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THE PROMOTION OF COMPETITIVE NEUTRALITY BY COMPETITION AUTHORITIES - Contribution from India

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The Promotion of Competitive Neutrality by Competition Authorities

The Indian experience

– Contribution from India –

1. Introduction

1. Post-independence, India chose a centrally planned economic structure which featured the coexistence of the private and the public sector, with a major role in capital formation assigned to the public sector to promote inclusive economic growth and social justice. The emphasis was on self-reliance and state-led investment in heavily capital-intensive industry, which was reflected in the Industrial Policy Resolutions of 1948 and 1956.

2. The legislation preceding the Competition Act, 2002, viz., the Monopolistic and Restrictive Trade Practices Act, 1969, was also in consonance with this framework, of an equity-centric economic development model. The focus of the MRTP Act was to control the concentration of economic power, and a substantial part of it was focused on monopolistic behaviour and economic concentration. The Monopolies Inquiry Commission, which gave its report in 1965, stated that "*Concentration of economic power is the central problem; monopolistic and restrictive practices may be appropriately considered to be 'functions' of such concentration*." The Hazari Committee (1965) also found evidence of concentration of wealth by a few business entities due to the licensing system in place. The preamble of the MRTP Act sought to address this issue by stating that it is an "*Act to provide that the operation of the economic system does not result in the concentration of the economic power to the common detriment, for the control of monopolies, for the prohibition of the monopolistic practices and restrictive trade practices and for the matters concerned therewith or incidental thereto*."

3. The emphasis on public-sector-led equitable economic development created an imbalance in terms of competitive neutrality. There were sectors reserved for the public sector, and the licensing regime created formidable entry barriers and scale restrictions for the private sector to flourish. A balance of payments crises in the early '90s necessitated broad-based economic reforms to usher India onto the path of rapid economic growth. The economic reforms of 1991, based on the principles of 'Liberalization, Privatization and Globalization,' brought about a paradigm shift in the policy outlook of Indian economic growth. Foreign investment was encouraged, economy was opened up and private enterprise was given its due place in economic development. Steps were taken to dismantle the complex regime of licenses, permits and controls. Further, emphasis on state ownership of means of production through the presence of public sector undertakings (PSUs) in major sectors was replaced by encouraging private enterprises to operate and thrive. Sectors once reserved exclusively for the state were now opened to private enterprises.

4. With this paradigm shift, a need was also felt for a modern competition law, keeping with the renewed vigour of growth the economy was experiencing. It was deemed appropriate to shift focus from *curbing monopolies to promoting competition.*

5. The Competition Act, 2002 (Act), follows the philosophy of modern competition laws and aims to "*prevent practices having adverse effect on competition, promote and sustain competition in markets, protect the interests of consumers and ensure freedom of trade carried on by other participants in markets in India*." The Act prohibits anti-competitive agreements, abuse of dominant position and regulates combinations (mergers and acquisitions) with a view to ensure that there is no adverse effect on competition in India. The legislation paved the way for a more competitive neutral legislative framework.

6. Anti-competitive agreements are dealt with under Section 3, which states that enterprises, persons or associations of enterprises or persons shall not enter into agreements in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which cause or are likely to cause an 'appreciable adverse effect' on competition in India.

7. The Commission is empowered to inquire into any cartel and to impose on each member of the cartel a penalty of up to three times its profit for each year of the continuance of such agreement or 10% of its turnover for each year of continuance of such agreement, whichever is higher. In case an enterprise is a 'company,' its directors/officials who are guilty are also liable to be proceeded against.

8. In addition, the Commission has the power to pass, *inter alia*, any or all of the following orders (Section 27):

- direct the parties to a cartel agreement to discontinue and not re-enter such agreement;
- direct the concerned enterprises to modify the agreement;
- direct the concerned enterprises to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any; and
- pass such other order or issue such directions as it may deem fit.

9. Regarding abuse of dominance, Section 4 stipulates that "*No enterprise shall abuse its dominant position*." 'Dominant position' is a position of strength enjoyed by an enterprise in the relevant market, which enables it to operate independently of competitive forces prevailing in the market, or affects its competitors or consumers or sways the relevant market in its favour. Abuse of dominance is judged in terms of the specified types of acts committed by a dominant enterprise. Such acts are prohibited under the law. Any abuse of the type specified in the Act by a dominant firm shall stand prohibited.

