriate comparison, the Section 18 of the Act is being extracted below for ready reference:

> *"18. Duties of Commission.— Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers, and ensure freedom of trade carried on by other participants, in markets in India:*

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> *Provided that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement, with the prior approval of the Central Government, with any agency of any foreign country."*

From the above duties, cast upon the Commission, it is expected that the Commission shall –

(i) eliminate practices having adverse effect on competition;

(ii) promote and sustain competition;

(iii) protect the interests of consumers; and

(iv) ensure freedom of trade carried on by other participants, in markets in India

The above duties have only been assigned to the Commission in view of the sentiments expressed in the preamble of the Act. For a ready reference, the preamble of the Act is being reproduced below:

> *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 markets, in India, and for matters connected therewith or incidental thereto.*

From the above preamble of Act, we realise that it aims -

(i) keeping in view the economic development of the country, for the establishment of the Commission;

(ii) to prevent practices having adverse effect on competition;

(iii) to promote and sustain competition in markets; and

(iv) to protect the interests of consumers; and

(v) to ensure freedom of trade carried on by other participants in markets in India, and for matters connected therewith or incidental thereto.

A comparison of the duties cast upon the Commission and the sentiments expressed in the Preamble of the Act would indicate that, first of all, they both contain a very logical sequence of events. This can be brought closer home if we compare it with the task at hand for a farmer tending a farmland for getting some productive outcome. The Act wants to keep the economic development of the country in view while establishing a Commission. It is like appointing a farmer to ensure that the farmland produces desired crops and plants. Any farmer is supposed to, first, remove unwanted and harmful weeds, which feed on the same limited nutrients in the soil, from any ground before sowing a new crop or a new type of plantation. In absence of removal of weeds, any well meaning effort of planting a new and desirable plantation or crop will not be fully successful. Following a similar logic, the Act is expected to prevent practices having adverse effects on competition. This is quite obvious that unless the practices having adverse effect on competition are not prevented and/or eliminated, as the case may be, as has been expected in the preamble or in the duties of the Commission contained in the preamble and Section 18 of the Act, respectively, any effort to promote competition or nurture the existing competition would be certain to fail.

Now that we are on this point of discussion, it may be interesting to note that the difference between the preamble of the Act and the duties of the Commission. On the face of it, they look quite similar almost like a mirror image of each other but that is not true in reality. An extremely important difference between the two is and the replacement of the word 'prevent' by word 'eliminate'

for the same aim. Though the legislation wanted the Act to 'prevent' practices having adverse effect on competition but it wanted the Commission, the body created for the purpose or the farmer appointed to cultivate the land to ensure not just 'prevention' but 'elimination' of these practices having adverse effect on competition.

Is this job of either prevention or elimination of the practices having adverse effect on competition and promoting and sustaining competition in the market is possible with or without the partnership with all the stake holders? Or do we require participation of each and every stake holders for the Act to succeed in the idealistic aim it has set for itself?

If we look at the performance of Commission in the times gone by, we notice that there is a room for enhancement of participation in the enforcement of the Act. To modify a way of putting emphasis on some thing, if it is stated that "competition law is too complex a subject to be left to competition commission and competition lawyers alone", it may not too much be off the mark. Perhaps, this progression can no more be left to chance. It would be appropriate if active and positive efforts are made to encourage the participation of all the stake holders who should see a future not only for themselves but for the country in this journey of enforcement of competition law.

If we look at the kind of cases how they are coming before the Commission and how they are being handled, we find a huge spectrum of cases- starting from cases being filed before the Commission for non-supply of the electricity and provisions of road by a municipal authority to cases where the information has included serious economic analysis upfront even at the stage of filing information. However, if we look from the reaction of the Commission's point of view, we notice that, perhaps, all the stake holders are not either getting enthused to join the process and/or are not being encouraged by the authorities. If the encouraging signals of participation for all the stakeholders are not there, either way, the loss will be that of competition law.

