

SUBMISSION FROM CUTS INTERNATIONAL AND CUTS INSTITUTE FOR REGULATION & COMPETITION (CIRC) TO THE COMPETITION LAW REVIEW COMMITTEE

PRELIMINARY COMMENTS

CUTS International and CIRC welcome the constitution of the Competition Law Review Committee (the Committee) to strengthen and re-calibrate the Competition Law so that it is in sync with the needs of strong economic fundamentals and the increasing size of the Indian Economy. The present review exercise is also important to get the competition regime well equipped to deal with the changing nature of the economy, which is quite paradoxical. At one level de-globalisation is taking place challenging the neo liberal agenda, and at another level disruptions are taking place such as through digitalisation of economy. Both factors are in turn inducing substantial changes in the existing market structure and behaviour of firms, as well as posing newer competition concerns.

CUTS and CIRC propose that the Committee should take a holistic approach, by looking not only at competition law and its enforcement, but also looking at competition policy tools to promote economic democracy. In this regard, the following steps are proposed:

1. Identification of new age competition concerns, including that may be foreseen in the context of Indian Economy taking into account its dynamism. Prepare an inventory of such concerns by using expertise within the Committee, submissions made before it and/or by secondary literature review. The Committee can also engage with Empanelled Institutions with Competition Commission of India (CCI) to carry out such studies.
2. Flag concerns that could be dealt with competition policy approach, which could also include bringing competition reforms at national and state levels and recommend adoption of a National Competition Policy to be able to also deal with policy induced competition distortions.
3. Flag concerns that would not require changes in the present Competition Acts and Rules, but will require changes in enforcement approach (including interpretation, protocols and guidelines). If it is found that certain concerns require changes in approach, recommend formation of Working Groups to look into it in granular details.
4. Flag concerns that require changes in competition rules. If so, form a Working Group to look into it.

5. Lastly, identify concerns that would require changes in the existing Competition Act on the basis of experience gained so far, and recommend necessary changes in the Final Report of the Committee.

Certain other preliminary comments, which would be useful in dealing with concerns due to new economy, are:

1. Include a broader “public interest” approach in competition analysis as against the present practice of narrower “consumer interest” approach. Public interest includes taking care of ‘producers’ welfare’ and hence would be helpful in providing impetus to small businesses in today’s rapidly concentrating economy. The sustainability of small businesses is required, among other things, to deal with the present grave unemployment scenario – to protect current jobs as well as to create new ones.
2. Enhance enforcement of extra territorial jurisdiction under the Competition Act, by using weightage of (large size of) the Indian Economy, so that global presence of the Competition Commission of India is felt. India can learn from Chinese experience in this regard.
3. Bestow more emphasis on ‘compliance education’ in the CCI and have a fulltime designated Compliance Education Officer.
4. Review various existing Guidelines as well as draft and adopt new guidelines based on good practices, which includes Penalty Guidelines.

CUTS/CIRC would appreciate if the Committee invites public comments on its interim report before finalisation and submission to the Cabinet. Be that as it may, this submission endeavours to flag some of the concerns for the Committee.

COMPETITION CONCERNS AND SUBMISSIONS

1. Growing economic concentration

World over there is a growing trend in economic concentration, which has been further aggravated with the advent of digital economy (platform economy, data economy) – winner-take-most economics. The side effects of this growing concentration on jobs and income of the people is resulting in erosion of the public trust in the competition regimes (and also in the

globalisation process), which seems to be failing in checking such concentration. In the words of noted competition policy expert, Frederic Jenny¹:

“We are witnessing a growing rejection of globalisation, trade liberalisation, and economic competition which feeds the populist rhetoric on both sides of the Atlantic. International and domestic market competition are increasingly seen as leading to unfair results such as the loss of jobs for some who have no or little hope of finding another job or downward pressures on wages for others. In the U.S., and to a lesser extent in Europe, owners of capital and highly skilled labour benefit greatly from competition while low skill workers are hurt increasing the inequality of income and wealth and the feeling that a few profit from market competition to the detriment of many others who are victims.

“Competition law enforcement seems to be unresponsive to the perceived injustice of the results of the competitive market system and does not seem to decrease the rising economic inequality which is the foundation of the sense of unfairness. *If anything, the actions of competition authorities to promote more competition seem to promote more inequality and unfairness.* As a result, economic competition law enforcement comes under criticism from populists both on the right and on the left.

“The claim by competition authorities that competition increases consumer welfare does nothing to comfort those who have seen their economic situation take a turn for the worse because of economic competition. Competition authorities are used to arguing that gains from economic competition could be used to compensate the losers but they are also quick to point out that redistribution is not their mission. Yet we know that redistribution schemes do not work well and that the losers from competition are not compensated. The sense of unfairness of the results of the competitive process is not limited to those who lose out in the competition process.

