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Ineffectively effective: Understanding competition law enforcement in India

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Abstract
After liberalization of the Indian economy in 1991, the erstwhile MRTP Act of 1969 was not able to stand up to the expectations of its stakeholders. So much economic concentration provided under the Act was acting as a restraint for the firms to grow. Aftermaths of liberalization brought with it a demand to promote healthy competition in the market, since the government was duty bound to give space and facilitate foreign firms to fetch them a healthy competitive environment in the Indian market. This is said, owing to inefficiency of the MRTP Act, it was not able to carter to the needs of this new dynamic market. The Competition Act of 2002 was the answer for this crisis.
The Competition Act, 2002 was enacted but at that time only few of the statutory provisions were enforced, mainly the administrative ones. Rest of them came into play by 2009, with establishment of the Competition Commission of India being as a competition watchdog. Although, this was not easy for the enactment to perform at its optimum capacity. It took almost eight years to the Act, and the CCI to operate at its full swing. A lot had to be faced. Challenges were there such as government apathy, lack of awareness, and CCI being one of the youngest enforcement agencies of the world was yet to learn its own share of experiences in terms of competition law enforcement in India.

Keywords: liberalization, MRTP Act, competition commission of India, enforcement

1. Introduction
Strong competition policy is not just a luxury to be enjoyed by the rich countries but a real necessity for the countries striving for creating democratic market economies.

Joseph Stieglitz

As in the words of Fali S. Nariman, "Competition law is all about economics and economic behaviour" [1]. Needless to say, economics provides a theoretical basis for the law and the tools to analyse market and the competition within it [2].
The Financial Crisis faced by India in the year 1991 prompted its Government to usher economic reforms of a magnitude and pace not witnessed earlier, making it a watershed year; and "liberalization"- the buzzword.
With the economy opened up, privatization, liberalization of international trade, invitation to private investment to hitherto close sectors, and other reforms took the centre stage [3]. But the reforms and existence of entry barriers for enterprises coming under the ambit of the MRTP Act were incongruous. While the need of the time was rapid expansion of the market or economy, for this, setting up of new ventures, prior approval of the Government for enterprises above the threshold limit slowed the effort [4]. To combat the steadiness, a high level committee on competition policy and law under the chairmanship of S.V.S Raghavan was appointed [5]. Furthermore, The Finance Minister of India, in his budget speech delivered in February 1999, stated "the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act), had become obsolete in certain areas in the light of international economic developments, and the Government had decided to appoint a committee to propose a modern competition law [6]."
The challenges in the MRTP Act, now vivid, gave rise to India's new competition law, the Competition Act, 2002.

2. Obituary to Mrtp Act & Surfacing Of Competition Act
Although the Competition Act was enacted in 2002, but at that time only administrative provisions from the Act were notified. Interestingly, it was only in 2009, nearly after seven years of its enactment, erstwhile the MRTP Act was fully made ineffective. A precise observation would suggest that the way it was enacted, amended and interpreted was not sufficient to carter to the needs of Competition law since it was from another era with an intention of reducing economic inequalities and promoting socialism, thus it seems that *promoting competition was among one of the many objectives of MRTP Act*, besides it didn't have requisite body of expertise or mechanism proving helpful while serving demands of new Competition law of the land.
While the objective of the new Competition Act was to provide a law relating to competition among enterprises which will ensure that the process of competition is left free without stronger trading enterprises manipulating the market to their advantage and following from that disadvantage to the consumers [7], hence it is evident that the sole motive of the modern Anti-trust laws was to prevent market players from restricting competition in ways that are harmful to efficiency and consumer welfare [8], unlike Competition Act, MRTP Act departed from this standard of basic Anti-Trust treatment [9].
The Monopolistic Trade Practices originally applied to only "monopolistic" undertakings [10] that were dominant [11], following that concentration of economic power was thus imposed upon firms that were either large [12] or dominant [13].

