

# COLLOQUIUM

includes debate by practitioners and academics on a contemporary topic

## Competition Law in India: Perspectives

Viswanath Pingali, Manas Kumar Chaudhuri, Payal Malik, Ram Tamara, Avaantika Kakkar, Chirantan Chatterjee, Shamim Mondal, and D Daniel Sokol

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### Themes

- Antitrust Policy
- Competition Act
- Competition Appellate Tribunal (COMPAT)
- Competition Law Compliance
- Damages Calculation
- Dawn Raid
- Exchange-Traded Funds
- Global Cartels
- Intellectual Property Rights (IPR) Regime
- International Competition Network (ICN)
- London Gold Fix
- Monopoly and Restrictive Trade Practices (MRTP) Act
- Patent Laws
- Raghavan Committee Report

### INTRODUCTION

#### Viswanath Pingali

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In 2002, the Parliament of India enacted the Competition Act, replacing the archaic Monopoly and Restrictive Trade Practices Act (popularly referred to as the MRTP Act) of 1969. The primary goal of the Act, as stated in the preamble, is ‘...keeping in view of the economic development of the country ... to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect interests of consumers and to ensure freedom of trade ...’.<sup>1</sup> Economic theory clearly shows that the total profit in an industry characterized by monopoly is greater than the combined profit of all firms in the industry in case the industry is competitive in nature. At the same time, due to higher prices, consumer welfare suffers under monopoly when compared to a more competitive setup. To me, this is the fundamental theoretical premise behind the competition law. The Act intends to curb any activity that could harm consumer welfare or freedom of any individual (or individuals) to freely and fairly compete in the market. Therefore, the three broad areas for the Competition Act to look at are: (a) cartelizing behaviour of the firms, (b) abuse of dominant position, and (c) mergers and acquisition. Cartels can be interpreted as the joint effort on the part of firms in an industry to drive prices higher than warranted under competitive conditions. In a seminal study, Stigler points out that, despite this advantage, firms may not collude (and form a cartel) because short-term deviations from collusion agreements yield significant short-term payoffs. One interpretation of this argument is that the free markets would dissuade any cartel agreements.<sup>2</sup>

<sup>1</sup> Competition Act of 2002. Retrieved 3 March, 2016 from [http://www.cci.gov.in/sites/default/files/cci\\_pdf/competitionact2012.pdf](http://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf)

<sup>2</sup> Stigler, J. (1964). A theory of oligopoly. *The Journal of Political Economy*, 72(1), 44–61.

Several studies have shown that cartels are indeed sustainable even under free markets.<sup>3,4,5,6</sup> Abuse of dominance arises when a firm utilizes its monopoly power in one market to extend it to the other markets; in other words, it impedes the competitive landscape in the other markets. Similarly, mergers and acquisitions, by their very nature, reduce the competition in the market. All these practices can harm consumer welfare and can arise out of free market condition. Therefore, a competition act is required in order to dissuade firms from undertaking any activity that harms consumer welfare significantly.

This colloquium brings together various articles on competition law and its implications. We start with an essay by Manas Kumar Chaudhuri on the emergence of competition law from its previous avatar of MRTP and the way forward. Chaudhuri is a leading lawyer of competition law and a partner in the competition practice at Khaitan & Company, one of India's leading law firms. He has also worked as a senior legal officer in both MRTP Commission as well as the Competition Commission of India (CCI) in its initial phase. His essay discusses the emergence of regulation of competition in India and the journey of the old MRTP Act as it metamorphosed into the Competition Act. Subsequently, he discusses the way forward for the current competition law. In the next essay, Payal Malik discusses the goals of competition law, specifically pertaining to the Indian

Competition Act. Malik is an Associate Professor of Economics at Delhi University. She was the Economic Advisor and Head of the Economics Division at the CCI for several years.

