

The Year Gone By... Competition Law in the Time of a Pandemic – Some Reflections

By Ashok Kumar Gupta | Competition Commission of India



Edited By Geeta Gouri & Swarnim Shrivastava

The Year Gone By... Competition Law in the Time of a Pandemic – Some Reflections

By Ashok Kumar Gupta¹

As we look back on the year 2020, it will always remind us of the challenges that we at the Competition Commission of India had to face with the onset of the COVID-19 pandemic. Across the globe, it led to unparalleled changes in the way the world conducts business. Even we at the Commission had to reorganize our operations and re-examine our priorities. While the pandemic brought the movement of people, goods, and capital to a standstill, it gave a much-needed boost to the digital world. More and more social and business interactions started taking place digitally. Enterprises and agencies across the world began devising strategies to respond to and mitigate the impact of such an abrupt disruption in economic activities and to keep the global economy running.

We, at the Competition Commission of India, realized quite early on that a response to the pandemic would warrant undertaking extraordinary measures. Electronic filings of antitrust cases, as well as combination notices including green channel notifications, were immediately allowed. CCI had recently introduced a green channel for an automatic approval of combinations. This is a first-of-its-kind trust-based system where notifiable transactions having no overlaps, be it horizontal, vertical or complementary between the parties, are approved upon filing. It is expected to promote a speedy, transparent and accountable merger review process, striking a balance between facilitation and enforcement and creating a culture of voluntary compliance that supports economic growth. Over the last year

the green channel route has gained traction, with one out of every five transactions being filed under this route, demonstrating stakeholder confidence. Facilities for pre-filing consultations for combinations were also made available through video conferencing. A robust mechanism was put in place to conduct all antitrust proceedings virtually.

Given the economic disruption caused by the pandemic, an advisory was issued in April 2020 allowing businesses to coordinate certain activities by way of sharing data on stock levels, the timing of operations, sharing distribution networks and infrastructure, transport logistics, R&D, production, etc. in order to meet their emergent needs without worrying about the regulator's ire. Such coordination was allowed so long as it ensured continued supply and distribution of products and services, resulted in efficiencies, and didn't inhibit competition. At the same time, the firms were cautioned not to take advantage of the COVID-19 situation in order to engage in anti-competitive activities like excessive pricing, refusal to deal, and collusion. The advisory spelt out the various provisions of the Competition Act, 2002, and the framework that would inform our decisions.

We also utilized a bit of the hiatus time, before virtual hearings started, to address some longstanding procedural issues. One of the issues that we had been considering in our regulation of combinations was the assessment of non-compete restrictions that were imposed on the target by the acquirer. It was increasingly felt that an appropriate assessment of the effect

¹ Chairperson, Competition Commission of India.

of non-compete restrictions in a modern business environment requires a much more detailed examination and understanding. Prescribing a uniform set of standards applicable to all evolving industries may not be possible or even appropriate. Providing information on non-compete arrangements creates challenges for the parties, especially in the present scenario, as it increases their filing burden and prolongs the combination review process. In view of this, it was deemed prudent to amend the combination regulations. Accordingly, we dispensed with the requirement of providing information on non-compete arrangements.

Given the unprecedented nature of the pandemic, we also coordinated with our global counterparts to develop and exchange ideas on the kind of efforts needed to provide support to businesses and to ease their regulatory requirements. CCI also signed a “Statement of the BRICS Competition Authorities on COVID-19” to join efforts in combating the negative economic consequences caused by COVID-19, sharing experiences, information and practices on developing competition during and after the pandemic for the benefit of society and our respective economies.

On the enforcement front, in light of the economic distress caused by the pandemic especially to small market participants, our decisions were guided by the over-arching goal of keeping smaller players afloat. We took into consideration the cooperation shown by the parties during the investigation and inquiry stage and refrained from imposing monetary penalties when the Commission was satisfied that a simple cease and desist order would suffice to correct the market.

Additionally, we continued with our practice of complementing our enforcement efforts by conducting market studies. The objective of market studies is to assess competition beyond the individual behavior of firms and enhance our knowledge about the sector as a whole. The aim is to get an understanding of the structural infirmities, consumer preferences, market practices, and regulatory architecture governing the sector and their implications on competition in and for the market. In a relatively young regime like ours, enforcement cannot be the only route to market correction. Targeted advocacy, through various instruments – market studies being one – will have to be used effectively. India is a vast country and correcting markets requires us to accelerate our advocacy efforts - which requires a deep understanding of the markets. Last year we successfully completed a Market study on e-commerce that was conducted to develop a better understanding of the novel competition issues that were emerging with the growing importance of digital platform-centric commerce. Bargaining power imbalance and information asymmetry between platforms and their business users underpinned most of the emerging issues in e-commerce. These infirmities were considered to be more effectively addressed through non-enforcement tools. Under its advocacy mandate, the Commission urged the e-commerce platforms to put in place a set of self-regulatory measures over certain areas such as search ranking, collection/use/sharing of data, user review mechanisms, revision of contract terms, and discount policy. The insights gained from the market study also contributed to a full appreciation of the facts and allegations in the Commission’s subsequent enforcement activities in e-commerce. In this fiscal year we initiated market studies in the telecom sector,

the pharmaceutical sector, as well as an issue-based study on common ownership.