However, during 1980's policymakers on the contrary came to realize that, the Act restraints on concentration of economic power were preventing the growth of firms to optimal scales nd their liberty to enter into new activities [14]. Therefore, in order to minimize the effect and to cut loose regulation over firm's activities asset threshold was raised to 100 Cr. from previously 20 cr. [15] Subsequently, welcoming the economy liberalization reforms in 1991 the requirement for approval [16] was also deleted calling it as *restructuring* the MRTP Act [17]. Reason given was that pre-entry restriction under the Act on investment decision of corporate sector has outlived its utility and has become a hindrance to the speedy implementation of industrial projects [18].

Hon'ble Supreme Court when rerouted the way; MRTP Commission started avoiding entertaining cases which didn't suit to its description though it was also overburdened. In one of the cases, which evidence cartelization by foreign suppliers was found, the commission prohibited imports, which from competitive perspective was a remedy worse than the disease, though, the judgment overturned by the Supreme Court took it to another level of absurdity and further observed that *the Act could not be applied to firms outside India even if their conduct had an effect in India, unless the agreement involved an Indian party* [19]. Arguably, it was the MRTP Act itself accompanied with transitioning economy, lack of understanding of International practices and Government's apathy collectively prompted its sad demise. Needless to say, it was not effective as envisaged and could be termed as *"an enactment only on paper."*

3. CCI's Quest to Protect "Competitive Process" in the market

A. Enforcement of Competition Act, 2002: A brief look

The basic principles upon which idea of competition law based is to promote, *Dynamic efficiency, Allocational efficiency and Innovation inter alia*. This might not only help in deciding preferences on the part of consumers in a dynamic market by having access to quality products at relatively lower price, but shall also compel the producers to strive for consistent innovation by maximizing efficiency and minimizing wasting of resources, ultimately, fostering growth of the economy in its widest of amplitude. Moreover, it also serves other social and political goals such as taking actions against the offending firms, integrating market into one etc. With an objective to realize consumer expectations; protectionism was defeated by liberalization, followed by privatization of banks and entry of foreign companies.

B. Roadmap To Eight Years Of Enforcement Of Competition Law

A preliminary reading to the objectives of Competition Act, suggests that it is designed to deal with 3 types of Antitrust issues mainly, *Anti-Competitive agreements, Abuse of dominance, and Combinations*. Although the Competition Act (*hereinafter, the Act*) was enacted in 2002, its enforcement was majorly invoked in year 2009. Data suggests that the Commission has been able to issue 654 cases, reviewed over 868 antitrust issues [20]. Moreover also, since the provisions related to combinations were notified in 2011, the commission has cleared over impressive 490 mergers filling out of 506 filled since then [21].

On a positive note, enforcement of the new Act has received salutation from every corner of the profession as well as the stakeholders who have attempted to embrace it; however it is also argued that the way of enforcement could have been better, had the government was more supportive since day of its inception [22], therefore, despite having faced scarcity of resources, and consistently being understaffed, underfunded, the enforcement has realized phenomenal achievement in a short span of eight years. The Commission could be said to have certainly geared itself to implement this Act which is at the intersection of law & economics [23]. Many a times enforcement in India is compared with enforcement capabilities to those of the developed economies like the US & EU, the author is of opinion that Indian economy is different from the economies of these developed countries, it is mixed in nature, where private and public sectors function collectively. Although, since Indian economy is still in transition stage, those developed economies didn't have to go through this phase and had to adapt to the changes what is taking place in India. The author believes that it was indeed, a herculean task to set up enforcement under new Act during this volatile economic situation, where everyone is either naïve or having little idea about the way it should be enforced. However, since the question here lies about the eight years of effective competition law enforcement, the author intends to further analyse and raise some issues through this text.

