



Competition Commission of India



**National Conference
on
Economics of Competition Law**

**April 5, 2018
New Delhi**

Summary of the Proceedings

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Economics Division

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National Conference on Economics of Competition Law 2018

5th April 2018

1. Competition Commission of India organised the National Conference on Economics of Competition Law on April 5, 2018 with the aim of bringing together scholars, practitioners, academicians and experts working in the area of economics of competition law. This year's conference was the 3rd of the series, beginning in the year 2016.
2. The conference consisted two "Technical Sessions", a "Special Session" and a "Plenary Session". Six papers were presented in the technical sessions covering a wide range of relevant topics. A special session on **Merger Control: A Practitioner's Perspective** was organised where professionals working in the area of merger assessment presented their view on the role of economics in merger review. A Plenary on **Competition, Regulation and Growth** was held where eminent experts shared their view points.
3. A brief overview of the sessions is presented below covering deliberations of the conference.
 - I. Inaugural**
 - i. The conference was opened by remarks from Shri. Augustine Peter, Member, Competition Commission of India. Later Shri. Devender K. Sikri, Chairperson, Competition Commission of India, delivered the inaugural address while the keynote address was delivered by Dr. Aditya Bhattacharjea, Professor, Department of Economics, Delhi School of Economics.
 - ii. **Introductory Remarks:** Shri. Augustine Peter in the introductory remarks stressed that competition law is an economic legislation. Therefore, the role of economics comes to the fore in enforcement. It was noted that use of quantitative evidence is growing steadily by the increased availability of data and by the use of scanning technology to track inventory at retail level in FMCG. Empirical evidence is crucial in the effective enforcement of competition policy. It was emphasised that all major competition authorities have economics divisions and chief economists. It was recapitulated that IIM Bangalore Committee proposed the organisation structure to have legal, economics and financial analysis professionals in the ratio of 40:40:20. It was also mentioned that a number of steps are being taken to enhance the capacity of the economists.
 - iii. The role of stakeholders was stressed by mentioning that unless economics inputs come to the Commission, it is difficult to reflect them in the decisions. He pointed that the conference was intended to develop capacity outside the Commission in addition

to enhancing the capacity inside the Commission. The recent developments where the Supreme Court mentioned that anticompetitive agreements also require defining relevant market were mentioned. The importance of data processing and analysis was emphasised but with the limitation that the inputs should be provided within time.

- iv. ***Inaugural address by the Chairperson, CCI:*** The Chairperson mentioned that the conference was conceptualised two years back to encourage research in economics of competition law in India. It aimed to create a platform where practitioners and academia would exchange views on better and systematic integration of economics in the application of competition law. The idea behind the conference was also to initiate a dialogue between law and economics so that legal principles and economic rationale are reconciled for efficient, precise and prudent interventions by the CCI.
- v. The address noted that competition law is an economic law, which rests on the foundation of economics. In India, the Competition Act, 2002 has economic principles embedded in every facet of it. The architecture of the law is such that adjudication entails appreciation of the economics of markets and the impugned conduct – be it in terms of defining relevant markets, assessing market structure, nature of competition, entry conditions or in identifying the theories of harm or in assessment of efficiency. The law mandates a case-by-case economic cost-benefit analysis for the determination of whether the legal test of ‘appreciable adverse effect on competition’ is met. In India, the statute mandates us to adopt case-by-case approach that factors in economic principles.
- vi. One of the issue in the application of economic tools and tests is the availability of ‘data’. Lack of reliable data at the right level of granularity often constrains our efforts in building cogent economic evidence. While economic analysis ought to be nuanced, they will also have to help in building legally robust cases. It is important that the economic analysis used in cases is comprehensible and that it fits well into the legal framework.
- vii. It was noted that in many mature jurisdictions, the use of expert evidence of economists in litigation is on the rise. Some are using the ‘hot tub’ method, where the judge can hear both the lawyers and the economic experts discussing the same issue at the same time. Apart from enforcement, Economics helps us gauge the impact of our decisions. It is a common practice with anti-trust authorities to conduct *ex-post* analysis of a merger to ascertain whether the outcomes are aligned with the *ex-ante* predictions.
- viii. The Chairperson concluded by saying that the markets are not only vitiated by anti-competitive practices of private enterprise but also by the state and its policy architecture that come in the way of efficient functioning of markets. It is thus a core mandate of any competition authority to advocate the principles of competition with the policymakers. Given the apparent tension between competition and regulation, competition authorities have a vital role to play in ensuring optimal regulation that protects consumer interest while allowing competition to flourish. There are no static or universal rule that can be applied across sectors and over time. Each sector has its own dynamics and moreover as the markets evolve, the need for regulation/policy interventions also undergo a change.

