Section B

Articles

Some Thoughts for CCI – Part I

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If we look at working of the Competition Commission of India (CCI or Commission), it has not shaped the way many expected it to after the competition law enforcement began in India keeping in mind a growing economy having considerable share of anticompetitive practices. Seven years is a good time for a second look the functioning of an institution. As some one who had been an insider and has seen the functions of all the divisions of the Commission from senior position, the author shares some random thoughts which, inter alia, may enhance the effectiveness and profile of the Commission. The author, who headed the Merger and Antitrust Divisions of CCI in addition to being the first Director General of the functional CCI discusses these very thoughts in this article.

A neutral observer, perhaps, would have expected a faster growth of the competition law enforcement apparatus and its effectiveness in India looking at the size of the economy and the type of anti competitive practices which, virtually, have been accepted as the legitimate business practices across business spectrum in different sectors of the economy. In reality, the actual growth is nowhere near the projections made when the basic structure of the CCI was being envisaged in the light of IIM Bangalore study done for the purpose. In this write up, we look at the areas which may have room for improvement.

Institutionalize 'Institutional Memory'

It has been now more than seven years that the enforcement powers had been given to the Competition Commission of India ('CCI' or 'Commission') to enforce competition law in India. As happens with any institution, as we go farther from its establishment, unless there are proper mechanisms in place, institutional memory is one of the biggest casualties. This is not the end of the matter. Once

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institutional memory by way of connecting old with the new and new with the newer becomes a casualty, there would be stages when the new persons, not knowing the background and the history of various matters would end up spending considerable time on doing things which have already been done. This may lead to repetitions and contradictions.

This reminds me of one interesting incident which I discovered by chance. I was told that in one matter the Competition Appellate Tribunal ('COMPAT' or 'Appellate Tribunal') was not convinced about the basis and the extent of discussion for imposing penalties in some of the order of the Commission under Section 27 of the Competition Act, 2002 ('Act') and had questioned the Commission as to why the Commission is not having guidelines for imposing monetary penalties on enterprises. Apparently, an undertaking to come back to COMPAT was given and, subsequently, the Commission would have put up some reply to the Appellate Tribunal. It may be highly instructive to know that the one of the first penal orders to be passed by the CCI was in DLF case imposing a substantial penalty on DLF for violation of the provisions of the competition law. That penal order under Section 27 of the Act had to wait as the then CCI establishment thought that it would not be inappropriate to pass a penalty order under Section 27 of the Act without having the guidelines to impose monetary penalties in place as they have in European Union and some other jurisdictions. The task was given to the undersigned and a global study was made involving some 42 countries and a presentation was given to the Commission way back in 2010 showing very clearly that, normally, with the only exception of Singapore, no country started its competition law enforcement armed with the law and all the relevant guidelines. These guidelines, in most of jurisdictions, grew out of experience. It was essentially to codify and freeze the wisdom acquired out of iterative processes of learning so that every time, time is not spent on doing the same thing again. The presentation showed that all the jurisdictions learn on job and, thereafter, come up with guidelines for either the imposition of monetary fines on enterprises or something else. As a matter of fact, even the horizontal merger guidelines of USA came a couple of decades less than a century after having had the experience of merger review process.

After having done the factual analysis, focus of the presentation was that all the countries first have learnt it on the job and, thereafter, had at appropriate time decided to put that learning in black and white and call all that learning by whatever name they preferred by them-guidelines or whatever. It applies to the guidelines for imposing monetary penalty of European Union and also to the horizontal merger guidelines of USA. After that, there are many other guidelines such as guidelines for vertical restraints, guidelines for vertical and conglomerate mergers. Similar guidelines have also been now issued by the European Union and some other jurisdictions also. As the mandate of the Commission while assigning this task to me at that time, in 2010, was to prepare guidelines to impose monetary penalty and it would have been inappropriate if draft guidelines were not prepared. Accordingly, the draft guidelines to impose monetary penalty were prepared and circulated to the Commission at that time before the meeting. However, with the leave of the Commission, it was submitted by me that it would be appropriate to first see the presentation and only, thereafter, have a look at the draft guidelines so prepared and circulated.