C. Enforcing Competition Law: Challenges

In a country like India, where one could have miscellaneous problems along with substantial problems, the same is seemed to be with enforcement issues with the competition law. However, for the purpose of making it more relevant, the author assumes that *"Enforcement of any law depends upon capabilities of the institution entrusted with its enforcement."* In this case, Competition Commission of India is being entrusted with enforcement of Competition Law, the highest regulatory body.

Any Competition Authority should find difficulties while keeping a pace with ever changing pattern and structure of a dynamic market in a globalised world, where inter trade relations between the countries have been liberalized through International Conventions and agreements. Thus, it leads to absence of a proper settled jurisprudence in this regard. What's happening here is, orders of CCI are being frequently appealed on account of procedural irregularities, owing to which COMPAT (Competition Appellate Tribunal) on numerous events becomes unable to appreciate its efforts and has either sent back cases to CCI for reconsideration or has set aside the order in its entirety. Moreover, prize for unnecessary judicial intervention couldn't be taken away rendered in the name of judicial review. Hence, cases tend to remain pending and ultimately the Supreme Court of India is expected to settle the jurisprudence.

Discussing few of the cases which holds relevancy while concluding this discussion, In February 2015, COMPAT set aside a penalty of Rs. 52.24 Cr. Imposed by CCI on *BCCI for abuse of dominance* [24], and held that CCI should have given opportunity to BCCI, since relevant market for considering abuse of dominance was different from that contested by DG (Investigation) therefore, BCCI's reply was only confined to the findings of DG's report and thus it was not provided with

an opportunity to contest CCI's consideration of "relevant market". *Also, the information downloaded from internet sources doesn't have evidentiary value.* Therefore, COMPAT held that CCI's passing order under S.27 of the Act is quasi judicial in nature, hence principal of Natural Justice could not be ignored when passing adverse order [25]. In *Chemist and Druggist Association Case* [26] COMPAT observed that methods adopted by the Jt. DG are totally unjustified, unfair and violative of Natural justice.

Again, In *Coal India's case* [27], COMPAT set aside, the penalty as the members who signed the order were not present in hearing of matter. It is termed as one of the biggest developments took place in competition law regime where Competition law was enforced on a public Sector undertaking, sending a clear and sound message as to Public Sectors under the scanner of CCI. Another aspect of criticism is view of "*Dominance in a relevant Market*" [28] which happens to be an inconsistent delineation [29]. *Case of Jaypee* [30] and *DLF* [31] held that due to lack of reasoning such inconsistent views do not lay down the principles of defining the "relevant market" which is a crucial basis of competition analysis. [32] Another disputed issues with enforcement is the reasoning deciding *"quantum of penalty"* imposed by the commission. Decisions ordering penalties have drawn a lot of flaks from the professionals. It contends as to its legal, economic rationale behind passing impositions on the violators.

However, *it is commendable that these penalties are the manifestation of CCI's seriousness as to competition law enforcement in India*. It started with meager penalties initially but the trajectory went up later on [33]. Though most of them upon an appeal before the COMPAT were set aside or turn down in its entirety, the reason being provided there was "they didn't have a discernible rationale and a legal or economic basis for imposition of the quantum of penalty" [34]. Following the premise of "not only justice be done but also seen to be done" in *M/S Excel Corp Case*, COMPAT modified penalty and held that while a particular penalty is being imposed reason must be given [35]. It was 1st time in this case, observed that if a business had multiple products, the relevant turnover of the product in question should be taken into consideration not the whole turnover of business [36]. Nevertheless, it is presumed that this *"alleged apathy"* on part of CCI while imposing jaw dropping penalties is a result of CCI being inquisitorial in nature comprising of high class bureaucrats who certainly going to make it different as compared to judicial approach where rights of the parties are preserved and valued above everything.

Hence, this form of enforcement is being condemned. Though it is advised that, in order to make this part of enforcement more effective, CCI should come up with a separate guideline similar to those of developed countries, this way it shall also help in having a formalized precedent which might help CCI maintain its status quo.