- ix. **Keynote Address:** Dr. Aditya Bhattacharjea mentioned that people / firms obey laws only if the gains from doing so outweigh the gains of violating the law, net of any penalty. To deter cartels, fine must be a multiple of the gains from colluding. Deterrence is possible with smaller fines if there are many firms in the cartel, or the fine encourages firms to ‘cheat’ on the cartel (internal instability). Deterrence is also possible if a leniency programme encourages firms to cheat and report to the authorities (but the fine still has to be large enough to make leniency / amnesty attractive). It was pointed out that ‘Indian cartels’ are different because they mostly comprise many small firms organized as trade associations. Traditional role of trade associations in facilitating cartels is to enable firms to arrive at an agreement or understanding, to monitor compliance and to penalize ‘defections’. In addition, associations also play role in boycott / intimidation of defectors. Also, the penalties on associations are substantially low because association has no profits and 10% of its turnover (membership fees, advertising revenue) is a very small fraction of its members’ profits. This may lead to recidivism by associations due to inadequate deterrence as a result trivial amount of fine.
- x. Attention was drawn to instances where CCI’s orders imposing high fines were either set aside or remanded or had fines substantially reduced by COMPAT on procedural or evidentiary grounds. COMPAT has set a high standard to establish AAEC. There are differences over whether fines are meant to be deterrent. In the case of M/s ECP Industries vs CCI, it was mentioned by the COMPAT that the Commission proceeded to decide the issue of penalty with a determination that the appellants who were found to be guilty of formation of cartel/ collusive bidding must be punished so that others may learn a lesson from this. This approach is wholly inconsistent with the objective sought to be achieved by the Act. However, Supreme Court of India, in the case of Excel Crop Care vs CCI, recognised that the purpose and objective behind the Act is to discourage and stop anti-competitive practice. Penal provision contained in Section 27 of the Act serves this purpose as it is aimed at achieving the objective of punishing the offender and acts as deterrent to others.

II. **Technical Session- I**

- i. The Session was chaired by Shri A.N.Haksar, Senior Advocate, Supreme Court of India. Ms. Jyoti Jindgar, Advisor, Competition Commission of India also participated in the session as discussant. In the course of the Session the following Papers were presented:
- a) Paper on ‘Assessing the Importance of Market Power in Competition Investigation’ authored by Dr.Meloria Meschi, Shri Montek Mayal; and Shri Avinash Mehrotra was presented by Dr.Meloria Meschi, Senior Managing Director, FTI Consulting.
 - b) Paper on ‘Case for Assessment of Dynamic Efficiencies in Merger Analysis’ authored by Shri Amit Bansal and Ms. Adrija Sengupta was presented by Ms. Adrija Sengupta.
 - c) Paper on ‘Does Bank Competition Affect Financial Stability in Banking Sector: Some Empirical Evidence from India’ authored by Dr. Tapas Kumar Parida and Mr. Debashis Padhi was presented by Mr. Debashis Padhi.
- ii. The Chair of the Session, Shri A.N.Haksar, observed that enforcement of the Competition Act essentially involves collection and presentation of economic evidence. He also stressed that the merger enforcement must keep the overall

economic development in view. The chair opined that in India the evidence in cartel cases is very difficult to collect and in the presence of limited evidence the task of the regulator becomes very difficult.