Let us look from different perspectives. First perspective can be whether all the stakeholders are being involved in the process of the evolution of competition law in the country or some of them got excluded out either by some express conduct or subtle practice. If we look at Section 35 of the Act, we notice that it contains enough flexibility for all types of persons or practitioners or professionals to appear before the Commission including any person or authorise representative in person. For a ready reference Section 35 of the Act is being extracted below:

> ***"35. Appearance before Commission.-*** *A complainant or defendant or the Director General may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of his or its office s to present his or its case before the Commission.*
>
> *Explanation.-For the purposes of this section,-*
>
> *a. "chartered accountant" means a chartered accountant as defined in clause (b) of sub-section (1) of Section 2 of the Chartered Accountants Act, 1949 (38 of 1949) and who has obtained a certificate of practice under sub-section (1) of Section 6 of that Act;*
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> *b. "company secretary" means a company secretary as defined in clause (c) of sub-section (1) of Section 2 of the Company Secretaries Act, 1980 (56 of 1980) and who has obtained a certificate of practice under sub-section (1) of Section 6 of that Act;*
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> *c. "cost accountant" means a cost accountant as defined in clause (b) of*

sub-section (1) of Section 2 of the Cost and Works Accountants Act, 1959 (23 of 1959) and who has obtained a certificate of practice under sub-section (1) of Section 6 of that Act;

d. "legal practitioner" means an advocate, vakil or an attorney of any High Court, and includes a pleader in practice."

A look at the Section 35 of the Act extracted above would indicate that, in addition to the persons or the officers working for the enterprise, there is an option of, amongst professionals, chartered accountants, company secretaries, cost accountants and legal practitioners to attend the proceedings before the Commission. A rough calculation would show that this would imply that the involvement of the legal practitioners in the proceedings before the Commission can, on an average, be at around 20% as legal practitioners, amongst other three professionals and the officers of the enterprise, would only constitute one of the five categories eligible for representation before the Commission. This expectation would be completely belied if you attend one or two hearings before the Commission in the morning at 10.30 AM on Tuesday, Wednesday or Thursday when the hearings for ordinary meetings, dealing with the cases relating to competition law, takes place. If any other category is appearing before the Commission that could be an exception, otherwise one sees only lawyers on any average day.

A comparison with other similar statutes may be in order. For a ready and immediate comparison, if we compare this with the provisions of Income-tax Act, 1961, Section 288 of IT Act, 1961 is the corresponding section for appearance before the IT Authorities and this section is being extracted below for ready reference and comparison:

*"**Appearance by authorised representative***

***288.** (1) Any assessee who is entitled or required to attend before any income-tax*

In addition to the persons or the officers working for the enterprise, there is an option of, amongst professionals, chartered accountants, company secretaries, cost accountants and legal practitioners to attend the proceedings before the Commission.

authority or the Appellate Tribunal in connection with any proceeding under this Act otherwise than when required under Section 131 to attend personally for examination on oath or affirmation, may, subject to the other provisions of this section, attend by an authorised representative.

(2) For the purposes of this section, "authorised representative" means a person authorised by the assessee in writing to appear on his behalf, being—

(i) a person related to the assessee in any manner, or a person regularly employed by the assessee; or

(ii) any officer of a Scheduled Bank with which the assessee maintains a current account or has other regular dealings; or

(iii) any legal practitioner who is entitled to practise in any civil court in India; or

(iv) an accountant; or

(v) any person who has passed any accountancy examination recognised in this behalf by the Board; or

(vi) any person who has acquired such educational qualifications as the Board may prescribe for this purpose; or

(via) any person who, before the coming into force of this Act in the

Union territory of Dadra and Nagar Haveli, Goa†, Daman and Diu, or Pondicherry, attended before an income-tax authority in the said territory on behalf of any assessee otherwise than in the capacity of an employee or relative of that assessee; or

(vii) any other person who, immediately before the commencement of this Act, was an income-tax practitioner within the meaning of clause (iv) of sub-section (2) of Section 61 of the Indian Income-tax Act, 1922 (11 of 1922), and was actually practising as such.