After going through the presentation, the Commission took a prudent view that it

would be more appropriate if, in keeping with the trend of other jurisdictions, the CCI also keeps issuing guidelines to impose monetary penalties in abeyance and does so when enough experience justifying such a move has been acquired. Till then, it was agreed that the penalty orders of the CCI can be more speaking. Perhaps a lot of effort could have been saved if all this background was easily and readily available when COMPAT questioned the CCI on the existence of guidelines imposing monetary penalties in case of different enterprises. Thus institutional memory can be of great help. It may be recalled that there was a proposal to have a small Knowledge Management Section in the Commission - specifically in Combination Division - so that nobody has to invent the wheel again even if there is a wholesale transfer of officials from their present assignments to any new ones. I am not sure whether such a thing exists. What is needed is that there has to be a division by whatever name called which keeps on track of all such developments and maintains well classified and documents to preserve institutional memory. I distinctly remember when the Merger Regulations were being drafted and presented to the advisory council as well as to other different stake holders, we kept on keeping a copy of all the versions for posterity so as to ensure any one, or the institution for that matter, if interested can know the background of all the changes made in different drafts and the logic behind all the changes. Hoping this to come into existence by chance may be a bit of wishful thinking. Some pro active efforts one needed for such a mechanism to come into place.

Dealing with Information:

The filing of Information before the Commission, in any matter, is a very important milestone for the Informant and the Commission both. It is the beginning of a relationship. This relationship is no different than other relationships in the human and commercial world. All relationships are based on mutual trust. Both the ingredients are of utmost importance - 'Mutual' and 'Trust'. The one sided relationships do not have a great future. If the Commission cannot care for its 'Informants', so will they and vice versa. Going by the past, it appears not many genuine informants feel comfortable coming under public glare the way the listing of the cases is done on CCI website. The results and the impact of this practice are not far to seek. The number of the real cases of Information before the Commission has not grown as they should have in a growing economy like India. On the contrary, they are on a relative decline.

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In the first enactment of competition law, Section 19 was worded as under:-

Section 19 :

"(1) The Commission may inquire into any alleged contravention f the provisions contained in sub-section (1) of Section 3 or sub-section (1) of Section 4 either on its own motion or on –

a) Receipt of a ***complaint*** *accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or*

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(emphasis added)

This was amended in September, 2007 by Competition Law Amendment Act,

2007 and the amended version of Section 19 is being given hereunder :

> "……. ……. …..
>
> (a) Receipt of any **information**, in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or
>
> ——————"

From the above amendment in Section 19 of the Act, it becomes quite obvious that the legislature was extremely conscious of the fact that anti competitive practices, in any developing country, such as India, are deeply entrenched and to have a law to deal with such anti competitive practices would require cooperation of the citizens who are having information about this kind of anti competitive practices but do not have the courage to either marshal the evidence or even, if they are able to marshal the evidence, to come out in the open and take wrath of the mighty parties which may be the opposite parties. It is for this reason that the identity of the informants is sacrosanct and is preserved at any cost by all the investigation agencies whose starting point is that information. They go to great lengths to preserve the identity of the informants. I can vouch for the system followed by Income Tax Department and other agencies also who practice similar methods by which complete confidence is created in the hearts of those who are coming with the information against extremely powerful groups/lobbies.

The anti competitive practices not only are indulged by very powerful market players but also mean huge financial gains for those who are indulging in them. Conversely, any dent on these anti competitive practices by the actions of the Commission will make a much bigger dent on the pockets of these extremely powerful interests which would not hesitate to go to any extent to continue with their free run of bucks. It was for this reason that the amendment sought to replace the word 'complaint' by the word 'information'. In the case of word 'complaint', these are adversarial proceedings whereas no such obligation remains if the proceedings arise out of an 'information' filed by somebody who has the information but not necessarily any vested interest. In the case of information being filed before the Commission, the person who is filing information is only fulfilling his task of being a good citizen. He is only assisting the Commission in its job. In any case, the Commission has power to initiate proceedings 'on its own' also in appropriate cases. He (the Informant) has got no interest unless it is a vested interest for some ulterior gains. The Commission is at liberty to have a look at the information submitted, take it up for investigation, if it so desires, or close it on the face of it but pick up from the threads which are available by way of summary nuggets of data/information in the information filed by the information giver.