Given that firms operate across various countries, some cartel cases spread across various geographies spanning several jurisdictions. Ram Tamara and Avaantika Kakkar discuss such cartels that are predominant in the international arena, with specific reference to the alleged cartelization in gold and precious metals in the US market. Tamara is Vice President and Director of Indian operations at Nathan Economic Associates, an economic consulting firm based out of Washington, DC. He has significant experience in antitrust matters relating to the United States and the European Union (EU). Kakkar is a partner in competition practice at Khaitan & Co., Mumbai office. She has advised several leading Indian companies on competition law matters. The next essay by Chirantan Chatterjee discusses the relationship between competition law and intellectual property and innovation. Chatterjee is a faculty member in the Strategy Area at the Indian Institute of Management Bangalore. Two key aspects of antitrust litigation are: definition of relevant market and measurement of market power. Another aspect of antitrust law is calculation of damages that arise out of illegal behaviour. These issues directly relate to the economic theory. In this context, Shamim Mondal and Viswanath Pingali discuss the use of economics in antitrust litigation. Shamim Mondal is a faculty member at Alliance Business School with research interests in labour economics, competition, etc. Both Mondal and Pingali have worked as economic consultants on antitrust matters in the past. We close this colloquium with an essay by Daniel Sokol on setting up of compliance programmes in corporates. Sokol is a Professor at Levin School of Law, University of Florida. He is also a Senior of Counsel at Wilson Sonsini Goodrich and Rosati in their antitrust practice.

<sup>3</sup> Porter, R. H. (1983). A study of cartel stability: The joint executive committee, 1880–1886. *Bell Journal of Economics*, 14(2), 301–314.

<sup>4</sup> Rotemberg, J., & Saloner, G. (1986). A supergame-theoretic model of business cycle and price wars during booms. *American Economic Review*, 76(3), 390–407.

<sup>5</sup> Haltiwanger, J., & Harrington, J. E., Jr. (1991). The impact of cyclical demand movements on collusive behaviour. *The RAND Journal of Economics*, 22(1), 89–106.

<sup>6</sup> For a detailed review on empirical studies on cartel, see Levenstein, M. C., & Suslow, V. Y. (2006). What determines cartel success? *Journal of Economic Literature*, 44(1), 43–95.

# *MRTP Act to Competition Act: The Way Forward*

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**T**he Government of India, in terms of a Notification dated 16 April, 1964 under the Commission of Inquiry Act, 1952, constituted the Monopolies Inquiry Commission in 1965 (the Commission).<sup>7</sup>

The terms of reference were set out in the notification as follows:

1. *to inquire into the extent and effect of concentration of economic power in private hands and the prevalence of monopolistic and restrictive practices in important sectors of economic activity other than agriculture with special reference to the following:*
  - i. *the factors responsible for such concentration and monopolistic and restrictive trade practices;*
  - ii. *their social and economic consequences and the extent to which they might work to the common detriment; and*
2. *to suggest such legislative and other measures that might be considered necessary in the light of such enquiry, including, in particular, any new legislation to protect essential public interests and the procedure and agency for the enforcement of such legislation.*

The notification further authorized the Commission to report on any other matter bearing on any aspect of national economy or functioning of the private sector and financial institutions that the Commission may deem necessary to look into in connection with the terms of reference. The Commission was directed to submit the report by 31 October, 1965.

The Commission had submitted the report on 28 October, 1965 with a dissent note from Mr R C Dutt.

The Committee on Distribution of Income and Levels of Living, under the Chairmanship of Professor P C

<sup>7</sup> The Commission had the following members: K. C. Das Gupta (Chairman), G. R. Rajagopal (Member), K. R. P. Aiyangar (Member), R. C. Dutt (Member), and I. G. Patel (Member).

Mahalanobis, an eminent economist, by then had already examined the extent of concentration of economic power in India prior to the setting up of the Commission.

The terms of reference were limited and had kept the industries under the public sector undertakings and agriculture out of the purview of the scrutiny of the commission. The intent perhaps would not have been to cause any disruption in the development of the industries under the public sector since the Government of India would have spent initial sunk costs in establishing these undertakings until 1964, the date of the notification setting up this Commission.

Among the different manifestations of economic power in the other fields of economic activity, the Commission believed one manifestation to be important which was the achievement by one or more units in an industry of such a dominant position that they were able to control the market by regulating prices or output or eliminating competition. Another manifestation that was considered by the Commission was the adoption by some producers and distributors, even though they did not enjoy such a dominant position in the market, of business practices which restrained competition and thereby deprived the community of the beneficial effects of the rivalry between producers and producers, and distributors and distributors, to give the best services. The Commission appeared to have assessed the market conditions then prevailing in India by analysing such commercial practices that may have impeded the best utilization of the nation's means of production. The Commission very emphatically opined the market realities of India then prevailing inter alia as under:

Economic power may also manifest itself in obtaining control of large areas of economic activity, by a few industrialists by diverse means. Apart from affecting the economy of the country, this often results in the creation

of industrial empires, tending to cast their shadows over political democracy and social values.<sup>8</sup>