“One thing we learned from behavioural economists such as Kahneman or Thaler is that a large fraction of individuals has some notion of fairness as an argument in their utility function and, to a certain extent, prefers fairer outcomes

¹ Chairman of the Committee on Competition Law and Policy, OECD, Paris (since 1994), among many other past and present key positions held worldwide. He also heads the International Advisory Board of the CUTS Centre for Competition, Investment and Economic Regulation (CUTS CCIER).

to larger gains. The sense of unfairness of the results of the competitive process has without doubt been reinforced by the disruptions due to the 2008 economic and financial crisis, the rapid development of international trade with China, and the digital revolution.”²

This erosion of public trust of the regime and consequent public pressure is driving the polity world over to have a relook at competition enforcement. The incumbents that are adversely affected by the digital disruptions are fuelling such public pressure on polity in reviewing respective competition regimes. Therefore many jurisdictions have felt the need for new tools, if not a new law. The digital competition jurisprudence seems not yet settled.

How to deal with the growing economic concentration and the public fallout because of this? Certainly it would NOT be advisable to go back to the philosophy of the past regime – the Monopolies and Restrictive Trade Practices Act, 1969, which was enacted to ensure that the operation of the economic system does not result in the concentration of economic power in hands of few, to provide for the control of monopolies, and so on.

It is submitted that the present competition law and its enforcement is more likely to be inadequate to deal with growing economic concentration, and would certainly require much wider competition policy tools. Adhering to competition principles in national and state policies – such as Industrial Policy (including IP Policy), Trade Policy, Data Protection Policy, ICT/Digital Communication Policy etc. – is more likely to counter the menace of growing concentration. For instance, where data-control is akin to market power, giving consumers the right to data portability would be a pro-competition measure. Similarly, legally requiring firms to store data only in India can be a protectionist measure against the principles of competition policy, such as limiting free and fair market process, creating entry barriers or distorting level playing field between competitors. Further, in order to deal with non-access to data amounting to entry barriers, data can be bestowed with infrastructure status where access could be guaranteed on FRAND³ terms. In addition to competition policy, effective universal social security systems could help sooth public anger and reduce distrust.

With regard to competition law tools to deal with the present concerns, the solution may lie in how its ‘objectives’ are interpreted and implemented. The overarching objective of the Competition Act, 2002 is focussed on the *economic development of the country* and to that end, the Act recognises the need *to prevent practices having adverse effect on competition, to promote and sustain competition*

² CPI Antitrust Chronicle, October 2018; www.competitionpolicyinternational.com

³ Fair, Reasonable and Non-discriminatory

in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets.

However, the present enforcement approach is such that the law is being largely used as a tool to achieve mere ‘consumer welfare’ and ‘economic efficiency’. Accordingly the consumer welfare standard for enforcement focussing mainly on consumer surplus is being adopted. The problem, most probably, lies in this very enforcement approach, which need to be rectified. In this regard approach suggested, among others⁴, by Frederic Jenny and Jerome Philippe could give useful lead. According to their opinion: *“At times where competition authorities face criticisms from various populisms, it should be noted that they themselves took a populist approach when they shifted from their original legitimate test of maximizing welfare in favour of the sole maximization of the consumer surplus. Returning to the original welfare test would help them resist against the new populist pressure.”*⁵

This suggested change in approach of competition enforcement may be reviewed broadly by the Committee and, if found useful, need to be examined further by a special Working Group considering all the nitty-gritties.

In addition, the Committee may like to recommend a legally mandated “market monitoring mechanism” within CCI, with a priority to closely monitor highly concentrated markets and/or those markets that are of utmost importance for common masses. A well-targeted compliance education programme can also be a useful tool in this regard.

Submissions: (1) the Committee may like to recommend adoption of a National Competition Policy; (2) the Committee may like to recommend change of approach in competition enforcement from “maximising consumer welfare and economic efficiency” to “maximising total welfare”; (3) may recommend a legally mandated “market monitoring mechanism” within CCI by suitably amending the Act; (4) bestow more emphasis on compliance education.

To include implementation of National Competition Policy Section 49 of the Act can be amended as follows:

“National Competition Policy Council and Competition Advocacy

⁴ See for instance: <https://www.competitionpolicyinternational.com/wp-content/uploads/2018/04/CPI-Wu.pdf> and <http://rooseveltinstitute.org/effective-competition-standard/>

⁵ Frédéric Jenny and Jérôme Philippe, *Populisme et concurrence*, Editorial, Concurrences N° 3-2018; www.concurrences.com

49. (1) There shall be a National Competition Policy Council headed by Chairman and consisting of not more than five eminent experts in the field of law, economics, trade including competition policy.