There can be instances where the information record is not complete enough to come up with really fool-proof information but has been able to generate sufficient doubt as regards the existence of an anti-competitive practice by any of the market players. At this stage, there should be two options available before the Commission. The first option would be to order an investigation as causing investigation is not any injury and, if there is no violation of competition law, the parties would not be penalized in the end as the investigation report would not be able to find any anti competitive practice. The other option would be that even at the level of information coming to the Commission, if the Commission is not inclined to even hold that it is a prima facie case for ordering investigation, the Commission, in that event, may close this information for record but should not let small nuggets of precious information

die a slow and natural death. Ideally, the CCI should have a division which should look into the relevant components in the investigation which might have not resulted in investigation immediately but have potential and if the information and data is found to be correct, it should be acted upon accordingly.

It is not sure as to how much of this is happening today, but it is a welcome memory that the competition law jurisprudence would not have been the same but for some work done by the Investigation Division, within CCI, in the initial years of operation where many anonymous letters, complaints, envelopes or information, which were not strictly in the format of information, were transferred to the investigation division which did its own enquiry, and at the appropriate level of collection of evidence/inferences, put It before the Commission and requested and succeeded in having *suo moto* investigations instituted in many cases. Cases like Phosphide tablet case similarly arose on the basis of a simple letter having been received from Food Corporation of India. During that period, not just one but at least a dozen or so cases were so investigated and resulted in successful penalization of the perpetrators of anti competitive practices through this method of follow up of the Investigation Division.

For reasons known only to the Commission, these kinds of instances as well as the number of information translating into investigation are becoming less and less from a time when almost all the cases coming before the Commission were going for investigation. In many instance despite very good prima facie evidences, extremely small fraction of cases are being sent for investigation by the Commission. This is a matter which only the Commission can look into and decide to take a call whether they want a Commission which is really heavy on anti competitive practices or otherwise. Or, may be, this is an issue of work load. Usually every competition authority has a mandate and authority to take up *suo moto* cases on any issue. If we look at the jurisprudence in European Union/USA, Pakistan we notice that a large number of cases decided by these competition agencies are based on *suo moto* information initiated by the agency. In comparison, the functioning of the Commission appears to be more like 'reaction' than a calculated 'response'. It has been driven by the events starting from the information having been filed by various informants and not many cases are really coming from the route of *suo moto* inquiries or investigations ordered by the Commission. It is slightly unusual for any young competition agency in which big economy full of such anti competitive practices all around should generally be interested in making its presence felt in the market. Another trend which appears to have set in, rightly or wrongly, is that in good number of cases, the opposite party or the party which is being accused of indulging in anti competitive conduct is called for hearing. In these situations, it appears that a copy of the information, as received from the information provider, is passed on to the Opposite party as it is. Thereafter, OPs are asked as to why it/ they should not be proceeded against.

Here again, the institutional memory comes as a very important link. When the general regulations of the Commission were being drafted, all these things were anticipated and it was thought that, perhaps, the life of those who are coming forward to the Commission with either the information or for other assistance can sometimes be at risk if due safeguards are not in place. It was with this intent that along with the hard copy of the information, a soft copy in MS word form was sought to be obtained from all the informants. The idea was that in case the Opposite Party is required to be confronted, it should be confronted with all the relevant material

The parties, by giving a fair opportunity of being heard, would be equally serious if the information from the soft copy is perused and the relevant portions relating to anti competitive conduct are extracted and made in a self contained form to be confronted to the party alleged against while safeguarding the poor information provider who may be at risk if the copy of information is provided

which is available against it and not necessarily told who has come against it. However, there is no value addition if the name of the person(s) or enterprise which are coming before the Commission along with this particular information to be revealed to the opposite party.

The parties, by giving a fair opportunity of being heard, would be equally serious if the information from the soft copy is perused and the relevant portions relating to anti competitive conduct are extracted and made in a self contained form to be confronted to the party alleged against while safeguarding the poor information provider who may be at risk if the copy of information is provided. This type of practice was also initiated in the office of DG, when the first notice under Section 36 read with Section 41 of the Act was started for the first time in the country. Only the relevant gist used to be confronted to the parties and not the source of the information. In the initial period some parties approached for the copy of the information and they were legally refused to protect the identity of the Informant. Unless there are some valid reasons, the information should be shared with the concerned parties in this form only and not having all the particulars exposing the Informant and the source of information. Keeping the identity of the Informant should be the 'default' made in CCI and not otherwise. It shall lead to a more effective CCI which shall be respected and reciprocated with by those in possession of good and credible information. The relationships based on these practices with the informants shall be healthy and long lasting.