There was no doubt in the minds of the chairman and the other members of the Commission that the concentration of economic power was the central problem and monopolistic and restrictive trade practices may be appropriately considered to be 'functions' of such concentration. The Commission may have drawn a strong persuasive value from the Constitution of India more particularly from the Chapter IV dealing with the Directive Principles of State Policy. According to Article 39 (b) and (c):<sup>9</sup>

The State shall, in particular, direct its policy towards securing

- (a) .....
- (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
- (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The Commission tried to examine the causes of concentration and opined the following:

The causes of concentration of economic power in private hands and the attendant phenomena of restrictive and monopolistic practices are many and varied. In the remote past, concentration of economic power, in our country as also in foreign lands, flowed largely from kingly favours. As political democracy came more and more into its own, this source shrank in importance. This is not to say that the favours of the big men in politics—whether ministers in the Government or not—do not still play their part in concentrating economic power in the hands of a few persons. They do. But other factors, including the various activities of the Welfare State, have in modern times assumed a greater importance.<sup>10</sup>

One of the major recommendations of the Commission was enactment of the Monopolies and Restrictive Trade

Practices Act in 1969 (MRTP Act) and setting up of the MRTP Commission in 1970. The intent and purpose of the Act and the Commission were to inquire, investigate, and pass remedial orders against restrictive trade practices. The Act and the Commission lived up to September 2009,<sup>11</sup> but the jurisprudence so evolved, barring a handful of few cases, did not improve the market distortions more often than not caused by unilateral and coordinated conducts of enterprises.

## ECONOMIC LIBERALIZATION AND ITS EFFECTS IN INDIA

The core issues of the Indian economy in 2016 are largely similar to what the Commission opined in 1964–1965 in the foregoing. Unemployment, poverty, non-availability of basic health care and educational facilities, poor allocation of natural and national wealth, etc., continue to haunt Indians even today. In spite of similarity, perhaps, we have travelled a lot and experimented quite a few options to remedy, to the extent possible, the ills of concentration of economic wealth in the hands of a few private entities. The growth of state-owned enterprises (SOEs) between 1960 and 1990 was one such experimental activity. Economic liberalization of India in July 1991, however, opened, amongst other issues, a debate in India as to whether or not the growth of the SOEs was really able to measure the importance of efficiencies of enterprises and was simultaneously able to address the issues of competitiveness amongst enterprises in the markets in India. The debate became even more engaging when India decided to sign the World Trade Organization (WTO) global treaty on 1 January 1995. It was a sovereign function of the state;<sup>12</sup> as such, several economic legislations were considered and enacted in India in respect of certain selected sectors of industries of India. Securities, Insurance, Telecom, Electricity, Petroleum and Natural Gas, Airports Economic Regulation, etc., were brought within the ambit of specialized statutes and the authorities so created out of these statutes were kept at arm's length from the day-to-day control of the federal government. Level-playing fields were considered a necessity between SOEs and private enterprises after 1991.

<sup>8</sup> Government of India Press. (1965) *Report of the Monopolies Inquiry Commission 1965* (Vol. I) . Retrieved 3 March, 2016 from <http://reports.mca.gov.in/Reports/44-Report%20of%20the%20monopolies%20inquiry%20commission%201965,%20Vo1.-I-II.pdf>

<sup>9</sup> Conceptual relationship between the Fundamental Rights of Citizens (Chapter III) and Directive Principles of State Policy (Chapter IV) in the background of Preamble of the Constitution was inter alia enunciated in the *Keshavanda Bharati v. State of Kerala*, (1973) 4 SCC 225.

<sup>10</sup> This is the opening paragraph of Chapter II of the Report of the Commission.

<sup>11</sup> Competition Act 2002 got the Presidential assent on 13 January 2003, but the implementation of substantive provisions of the Act came into effect on 20 May 2009. The undecided cases of the previous regime continued to be adjudicated until the MRTP Act was finally repealed by an Ordinance of the Parliament in August 2009 making the same effective on 1 September, 2009.

<sup>12</sup> Article 253 of the Constitution of India.

Around that time, another interesting debate emerged as to whether or not the Monopolies and Restrictive Trade Practices Act, 1969 and the MRTP Commission should continue to regulate the monopolies and restrictive trade practices in India. A high-powered committee, headed by Mr S V S Raghavan (Raghavan Committee), was constituted in 1999 to assess some of the likely changes which may be necessary in combating the trade-related anti-competitive practices of the Indian enterprises in the post-1991 economic liberalization scenario and suggest/recommend a way forward including a legislative framework, if any.

