

Unclassified

DAF/COMP/GF/WD(2016)62

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

10-Nov-2016

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Cancels & replaces the same document of 19 October 2016

Global Forum on Competition

INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

Contribution from CUTS

-- Session III --

1-2 December 2016

This contribution is submitted by CUTS under Session III of the Global Forum on Competition to be held on 1-2 December 2016.

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JT03405099

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-- Contribution by CUTS* --

Executive Summary

1. Institutional efficacy and optimal performance inter alia demands on competent personnel and functional independence. Functional independence for an institution implies achieving the desired degree of autonomy and maintaining an arm's length relationship from interest groups. To be truly independent from the government, not only must the regulator be an independent statutory authority, it must also be financially, institutionally and operationally independent from the government.

2. If the case of India's competition regime is considered, the Competition Commission of India's (CCI) reliance on the Central Government effectively lowers the independent functioning of the authority, especially in matters of financial support and appointment. As illustrated in this paper, there are several provisions of the Competition Act, 2002 which hamper the effective and independent functioning of the authority. Institutional independence of CCI is restrained through several statutory powers granted to the Central Government under the Competition Act. Moreover, financial dependence on the government also restricts the autonomous functioning of the Commission. However, the Act has significantly protected the operational and decision making functions of the Commission and checks and balances are provided by the independent judicial branch.

3. The CUTS paper attempts to evaluate CCI's independence on benchmarks of institutional, financial and operational independence through enumerating relevant legal provisions. Finally, it suggests some structural amendments and alterations which would ensure the independent functioning of the authority.

1. Introduction

4. Free markets offer the potential to efficiently allocate resources and assist in overall economic development of the country. However, it is not always the case that free markets lead to efficient results.¹ As giant private entities tend to focus on maximizing profits, there is always the chance of undesired results such as market failures. The not so recent global economic crisis clearly highlighted the need for regulation in order to prevent market failures due to financial breakdowns of significantly important entities.² Moreover, even if markets are working efficiently in the economic sense, they may not be in tandem with the overall goals of social efficiency and equity envisaged by a country. Hence, in developing countries, like India, introduction of

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¹ The New Economics Foundation, *Markets, market failure, and regulation*, 1 (2013), available at http://www.neweconomics.org/page/-/Economics_Briefing_8.pdf.

² Moss, David, and John Cisternino, eds. *New Perspectives on Regulation*. Cambridge, MA; The Tobin Project, (2009) and Joseph Stiglitz, *Regulation and Failure*, Cambridge, MA; The Tobin Project, 11 (2009)

regulation or any reform often originates from the criteria other than economic efficiency, with objectives of equity (distribution of welfare) and institutional efficacies often dominating.

5. Institutional efficacy and optimal performance inter alia demands competent personnel and functional independence. Functional independence for an institution implies achieving the desired degree of autonomy and maintaining an arm's length relationship from interest groups. The line between independence and autonomy is thin, but it is important that it should be clearly recognisable.

6. To be truly independent from the government, not only must the regulator be an independent statutory authority, it must also be financially, institutionally and operationally independent from the government. The executive cannot be allowed to either interfere, or arm-twist the regulator and interfere in its administrative functioning. More importantly, since the onus of meeting regulatory objective lies with the regulator, the government should not be allowed to have unbridled discretion in how the regulator hires and manages personnel, and uses its finances.³

2. Need for independent Regulators in India

7. Following the 1990s reforms marked by policies of deregulation, privatisation and trade liberalization in India, it was initially thought that the private sector firms would enter within the existing framework of incentives and invest using the revised and amended sectoral framework. However, the same did not happen and a need was realised for establishing independent regulators so as to provide a level playing field to private players and thus assure them of predictability and fair treatment. There was a realisation that government intervention in markets to correct market failure in various sectors (e.g. utilities) was inappropriate and hence, a new form of economic governance emerged with independent specialised sectoral agencies for correcting market failure and ensuring competitive outcomes, with decision making based on transparent and participatory processes. There was also a dire need for separation of policy-making, regulation and operation functions. Hence, several independent regulatory regimes have been set up with the expectation of insulating economic decision making from political control, ultimately contributing towards a consistent and rational policy environment; providing a level playing field to competitors; and reducing regulatory uncertainty amongst private investors.⁴