(2) There shall be an Advisory Committee to National Competition Policy Council comprising of upto 35 members representing economic and infrastructural ministries, Consumer Affairs and Law, state governments, consumer organisations, media and academia to be rotated on periodical basis.

(3) There shall be a properly resourced secretariat to assist the National Competition Policy Council headed by a Director and supported by such number of full time and part time members and experts having sound knowledge and experience in the fields of law, economics, competition policy, trade and business law.

(4) The Union Government and State Government, as the case may be, in formulating a policy (including of review of laws) or any other related matter, may make reference to the National Competition Policy Council for its opinion on possible effect of such policy or law on competition; and on receipt of such reference, the National Competition Policy Council shall, within sixty days of making such reference, give its report to the Central Government or the State Government, as the case may be, which may thereafter further action to accept it or not with a speaking order.

(5) The report of the National Competition Policy Council on such matters should be placed before the Parliament annually with action taken report.

(6) The National Competition Policy Council shall take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues.”

2. Market power/dominance assessment

The emergence of the digital economy has raised several challenges *vis-a-vis* the enforcement mechanisms adopted by competition authorities. Traditional tools are running the risk of becoming redundant.

For instance, in cases related to abuse of dominance, we can see that the forms-based approach – defining relevant market and assessing dominance based on market shares – is losing its

relevance as markets are becoming more dynamic. As Louis Kaplow puts forth "*the immodest claim that the market definition process is incoherent as a matter of basic economic principles and hence should be abandoned entirely*"⁶. Payal Malik et al also question the legitimacy of the present tools applied to define the relevant market and propose that "*abuse of dominance enforcement requires a shift towards adopting an effects-based approach, weighing the pro and anticompetitive effects and considering efficiency justifications*"⁷.

Thus, there is a need to reinforce the move from a forms-based approach to effects-based approach. As a result, the use of economics tools should be increased instead of leaning too much on the legal provisions. Keeping in mind the intricate and dynamic nature of platform markets, the criteria for determination of dominance/market power may include other criteria like 'network effects' and 'control over consumers' data' by a firm. The argument of 'new entrant' as defence in abuse of dominance cases, may be re-looked into where a firm already has huge advantage in terms of data control and network effects. Also discriminatory practices by digital platforms or other entry barriers created by them for suppliers/rivals should attract closer scrutiny. Moreover, with data becoming the chief competitive leverage in the digital era; dominance and its abuse should also be analysed from the perspective of the obvious non-price related pitfalls of data collection - such as breach of privacy and data protection laws.

Similarly, easy access to finance by established digital platforms as against lack of access to finance by start-ups may get included in the determination of entry barriers (deep pocket argument) and also as hurdle in innovation. This is because the platform business strategy is "competition for market" (rather than competition in market) and hence those who lead in bringing suppliers and consumers on their platform have the critical mass of network effect and hence are those who begin to control the market.

Since, seemingly, such platform markets do not have much appetite to absorb more than 2-3 players, firms tend to spend substantially and are ready to sustain loss for quite long. Those who miss the bus would not only find it tough to enter and sustain itself in the market, but also may not get access to capital. Consequently, even if there may not be high capital cost of 'entry', there is very likely to be a high capital cost for 'sustaining' in the market.

⁶ Louis Kaplow, Why (Ever) Define Markets, 124 Harv. L. Rev. 438 (2010); https://dash.harvard.edu/bitstream/handle/1/30013694/vol_12402kaplow.pdf?sequence=1

⁷ Malik, P., Malhotra, N., Tamarappoo, R. et al. Rev Ind Organ (2018). <https://doi.org/10.1007/s11151-018-9651-y> (*Legal Treatment of Abuse of Dominance in Indian Competition Law: Adopting an Effects-Based Approach*)

The concept of collective/joint abuse of dominance may also need to be covered under the Competition Act. There had been an attempt in the past to amend the Act to include the concept of “collective dominance”, which was found to be the case while investigating the onion ‘cartel’ in India few years ago which was an implicit cartel following price parallelism rather than an explicit cartel. A dominant position may be held collectively when two or more legally independent undertakings are linked in such a way that they adopt a common policy on the market (e.g. price parallelism).

Collective abuse of dominance has an explicit legal backing in the EU, as Article 102 (earlier 82) of the EC Treaty has been used by the European and national competition authorities to address collective abuse of dominance.

