



भारतीय प्रतिस्पर्धा आयोग Competition Commission of India

Chairperson's Address for **CII Conference on 'Competition Law and Practice'** The Taj Mahal Palace, Mumbai October 7, 2016

I am happy to be here to address this Conference being organized by CII today. Let me compliment CII for organizing this Conference on 'Competition Law and Practice'. CII does not need any introduction. It is one of the apex and largest business federations in the country, which has played a catalytic role in shaping our industrial landscape. It has also been very active in promoting the policy of partnership and cooperation with stakeholders and more particularly, the Government. On behalf of the Competition Commission of India, I thank CII for bringing competition law to the centre stage of discussion today and for enabling to connect with such a large audience.

2. For those of us who have not lived in that phase, it may be important to know that in the first three decades of independence, our policy architecture was founded on the ideals of planned economic development which was characterised by controls and licensing. As a result, market structures emerged which were largely an outcome of government policy and not a consequence of free competitive firm interactions. In fact, multitudes of control led to fragmented capacity and muted competition.

3. The 1980s saw the beginning of experimentation with policy reforms. But it was the year 1991 which marked a crucial turning

point, when a clear and comprehensive shift was made in the policy stance towards liberalisation-privatisation-globalisation (LPG). The reform measures that followed, altered the operating environment for Indian firms. There has been a gradual dismantling of trade, investment and entry barriers, thus, unleashing the competitive forces.

4. What followed then is a story of unprecedented dynamism in Indian industry, which has evolved from a frail entity insulated from the global economy into a strong and vibrant sector that is driving India's economic growth today. CII has played a crucial role in this evolution.

5. The new economic order has empowered the 'invisible hand' of the market and ensured economic freedom for enterprises. However, there are forces that can limit the economic freedom even in liberalised markets. One of them is the economic enterprises themselves who can impede freedom of others. By using their market power to capture the whole market by unfair means. The other is the restriction on freedom which may come from the visible hands of the State through policies and legislations enacted in public interest. They may inadvertently distort the level playing field and create hindrance to free rivalry. Competition law and policy guide and moderate the influence of these visible hands and thereby strengthen the invisible hand of the market.

6. The enactment of the Competition Act, 2002, and the establishment of the Competition Commission of India were precisely to lay the foundation of a competition ecosystem in the

country. The Competition Act, 2002, is a *state-of-the-art* Act, which promotes competition rather than curbing monopolies which was previously the position under the MRTP Act.

7. The scheme of the Competition Act is simple. It deals with horizontal agreements (under Section 3(3)), vertical agreements (under Section 3(4)), dominant position and its abuse (in Section 4), and regulation of combinations (under Sections 5 & 6). Horizontal agreements amongst enterprises include cartels which are the most egregious forms of anti competitive behaviour. That is why under Section 3(3) of the Act, existence of a cartel is in itself violative of the Act. Its effect on the market doesn't need to be established by the competition authority. On the other hand, in the case of vertical agreements, effects of the agreement on the market have to be established. This requires application of the rule of reason approach, in which the anti-competitive act is weighed against the efficiency gains or consumer benefits emanating from the agreement.

8. Internationally, the experience has been that cartels are the most difficult to prove as they are often conceived in secrecy and executed in darkness. Therefore, competition authorities have to increasingly rely on circumstantial evidence. The proceedings under the Act, being civil in nature, standard of proof is not that of 'beyond reasonable doubt'. Instead it is the preponderance of probability, which guides the decision and this has been endorsed by the Competition Appellate Tribunal also.

9. The Act provides for very strict punishment for cartels. The quantum of penalty prescribed in the Act, if imposed on the upper

side, may wipe out the existence of an enterprise. However, there is an exit route provided. This is available in the form of leniency provision of the Act. There is Section 46 of the Act which enables the colluding enterprises to come forward and claim immunity of upto 100%, on the condition that they would make full and true disclosure of the cartel activity. Lesser penalty provisions are a vital tool in the arsenal of competition authorities and have led to the detection of numerous cartels around the world. In United States, more than 90% of the cartel cases have emanated from leniency penalty provisions. This is despite the fact that there, the immunity is assured only for the first applicant. Contrary to this, our regulations are more benevolent and provide for upto 100%, 50% and 30% reduction in penalty to the first, second and third qualifying applicants, respectively. In the last one year, there has been a surge in leniency applications before the Commission. We hope that this trend will gather momentum and more and more enterprises will come forward and uncover cartels.