3. Regulator for Competition: Competition Commission of India (CCI)

8. While new regulatory bodies were being set up to tackle various issues emanating from actual and anticipated private player behaviour and other structural issues, the same concerns were also being felt about the competition arena. Prior to the early 1990s liberalisation period, India had an operational competition law in the form of the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969. The MRTP Act was enacted at a time when India was pursuing the 'command-and-control' paradigm for the administration of the economic activities of the country, giving it little influence over the process attributes of competition, which was largely non-existent. As the new paradigm of economic reforms took effect in the early 1990s, the MRTP Act was found to be hardly adequate as a tool and a law to regulate the market and ensure the promotion of competition. This saw a lengthy process towards competition reforms, eventually resulting in the extant Competition Act, 2002 (as amended). This saw the creation of two

³ Mehta, Pradeep S (ed.), *Regulatory Performance: Independence and Competence Matters, Competition and Regulation in India Report*, CUTS International, 45 (2013).

⁴ Mehta, Pradeep S, "Creating Regulators is not the End, Key is the Regulatory Process", Serials Publications, New Delhi, (2009).

competition bodies, the Competition Commission of India (CCI) and the Competition Appellate Tribunal (CAT), to administer the competition law in India.⁵

4. Independence of CCI: Situational Analysis in India

4.1 Institutional Independence

9. Institutional independence has an inverse relationship with external influences over the authorities. The lesser the influence, the higher will be the scope for functional autonomy. Institutions are necessary for a healthy functioning of political and economic democracy, but they do come into conflict while exercising their independence to make social welfare meaningful.⁶ The following table evaluates the independence of CCI as per the benchmark of institutional independence:

Table I: Institutional Independence of CCI

Issue	Relevant Legal Provision of the Competition Act, 2002	Remarks
Structure	Nature of CCI As per Section 7(2) the Commission is a body corporate having perpetual succession and a common seal with power, subject to the provisions of this Act, to acquire, hold and dispose of immovable and movable property. It can also enter into contracts in its name and can sue and be sued.	It is important to mention that the structure of CCI is predominantly supervised by the Central Government. One welcome step to facilitate the independence of CCI was the 2007 amendment to Section 9. The amendment led to creation of a Selection Committee taking away the powers of the Central Government.
	Composition of the CCI As per Section 8(1), the Commission consists of a Chairperson and not less than two and not more than six other Members which are appointed by the Central Government.	However, if examined carefully, the role of the Selection Committee is limited to recommendation of a panel of names. It is still up to the Central Government to choose from the recommended names and select the Chairman and other members of the CCI.
	Appointment Section 9 which was amended in 2007 introduced a new selection process, according to which the Chairperson and other Members of the Commission are appointed by the Central Government from a panel of names recommended by a Selection Committee which consists of (i) the Chief Justice of India (CJI) or his nominee; (ii) the Secretary in the Ministry of Corporate Affairs; (iii) the Secretary in the Ministry of Law and Justice, (iv) two experts of repute who have special knowledge and experience in international trade, economics, law etc. Notably, the term of the Selection Committee and the manner of selection of panel of names shall be such as may be prescribed by the Central Government.	Although, the inclusion of the CJI in the selection process is commendable, the final word still rests with the Central Government. Moreover, the Selection Committee also consists of 2 members from the executive branch. Hence, the structural independence of the regulator is not clearly established even after the amendment. Moreover, the pervasiveness and influence of government is still prevalent and is clear from the Competition Commission of India (Term of the Selection Committee and the Manner of Selection of Panel of Names) Rules 2009. According to Rule 4(4) an officer not below the level of Joint Secretary who is nominated by the Ministry of Corporate Affairs acts as the Convener of the Committee.
	Resignation, removal and suspension of Chairperson and other members The Chairperson and any other member can resign by giving a written notice addressed to the Central Government	The removal procedure however is safeguarded substantially from arbitrariness. According to Section 11 (3), if a member is to be removed on grounds of acquiring prejudicial financial interest and abuse of powers of his

⁵ CUTS International, *Competition and Regulatory Overlaps: The Case of India*, (2012) available at http://www.cuts-ccier.org/IICA/pdf/Country_Paper_India.pdf

⁶ Supra 3, at 48.