### CONSEQUENCES OF THE RECOMMENDATIONS OF RAGHAVAN COMMITTEE

Raghavan Committee inter alia recommended repealing of the MRTP Act and enacting a modern competition law to meet the challenges, if any, of trade liberalization.<sup>13</sup> Article 19(1) (g) of the Constitution of India guarantees all citizens of India a right to practice any profession or to carry on any occupation, trade or business subject to the condition that the state shall in public interest impose reasonable restrictions to such freedom by enacting suitable legislations.<sup>14</sup> Article 301 of the Constitution of India, read with Articles 302 and

304(b), empower the Parliament to enact suitable laws to reasonably restrict freedom of trade throughout the territory of India. Thus, it emerges from the foregoing that the Parliament is empowered to impose reasonable restrictions upon enterprises from enjoying unfettered freedom of trade and commerce. Coupled with the recommendations of the Raghavan Committee and the Constitutional mandate, the Parliament enacted the Competition Act, 2002 in December 2002 which obtained the Presidential assent on 13 January 2003. The Competition Act is, thus, a legislation that imposes reasonable restrictions upon citizens and enterprises to the freedom of trade and commerce while operating in India. In view of the foregoing principles, it would be prudent to briefly examine the necessity of passing of the Competition Act in 2002. While enacting the Competition Bill, the Government of India inter alia observed the following:

India has, in the pursuit of globalisation, responded to opening up its economy, removing controls and resorting to liberalisation. As a natural consequence of this the Indian market has to be geared to face competition from within the country and outside. The Monopolies and Restrictive Trade Practices Act, 1969 has become obsolete in certain respects in the light of international economic developments relating more particularly to competition laws and there is a need to shift the focus from curbing monopolies to promoting competition.<sup>15</sup>

Comparison of some of the salient provisions of the two legislations (Table 1) may indicate the intent of the Parliament.

<sup>13</sup> Indian Competition Law (2000). *Report of the High Level Committee on Competition Policy and Law*. Retrieved 5 March, 2016 from [https://theindiancompetitionlaw.files.wordpress.com/2013/02/report\\_of\\_high\\_level\\_committee\\_on\\_competition\\_policy\\_law\\_svs\\_raghavan\\_committee.pdf](https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf)

<sup>14</sup> Refer to Civil Appeal No 4157 of 2015 [Kerala Bar Hotels Association v. State of Kerala 2015 SCC Online SC 1385] & [(2007) 10 SCC 306 Udai Singh Dagar and others v. Union of India and others].

<sup>15</sup> The Competition Act, 2002, p. 1 (Introduction).

**Table 1: Comparative Features of MRTP Act (1969) and Competition Act (2002)**

MRTP Act, 1969	Competition Act, 2002	Remarks
Genesis—Article 39(b) and (c) of the Constitution of India	Genesis—Item 21 of the List III of VII Schedule of the Constitution of India	Curbing monopolies to promoting trade-related competition
Monopolistic, restrictive, and unfair trade practices were considered illegal per se.	Anti-competitive agreements between enterprises and abuse of dominance by enterprises are prohibited but combinations between enterprises are permitted with a regulatory oversight.	Shifting from illegal per se to rule of reason ensured the industry a statutory right to defend the allegations on merit. Combination provisions in the earlier regime could not be effectively implemented but is absolutely important in the new regime.
Mandatory registration of prohibitory clauses of the agreements by the Director General (DG) Investigation and Registration (I&R) in terms of Section 35.	No such provision has been inserted.	In spite of mandatory registration clause, Section 37 of the MRTP Act by implication mandated the Commission to pass final orders without any registration—a serious defect in law.