Submission: (1) It would be important to reassess the present approach towards competition enforcement (including economic tools) vis-à-vis assessment of market power/dominance. If the Committee is prima facie satisfied on this, it may recommend a Working Group to study this at the granular level. (2) Amend Section 4 of the Competition Act to include the concept of collective/joint abuse of dominance. S.4(1) and (2) could be amended by adding underlined phrases, as follows:

4. (1) No enterprise or group, alone or jointly with other enterprise or group, shall abuse its dominant position. (2) There shall be an abuse of dominant position under subsection (1), if an enterprise or a group, alone or jointly with other enterprise or group.-- ...

3. Combinations

The provisions of the Competition Act that deal with ‘combinations’ tend to propose a ‘total welfare standard’, keeping in mind India’s economic interests. Therefore, a high threshold for mandatory review for clearance has been kept so that Indian firms scale up to become globally competitive. In digital economy, however, there may be situations where a proposed combination, though below the threshold (lower in terms of value), can have grave competition concerns. What should be done in such cases? Is there a need to revisit the way ‘threshold’ is being calculated? If yes, should there be a different threshold regarding digital sector and other dynamic combinations, which can include ‘network effects’ and ‘control over consumers data’ or

its calculation can be done using turnover and market valuation of the combining entities? This approach could also help in the pharma sector.

Further, the vertical and conglomerate mergers (which used to be considered as having very benign effects on competition while promoting efficiency) should need to be taken as seriously as horizontal mergers. In the new economy, these mergers now could result in serious foreclosure and loss of competition in several seemingly unrelated markets, through subsequent behaviours such as refusal to deal, tying and bundling. We should also consider the loss of innovation (dynamic competition for the market) as a significant factor in merger review.

Furthermore, with the introduction of the Insolvency and Bankruptcy Code, 2016 (IBC), many enterprises have undergone the Corporate Insolvency Resolution Process (CIRP) and the transactions falling under the same have touched the threshold limit triggering the approval of the Competition Commission of India for the combinations provided under section 5 of the Act. Since CIRP is also a time bound affair and it is filed with CCI for approval only after a resolution plan is approved by the Committee of Creditors, it runs a risk of reaching its deadline before the CCI merger timeline. Thus, some sort of synergy needs to be established between the two processes and also with the processes related with SEBI⁸ takeover regulation. (Be that as it may, the “failing firm” defence in the merger review process needs to continue its weightage.)

Submission: (1) There is a need to relook at the existing M&As protocols (threshold, economic tool, guidelines etc.), which may also subsequently require changes in sections 5 and 6 of the Act. (2) Establish some sort of synergy between the CIRP process U/IBC and CCI merger review process, and also SEBI process.

4. Cartels and Leniency Provisions

Thanks to digitalisation, tacit collusion or strategic behaviours could be much more easily undertaken. Anti-competitive agreements may happen due to Algorithms (Artificial Intelligence-led cartels; machine to machine collusion). The Committee should seriously consider how to deal with that, including suggesting changes in the Act. This may also require changes in penalty for cartels to make it much higher for more deterrence.

⁸ Securities and Exchange Board of India

Further, leniency programmes are the most effective tool today for detecting cartels and obtaining evidence to prove their existence and effects. However, to make the leniency programme more effective, the following suggestions⁹ could be useful:

- A marker system should be established. As seen in EU and USA, the marker system there has played a huge role in the improvement of leniency policies. Also, the adequate amount of transparency and information shall be maintained.
- The term “vital information” provided in Regulation 4 of the Lesser Penalty Regulation must be explained so as to remove the ambiguity about the matter.
- An ‘amnesty plus’ system could be introduced to encourage further investigation.
- The incentives may be increased in the initial years at least so that there is an amount of encouragement to the existence of a cartel to report to the commission.

5. Penal provisions

Currently the penalty determination appears arbitrary, which has also been noted by Competition Appellate Tribunal (COMPAT) also. Until the penalty imposed is not higher than the benefit that an organisation is getting by indulging in an anticompetitive practice, they may not comply. Thus, penalty provisions need to be revised and a new Penalty Guidelines need to be drafted and adopted.

Since 2011 the Competition Commission of India has dealt with cases with repeat offenders (recidivism) and has witnessed continuation of certain anti-competitive practices in the industry even after imposing the highest penalty possible on multiple offenders. Further, the Commission has been able to recover only 0.3% of penalties imposed so far. The present penalty provisions under the Competition Act, 2002 are not enough to deter the anti-competitive practices in the Nation. Therefore, the Competition Act in order to make the enforcement of the law strict can follow examples from the Brazilian Competition Law and incorporate following deterrents in the Act:

- Higher quantum of penalty in case direct evidence to the cartelisation is produced before the Commission and imposing of mandatory criminal sanction of certain period for the individuals playing active role in the cartelisation.