Issue	Relevant Legal Provision of the Competition Act, 2002	Remarks
Powers of the Central Government	<p>In case of fulfillment of certain conditions laid down under Section 11(2), the Central Government has the power to remove the Chairperson or any other Member from his office.</p>	<p>office, the Central Government can only remove him from office after the nod of the Supreme Court.</p>
	<p>Power to exempt in public interest As per Section 54, the Central Government has the power to exempt any class of enterprises if such exemption is necessary in the interest of security of the State or public interest from the application of the Act.</p>	<p>These sections give unbridled power to the central Government.⁷ The power to exempt enterprises from the ambit of the Act on grounds of “public interest” provides wide discretion to the Central Government.</p>
	<p>Power to issue directions Under Section 55, the CCI is bound by the directions passed by the Central Government on questions of policy. Moreover, the decision of the Central Government on the point whether a question is one of policy or not is final and the CCI is bound by it.</p>	<p>The term “public interest” is nowhere defined in the Act and is subject to the interpretation of the Central Government. It is also pertinent to mention here that the Committee which brought in Competition reform in India (Raghavan Committee) also recognised that wide amplitude of “public interest” can easily constrain the independent administration of competition policy.</p>
<p>Power of Central Government to supersede Commission As per section 56, the Central Government has the power to supersede the Commission on grounds of non-performance of duties imposed by the Act. It also supersedes in case the Commission has persistently made default in complying with any direction given by the Central Government under the provisions of the Act.</p>	<p>Also, the power to issue directions is vested in the hands of the Central Government. Although CCI has a right to express its views before the directions are passed, the Central Government still has the final word in deciding whether the question is of policy or not.</p>	
		<p>Section 56 lays down wide discretion to the Central Government to suppress the functioning of the Commission. The subjective nature of the wording of the provision might compromise the independent functioning of the Commission.</p>

4.2 *Financial Independence*

10. An important aspect of regulatory independence is financial independence. Dependence on uncertain budgetary allocations reduces the independence of regulatory bodies. To be truly independent from the government, not only must the regulator be an independent statutory authority, it must also be financially and administratively independent from the government.⁸ The following table evaluates the independence of the regulator as per the benchmark of financial independence:

⁷ Ragahav Kumar Singh & Sukriti Guha, Discerning the Role of Government in Competition Act, 2002: Need for institutional separation between policy making and regulation, Competition Law Reports, Manupatra, B-102 (2011)