- iii. The first paper in the session was presented by Dr. Meloria Meschi, Senior Managing Director, FTI Consulting on the topic of “*Assessing the Importance of Market Power in Competition Investigation*”. The paper observed that market shares may not always reveal the actual market power wielded by a firm. The author also showed that high market power does not always result in negative welfare effect especially on grounds of product differentiation, total social welfare, etc. The context specific nature of welfare effects associated with mergers reveal that adoption of standard approach for assessing competition may not always bring out the true picture.
- iv. The second paper presented, by Ms. Adrija Sengupta was ‘*Case for Assessment of Dynamic Efficiencies in Merger Analysis*’. It highlighted a very important issue of assessment of ‘Dynamic Efficiency’ generated by mergers over a longer period of time and the complexity involved in its assessment. The issue of assessment of dynamic efficiency is more pronounced for high innovation sectors. In this regard, the Paper distinguished between ‘Static’ and ‘Dynamic Efficiencies’ generated by a mergers. It may be noted here that innovation affects the cost of production (namely the marginal cost) and thus the price of a product in the long run. Therefore, concerns with regard to Static and Dynamic Efficiencies are correlated and intertwined. Both the efficiencies distinguished in the paper, impact the basic economic factors such as cost of production and price with the difference in their time period.
- v. The third paper by Mr. Debashis Padhiwas was ‘*Does Bank Competition Affect Financial Stability in Banking Sector: Some Empirical Evidence from India*’. The paper observed that empirical results suggest that the effects of bank competition on stability may differ depending on the type of risk. It was observed that competition has a positive effect on bank liquidity, while it may have a potentially negative impact on solvency and credit quality. Price competition improves the liquidity position of a bank by inducing a self-discipline mechanism on the choice of bank funding sources. If banks are subject to strong competition, they get lower profit margins and are then unable to afford costly funding sources; for this reason, they prefer to keep larger buffers of liquid assets. Capital regulation may strengthen the liquidity-enhancing effect of price competition, while deposit insurance may reduce such incentives. The paper also showed that price competition may increase the credit risk of the loan portfolio if banks are induced to take on additional risks to improve their profitability. In such a case, the effect of an increase in bank risk taking from the lender’s side would be more relevant than the effect of a potential decrease in credit risk from the borrower’s side.
- vi. Ms. Jindgar while discussing the papers observed that the first Paper on ‘Assessing the Importance of Market Power in Competition Investigation’ raises certain relevant questions about the validity of the direct relationship between market power and market share and circumstances under which such relationships fail to hold. It further highlights how high market power at times does not indicate negative welfare effects. In the second Paper, ‘Case for Assessment of Dynamic Efficiencies in Merger Analysis’ Ms. Jindgar outlined, why Regulators of

Competition should take into account 'Dynamic Synergies' over and above 'Static Efficiencies' while assessing the net impact generated by probable mergers. Finally, the third Paper, 'Does Bank Competition Affect Financial Stability in Banking Sector: Some Empirical Evidence from India' reflects the present state of competition in the Indian banking industry. In this regard, it narrates whether financial stability of the banks deteriorates with the increase in competition. In the concluding remarks, Ms. Jindgar stated that it is a matter of great delight that research in competition economics is generating a lot of interest among scholars and practitioners of competition law and policy.