⁹ http://www.cuts-ccier.org/pdf/Designing_Effective_Leniency_Programme_for_India-Need_of_the_Hour.pdf

- In case of bid-rigging, debarring the members indulging in the act from participating in public procurement procedures and further debarring them to obtain any funds from the public financial institutions up to a certain period of time. In Brazil the limit is up to five years.
- Recommending the tax authorities to blacklist the members of the cartel from obtaining any tax benefits for a certain period of time.
- Restricting the individuals found playing active role in the anti-competitive practices carried out by the firm to continue with the same position at the company and should be prohibited from exercising market activities on his/her behalf for a certain period of time.
- In cases concerning refusal to deal and denial of licensing of IP rights, empowering the Commission to recommend to the IP authorities to grant compulsory licences on IP held by the wrong doer.

***Submission:** Most competition agencies have developed robust transparent guidelines for fining/penalties. It is important for the Commission to design and adopt such guidelines to bring in more clarity and certainty in terms of imposition of penalties¹⁰.*

6. Overlap-conflicts between sectoral regulators and CCI

In 2011, CUTS International came out with a detailed report¹¹, commissioned by the Ministry of Corporate Affairs, on the overlap-conflicts between sectoral regulators and competition authorities. According to the study:

“Both competition agencies and sector regulators have a common objective of promoting economic growth through pro-competitive regulation. Regulators often focus on preventing “excessive pricing” through regulation of tariffs, ensuring access to essential facilities and ensuring that barriers to entry are reduced which are also shared by competition authorities. Given their roles, it is therefore also necessary for governments to ensure that a “competition culture” encompasses the functions of both sector regulators and competition authorities.

¹⁰ <https://www.financialexpress.com/archive/need-for-a-realistic-penalty-regime/1094528/>

¹¹ Harmonising Regulatory Conflicts; 2011, CUTS International; http://www.cuts-ccier.org/IICA/pdf/Synthesis_Report-Harmonising_Regulatory_Conflicts.pdf

“Despite sharing a common goal, it needs to be appreciated that sector regulators and competition authorities generally have different legislative mandates and their perspective regarding competition matters may be different. Technical regulation is generally a structural issue, while competition enforcement qualifies as a behavioural issue. Thus, sector regulators are primarily responsible for structural and *ex ante* issues, while the competition authority looks into the behavioural and *ex post* issues.

“Furthermore, a clear delineation of the jurisdictional roles of two authorities is still missing. When competition agencies and sector regulators have overlapping jurisdictions, concerns will arise if the agencies do not coordinate their decisions and processes because failure to do so will create regulatory risk for investors and increase compliance costs. Both can harm consumers by raising costs and prices”.¹²

The said CUTS study went into the root of the problem, which says:

“[I]n India, while the current framework rightly provides for consultations between two regulatory authorities, it is not adequate as the opinions of authorities in these matters are not binding. Furthermore, sectoral laws are highly inconsistent with one another in that while some clearly define the different roles to be played by both authorities, others have conferred powers on the sector regulator to look into competition matters.

“Much ground was covered in the 2007 amendments to the Competition Act. While the original law permitted reference to Competition Commission of India (CCI) by a sector regulator only when any party requested for it, now the regulator can refer *suo motu* as well. The amendments also inserted the requirement of recording reasons for disagreeing with CCI.

“Furthermore, in efforts to enhance mutual cooperation, Section 21A, a mirror image of Section 21, applicable to reference by CCI to sector regulators was also inserted. However a glaring loophole continues to remain in this framework because the opinions received from consultations under sections 21 and 21A are not binding.

¹² Ibid, p3

“The current framework which until recently rightly provided for non-mandatory consultations between two regulatory authorities was not adequate. Section 21 of the Competition Act said that any statutory authority may make a reference to the CCI, and its opinion be rendered in 60 days which shall be considered by the statutory authority. The problem envisaged is that in this case it was optional for the regulator to consult CCI, and not mandatory.”¹³

As far as solution for such jurisdictional conflicts is concerned the said CUTS study suggests:

“Competition agencies are best suited to examine behavioural issues while sectoral regulators are better equipped for structural matters. Therefore, giving primacy to one over the other as some jurisdictions have done is not sound judgment. All sector regulators have the duty to *promote competition* in their respective sectors as drafted in their preamble. However, this is not to be interpreted in a manner that they are also required to check anticompetitive practices (*protect competition*) in their sector and preclude the CCI from performing its legitimate duties.