10. Section 4(2) of the Act specifies the following practices by a dominant enterprise or group of enterprise as abuses:

(i) directly or indirectly imposing unfair or discriminatory conditions in the purchase or sale of goods or services;

(ii) directly or indirectly imposing unfair or discriminatory prices in the purchase or sale (including predatory price) of goods or services;

(iii) limiting or restricting the production of goods or the provision of services or market;

(iv) limiting or restricting technical or scientific development relating to goods or services to the prejudice of consumers;

(v) denying market access in any manner;

(vi) making the finalization of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;

(vii) using its dominant position in one relevant market to enter into or protect another relevant market.

11. Under Section 5, the Commission regulates combinations. Broadly, 'combinations' under the Act mean acquisition of control, shares, voting rights or assets by a person or an enterprise and mergers and amalgamations between or amongst enterprises when the combining parties exceed the thresholds set in the Act. The thresholds are specified in the Act in terms of the assets or turnover in India and abroad. Entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India is prohibited, and such a combination shall be void.

2. State-Owned Enterprises in India

12. State-Owned Enterprises (SOEs) in India exist in the form of government majority held companies and statutory corporations set up by an act of Parliament and are fully owned by the government. SOEs in India exist in the following forms:

- Government companies
- Public corporations
- Departmental enterprises
- Public sector banks/financial institutions
- Cooperative societies
- Autonomous bodies
- Trusts

13. In the pre-reform era, SOEs laid a strong foundation for economic development in the country through large-scale investments in infrastructure, services and resources. Post-economic reforms in 1991, emphasis was laid on improving the market competitiveness and efficiency of SOEs to improve their competitiveness vis-à-vis the private sector. This further manifested in the policy of privatization and 'disinvestment,' involving the sale of government equity in public sector enterprises to enhance their viability. The Government of India is following the principle of "*Minimum Government-Maximum Governance*". This is reflected in the recent decisions on strategic disinvestments of SOEs, such as Bharat Petroleum Corporation (BPCL), Air India, Shipping Corporation of India and Container Corporation of India.

3. Competition Neutrality in Competition Act, 2002

14. Competition Act, 2002, is a legislation that fosters competitive neutrality as it does not differentiate between business entities on the basis of whether they are state-owned or privately owned. The basic design of the Act promotes competitive neutrality.

15. The Competition Act, 2002, defines the term 'enterprise' in Section 2(h) as:

> *"A person or a department of the Government…but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defense and space."*

16. The litmus test of a business entity being defined as an 'enterprise' within the meaning of the Act, i.e., determining the applicability of provisions of the Act, is whether or not the business entity is engaged in any 'economic activity'. Any business entity engaged in 'economic activity' will fall within the definition of an 'enterprise' under the Act, i.e., it will fall under the purview of the provisions of the Act. This is subject to the condition that the entity is not engaged in any 'sovereign function' of the central government, as mentioned in Section 2(h) of the Act.

17. Therefore, it is clear that the Competition Act, 2002, and its applicability is independent of the nature of the enterprise and does not depend on whether the entity is a public or a private entity. There is no special treatment given to SOEs under the Act, with the exception of sovereign functions and departments of the Central Government dealing with atomic energy, currency, defense and space.

4. CCI's Role in Promoting Competition Neutrality

18. Given the legal framework of competition neutrality provided in the provisions of Competition Act, 2002, CCI stands committed to the application of the provisions of the Competition Act in a competition neutral manner. CCI follows the twin approach of enforcement and advocacy to foster a culture of competition across markets, regardless of the nature of enterprises therein. Through enforcement, it examines cases falling under the provisions of the Act according to merits, irrespective of the ownership of enterprises involved, provided they fall under the definition of 'enterprise' as provided under Section 2(h) of the Act. Through competition advocacy, the Commission sensitizes and encourages stakeholders, especially government departments and undertakings, towards not only robust competition compliance but also ensuring neutrality in their business activities, such as procurement.

4.1. Competition Neutrality: Enforcement Experience

19. Under enforcement, CCI acts upon cases filed as Information and also initiates *suo motu* investigations. CCI has taken up cases relating to SOEs under cartel, abuse of dominance and mergers and acquisitions under the relevant sections of the Act, and wherever appropriate, penalties have been imposed.