Clearing All Pending Applications Before Passing Any New Order

But for an application for adjournment for a new date filed by Steel Authority of India Ltd. (SAIL) remaining undisposed of on the files of the Commission, the competition law jurisprudence in India could have been a bit different. Perhaps, there could not have been a SAIL judgment by Hon'ble Supreme Court. Not that it was a bad thing as the judgment in SAIL case is a path breaking order clarifying many points of law. The origin of that matter was that an application for adjournment by SAIL was received and 'inadvertently' remained undisposed of, neither being rejected nor being accepted. In either case, it would have been perfectly fine if this application was rejected with valid reasons before the Commission passed an order under Section 26(1) of the Act directing the DG to conduct investigation. There was no point disposing it of after the investigation was ordered. It was this weakness which was taken to logical conclusion and we have a judgment of CCI vs. SAIL which has become a land mark judgment defining as to what can be taken for litigation and what cannot

be taken. If in the secretariat, there is a proper record in which it is ensured that on the date of hearing all pending applications are disposed of and nothing is pending without a good reason, it would save the Commission from a large number of legal troubles as has happened in the past and may still happening in some cases.

'One Who Hears, Must Decide'

It is a trite law that in any quasi judicial or judicial proceedings, the persons who hear must decide. It happens every day in the courts. After a new member joins and some matters have been part heard, the matters are again heard after including of the new member on the bench and only, thereafter, the matters are decided and orders are passed. Every Income Tax Officer worth his salt knows that if he has joined a new post where his predecessor has done all the work to dispose of an assessment order which on the face of it, is sufficient to even dispose of the matter, he would not proceed with the matter unless and until he has given a notice of hearing to the party and heard them afresh himself. In all judicial and quasi judicial forums, this is extremely important that the person who is signing the matter should have heard the parties concerned. It is happening in COMPAT very frequently. Recently, a third member joined in COMPAT. In the transitional period, the bench used to sit twice. The matters which were heard in the absence of the third member used to be heard by the previous bench only and the matters which were at a preliminary stage were being heard along with the full bench. The COMPAT bench used to have two sittings with appropriate division of members and Chairman depending on when they have joined and which matters they had heard. This is extremely obvious procedural drill. The secretariat of the Commission need to have a system and documentation in which history of all the cases is recorded and it is rigorously followed at the time of next hearing and at the time of signing of orders. There are only two options. These are either additional hearings in the part heard matters with the new member(s) on board or the new member(s) need not sign the orders which have been heard by earlier set of members prior to his/her joining the bench. Commission has lost out in a number of important cases on account of not following this basic rule which is prevalent in all the forums. This can be easily enforced with a little due diligence by secretariat.

Monitoring Anti Competitive Conduct

As has been mentioned in the preceding paragraphs, Commission so far has not shown any great enthusiasm for taking up suo motu cases. The general impression an outsider gets is that the primary fodder for the Commission to move is information being filed before the Commission. After this act is done, the Commission goes through nearly pre-decided motions. For a competition agency which had the mandate to promote competition and curb anticompetitive practices and having completed seven years of existence, the bar of expectations from the agency from all the stakeholders and peer agencies is much more high. The peer agencies look towards such a new agencies towards the steps taken to promote competition and pro- active steps taken to curb anticompetitive conduct and not simply reaction to a cluster of vested interests in the economy. It may be help a lot if a small task force is constituted within the Commission to keep on looking for anti competitive practices and conducts which are in public domain and start feeding the background material to the Commission for initiating *suo motu* enquiry in appropriate cases. This would do Commission great good as far as functional reputation and its contribution to the economy is concerned.