The telecom study was undertaken to better understand the unfolding competition dynamics in the sector. The study confirmed that while growth has been robust, price competition has squeezed the bottom line for incumbent operators and led to significant market consolidations. Moreover, with the market moving towards data-based applications and services, there is a noticeable change in the demand for quality of service, with bundled offerings likely to be the focus of differentiation among service providers. The findings of the study suggest that as technology convergence drives further integration across the value chain, vertically integrated service providers will become important and instrumental in ensuring healthy competition. At the same time, technology-led convergence would make services less distinguishable, thereby raising new challenges in defining relevant markets and necessitating the application of competition tools developed for multi-sided markets. Competition concerns arising out of data were flagged and it was highlighted that the antitrust law framework is broad enough to address the exploitative and exclusionary behavior arising out of privacy standards and entities commanding market power. The study accentuated the need for a harmonious regulatory environment, focusing on strengthening cooperation among the sectoral regulators and the competition authority.

While the telecom study was launched due to rapid advancements in technology and the fast-changing market dynamics in the sector, the pharmaceutical study was initiated because of observable demand side issues, such as lack of effective consumer choice. Though affordability

has received much policy focus (in the form of price controls on selected drugs) in India, our years of enforcement have shown that certain industry practices in the pharmaceutical sector do not allow markets to work effectively. With the study, our basic intention is to appreciate the factors that influence price competition in the sector, with a focus on emerging issues in the distribution business, discounts/margin policies at the wholesale and retail levels of the distribution system, the role of trade associations, the impact of e-commerce on price and competition, the extent of proliferation of branded generic drugs in India with its implications for competition, and to assess potential hurdles, if any, for the entry of bio-equivalent/bio-similar drugs in India. The key stakeholders include pharmaceutical companies, distributors, chemists, trade associations, online pharmacies, doctors, sector experts, and regulators. The pharmaceutical study is currently on-going.

Compared to the other market studies initiated by the Commission, the study on common ownership is not based on a single sector but rather cuts across sectors. The issue of common ownership by institutional investors may have both antitrust and macroeconomic implications. It may require developing frameworks for articulating a theory of harm. Given the paucity of data on the level and extent of common ownership in India, we felt it was imperative to launch such a study and develop a deeper understanding distinguishing between control and influence, since influence is a nebulous concept. The study aims to gauge the trends and patterns of common ownership in India, institutional investors' underlying incentives and motivations behind such investments, and the type of rights they get that can translate into their ability to influence the

decision of a firm that may consequently impact competition. The study has just begun, and we hope to get some initial results by the end of the next quarter.

Another area of the Commission's work that I would like to highlight is public procurement. Competitive procurement markets are fundamental to ensuring that public money is well spent and fiscal space is created for greater public spending. In countries like ours, public procurement spending triggers a circular investment and income cycle in the economy that also propels job creation, innovation, and economic growth. For private enterprises, public procurement is often a crucial component of their businesses, and has a significant bearing on their scale of operation and competitiveness. Opening and levelling the playing field in procurement markets can provide opportunities for smaller entities, better ideas, and innovation.

Along with market studies, we are augmenting our advocacy efforts through the State Resource Persons Scheme. Under the scheme, two retired officers from the State Government are appointed by CCI. These officers disseminate awareness on competition law by imparting training and organizing workshops and seminars in each State for the procurement officers of various State Departments. Through this scheme, CCI aims to make the States active partners in promoting a culture of competition in the country.

India is a vast country and expanding our outreach in every part of the country would require regional presence of CCI. The Commission recently opened its first regional office in Chennai in south of India, to augment its geographical outreach. As a federal regulator we are conscious of our duty in engaging closely

with State Governments, public sector units, industry bodies and academia who are important stakeholders in fostering greater competition in the economy. The southern region, consisting of prominent industrial clusters and has been at the forefront of India's economic progress. The regional office is going to facilitate the Commission's advocacy outreach, which has been at the core of competition regulation. It will also facilitate enforcement by acting as a center for filing and receiving cases, facilitating investigation, following up on court cases and online deposition in coordination with the Delhi office.

As the pandemic recedes globally the pressing question now facing policymakers is how to reignite the national growth engine amidst the uncertain and shaky global economic environment. Recent forecasts have imbued optimism for an impending recovery. The challenge now is not only to spur an economic rebound, but also to ensure that the steps towards recovery do not irreversibly alter markets. It is important that competition principles be respected along the way. In India, the direction of the government's economic reforms agenda is clear. The economic stimulus package has provided strong impetus to structural reforms in various crucial sectors of the Indian economy. We broke away from the system of controls in the early nineties and it is being progressively replaced with a regime where the role of the State is that of a facilitator, where the market is to take the lead and become a self-reliant instrument of growth as envisioned by the Indian Prime Minister in the Aatmanirbhar Bharat Abhiyaan. It is therefore imperative that we have markets that are well-functioning, supported by healthy competition.