20. *In Maharashtra State Power Generation Company Ltd. v. Coal India Ltd. (Case No. 03, 11 & 59 of 2012)*[1], CCI found Coal India Limited (CIL) and its subsidiaries to be in contravention of the provisions of Section 4(2)(a) of the Act for imposing unfair/discriminatory conditions in Fuel Supply Agreements (FSAs) with the power producers for supply of non-coking coal. A batch of information was filed by the Maharashtra State Power Generation Company Ltd. and Gujarat State Electricity Corporation Limited against Coal India Ltd. and its subsidiaries (Mahanadi Coalfields Ltd., Western Coalfields Ltd. and South Eastern Coalfields Ltd.). CCI held that CIL, through its subsidiaries, operates independently of market forces and enjoys dominance in the relevant

[1] https://www.cci.gov.in/sites/default/files/03%2C%2011%20%26%2059%20of%202012.pdf

market of production and supply of non-coking coal in India. CCI noted in the order that CIL did not evolve/draft/finalize the terms and conditions of FSAs through a bilateral process, and the same were imposed upon the buyers through a unilateral conduct. CCI found CIL and its subsidiaries to be in contravention of the provisions of Section 4(2)(a)(i) of the Act for imposing unfair/discriminatory conditions in FSAs with the power producers for supply of non-coking coal. Apart from issuing a cease and desist order against CIL and its subsidiaries, CCI directed modification of FSAs in light of the findings and observations recorded in the order. The impugned clauses related to the sampling and testing procedure, transportation charges and other expenses for the supply of ungraded coal from the buyers, capping compensation for the supply of stones, etc. For effecting the modifications in FSAs, CIL was ordered to consult all the stakeholders. CIL was also directed to ensure uniformity between old and new power producers as well as between private and PSU power producers. Further, CCI imposed a penalty of Rs. 591.01 crore upon CIL for the aforesaid abusive conduct.

21. In *National Insurance Company Ltd. v. CCI*, the Commission ordered a *suo motu* investigation against the four public sector general insurance companies, namely, National Insurance Co. Ltd., New India Assurance Co. Ltd., Oriental Insurance Co. Ltd. and United India Insurance Co. Ltd., pursuant to an anonymous complaint alleging contravention of the provisions of Section 3 of the Act. It was alleged that these four insurance companies had formed a cartel to increase the premium for Rashtriya Swasthya Bima Yojna (RSBY) of the Government of Kerala. After a detailed investigation by the DG, the Commission imposed a total penalty of Rs. 671.05 crore on the said four public sector insurance companies for manipulating the bidding process initiated by the Government of Kerala to select an insurance service provider for RSBY for the years 2010–11, 2011–12 and 2012–13. It noted that the impugned conduct of these companies resulted in the manipulation of the bidding process in contravention of the provisions of Section 3(1) read with Section 3(3)(d) of the Act. It considered the bid rigging in public procurement for social welfare schemes, the beneficiaries of which were BPL and poor families, as an aggravating factor.

22. In *M/s MaaMetakani Rice Industries v. Odisha State Civil Supplies Corporation Ltd (Case No. 16 of 2019)*, the Information was filed by M/s. MaaMetakani Rice Industries ('Informant') against the State of Odisha and Odisha State Civil Supplies Corporation Ltd. (OSCSC), alleging, *inter alia*, that OSCSC was directly/indirectly imposing unfair and discriminatory conditions in the purchase of services from the Informant and acted in contravention of the provisions of Section 4 of the Act.

23. After examining the investigation report and the submission of the parties in the matter, the Commission found OSCSC to be dominant in the relevant market. As far as withholding the milling and ancillary charges of the Informant by OSCSC was concerned, the Commission noted that, in the facts and circumstances of the case, the issue relating to the tenability of the insurance claim and the withholding of the amounts was *sub judice* in another forum, and thus, the Commission did not delve into it. Further, the Commission did not find the modification of eligibility criteria pertaining to Rabi season of KMS 2017–18 to be a contravention, since it had not caused serious injury prejudicing the millers. The Commission held that non-payment of differential custody and maintenance charges pertaining to KMS 2017–18 was unfair as OSCSC introduced unfair terms that were not in consonance with the provisions of Section 4(2)(a)(i) of the Act. Further, the Commission did not find the conduct of OSCSC to be an abuse of its dominant position as far as communication of rates to the millers was concerned. Lastly, the Commission noted that the conduct of OSCSC in deliberately delaying the settlement of dues of custom millers was an abuse of its dominant position.