Giving Copies of DG Report

Already the Commission has been pulled up by various courts for having revealed the confidential information relating to some of the parties in proceedings before the Commission. The regulations were framed in such a way that DG also submits a soft copy of the investigation report to the Commission. The idea was that extracts can be taken easily and comfortably so as to protect the confidential information or the name of the source. DG is also supposed to give one more additional copy containing redacted version of confidential information. This purpose of this exercise was that the staff of the Commission/ Secretariat can take extracts of both the confidential and/or non-confidential versions according to their need. The Commission is not duty bound to give copies of investigations report to all the parties. Yes, it is obliged to give copies of the investigation report if the investigation arises out of a reference by Central Government or any statutory bodies. Either way, no harm would be done if the Secretariat takes extracts of allegations and findings and the abuses for having reached these findings without revealing the name of the informant or the sources of evidence as doing so may put the sources at an unnecessary risk and may also dry up the sources of information to the Commission in future. This appears to be already happening as the number of information are greatly coming down. Only if the evidence so collected is being refuted and the basis challenged and the evidence of such a nature which requires cross examination can an 'in-camera' access may be allowed. This would bring enhanced credibility to the proceedings before the Commission.

Rewarding the 'Informant' in Suitable Cases

We can learn from Competition Commission of Pakistan and start a reward scheme for the persons giving information against the anti competitive practices. What is happening in the CCI is reverse. Many times the persons filing information feel harassed. They continue if they have some perceived gains in the matter. Some of these Informants also hire expensive senior counsels also. Does it not, by itself, raise the heckles of the Commission or give some hints about the nature of proceedings before it? The genuine informants will hardly have the resources of that kind and, perhaps, may not persist if confronted with huge legal costs and a not-so-cooperative Commission. This calls for treating the informants with care and not just kid gloves, whereas, at present, it is none. It may encourage people and make the job of the Commission easier if informants are treated in confidence and feel always comfortable in bring the anticompetitive practices to the door of the Commission merely because of being good citizens and patriotism.

Consistency in Orders -Use Templates

Normally, the orders of any completion agency are available on their websites. A close look at the orders of European Union, for example, would show a pattern of all that is included in the order. For the sake of form as well as consistency, it is necessary that the basic facts, sequence of events, issues and decisions follow a pattern. The reason this issue is being raised in present context is that a exercise was done by the author while devising merger review format for the country. After seeing that whichever order you pick up, the facts and issues will change from case to case but the basic structure and flow were almost similar, templates were devised for the draft orders of merger clearances to ensure consistency and to guarantee that none of the vital facts are missing from the order. A similar approach in needed in the orders of antitrust also. There should be some regular templates

which are followed in all the orders. It should promote consistency and coherence.

Strengthening Investigation by DG

The competition law investigation is not a merely fact finding mission. It needs to do a number of activities beyond the inquiry of facts. These can be surveys of consumer satisfaction, survey of substitutes' availability, third party reports, dawn raids and many other such economic and investigation tools. It would be better if the Commission encourages and, possibly, nudges DG to strengthen his investigation and do not just submit his reports on the basis of merely circumstantial evidences. That means the investigations should be conducted in such a manner that investigations and their outcomes are far more fair.

There can be done by making a chart mandatory in all the reports on the tools used and their relevance and impact on the resultant product. Another system of grading the reports on different parameters shall also ensure that the quality of the DG report is of some level and there is a scope of continuous and further level of enhancement. There are a number of reports wherein the DG report just cursorily discusses some legal issues and pretend as if the investigation is competed. There are some other cases, where only a slew of circumstantial evidences is treated as a good report. Such tendencies have to be avoided. To improve the quality of the Investigation reports, the good reports must be rewarded and bad reprimanded. A checklist may be given by the Commission to the DG who should be made to tick all the reports submitted by him on each of these parameters. This would ensure that aspects which CCI wants to be covered are included in the report. This may help incentivize the staff of DG to pull their socks and do a better job. The checklist may be made of the some type of parameters. A few illustrative instances are being given below:

- Comparison with others similar cases done in other international jurisdictions
- All economic tools used along with complete details
- Mapping of reports on the factors affecting appreciable adverse effect on competition (AAEC) in Section 19 (3) of the Act – a complete mapping
- All questionnaires and replies in the annexures are attached with the report – being compromised in some cases.
- Details of any consumer or suppliers' or manufacturers' survey
- Any other innovative tools
- Etc.

The items would depend upon the need and the imagination of the Commission. However, it would certainly encourage some of the enterprising officers in the office of DG to come up with good reports after including economics and other modern tools. If sincerely tried, some of the suggestions may really help improve the effectiveness of CCI as an Institution and enhance its credibility.