<b>MRTP Act, 1969</b>	<b>Competition Act, 2002</b>	<b>Remarks</b>
No competition advocacy.	Competition advocacy is a statutory mandate under Section 49.	A unique feature of the new regime.
Cease and desist order was the only remedy with final appeal before the Supreme Court under Section 55. No individual liability provision existed in the law.	Pecuniary fines, division of dominant undertaking besides cease and desist orders, and two tiers of appeal with penalty against individuals if found responsible for the breach of law.	New regime is more effective in terms of compliance of the orders passed by the authorities.
No Leniency Programme or dawn raid existed	Leniency programme and dawn raids are part of the statute	Stronger law in respect of remedying cartels and bid rigging
No non-obstante clause existed.	Non-obstante clause is part of the Law and the Civil Court jurisdictions are barred by law.	More transparent than the previous regime.
DG (I&R) enjoyed suo motu powers of initiating investigation concurrently with the MRTP Commission.	No suo motu powers available with the DG.	DG CCI's role is restricted to factual investigation as per the directions given by the Commission.
Overlap between MRTP Commission and sector regulators neither existed nor needed to address since most of the sector regulators did not exist during the life time of MRTP Act.	Sections 21 and 21A provide the statutory mandate to harmonize overlap between regulatory regimes.	Unique feature in the new regime and can help avoiding forum shopping.
International cooperation policy was not part of the law.	It is part of the law and has already been implemented partially.	Helps implement principles of 'effects doctrine' (Section 32)

**Source:** Based on author's analysis of MRTP Act, 1969 and Competition Act, 2002.

## WAY FORWARD

The latest competition legislation of India is a civil legislation and mandates the Commission to abide by the principles of natural justice.<sup>16</sup> Cartels and bid rigging are the most pernicious anti-competitive practices, yet the law stipulates a rebuttable presumption regime in favour of the respondents. Thus, respondents in cartel or bid rigging allegations are mandated to be afforded opportunities of being heard by the DG and the CCI. Any departure from the legal mandate may prompt the appellate authorities to distinguish, on merit or on procedural grounds, the commission's orders in appeals which may slow down the evolution of the jurisprudence in India. The importance of analysing market economy concepts is paramount, especially in cases arising out of disputes in vertical chain and/or abuse of dominance. But the authorities should avoid ignoring robust documentary evidences of breach or no-breach in vertical restraint allegations and/or abuse of dominance cases and refrain from searching for economic theories and pass final orders on circumstantial economic theories only. Unless a proper balance is struck, the appellate authorities may not appreciate departures. Sections 35 and 53S unfortunately do not mandate professional economists to cause

appearance before the Commission and the Competition Appellate Tribunal (COMPAT) which complicates the problem further. The law mandates chartered accountants, cost works accountants, company secretaries and lawyers to represent cases of their clients before the CCI and the COMPAT, but it does not make identical provision for economists. In reality, a complex economic analysis should, for ends of justice, be presented by economists who prepared them. Unless the law is amended to this effect, the problem would remain unresolved. The COMPAT at several occasions upheld<sup>17</sup> the commission's orders but at some other times distinguished<sup>18</sup> many. The process of evolution of jurisprudence of the law is a continuing process. India is one of the last major common law democracies to adopt the modern competition law; therefore, it has the benefit of drawing persuasive values from matured jurisdictions. The international cooperation arrangements entered into between the CCI and its counterparts in the United States, Russia, European Commission (EC), Canada, and Australia may help in converging and developing international standards, whenever needed and wherever possible. Besides,

<sup>16</sup> Sections 36(1) and 36(2) of the Competition Act, 2002.

<sup>17</sup> For example, DLF and NSE MCX cases. Retrieved 15 January, 2016 from <http://compat.nic.in/JudgementsAndOrders.html>.

<sup>18</sup> For example, Cement Cartel, BCCI, Pharmaceutical sector cases, etc. Ibid.

the active participation by agencies in the International Competition Network (ICN) events may strengthen the larger interests of the dissimilar economies to adopt some common grounds in cross-border competition law issues for the larger consumer welfare.

Amidst opportunities, the Commission faces challenges with regard to lack of awareness amongst all important stakeholders about the newer methods of implementing the law. The most talked about challenge is collection of evidence against cartel and bid rigging.

The lesser penalty regime (LPR, identical to leniency programme) has not been able to evolve properly. The repeated delays in concluding the LPR applications may dampen the confidence of the future applicants. The first 'Dawn Raid' proceedings<sup>19</sup> initiated by the authority could not meet the objectives due to procedural infirmities.

Institutional memory loss due to shorter tenure of important functionaries including the chairperson and the other members is another challenge in the process of evolution of the law in India.

The merger control<sup>20</sup> regime has evolved better may be because of the non-adversarial 'regulatory' intent of the law unlike 'prohibitory' nature of adversarial enforcement provisions.<sup>21</sup> The debate in India continues as to

<sup>19</sup> Section 41(3) of the Competition Act 2002 empowers the DG, CCI to conduct unannounced raids in the early hours with warrant from the Chief Metropolitan Magistrate, New Delhi, for search seizure operation.