10. Besides the Act has the provision which deals with dominance and prohibits its abuse. Unlike in the past, corporates can now grow to any size and scale which they deem appropriate for survival and for succeeding in domestic and global markets. But they cannot abuse their market position of dominance for unlawful gains. The Act spells out explicitly the conduct which amounts to abuse of dominance and offers opportunity to businesses, both as competitors as well as consumers, to come forward and complain of it. The Commission has made some of the major decisions in cases involving abuse of dominance across the sectors. These include Real Estate, Stock Exchange, electronic payments and media &

entertainment. This is not to mention the sectors in which cases are currently ongoing.

11. Overall in the past 7 years of the anti-trust enforcement, we have crossed some important mile stones and have made critical interventions. First in terms of numbers, we have by now handled more than 700 anti-trust cases and have disposed of more than 600 of them. In terms of impact, our interventions have brought about positive outcomes. Businesses and associations have corrected their policies and practices to bring them in alignment with principles of competition. In some cases corrections have taken place mid-course also. To mention a few, Indian Trade Promotion Organisation (ITPO) revised its policy for licensing exhibition space after the Indian Exhibition Industry Association complained of discriminatory time gap in it. Coal India initiated the process of examining their e-spot auction scheme after an advisory from the Commission. A leading real estate company and following it, many others, redrafted the terms and conditions of their allotment letter in the realty sector. In the Pharma sector, AIOCD issued instructions to all the State level chemists and druggists associations as well as drug manufacturers to refrain from indulging in practices which have been identified as anti-competitive by the Commission. It is now incumbent on the Pharma companies which have been seen as victims to come forward and play a pro-active role in curbing such practices.

12. Interventions by the Commission backed by advocacy initiatives, have resulted in increased awareness about the Act, its provisions and their enforcement. The fact that a local cable operator in Baran district of Rajasthan can now come to the

Commission with allegations against a renowned music company; a group of warp knitters in Surat can file Information against reputed yarn producers, shows that even small enterprises located in far-off places have gained confidence to take on established industry leaders. In the recent publication brought out by CUTS on 'Competition and Regulation in India, 2015', it is mentioned that awareness about the CCI has grown. An overwhelming 71% of the respondents interviewed stated that they were aware of CCI; in the previous survey in 2013, this number was only 48%.

13. Having said this, I must assure those present here that a judicious and evidence-based approach is being followed in our anti-trust scrutiny at the prima facie stage. 80% of the orders passed by the Commission in the last one year, at this stage are orders of closure. Thus, we undertake to intervene only when the impugned conduct is apparently anti-competitive and is likely to result in an appreciable adverse effect on competition in the markets. In case, in which the investigation is ordered, we are providing the parties with full opportunity to defend their position and contest the findings of the DG's investigation.

14. Our ultimate goal is to ensure that markets are competitive and that enterprises are competition compliant. This is possible through a judicious mix of competition advocacy for prevention of anti-competitive behaviour and penal action in case of a transgression. Recently, at a business forum, I spoke about how we do not favour penalties at the Commission and that the CCI advocates more and more of compliance as it is in the best interest of the economy. Interestingly, soon after, there were articles in the media listing cases where the Commission has imposed penalties.

15. Let me take this opportunity to reiterate that we are a firm believer in, and will prefer competition advocacy to inculcate the competition culture in our economy by making enterprises realise the benefits of the competition and thereby imbibe competition compliance into their functioning, so that violations of the Act do not take place. But in case there is contravention, the Commission will have no choice but order appropriate remedy looking at the gravity of the infringement. Imposition of penalty is admittedly a remedy provided in the Act and there is no denying the fact that it does play an important role in deterrence, by making unlawful/ anti-competitive conduct less profitable.

16. An important issue on the antitrust side which I must touch upon is jurisprudence. The law being young, the substantive jurisprudence is yet to settle. In the next few years, as jurisprudence will develop, there will be clarity and certainty with respect to several issues. Apart from substantive questions of law, several jurisdictional and procedural issues have yet to complete the appellate process. We certainly will not want our decisions to be remanded or overturned on account of inadequate processes. As a young institution, we are constantly evaluating and streamlining our processes and procedures, to conform to judicial norms and deliver as an effective and credible regulator. Along with, we strive based to develop a thorough understanding of markets which is necessary for prudent decision-making. This is a challenge facing the competition agencies all over the world as markets are evolving at an unprecedented pace. For instance, the traditional transport market has been transformed by web-based, technology-led platforms. Similarly, traditional 'brick and mortar' retailing has been replaced by 'click and order' e-options. We are carefully assessing

these developments to evaluate their impact on the competitive process as well as interest of the consumers. Our endeavour will be to equip our processes to strike a right balance, so that efficiency and innovation are not stifled by unnecessary intervention while at the same time, markets are free from anti-competitive practices.