24. *Vide* order dated 05.08.2021, the Commission found the conduct of OSCSC to be in violation of the provisions of Section 4(2)(a)(i) of the Act and directed it to desist from indulging in such practices that were found to be in contravention of the provisions of the Act.

25. Further, the Competition Commission of India, in its various orders, has examined the applicability of Section 2(h) of the Act on a case-to-case basis. Its position in various cases has also been supported by courts in their judgements.

26. In the matter of *Indian Railway Catering and Tourism Corporation Ltd. (IRCTC) (Case No. 30 of 2018)*[2], an Information was filed against IRCTC alleging contravention of Section 4 of the Act. In its order, while dealing with the issue of whether the Railways are an enterprise under Section 2(h) of the Act, the Commission held that only primary, inalienable and non-delegable functions of a constitutional government should qualify for exemption within the meaning of 'sovereign functions' of the government under Section 2(h) of the Competition Act, 2002. The Commission was of the view that the petitioner cannot be said to be performing a sovereign function. It is a government department engaged in an activity relating to the rendering of services. It was, therefore, held that it is an 'enterprise' under Section 2(h) of the Act. Further, a writ petition was filed in Hon'ble Delhi High Court on the matter[3].

27. Hon'ble High Court of Delhi, in its judgement, highlighted the clear distinction between sovereign and non-sovereign functions of the government, as under[4]:

- Primary, inalienable and non-delegable functions of the government are to be considered sovereign functions of the government under Section 2(h) of the Competition Act, 2002.
- Welfare, commercial and economic functions are not sovereign functions, and the state, while discharging such functions, is as much amenable to the jurisdiction of CCI as any other private entity discharging such functions. The running of Railways is a business activity that falls within the purview of Section 2(h) of the Competition Act, 2002, and hence, it is an enterprise.
- *"Unless the petitioner's activity can be classified as relatable to sovereign functions of the Government including all activities carried on by the departments of atomic energy, currency, defence and space,"* it cannot avoid being classified as an 'enterprise' under Section 2(h) of the Act.
- If it is an 'enterprise' under Section 2(h) of the Act, the Commission gets jurisdiction under Chapter IV of the Act.

28. Thus, the Hon'ble High Court of Delhi upheld CCI's decision that the Railways constitute an 'enterprise' under the Competition Act and therefore, falls within its jurisdiction.

[2] https://www.cci.gov.in/sites/default/files/30-of-2018.pdf

[3]In Union of India v/s Competition Commission of India

[4]javascript:fnCitation('MANU/DE/0594/2012');

29. In *Department of Agriculture and Farmers Welfare, Government of Haryana vs CCI (Case No. 22 of 2018)*[5], CCI held that if the term 'enterprise' as defined in Section 2(h) is read in conjunction with the definition of the term 'person' and 'service,' it becomes clear that the legislature has designedly included government departments in relation to any activity relating to the storage, supply, distribution, acquisition or control of articles or goods, or the provision of services of any kind. It was stated by the Commission that the breadth of the definition of 'enterprise' becomes clear from the definition of the term 'service': "*The inclusive part of the definition of 'service' takes within its fold service relating to construction and repair. These two words are not confined to construction and repair of buildings only. The same would include all types of construction and repair activities including construction of roads, highways, subways, culverts and other projects etc. It is thus evident that if a department of the Government is engaged in any activity relating to construction or repair, then it will fall within the definition of the term 'enterprise'. We may add that there is nothing in Section 2(h) and (u) from which it can be inferred that the definitions of 'enterprise' and 'service' are confined to any particular economic or commercial activity. The only exception to the definition of the term 'enterprise' relates to those activities which are relatable to sovereign functions of the Government and activities carried by the four departments of the Central Government, i.e., atomic energy, defence, currency and space.*"

30. In the matter of *Haryana Urban Development Authority (HUDA) (Case No. 94 of 2016)*[6], an Information was filed with the Commission alleging abuse of dominant position by HUDA in the matter of supply and sale of institutional plots in urban estates in Haryana. The Commission observed that the functions of HUDA fall within the ambit of the term 'enterprise' as defined under the provisions of Section 2(h) of the Act.