“In conclusion, it is important that both the competition authority and sector regulators should try and appreciate the difference between technical and behavioural issues. The sector regulators should have the leading role in regulating technical issues. Thus, for structural issues, which in most cases are *ex-ante*, sector regulators should take a leading role. But, for competition issues which are largely behavioural and *ex-post*, competition authorities should take a leading role.”¹⁴

The study recommends, in order to avoid jurisdictional conflicts between sector regulators and CCI, that the both (set of) laws – competition law and sector regulation laws – should provide for “mandatory” consultation between the two bodies in regard to the issues coming under either’s jurisdiction. This recommendation was also made by the Planning Commission’s policy document of December, 2007 and in the draft National Competition Policy, 2011¹⁵. Such a provision will ensure the responsibility of every regulator to keep in loop other regulators exercising overlapping domain over the same issue. Cooperation and not competition will be the best way forward to resolve such turf issues.

¹³ Ibid, p26

¹⁴ Ibid, p27-28

¹⁵ http://www.mca.gov.in/Ministry/pdf/Draft_National_Competition_Policy.pdf

The following excerpts from the draft National Competition Policy, 2011 put the issue in the right perspective:

“The conflicts between CCI and the sectoral regulators could be caused by legislative ambiguity or jurisdictional overlap or legislative omission. Interpretational bias of the bureaucracy involved could further aggravate the conflicts. Conflicts between the two may be generated by the market players and legal arbitrators for obvious reasons. Conflicts are bound to hurt consumers and the uncertainties that go with them can increase investment risks. Conflict resolution by a court of law may perhaps be time consuming, and therefore, be only the last alternative.”¹⁶

“The above matter has been addressed in detail in the XI-Plan document (chapter 11, para 11.33) and approved by NDC as below: *“The interface between the Competition Commission vis-à-vis sectoral regulators is critical. The basic premise to be recognized is that sectoral regulators have domain expertise in their relevant sectors. The Competition Commission, established under the Competition Act, 2002 on the other hand, has been constituted with a broad mandate to deal with competition for which certain very specific parameters are laid down under the Act. A formal mechanism for coordination between the Competition Commission and the sectoral regulators is, therefore, of key importance. Coordination between sectoral regulators and Competition Commission should be made mandatory through suitable provisions in the Competition Act, 2002 and sectoral laws.”*¹⁷

“With regards to economic regulation, the role of sectoral regulators is critical since they generally apply an *ex ante* prescriptive approach while competition authorities, except in the important area of merger review, generally apply an *ex post* enforcement approach. This essentially happens because sector-specific regulators typically engage on a moment to moment basis with the sector they are responsible for and intervene more frequently based on a constant flow of information reporting from regulated entities. At the same time competition agencies generally rely more on complaints and gather information only when necessary in connection with possible infringements of the law.”¹⁸

¹⁶ Ibid, p20

¹⁷ Ibid, p21

¹⁸ Ibid, p19

“In essence a framework for an interface between a competition regulator and a sectoral regulator should deliver the following benefits: a) appropriately identify issues of concern; b) ensure appropriate channelisation of various concerns to the appropriate forum and obtaining corrective action at the earliest; c) establish a framework that avoids duplication of effort; d) conserve the Commission's resources and limit its ambit only to matters of competition; and e) promote capacity building and developing expertise both at the level of the competition regulator and the sectoral regulator.”¹⁹

Therefore, where a separate regulatory arrangement is set up in different sectors, the functioning of the concerned sectoral regulator should be consistent with the principles of competition as far as possible. Also there should be an appropriate coordination mechanism between CCI and sectoral regulators to avoid overlap conflicts in interpretation of competition related concerns. CCI and the sectoral regulators need to cooperate and establish a forum for regular exchange of ideas. The mechanism adopted via an Ordinance (2010) to resolve jurisdictional conflict between SEBI and IRDA (Insurance Regulatory and Development Authority) over ULIPs (Unit-linked Insurance Plans) could be a useful guide in this regard.²⁰

The European Union member states have also resolved the overlap issues by providing for mandatory consultation between the competition authority and sector regulators under both the competition law and sector regulatory laws²¹.

Submission: (1) Replace the word ‘may’ with ‘shall’ in S.21 and S.21A of the Competition Act. (2) Amend suitably sector regulation laws like Electricity Act, Telecom Regulatory Authority of India Act etc. (3) Adopt National Competition Policy (4) Establish a ‘coordination mechanism’ between sector regulators and CCI (a permanent forum of all statutory regulators can be envisaged, which inter alia could help in brining coherency in their approach as well as in policy making)

¹⁹ Ibid, p21

²⁰ See for instance: <https://www.moneylife.in/article/no-more-turf-war-ordinance-forces-all-four-financial-regulators-to-coordinate-their-moves/6313.html>

²¹ Pradeep S Mehta and Udai S Mehta; <https://thewire.in/business/ci-trai-promoting-competition-anti-competitive-practices>

7. Safeguarding Interests of Sellers' (small businesses/farmers) in monopsony/oligopsony markets

One of the main aims of the Act is to protect the interests of consumers. However, in monopsony/oligopsony markets, protection of the interests of sellers becomes equally important than buyers, from competition perspective. As per the present definition of consumers, the buyers in such markets are consumers and hence the Act would tend to protect their interests.

