CPI's Asia Column Presents:

The Progressive Weakening of India's Competition Law

By Vinod Dhall[*]

(Platinum Partners)

Edited by Dr. Geeta Gouri & Swarnim Shrivastava

CPI COMPETITION POLICY INTERNATIONAL

September 2020

When the Indian Competition Act was enacted in January 2003, few people really understood what it was all about. In its early years, people asked me with genuine curiosity as to what the Competition Commission ("CCI") would do: Conduct competitive examinations? Conduct music or sports competitions? In the command and control era of economic policy, free competition in markets was as yet a novel concept, and the idea of a law to promote this was not easy to understand. Even when economic reforms were introduced in the early nineties, the new competition law to replace the archaic MRTP Act came only in the next decade! And then it faced numerous hurdles in starting its enforcement which ultimately could commence only in 2009.

Unfortunately, even after a full decade of its existence, the Competition Law has gained few friends or supporters or in the number of those who truly appreciate its role in the economy. Its numerous hurdles have come from industries, from political leaders, from the judiciary, even from other regulators. It has been dealt some heavy blows to its effectiveness which are explained below.

In a high-profile case between telecoms companies, the Hon'ble Supreme Court in a detailed judgement ruled that the CCI and TRAI (which had challenged CCI jurisdiction in telecoms cases) each had its own area of jurisdiction.[1] However, in an effort to harmonize the roles of both regulators, the Hon'ble Court decided that TRAI, being the expert regulator in telecoms, should first be allowed to decide on the disputed issue; the jurisdiction of the CCI was not excluded but pushed back to a later stage after completion of the TRAI proceedings.

The Court did not appreciate that even in regulated sectors like telecoms, the CCI must necessarily keep an overarching oversight so that while complying with the sectoral law, the competition law is not violated. For example, broadcasting companies may well be within the price caps set by TRAI, but by colluding with each other they may decide to charge not below the maximum level permitted by TRAI. Thus, they would be compliant with TRAI regulations but would be guilty of running a cartel under the competition law. Nonetheless, consequent to the Hon'ble Court's ruling, the Competition Commission will be left a mute spectator while the case might take years to wind through appeals to TDSAT and the Supreme Court. On the other hand, while maintaining the concurrent jurisdiction of the CCI, the Court could have made it mandatory for the two regulators to consult each other or enter into an MOU in terms of Sections 21 and 21A of the Competition Act enacted for this very purpose. The judgment effectively renders these sections ineffective or superfluous as far as the telecoms sector is concerned and reduces the Competition Commission to a secondary status.

In contrast, in a landmark case, the Delhi High Court in a writ challenging the jurisdiction of the CCI to inquire into an abuse of dominant position flowing from a patent, ruled that there was no conflict in that case between the Competition Act and the patents law, and the CCI could well proceed against the concerned party.[2]

Recently, NCLAT ruled that any person who files a complaint before the CCI ought to be one who has suffered on account of the alleged violation otherwise she would not have the *locus standi* to complain.[3] The NCLAT failed to appreciate that the CCI has the mandate to rid markets of anti-competitive practices, which are regarded as offenses *in rem* and not in *personam* and the duty of the Commission is toward the market and the economy at large and not toward any particular complainant who approaches the Commission. The constricting effect of the NCLAT judgment on the ability of the CCI to act on complaints raised serious concern among all who have a stake in maintaining robust competitive markets in the country.

However, the issue of *locus standi* of an informant came up before the Commission recently when it was raised as a defense by WhatsApp and Facebook in a case of abuse of dominance.[4] The Commission took the opportunity to spell out in detail the correct legal position in this respect and emphatically asserted the point that any party that approaches the Commission need not necessarily be one injured by the complained practice. The Commission, *inter alia,* observed:

> *"The Preamble to the Act unequivocally voices the ethos with which the Act was enacted, [……] Clearly, the Act has been conceived to follow an inquisitorial system wherein the Commission is expected to investigate cases involving competition issues in rem, rather than acting as a mere arbiter to ascertain facts and determine rights in personam arising out of rival claims between parties. Further, many a time, even though a case filed by an aggrieved party may appear to be a case in personam, underlying it is a larger question of market distortion. The mere fact that a case has been filed by an aggrieved party under the Competition Act, does not take away its character of being a case in rem involving a larger question of fair and competitive markets."*

Further, "*This approach is also evident from the powers available to the Commission to direct investigation and hold inquiries even against persons or entities, who were not party to the information, but who are also suspected to be involved in an anti-competitive conduct."*

The Commission cited the SAIL judgment of the Hon'ble Supreme Court,[5] "*wherein the Hon'ble Court specifically noted that the Commission discharges inquisitorial, regulatory as well as adjudicatory functions."*

The Commission also recalled its earlier pronouncements about the locus standi of the Informant, for example:[6]

> "*The proceedings before the Commission are inquisitorial in nature and as such, the locus of the Informant is not as relevant in deciding whether the case filed before the Commission should be entertained or not. As long as the matter reported to the Commission involves anti-competitive issues falling within the ambit of the Act, the Commission is mandated to proceed with the matter. Further, it may be noted that as per the scheme of the Act, it is not necessary that there must be an informant to initiate an inquiry or investigation. The Commission is entitled to even proceed suo motu or on any reference being made by the Central Government or State Government or any Statutory Authority. Thus, the Commission is more concerned with the facts and allegations highlighted in the information rather than the locus of the person who provided such information."*

It is hoped that in the face of the Commission's emphatic reassertion of the correct legal position regarding locus standi of an informant this issue would now remain settled.