One admirable provision under Competition Act, 2002 is relating to "Combinations", it prohibits combinations which are having *"appreciable adverse effect"* on competition. Unlike MRTP Act, wherein parties required to take prior permission of the government, this new legislation (Competition Act) only obligates the parties to file form II, enabling the commission to determine whether the combination present before is anyway likely to cause an appreciable adverse effect on competition, if does, it shall be deemed to be void [37]. It has innocuous benefits for the domestic economy; firstly it shall make combinations hindrance free though with little investigations, shall ensure international presence of the domestic companies ultimately fostering financial growth of economy and the corporation itself, only because of this, proposed combination between, *Isuzu Japan and Sumitomo* was approved, on account of question whether this combination has anti competitive effect on Indian market, the CCI while approving held that this doesn't have appreciable adverse effect on Indian market, because market share of Isuzu is nearly negligible. Needless to say, it would not have been approved if components sold by both the entities were same or alternate to each other [38]. This way Competition Act refrains itself from unbecoming a Competition Law.

Quoting D.K. Sikri, the incumbent Chairperson of CCI, he rightly observed that "CARTELS are the most egregious form of antitrust issues" [39]. It is said that proving a cartel is the biggest challenge faced by competition authorities, though jurisprudence in India is still developing and CCI is struggling with the cases even after importing legal principles from foreign jurisdiction [40]. It appears only to be a matter of luck upon which CCI seem to be dependent upon mostly. It carries investigation only after receiving information against the existence of a cartel. Moreover, CCI in order to gain confidence of members of a cartel has notified amendment [41] to its leniency program, the lesser penalty leniency program now extends even to applicants, and broadens the definition. Now person(s) having association to cartels can also apply to commission for leniency. Although upon disclosure of information, it provides for discretionary power to commission as to whether to keep confidentiality of the applicant as opposed to the original regulation.

Recently in another case of Fast track call Cab & Anr. vs Ola [42] the Commission held that held that Ola was not in a dominant position in the market of *"Radio taxi services in Bengaluru",* and dismissed the information alleging Ola to be dominant therein. The commission recognized advancement in technology which has significant effect over the market and observed mere adoption of technology powered by new business model doesn't make it different from traditional local players in the relevant market. *It is admirable that the commission has denied intervening more than necessary into such a young industry probably to let it grow at this stage.*

4. Conclusion

Assessment of anti-competitive practices and enforcement of Competition Law comes hand in hand; both of them are proportional to each other and are interdependent. A law could not be enforced if its need has not been assessed properly. Thus, enforcement agency must come up with a more formal, more precise and certain set of rules which intends to minimize irregularities while enforcing such rules and enables the commission to decide on merits keeping in mind; protection of "competitive process" and consumer welfare. It is reiterated that enforcement so far in eight years is quite commendable given the structure of economy which is prone to issues and also a result of bad economic policies of the

different governments. What is more important is creating awareness about competition, implementing niche policies effective enough to serve enforcement purpose. This would be possible by way of Competition Advocacy and CCI has been actively advocated for competition since its inception. As a part of advocacy, it has signed various treaties with foreign competition agencies, most importantly on cartels with Russia and other countries, so as to expect cooperation from them on conducting investigations. There are some other enforcement issues which need to be addressed by the commission such as telecommunication sector, since it could not be placed in conventional category of businesses, certainly posing challenge while enforcing competition law. Competition law in digital world needs to be addressed.