III. Special Session: Merger Control – A Practitioner’s Perspective

- i. The session deliberated specifically on the challenges involved in the merger assessment. The panel for session comprised Mr Amit Sibal (chair), Senior Advocate, Supreme Court of India, Dr Geeta Singh, Partner, Genesis Analytics, Dr Ram Tamara, Vice President, Nathan Associates Inc, and Mr John Davies, Former Head of Competition Division, OECD.
- ii. The session was opened by Mr Amit Sibal (Chair), he emphasised that in merger control economic analysis has a major role to play as ex-ante assessment is required. He pointed out that practitioners from law stream typically looks for economists' assessment to be rigorous and cogent on the one hand and lucid and simple on the other hand, so that it would be easy to comprehend for judiciary and other stakeholders. He observed that the CCI has been increasingly using economic analysis for assessment of the merger cases. He briefly also touched upon the aspect of reliability of data in merger control.
- iii. Ms Singh emphasised that while assessing a merger case, the proposed combination may “likely” reduce competition and the word “likely” is important because there is predictive analysis in case of a merger. She said that there has to be consistency in application of economic tools across Sections 3 & 4 and Sections 5 & 6. She discussed in detail the 'Form based' and 'Effect based' approach for testing theory of harm. The speaker also highlighted the limitations of Effect Based approach such as assumptions about demand and past practice of the firm under consideration. Thus, reliability rests on various assumptions. Accordingly, the speaker emphasised that the best way to go about is to carry out a detailed survey, if and when required. At the conclusion, the speaker noted that economics does not give benchmark for HHI, diversion ratio etc. and it rather comes from the experience, and hence, there is a need for theoretical linkage.
- iv. Mr Ram Tamara highlighted the use of economic analysis by the Commissions in various merger analysis. However, CCI has not subscribed to any benchmark threshold for LIFO /LOFI, HHI etc. He also highlighted dichotomy in the Commission's order in relation to the use of economic analysis, stating that the Commission has used certain analysis in some merger case but did not carry out the said assessment in similar cases. The speaker concluded with the statement that there is a need to balance anticipated positive and negative aspects in a merger analysis.
- v. Mr John Davies touched upon the aspects of innovation and merger control wherein he analysed the theories of Kenneth J Arrow, Schumpeter and Shapiro. In the innovation theory, 'Inverted U-shape' theory of Aghion et al. (2005) was discussed

wherein it was presented that in this model innovation is driven by the difference between pre-innovation profits and post-innovation profits. As per the empirical study an “inverse U-shape” relationship between competition and innovation (using patent data for LSE-listed firms) was found. He pointed that competition has ambiguous effects on innovation. In this context, Shapiro has argued that such statements are not correct in the merger policy context – his view is that some of the models which appear inconsistent with one another are in fact compatible. Instead there should be a rebuttable presumption that a merger of two firms who are important, direct R&D rivals in a given industry is likely to reduce innovation when set against the counterfactual. He concluded that as per Shapiro there are three aspects: (i) Contestability – which deliberates whether the innovation cannibalise sales from the other merger party; (ii) Appropriability – what is the benefit of innovation that the company receives; and (iii) Synergies – does the merger bring together two complementary assets of the merging parties. The speaker discussed about Dow / DuPont merger case in the EU wherein the DG Competition held that the merger was to have significant impact on innovation and accordingly, remedies required divestment of DuPont business. The speaker concluded that predicting future market dynamics is very difficult.