Explanation.—In this section, "accountant" means a chartered accountant within the meaning of the Chartered Accountants Act, 1949 (38 of 1949), and includes, in relation to any State, any person who by virtue of the provisions of sub-section (2) of Section 226 of the Companies Act, 1956 (1 of 1956), is entitled to be appointed to act as an auditor of companies registered in that State.

(3) [***]

*(4) No p*erson—

(a) who has been dismissed or removed from Government service after the 1st day of April, 1938; or

(b) who has been convicted of an offence connected with any income-tax proceeding or on whom a penalty has been imposed under this Act, other than a penalty imposed on him under [clause (ii) of sub-section (1) of] Section 271; or

(c) who has become an insolvent,

shall be qualified to represent an assessee under sub-section (1), for all times in the case of a person referred to in sub-clause (a), for such time as the [Principal Chief Commissioner or] Chief Commissioner or [Principal Commissioner or] Commissioner] may by order determine in the case of a person referred to in sub-clause (b), and for the period during which the insolvency continues in the case of a person referred to in sub-clause (c).*

(5) If any person—

(a) who is a legal practitioner or an accountant is found guilty of misconduct in his professional capacity by any authority entitled to institute disciplinary proceedings against him, an order passed by that authority shall have effect in relation to his right to attend before an income-tax authority as it has in relation to his right to practise as a legal practitioner or accountant, as the case may be;

(b) who is not a legal practitioner or an accountant, is found guilty of misconduct in connection with any income-tax proceedings by the prescribed authority, the prescribed authority may direct that he shall thenceforth be disqualified to represent an assessee under sub-section (1).

(6) Any order or direction under clause (b) of sub-section (4) or clause (b) of sub-section (5) shall be subject to the following conditions, namely :—

(a) no such order or direction shall be made in respect of any person unless he has been given a reasonable opportunity of being heard;

(b) any person against whom any such order or direction is made may, within one month of the making of the order or direction, appeal to the Board to have the order or direction cancelled; and

(c) no such order or direction shall take effect until the expiration of one month from the making thereof, or, where an appeal has been preferred, until the disposal of the appeal.

(7) A person disqualified to represent an assessee by virtue of the provisions of sub-section (3) of Section 61 of the Indian Income-tax Act, 1922 (11 of 1922), shall be disqualified to represent an assessee under sub-section (1)."

A look at the above Section 288 of the IT Act, 1961 shows that like before the Commission, in income-tax matters also, different representatives can be present for

presenting of a case for any assesses. Unlike the CCI, where you would be pardoned to confuse the Commission with a normal court with an overpowering presence of advocates, the Income tax Department sees a stream of visitors including chartered accountants, cost accountants, employees of assesses and assesses themselves. Thus, the representation before the Income Tax Authorities actually does not consist of more than 15% to 20% of lawyers. It may vary from time to time. However, this is not the situation before the Commission- despite the fact that both are specialised domains.

This is totally in contrast to the expectations and the hope the stakeholders had when the Commission was established and the regulations framed. At the time, it was intended to be made so consumer friendly that even the dress for the proceedings was not kept like a lawyer's robes. It was meant to be any decent formal clothing or business lounge suit in the beginning. Thus, in keeping with the expectation of being an instrument of modern economy, everything was kept to be highly progressive whether these intents have been able to show up themselves in practice, as of now, is a moot question.