⁸ Supra 3, at 53

Table II: Financial Independence of CCI

Issue	Relevant Legal Provision of the Competition Act, 2002	Remarks
Budget and Funding	<p>Grants by Central Government As per section 50 of the Act, the Central Government has the discretion to provide grants to the CCI as it deems fit and appropriate for utilisation for the purposes of the Act.</p> <p>The Competition Fund The Act does not explicitly specify the preparation of budget for the CCI. But, u/s 51, the Act provides for the constitution of the "Competition Fund". All the relevant government grants are credited to this Fund. The Fund is applied for meeting the salaries and allowances of the Chairperson and other members and also for meeting the administrative expenses of CCI. Moreover, the Fund also meets all miscellaneous expenses of the CCI in connection with discharge of its functions.</p> <p>Salaries of Chairperson, members and staff The salaries are determined by the Central Government. It has the power to lay down rules for the same under the Act.</p>	<p>It is clear from the provisions of the Act that the discretion of granting funds for the functioning of the regulator lies wholly with the Central Government. The Central Government is not even mandated to consult the Commission before allocating the grants. Hence, the CCI is wholly dependent on governmental grants for carrying out the required functions enshrined under the Act.</p> <p>This dependency could result in unnecessary hindrances to effective functioning of CCI in case where the funding falls short of the required amount. Moreover, complete financial dependence creates a situation wherein the regulator has to implore the line Ministry time and again for supplementary funds. This might also lead to arm-twisting by the executive.</p>
Utilization and allocation	<p>Administration of the Competition Fund Under section 51(3) of the Act, the Fund is administered by a committee of Members of the Commission. The selection process of the members is done by the Chairperson.</p> <p>Accounts and auditing Under section 52, the CCI is mandated to maintain proper accounts and other relevant records and prepare an annual statement of accounts. This will then be audited by the Comptroller and Auditor-General of India (CAG) which is a constitutional authority established under Article 148 of the Constitution of India.</p> <p>Furnishing of returns, etc., to Central Government As per section 53, the CCI has to prepare an annual report and give a true and full account of its activities and forward a copy to the Central Government. The copy of the report is then laid down before each House of Parliament.</p>	<p>Although the administration of the fund and utilization is up to CCI's committee of Members, the regulator is still accountable to the line-ministry for its activities. The fact that accountability of the regulator is associated with the line-ministry endangers its independence and makes it vulnerable to vested interests which can be channelized through the executive branch.</p> <p>It is important to note that the accounting and auditing is done with the aid of the CAG which is an independent constitutional body but the accountability and furnishing of returns, etc. is to be made to the executive branch or the Central Government. This dichotomous provision makes CCI's accounts subject to the constitutional branch and functional reporting subject to the executive.</p> <p>Although checks and balances are important, the subjectivity and accountability to the line-ministry does not provide the most optimal solution and might render the regulator's independence susceptible to vested interests.</p>

4.3 Operational/decision making Independence

11. Regulatory efficacy demands functional independence which calls for the regulator maintaining an arm's length relationship from interest groups. This means that the authorities ought to be free from functional and operational control of the government. Operational independence is indeed essential for the competition authority to adjudicate upon matters in a transparent and unbiased manner. The following table evaluates the independence of the regulator as per the benchmark of operational independence:

Table III: Operational/decision making Independence

Issue	Relevant Legal Provision of the Competition Act, 2002	Remarks
Choice of cases and inquiry procedure	<p>Inquiry into anti-competitive agreements, abuse of dominant position and combinations of enterprises</p> <p>As per Section 3, 4 and 5 of the Act, the CCI focuses on the following areas: (i) prohibition of anti-competitive agreements; (ii) prohibiting abuse of Dominant position; and (iii) regulation of combinations. The Commission has the power to direct the Director General (the investigative arm) to investigate into possible anti-competitive agreements and cases of abuse of dominance. CCI can inquire into these matters upon information received from any individual, upon reference of the Central Government or even suo moto.</p> <p>Power to regulate its own procedure</p> <p>As per Section 36, in order to discharge its functions, the Commission is guided by the principles of natural justice and is subject to the other provisions of the Act and rules made by the Central Government. Moreover, to carry out its functions, it has been given the same powers as a Civil Court.</p>	<p>The decision making powers exercised by the Commission are fairly free from governmental control. The CCI exercises suo moto powers to inquire into anti-competitive agreements, possible abuse of dominance cases and also has the power to examine and assess combinations of entities. However, when CCI thinks that there exists no prima facie case, it is still mandated under section 26(2) to pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government. This entails that the Commission cannot close the matter prima facie without giving a formal order to the Central Government. This can sometimes slow down the process of adjudication and leads to unnecessary wastage of precious time.</p> <p>The independence of the investigative process has been ensured by the formation of the Director General under section 41 who has to investigate when directed by the Commission. The DG also has the same powers as that of a Civil Court.</p>
Decision making process	<p>Passing Orders</p> <p>Where after inquiry by the DG, the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, the Commission has the power to impose penalties as it may deem fit which shall be not more than ten percent of the average of the turnover for the last three preceding financial years.</p>	<p>CCIs power to pass orders penalizing the entities is fairly wide and the regulator can exercise its independence and discretion in the matter. The orders and assessment have to conform to principles of natural justice, and rightly so. Scope of governmental control is negligible in this regard.</p>
Procedure of Appeal	<p>Competition Appellate Tribunal (COMPAT) and the Supreme Court of India</p> <p>As laid down under Section 53A, appeals to CCI's orders lies with COMPAT. The members of COMPAT are also appointed by the Central Government from a panel of names recommended by the Selection Committee. Appeal to an order passed by COMPAT lies with the Supreme Court of India.</p> <p>Power of Central Government to file appeal</p> <p>Under Regulation 21(8) of the Competition regulations, 2009, the Central Government can file an appeal to the appellate tribunal if it is not satisfied with the decision of the CCI.</p>	<p>The Central Governments power is restricted to filing an appeal if it is not satisfied with the Commission's decision. The adjudicatory powers to decide the case lies wholly with the Appellate authority and finally with the apex court of India.</p>