5. References

1. Fali S. Nariman, 'Law and Economics', in Vinod Dhall (ed.), Competition Law Today: Concepts, Issues and Law in Practice xv (Oxford University Press, New Delhi, 2007.
2. See Doerrn, G Bruce, Stephen Wilks. Comparative Competition policy-National Institutions in a Global Market Clarendon Press, Oxford, 2001.
3. Amitabh Kumar. The Evolution of Competition Law in India, in Vinod Dhall (ed.), Competition Law, Today, Concepts, Issues and Challenges and the Law in Practice at Oxford University Press, New Delhi, 2007, 489.
4. Id.
5. Id.
6. See Para. 3.1.10 Report of the working Group on Competition Policy, Planning Commission, GOI, February 2007, available at http://planningcommission. nic.in/aboutus/committee/wrkgrp11/wg11_cpolicy. pdf Visited on April 20, 2018
7. T Ramappa Competition Law in India, Policy, Issues and Developments 1(Oxford University Press, New Delhi, 3rd edn, 2014
8. Aditya Bhattacharjea, of Omissions and Commissions: India's Competition Laws. 2010; 45(35):31-37.
9. Id.
10. Id.
11. Firms having assets exceeding 1 Crore or market Share more than 1/4th.
12. Those firms whose assets together with those of undertakings exceeded Rs. 20 Crore.
13. Id.
14. Aditya Bhattacharjea, "Of Omissions and Commissions: India's Competition Laws EPW. 2010; 45(35)31-37.
15. Id.
16. Under Chapter III all such "MRTP Companies" were required to take prior permissions from the government for mergers, acquisition and amalgamations with other undertakings.
17. Id.
18. T Ramappa. Competition Law in India, Policy, Issues and Developments 20 Oxford University Press, New Delhi, 3rd edn, 2014.
19. Id.
20. Till 31st March, 2017
21. Id.
22. The recommendation of Standing Committee was ignored on the manner of Selection of Chairperson of the Commission. The Committee recognized that the members of the Competition Commission would be chosen for their expertise in commercial issues and their ability to make effective competition analyses, it was inappropriate to provide for machinery for selection as provided by Section 9.
23. DK. Sikri. Competition law enforcement in India: issues and challenges: Opening statement from the Competition Commission of India, JAE. 2017; 5(2):163-165. available at https://doi.org/10.1093/jaenfo/jnx008, visited on (April 20, 2018.
24. Appeal No. 17 of 2013, Order dated February 23, 2015
25. See Anupam Sanghi, "CCI Loosing it's Teeth-Need for Developing Jurisprudence" accessed from http://www.manupatrafast.in.nusrlranchi.remotexs.in/pers /Personalized.aspx (last visited on April 25, 2018)
26. Appeal No. 56 of 2014, Order dated April 27, 2015
27. COMPAT order dated May, 16, 2016
28. Id.
29. Id.
30. Appeal No. 21 of 2016- Shri Sunil Bansal vs. M/S Jaiprakash Associates Ltd
31. Case No. 67 of 2010 Magnolia Flat Owner's Association vs. M/S DLF Universal Ltd.
32. Id. at 27
33. See Vijay P.S. Chauhan & Anisha Chand, "Competition Law in India: Looking Back at 2013 and Expectations from 2014" accessed from http://www.manupatrafast.in. nusrlranchi.remotexs.in/pers/Personalized.aspx (last visited on April 25, 2018)
34. Id. at 27
35. Id.
36. Id.at 27
37. See Kanishka Tyagi, Isha Mehta. Competition Law on Mergers and Acquisitions accessed from http://www.manupatrafast.in.nusrlranchi.remotexs.in/pers /Personalized.aspx (last visited on April 24, 2018)
38. Id.
39. Id. at 25
40. See Rishabh Juneja. Comprehending Cartels and check on them: India's Nascent Competition Law" accessed from http://www.manupatrafast.in.nusrlranchi.remotexs.in/pers /Personalized.aspx (last visited on April, 2018)
41. See Gazette of India extraordinary, 22 August, 2017 available at http://www.cci.gov.in/sites/default/ files/regulation_pdf/178210. pdf (Visited on April 23, 2018)
42. Fast track call Cab & Anr. vs Ola Case No. 6 and 74 of 2015, Order dated July 19, 2017 Order dated February 9, 2016 and Case No. 96 of 2015.