In numerous cases parties have succeeded in stalling the proceedings of the CCI/DG for months through writ petitions filed before the Hon'ble High Courts where a stay order has been issued by the court. Such has been the case both in cartel proceedings[7] and cases of abuse of dominance.[8] While recourse to writ jurisdiction of the courts is fully recognized, the courts equally have the responsibility to ensure that the proceedings of the Commission are not unduly impeded or delayed on this account.

A cartel is regarded as the most egregious of offences under the competition law in all regimes. Bidding cartels, especially in supplies to government, are endemic in India. The law provides that parties to a cartel can be punished with penalty up to 10 percent of the annual turnover of the company for each year of the cartel. However, in an appeal, the Hon'ble Supreme Court held that turnover must be interpreted to mean only the "relevant turnover" in the product whose supply was the subject of the cartel arguing that this would be in conformity with the constitutional principles of proportionality and equity.[9]

However, the court overlooked the fact that setting a penalty in proportion to the turnover of each company itself reflects the principle of proportionality. The Hon'ble Court seems to have misunderstood the cited practices in important overseas jurisdictions such as South Africa, UK and EU. In these jurisdictions, assessing the "relevant turnover" is only the starting point for the computation of the penalty; the maximum penalty leviable still remains at 10 percent of the total (worldwide in UK) turnover. In the UK, for instance, even at the starting point the penalty for cartels is computed at 21 percent to 30 percent of the relevant turnover; to this another amount of 15-25 percent of the relevant turnover can be added specifically for deterrence. Thereafter the penalty can be increased for aggravating factors such as the duration of the cartel, repetitive violations, role of a cartel leader, coercion et al. Similarly mitigating factors and proportionality are specifically kept in mind.

The short point is that the Hon'ble Supreme Court's ruling has effectively tied the hands of the Commission in imposing appropriate penalties on cartels and in effectively deterring further violations.

It is somewhat perplexing that the Commission itself in some recent cases has gone inexplicably soft on cartels. After concluding that a cartel in supplies of bearings was proved on the basis of secret meetings, telephone calls and email exchanges, the Commission let off the guilty parties with a mere warning. In another case in supply to a government entity, the Commission again let off the parties, including those that falsely denied any cartel ever existed, with a mere rap on the knuckles. The Commission seems to have overlooked the injury caused to the parties that were victims of the cartels.

If the Competition Commission is to effectively discharge its oversight function against anti-competitive practices especially against cartels, its ability to impose appropriate penalties extending up to a maximum of 10 percent of the company's turnover needs to be restored, if necessary through an express amendment to the Competition Act (an amendment bill is under consideration of the government). At the same time, it is opportune for the Competition Commission to come out with detailed guidelines on computation of penalties, much as many other authorities have done. The guidelines should *inter alia* keep in mind the principles of proportionality and equity averred to by the Hon'ble Supreme Court in its judgment referred above.

* Vinod Dhall is former Member and actg Chairman of the Competition Commission of India and currently Senior Adviser, Platinum Partners, India. He acknowledges the contribution to this article by Apurva Badoni, Associate, Platinum Partners.

[1] *Competition Commission of India v. Bharti Airtel Limited & Ors*., (2019)2 SCC 521.

[2] *Telefonaktiebolaget LM Ericsson v. Competition Commission of India & Anr.,* 2016 CompLR 497 (Delhi).

[3] *Samir Agrawal v. Competition Commission of India & Ors.,* Competition Appeal (AT) No.11 OF 2019.

[4] *Harshita Chawla v. WhatsApp Inc. and Facebook Inc.*, Case No. 15 of 2020.

[5] *Competition Commission of India v. Steel Authority of India Ltd.*, (2010)10 SCC 744.

[6] *Reliance Agency And Chemists and Druggists Association of Baroda & Ors.,* Case No. 97 of 2013.

[7] An investigation initiated by the CCI in 2014 in an alleged cartel in the conveyor belts market has been stalled due to various writ petitions filed before the High Court of Delhi.

[8] An investigation initiated by the CCI in 2016 against Monsanto Holdings Pvt. Ltd. for alleged abuse of dominance was stalled due to a writ petition filed before the High Court of Delhi on *inter alia*, jurisdictional grounds. However, the High Court recently decided that the CCI does have jurisdiction. Moreover, the investigation initiated by the CCI in the *Autoparts* case was also delayed owing to a pending writ petition in the High Court of Madras.

[9] *Excel Crop Care Limited v. Competition Commission of India & Ors.,* (2017) 8 SCC 47.