5. Way Forward

12. Special attention needs to be given to bring in effective independence in the regulatory structure of the CCI in India. The structural and financial organization of the competition authority needs to be revisited and the following recommendations if adopted will go a long way in ensuring independent functioning of CCI:

5.1 *Accountability of CCI to a Parliamentary Standing Committee*

13. In order to secure *democratic accountability*, CCI should be directly responsible to the legislature through a Parliamentary Standing Committee and to the people at large. Parliamentary supervision seems to be the ideal form of accountability as accountability to the line ministry can often be associated with pressure being exerted on the regulator to favour utilities being operated by the ministry. Similarly, vested interest groups often find it easier to effectively pressurise the regulator through the line ministry rather than through the Parliament. Therefore, replacing the line ministry's control by Parliamentary supervision is essential.⁹

14. Currently, the Act requires the Commission to prepare an annual report giving account of its activities and forward it to the Central Government. Post this step, a copy of the report is laid out in both the Houses of the Parliament. Ideally, the scenario should be that the Parliament should discuss the report of the Commission and such a discussion should be led by a Parliamentary Standing Committee. The CCI should be made directly accountable to the Parliamentary Standing Committee and the Central Government should not have a say in it. The Commission is in the best position to explain semantic issues, procedures and the extent to which the objectives of the Act have been met or not directly to the Parliamentary Standing Committee and the line ministry's role should be annulled.

5.2 *Allocation of budget and funding through legislative process*

15. The financial requirements proposed by the regulator should be linked with their work plan for a certain time period and approved directly by the Parliamentary Standing Committee. The Commission should be consulted before the grant is approved and CCI's budget should ideally be a charged expenditure on the Consolidated Fund of India instead of the Competition Fund which is currently governed by the Central Government. Moreover, CCI should be allowed to generate resources on their own through a reasonable fee, cess, etc. wherever possible, and be allowed to spend it. The Central Government's power to grant funds should be shifted directly to the Parliamentary Standing Committee and the legislative process should govern the financial dependence (or independence) of the competition authority. This will enable the regulator to maintain distance from line ministry and would ensure CCI's independence from the micro-management of the line minister.

5.3 *Transparent Appointment Procedure*

16. An important requirement of good regulation is to have the right people on board. This requires having in place proper mechanisms to ensure appointment of experts as regulators. In Indonesia, vacancies are announced in media and candidates have to pass a vigorous test process prior to being considered for appointment as regulators. In South Africa, nominations for appointing telecom regulator are invited from the market and public hearings are held in respect of each candidate. In some countries, the Parliament plays a decisive role in ratifying candidates. These practices ensure transparency in selection and keeps discretionary elements at bay.¹⁰

⁹ Supra 3, at 56

¹⁰ Supra 3, at 55

17. The government must make the selection process transparent and short of interference. To ensure this, the Chairperson and members of the CCI may be appointed by the President of India on the recommendation of the Prime Minister. The Prime Minister can choose these names from a panel of two or three names empanelled by a committee comprising the Chief Justice of India, the Chairperson of the Union Public Service Commission (UPSC), Cabinet Secretary and Chairperson of the competition authority and an independent expert. Hence, the appointment procedure should be altered to ensure the independence of the Commission which would facilitate its effective functioning.