31. In *Re: Dilip Modwil and Insurance Regulatory and Development Authority (IRDA) (Case No. 39 of 2014)*[7], the Commission observed that any entity can fall within the definition of the term 'enterprise' if it is engaged in any activity relatable to the economic and commercial activities specified therein. It was further observed that regulatory functions discharged by a body are not amenable to the jurisdiction of the Commission per se.

32. The Competition Act is also designed to regulate the operation and activities of 'combinations.' A direct or indirect acquisition of assets, control, shares or voting rights of an enterprise, or a merger or amalgamation of enterprises, irrespective of the nature of the enterprise, which exceeds the financial thresholds prescribed under Section 5 of the Competition Act is defined as a 'combination' and must be notified to the Competition Commission of India for prior approval. CCI has examined a number of combinations involving SOEs as per the provisions of the Act.

4.2. Competition Neutrality through Advocacy Outreach

33. Competition advocacy is one of the main pillars of modern competition law, which aims at creating, expanding and strengthening the awareness of competition in the market. Section 49 of the Act mandates CCI to take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues. CCI has undertaken various initiatives for the promotion and creation of awareness about competition law and capacity building of stakeholders in competition matters, such as trainings,

[5] https://www.cci.gov.in/sites/default/files/Case%2022%20of%202018.pdf

[6] https://www.cci.gov.in/sites/default/files/94-of-2016.pdf.

[7] https://www.cci.gov.in/sites/default/files/392014.pdf.

workshops, seminars, sponsorship of moot courts on competition law and internships. The Commission has regularly engaged with various stakeholders such as the central and state government, public sector industry, professional bodies and academia through its advocacy outreach efforts. Since its inception, the Commission has organized/participated in more than 1,000 advocacy outreach programmes all over the country.

34. Recently, in order to take forward its engagement with state governments, the Commission introduced the State Resource Person Scheme (SRPS). The SRPS aims to sensitize departments of state governments on competition matters, especially public procurement. Through the scheme, CCI aims to train state public procurement officials to be better equipped with fair trade practices and help them design competition-efficient tenders.

35. The focus in these trainings is on sensitizing public procurement officers in state departments on effective tender design to encourage broad-based tender participation, detect warning signals of bid rigging and identify red flags and file references with CCI in cases of suspected bid rigging. The state government departments/undertakings involved in economic activities are also familiarized with basic provisions of Competition Act, 2002, and trained in compliance of competition law.

36. In furtherance of the objective of the Scheme, CCI has conducted more than 100 advocacy programmes so far for procurement officials under the SRPS. The Scheme has received positive feedback from the stakeholders.

37. CCI has also designed a *Diagnostic Toolkit Towards Competitive Tenders* for public procurement officers, which is a practical guide for such officers to review their public procurement systems and processes and its level of competition efficiency. The Toolkit has a section on tender design, which trains procurement officers in designing their tenders to attract maximum participation on fair and neutral terms.

38. CCI has also designed a *Competition Assessment Toolkit*, which provides a roadmap for a comprehensive competition assessment of policies, legislations, rules and regulations in India. The Toolkit outlines various stages through which the comprehensive competition assessment exercise has to be conducted and provides a checklist that can be used by stakeholders to assess legislations and policies through a competition lens. The Commission has conducted three rounds of competition assessment of legislations. Various legislations/sectors have been put under competition assessment, and findings have been communicated to the ministries/departments wherever required.

5. Conclusion

39. For robust and balanced economic growth, it is vital that both public and private enterprises be given a fair and neutral playing field to enable them to operate in markets at their optimum level. At the same time, country-specific socio-economic realities may require SOEs to play a certain role in specific markets. Competition law plays an important role in ensuring that the conduct of such enterprises does not distort competition or have any adverse effect on it. It is also vital to ensuring that dominance, whether natural or acquired, is not abused in any manner.

CCI has ensured that the application of competition law is equal regardless of the nature of ownership of the enterprise and has, on a case-to-case basis, intervened wherever required. It has also taken cogent steps towards advocating for the benefits of competition compliance by both private and state-owned enterprises. Going forward, CCI strives to continue its efforts towards creating a level playing field across markets through active enforcement and larger market correction.