IV. Technical Session 2 – Technology, Innovation and Competition.

- i. The Session was chaired by Shri Mr Ramji Srinivasan, Senior Advocate, Supreme Court of India. The session was also participated by Ms Payal Malik, Advisor, Competition Commission of India, as discussant. In the course of the Session three papers were presented:
- ii. The first paper was “*Impact of Firms’ Technology Strategies on Market Competition: Experience from selected Industries of Manufacturing Sector during the Post Reform Period*” presented by Pulak Mishra. The author with the help of panel data analysis found that technology strategies and mergers and acquisitions do not have any significant impact on market structure. However, having liberal trade policies makes the market more competitive whereas capital accumulation increases concentration. The paper also emphasized that indigenous technology development in India is low when compared with the intensity of foreign technology purchase. The paper has important implications for fine tuning of policies related to technology, international trade and competition.
- iii. **The second paper was “The Economy of Digital Markets and its Competition: A view through Hooked Model and the Role of CCI in Indian E Wallet Industry” by Kanika Goyal and Venu Shankar.** The authors observed that mere presence of multiple players does not make an industry competitive unless the market share is evenly distributed as in the e-wallet industry 80% of the market is held by 3 firms. The paper also made use of primary survey to find out the factors behind the usage of e-wallets and observed using the hooked model that habit formation may come out to be a strong factor determining the e-wallets usage pattern.
- iv. **The third paper was “Artificial Intelligence: Challenges for Antitrust Authorities and Way Forward” by Ms. Jyotsna Yadav and Ms. Savitri Kore.** The paper discussed the presence and measure the impact of Artificial Intelligence (AI) system in context of competition law. The presentation highlighted a number of technical challenges in analysing competition concerns in market where AI is used. The

important challenges faced are: difficulty in separating actions of algorithm and human operation to attribute liability, network effect and difficulty in measuring concentration when the prices charged is low or zero, etc. The paper argued that failure to meet these challenges often causes AI algorithms to defect rather than to cooperate when cooperation and self-interest appear to be in conflict.

- V. **Discussant Comments:** The discussant, Ms. Payal Malik, found the paper on “Impact of Firms’ Technology Strategies on Market Competition” to be interesting and emphasized on taking service industry also into consideration for further research. With regards to the e-wallet paper, the discussant felt the need of more research in order to get an idea about the nature of competition issues that may arise in the e- wallet industry. For the artificial intelligence paper the discussant argued that there exists, no empirical evidence to support that self-learning algorithm leads to collusion. There are many theories of possibility but the probability of collusion is low.

VI. **Plenary: Competition, Regulation and Growth**

- i. The plenary session was chaired by **Mr Augustine Peter, Member, CCI** who set the session in motion by stating that though the benefits of competition like ushering in static and dynamic efficiency in markets are well established, there are sectors and situations where competition faces hurdles, such as cases of natural monopolies. He outlined the difference in the roles played by sectoral regulators and the competition regulator by stating that while the former looks after sector-specific and technical parameters like tariffs, standards, supply, quality of service, the latter caters to broader metrics of market power, efficiency and addressing market failures. He set the tone for the session by bringing out following myths and realities and invited the panellists to give their views on them – a) Regulation is panacea for every ill e.g. RBI b) self-regulation is effective and important e.g. associations in the pharma sector c) Sectoral regulator’s objective is to take sector towards competition d) Competition law enforcement is a hurdle towards achievement of ‘ease of doing business’ e) In the wake of protectionism, competition authorities are being advised to go slow on enforcement.
- ii. **Dr Rahul Khullar, Former Chairman, TRAI** touched upon the issue of sectoral vs competition regulator. He stated that a school of thought believes that if there is a regulated market, there is no need for a competition regulator and it is the job of a sectoral regulator to ensure competition. He rejected such a view by stating that while sectoral regulator can take care of issues such as pricing, allocation of resources like spectrum in ex-ante, whereas in an ex-post scenario, rules of sectoral regulators do not operate and that necessitates competition regulation. He gave the example of price discrimination and stated that the sectoral regulator is not the best suited to address the issue and it is the competition regulator which can define the realm of unacceptable price discrimination. He also rejected the idea of hierarchy of regulators and suggested that informal understanding and co-ordination between regulators is the best way to go ahead. He also warned about the issue of regulatory capture and stated that regulators around the world are witnessing this problem. He stated that independence of regulators needs to be maintained and protected as it is vital to earn and retain the respect of the public.