The Agriculture Produce Market (under APMC regime) is one such example where the interests of traders (buyers; consumers) in the mandi could be protected, while interests of farmers (sellers) will not be protected under the Act. This should, however, be the other way round. Similar problems can be faced by (large number of) small businesses when platform-based marketing channels (very few in numbers) become a norm. Such businesses/farmers, which are important from the livelihoods perspective, need special attention under the Competition Act.

Submission: The Act should be suitably amended to include a separate clause on the protection of the interests of sellers (small businesses, farmers etc.) in monopsony/oligopsony markets, or wherever in the Act the 'interests of consumers' are taken into account, the same can be qualified by the words "or the interests of sellers in monopsony and oligopsony markets, as the case may be".

For instance: the Object clause can be amended as follows: "An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers or the interests of sellers in monopsony and oligopsony markets, as the case may be, and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto."

But since object clause is not a justiciable provision, suitable amendment in the main body of the Act is mooted.

8. Dealing of IPRs under Competition Act

While abuse of IPRs can be dealt under the 'abuse of dominance' provisions, yet the exemptions granted to IPRs under the S.3(5) can be relooked into, and can also be extended to 'anti-

competitive agreements'. For this purpose, the Zimbabwe Competition Act can be a good guideline, which under Section 3(1) says:

“3. Application of Act

(1) This Act applies to all economic activities within or having an effect within the Republic of Zimbabwe but shall not be construed so as to—

(a) limit any right acquired under—

(i) the Plant Breeders Rights Act [Chapter 18:16]; or

(ii) the Copyright Act [Chapter 26:01]; or

(iii) the Industrial Designs Act [Chapter 26:02]; or

(iv) the Patents Act [Chapter 26:03]; or

(v) the Trade Marks Act [Chapter 26:04];

except to the extent that such a right is used for the purpose of enhancing or maintaining prices or any other consideration in a manner contemplated in the definition of “restrictive practice” in section two; or...”

Submission: Review the way IPRs has been dealt within the Competition Act and see whether the scope can be expanded beyond ‘abuse of dominance’.

9. Inclusion of doctrine of ‘cy pres’

Firms can be fined if found violating the competition law, however, it can often be impossible or impractical to compensate all victims of firms’ anti-competitive conduct (i.e. consumers who have suffered losses). This can also happen in class action suits involving competition law. In such cases it would make sense to employ the doctrine of “cy pres” to put the collected amount to the “next best use,” which may include awarding funds to public interest organisations for the purposes related in some way to the case. Therefore, the Competition Act may be amended to include this doctrine.

Submission: A new clause may added to Section 42A of the Competition Act, which can be in form as follows: “In a case of class action or in cases where consumers, who are the ultimate victims of the violation of the Act could not be compensated due to practical reasons, the Appellate Tribunal can direct the defendant to pay the sum of unpaid residue, plus interest on the sum from the date of entry of the initial order, to non-profit organisations to support projects that will benefit the class or similarly situated persons, or to promote the objectives of competition law and policy consistent with the objective and purposes of the underlying cause of action.”

10. Enhancement of Competition Advocacy functions

Competition advocacy is an important function to engender competition culture not only amongst the market players, but also amongst the policy makers in Centre and States. On the one hand, it generates awareness (including compliance education) to firms and consumers; on the other hand, competition advocacy induces policy makers to assess the effect on competition of existing or forthcoming law and policies. The latter (can also be called competition policy advocacy) is necessary from optimal regulation perspective i.e. laws, policies and regulations are not more restrictive than absolutely necessary. It is important to acknowledge the role which tools like Competition Assessment play in formulation of a country's economic policies. (The Ministry and CCI are already engaged in persuading government departments at the Centre and States to allow Competition (Impact) Assessment of their policies so that they can be made more efficient).

The CCI is empowered under S.49 of the Competition Act to discharge the function of competition advocacy. For the purpose of conducting competition (impact) assessment CCI has created a pool of Empanelled Institutions. Although the Commission has undertaken several initiatives to spread general awareness with the aim of creating a competition culture in India, nothing much has happened on CIA front.²² In the fast changing nature of the economy when regulations and policies are trying to catch up with the pace, competition policy advocacy assumes much importance.