A couple of anecdotes may not be out of place. In one case of hearing, one lawyer thought that so long as he dressed in a lounge suit, he is fit enough to represent matters before the Commission (although the requirement of the lounge suit has also been done away now.). He went in properly legitimate dress, as per regulations and, on his turn, started putting forward his views. One member of the Commission wanted to know, first, identity of this person before he could proceed. This became obvious as all the other representatives were in lawyer's dress. This is a really a strange situation. Unless you are not wearing lawyer's robes you are not likely to being identified as a representative of the enterprise. In this particular instance, all the other members knew the person personally and he proceeded to speak without him being in a lawyer's dress on the occasion. Nonetheless, he safely decided to always have lawyer's dress in future before the Commission lest his case be adversely affected. In another instance, another enterprise decided to visit the website of the Commission and file an information of an anti-competitive conduct, after going through instructions on the subject on the website of the Commission. Instead of hearing this informant alone, during the preliminary hearing which the Commission decided to hold in this case, the Commission also called all the opposite parties on the same date and at the same timing. All the opposite parties hired top lawyers. On the date of preliminary hearing, already hugely marginalised by the massive presence of lawyers of the four parties and pushed into a highly insecure minority numerically as well, the representative of the enterprise, the managing director, was asked by a member if he felt overawed by the presence of so many heavy weight attorneys. He, naturally, confessed in the affirmative. In one of the recent films 'Aligarh', in one of the scenes in the film, a professor of Marathi language, Prof Siras was asked to vacate the accommodation provided by the university, on an extremely short notice. A television reporter approaches the professor, with camera in attendance, to ask how is he felt on being pushed out of the accommodation in such an unceremonious manner. Imagine, the shock and chagrin of this professor if the authority who ordered vacation in the first place were to ask the same question in that film scene. In this particular instance, it was totally upto the Commission either to call the informant alone or in the overpowering presence of such a huge batteries of lawyers. Thereafter, being asked the obvious, is like being pointed out the

irony if it, some how, missed on the informant.

One of the cardinal principles in any tactical strategic planning is an element of 'surprise'- be it in the recently conducted 'surgical strikes' on the Indo Pak border or any other investigation worth its salt. For any such operation to be successful you lose the element of 'surprise' and you have lost it. In a scenario, when the outcome of a deliberation could be an investigation against a party or an enterprise, should that party or enterprise know much before that 'investigation' has even been instituted? It may be argued that the concerned party or enterprise would come to know of the investigation anyway after some time. The Director General of the Commission(DG) has the powers to carry out dawn raids. One of the criteria for any investigation agency to carry out a dawn raid is to do so if it apprehends that any vital evidence either has not been submitted before it in investigation despite having been called upon to do so or it might not be produced before it even if called upon to do so. Thus, an apprehension that an evidence is so vital that the concerned authority has reason to believe that even if asked to be produced, it would not be produced before it by the concerned party or enterprise is more than sufficient ground to carry out a dwan raid. In such a situation, for a law violation of which can invite a penalty equal to three times the profits or ten percent of turnover, to hope that it/he/she(opposite party) would sit idle after knowing exactly the allegations and their basis, is like hoping for a world where every one follows law on its/his/her own. If that was the case, no law enforcement agency including the Commission need exist. Therefore, the logic of the Commission calling the opposite parties, routinely, at the stage of prima facie determination would be known to itself. It should have good reasons for it but it is not clear to any person having exposure to similar proceedings and investigation. This, in a country where Income Tax authorities have routinely travelled as marriage parties when going for dawn raids so as not to rouse the suspicions of potential tax evaders or had to disguise as waiters just to catch the tax offenders off guard, is really difficult to understand. There can be an argument in favour of this newly started practice. It can be that, instead of wasting time, right in the first meeting itself the Commission becomes very clear about all the pros and cons of the matter. This can, at the most, be a self destructing argument. A body which was conceptualised as an *expert* body to need the *assistance* of opposite parties to *understand* if there is a prima facie violation of the law or not is like police asking a wrong doer if he/she committed any wrong. People would start doubting the capacity of the police, if this were the case. For an *expert* body having power to initiate actions on its own and which considered it necessary to request the legislature to give it powers to initiate proceedings on the basis of an *information* and not wait for a *complaint* to come before it, it is really difficult to understand as to what led it to start such a practice. In a country where no newspaper is complete unless it reports a matter or two of anticipation of destruction of evidence or threatening of witnesses in relation to matters of anticipatory bails and arrests of the accused, it is indeed difficult to understand its newly started practice in such matters which have the potential to destroy its own credibility. It appears to be a participation of all the stakeholders (read opposite parties) of a different kind. No doubt, both this practice as well as a undeclared preference to lawyers is good for the legal profession. However, whether this ever was the intent of the framers of this modern law only time would tell.