- iii. **Mr John Davies, Former Head of Competition Division, OECD, Senior Vice President, Compass Lexecon** dealt with the importance of competition and the scope of competition policy. He stated that while competition is beneficial to growth, macro-level evidence of the same is unclear as policies are introduced as a package. He stated that at the micro level, the evidence is powerful as has been brought out in the OECD Competition and Growth Fact sheet. He highlighted the debate of expanding the scope of competition policy towards addressing larger issues such as unemployment, corruption, inequality etc. and gave the example of South Africa where the merger control involves aspects of impact on employment. He however stated that the impact of competition law on issues like employment is unclear and there need to be more empirical studies on the same. He advocated that competition law is only one instrument of policy and one instrument should not have more than one objective and that competition law should focus on competition issues.
- iv. **Dr Harsha Vardhana Singh, Former Deputy Director General, World Trade Organization** brought the focus back on the sectoral vs competition regulator debate and stated that where technical matters (like interconnection in telecom) are involved, sectoral regulators are best placed to deal with them and competition regulators are suited to deal with larger issues of market failure. He emphasized on the need for an assessment of best practices in regulation and co-ordination between regulators globally and replication of success cases in India. He went on to say that the problem is not that of the role of regulators but what should happen in case of an overlap. He emphasized the need for some understanding between regulators and clear rules of conduct. He then highlighted the rapidly evolving technology and the growing coalition developing between service providers on how data is to be used. He stated that with the size of data, the level of granularity is also increasing and competition policy should evolve keeping the same in mind. He emphasized on the need for a coalition between regulators to tackle this issue as no single body is equipped to deal with it.
- v. **Dr T. C. A. Anant, Professor and Head, Department of Economics, Delhi School of Economics** highlighted that the effectiveness of an institution lies in the nature of information it can process. He stated that sectoral regulators have an advantage of having access to information that companies hold, which the competition regulator does not, as it works with a lot coarser data, which is not adequate to make a welfare assessment. He gave the example that while it is known that there exists of long tail of inefficient companies in India, there is no data regarding them. He emphasized on reworking on the relation between sectoral and competition regulator in the light of growing availability of transaction-level data and also called for a structured mechanism of information exchange between them.

VII. Conclusion

- i. The conference was concluded with the “vote of thanks” by **Ms. Payal Malik, Adviser, CCI**. She extended heartfelt thanks to the Commission, chairs, presenters, speakers, and participants and highlighted key learnings from the conference. She pointed out that competition law is relatively new therefore, continuous research is needed in this field to help in building economic evidence in cases. There is a need for regulatory bodies in India to operate in a cohesive way, each institution must follow its mandate with compassion towards other’s objectives. Another important point emphasised was that Indian competition law is a modern law in the sense that it

pursues efficiency as its goal and it does not pursue conflicting goals. She ended with a special thanks to the Plenary speakers for providing an insightful discussion on the institutional aspects of regulation as according to her the subject of economics has provided a very sophisticated framework but the challenges arise in the implementation and the institutional milieu cannot be overlooked for economics to be translated into policy.

The conference in this annual series is an endeavour for creating a minimum critical mass of home grown antitrust economists, and to develop and sustain interest in the subject. Traditionally, economics research in India has not researched these issues when the erstwhile MRTP Act was in force, as that was a structural law and not a modern competition law that uses more nuanced economic framework for enforcement as opposed to the blunt instruments used by the MRTP Commission. Mentoring future antitrust economists through this platform can help building up key resources for evidence based enforcement in the future. The demand for this research has to be promoted by the Commission before it becomes a mainstream academic pursuit. Researchers from IIMs, IITs and other universities have already started taking note and are doing research on economics of competition law. Knowledge sharing and discussions at these conferences go beyond case specific sessions and provide the economic milieu for the enforcement of the Act. It provides an ideal platform for understanding the economic perspectives from stakeholders including senior legal practitioners in economic laws, senior administrators, policy makers etc. Going forward the division hopes that this Annual Conference will result in publishable quality papers that can come out in a special volume of a reputed Indian journal.