Therefore the present arrangement needs to be relooked, and a comprehensive mechanism that has been suggested above for the implementation of National Competition Policy may be adopted.

11. Independence of CCI

In order to secure democratic accountability, CCI should be directly responsible to the legislature through the Parliamentary Standing Committee of Finance and Corporate Affairs, and to the people at large. Parliamentary supervision seems to be the ideal form of accountability as accountability to the line ministry can often be associated with pressure being exerted on the regulator to favour firms/utilities being operated by the government, hence deviating from the

²² To see all initiatives of CCI, see <http://www.cci.gov.in/glimpses-competition-advocacy-initiatives>

principles of ‘competitive neutrality’. Similarly, vested interest groups often find it easier to effectively pressurise the regulator through the line ministry rather than through the Parliament. Therefore, replacing the line ministry’s control by Parliamentary supervision is essential²³.

Currently, the Act requires the Commission to prepare an annual report giving account of its activities and forward it to the Central Government. Post this step, a copy of the report is laid out in both the Houses of the Parliament. Ideally, the scenario should be that the Parliament should discuss the report of the Commission and such a discussion should be led by the relevant Parliamentary Standing Committee.

12. Fix CCI’s inherent design-related irregularities²⁴

One of the major pending legal challenges in context of the appropriate design of CCI is its seemingly inherent inconsistency with the constitutional principles of separation of powers and judicial independence (Ramesh, 2016, p. 286). But first, this discussion deserves a brief historical context. After the Supreme Court’s landmark judgment in the case of *Brahm Dutt v. Union of India*,²⁵ which essentially gave the legislature an opportunity to fix the apparent unconstitutionality of provisions, related to the structure, powers and functions of the CCI, there were several changes made to the erstwhile Act via the 2007 amendment (Ramesh, 2016, p. 261).

The Court held that:

“If an expert body is to be created as submitted on behalf of the Union of India consistent with what is said to be the international practice, it might be appropriate for the respondents to consider the creation of two separate bodies, one with expertise that is advisory and regulatory and the other adjudicatory”.

²³ [https://one.oecd.org/document/DAF/COMP/GF/WD\(2016\)62/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2016)62/en/pdf)

²⁴ Ghuman, Parveer S. and Mehta Udai S, *Institutional Design of Select Competition Authorities in South Asia: Identifying Challenges and Opportunities*, available at <https://rdcu.be/1uFw>

²⁵ See *Brahm Dutt v. Union of India* (2005) 2 SCC 431. The essential challenge was on the basis that the Competition Commission envisaged by the Act was more of a judicial body having adjudicatory powers on questions of importance and legalistic in nature. In the background of the doctrine of separation of powers recognized by the Indian Constitution, the right to appoint the judicial members of the Commission should rest with the Chief Justice of India or his nominee and further the Chairman of the Commission had necessarily to be a retired Chief Justice or Judge of the Supreme Court or of the High Court, to be nominated by the Chief Justice of India or by a Committee presided over by the Chief Justice of India. In other words, the contention was that the Chairman of the Commission had to be a person connected with the judiciary picked for the job by the head of the judiciary and it should not be a bureaucrat or other person appointed by the executive without reference to the head of the judiciary (pp. 3). Notably, the apex court gave the Central government an opportunity to fix this irregularity and held that “it would be appropriate to postpone a decision on the question after the amendments, if any, to the Act are carried out and without prejudice to the rights of the petitioner to approach this Court again with specific averments ...” (pp. 5)

The legislature intended to separate the regulatory functions from the adjudicatory by *inter alia* creation of the appellate adjudicatory body, COMPAT through the 2007 Amendment Act and the CCI was contemplated to be an ‘expert body’. But, it has been observed that the requisite amendments aimed at changing the structure of CCI into a regulatory expert body were not enough and were essentially against the *dictum* of the *Brahm Dutt* judgement (Ramesh, 2016, p. 277). Despite the amendments, CCI still functions essentially as an adjudicatory body and this apparent irregularity of design has made it the subject matter of further legal dispute.²⁶ The same is further aggravated by the fact that the appointment of Members and Chairperson of CCI remain dependent on the Central Government while the institution imparts adjudicatory functions.

Notably, this imbalance might have negatively affected the efficacy of enforcement of competition law in India and might have been a contributing factor which encouraged the COMPAT to set aside CCI’s orders due to *want for* procedural fairness and natural justice (Nathani et al., 2017). This needs to be fixed by reviewing the detailed procedures of the CCI and ensuring that it adheres to the principles of separation of powers.

²⁶ See *Mabindra and Mabindra Ltd. v. Competition Commission of India* (pending), WP (C) No. 6610 of 2014 (Del)