17. Turning to combinations, we have completed 5 years of the combination review regime this year. We have seen a steady increase in M&A filings over the years. As of September 2016, we have received 436 M&A filings. M&A activity has been particularly robust in 2015-16 and this pace shows signs of continuing. In sectors such as chemicals, we are witnessing consolidation in the industry (*Dow/DuPont; Syngenta/China AgroChem*) and in sectors such as IT, ITES and IT hardware, we have seen acquisitions and vertical integration amongst major players (*Denali/EMC; NTT Data/Dell; HCL/3DPLM*). We are conscious of the need and significance of inorganic growth in order for enterprises to attain size, scale and efficiency required for surviving and succeeding in domestic and global markets and against global behemoths. The Commission has been pursuing the policy of quick approval of M&As that do not cause appreciable adverse effect on competition. We have a self-imposed deadline of 30 working days for approving such cases and, so far, it has taken, on an average 22 working days to approve notified combinations. Only 3 cases filed with CCI have gone for Phase II investigation (*Sun/Ranbaxy, Holcim/Lafarge & PVR/DT*).

18. Based on our experience so far and our dialogue with stakeholders, we have been amending the combination regulations

constantly to remove ambiguities, reduce compliance cost and to make filings simpler. In March 2016, merger notification thresholds were revised upwards. Under the Hon'ble Prime Minister programme of Ease of doing Business, we are in the process of developing a '**Know it yourself**' online module that will help enterprises understand whether any contemplated transaction is notifiable or not. Not only that, this will supplement the pre-filing consultation mechanism that we already have in place.

19. Currently, our statutory provisions mandate merging parties to notify a transaction to CCI within 30 days of specified trigger events. From our experience so far, we feel that the timeline of 30 days is difficult to adhere to and parties often submit incomplete information. The result is that Commission has to either invalidate notices or issue defect letters which prolongs the review process. To address this issue, we have initiated steps to revisit this timeline. We shall continue to do our bit in streamlining and simplifying the processes to address the genuine concerns of industry as part of the efforts being made by the government in improving the Ease of Doing Business. In this endeavour, we hope that industry will supplement our efforts by raising the compliance standard.

20. Competition law is a complex mix of economic and legal principles. It is important that the industry familiarises itself with its various provisions and their implications. Several industries are still carrying the past baggage. Many practices and agreements which were acceptable and legal are now prohibited under the Competition Act. The enterprises need to conduct competition audit of the

various agreements and transactions to ensure compliance and adherence with the provisions of the Competition Act. Enterprises must conduct proper due diligence before becoming members of trade associations. Trade associations/ members must also be aware of the types of conduct the law proscribes when carrying out an association's programs and activities. As members of industry/business associations, enterprises need to have a clear policy regarding participation in association meetings. We are conscious that majority of the businesses would wish to comply with the law. We would like to join and support them through our advocacy initiatives.

21. Before I conclude, I must say that the Indian economy is standing at a historic juncture. When the global economy is still sluggish, India is surging ahead on an ambitious growth path. Increasing overall competitiveness will be crucial in sustaining such high growth rates in the long run. It is encouraging that we have recorded a remarkable 32 point jump on World Economic Forum's Global Competitiveness Index in two years. In fact, as per the Global Competitiveness Report, India's competitiveness has improved across the board, including in goods market efficiency, business sophistication, and innovation. It goes without saying that these are outcomes of the government's commitment to economic reforms, initiatives undertaken to improve public institutions scaled up investment in infrastructure to liberal investment regime and increased transparency in the financial sector, to mention a few. The journey from here will depend on how well we can build on our strengths and address our weaknesses. As the government continues to focus on facilitating ease of doing business, on making healthcare and education more inclusive, on making one-India

market a reality, industry must also step up efforts for enhancing efficiency, innovation, technological prowess and to adhere to the ground rules of competition. CII, as an institution, has constantly reinvented itself to work for the progress of the nation. I am happy to know that the CII theme for 2016-17 is "Building National Competitiveness". I invite businesses to come forward and forge proactive partnership with us in building competitive markets and a robust compliance culture in the country.

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