<sup>20</sup> The Competitions Act, 2002. Chapter II, pp. 8–11. Retrieved 1 March, 2016 from [http://www.cci.gov.in/sites/default/files/cci\\_pdf/competitionact2012.pdf](http://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf)

<sup>21</sup> *Ibid.*, pp. 5–7.

what roles and functions of the Commission matter in respect of 'market behaviour' and 'market structure'. Some believe it is 'regulatory' but others strongly believe that enforcement matters are adjudicatory; hence, it is a mix of the two.<sup>22</sup> To my mind, the best way forward for the young regime to grow within the confines of the statutory framework is to pass orders without any avoidable procedural errors and such a process could be the best competition advocacy for stakeholders in the formative years. The competition regime is unique and exclusive with civil courts' jurisdictions being barred.<sup>23</sup> This further necessitates avoidance of procedural errors more important than a mere wishful thinking.

Finally, a quote from two English barristers, Flynn and Stratford,<sup>24</sup> would be apt to conclude the article which is as follows:

It is also helpful to bear in mind the distinction between a restriction on *competition* (an economic concept) and a restriction on *conduct* (a concept which lawyers find easier to understand), especially since such restrictions can be discerned from contractual terms without deeper consideration of the underlying circumstances.<sup>25</sup>

<sup>22</sup> *CCI v. SAIL* judgment of the Supreme Court of India ([2010] 10 SCC 744). Retrieved 22 February, 2016 from <http://indiankanon.org/doc/346379/>

<sup>23</sup> Sections 60 and 61 of the Competition Act 2002 provide exclusive jurisdiction to the CCI to decide anti-competitive practices and civil courts' jurisdictions are barred by law. Hence, it is 'exclusive' by interpretation.

<sup>24</sup> Government of India. (2000, April 27). *Report of the high level committee on Competition Policy and Law* (File No.1/9/99.CL-V). New Delhi: Ministry of Law Justice and Company Affairs, Department of Company Affairs.

<sup>25</sup> Extracted from Mr Sudhir Mulji's dissent note in the Raghavan Committee Report.

# Competition Law in India: Developing Efficient Markets for Greater Good

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India's industrial policy today is a far cry from the pre-1991 era, characterized by static mis-allocation of resources—resulting in a dynamically inefficient system in so far as it impeded innovation, technical change, and growth. The virtually unconditional protection provided to domestic industry, together with the other aspects of the licensing regime, fostered a high cost industrial structure that was inefficient in utilization of resources and unable to compete internationally. The spectrum of reforms, which altered the economic architecture of our country, was designed to increase market contestability with the presumption that it would increase competitiveness of Indian industry and contribute to the overall economic growth.

This is not to say that liberalized markets can be presumed to be competitive per se. They can still be fraught with distortions caused by large monopolistic firms or groups of firms in concert. Such distortions break the link between liberalized markets and the productivity and innovation gains that they are believed to yield. Hence, the need for a robust competition law and policy for the development of efficient markets serving as an instrument of growth cannot be overstated.

Interestingly, therefore, with the channels of interaction between competition and economy getting uncovered, the two seemingly divergent disciplines of competition law and development economics are finding common ground. Till recently, promotion of competition in the markets was seen as an end in itself and not as an instrument of economic development. Developing countries now form the majority of jurisdictions that have enacted competition law statutes.

Linkages between firm-level innovation and economy have been established, recognizing the importance of competition for productivity and growth. The role of

well-functioning markets in achieving development goals has been recognized in the development literature as well. When government policies limit competition, more efficient companies cannot replace less efficient ones. The economic growth slows and nations remain poor.<sup>26,27</sup> It is in this milieu that Competition Law of India is situated and hence its instrumentality has to be understood in this context.

Given this rather distinct competition, efficiency, productivity, growth linkage accepted both in theoretical and empirical literature, can competition law enforcement in India adopt some bright line rules for applying the law? Should competition law be seen as squarely directed to the protection of the competitive process or should the protection of competition be viewed as an instrument in order to achieve 'consumer welfare'<sup>28</sup> and economic efficiency?

Robert H Bork captures the importance of finding goal(s) for competition law enforcement to establish a coherent body of jurisprudence in this statement:

Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else

<sup>26</sup> Lewis, W. W. (2004). *The power of productivity: Wealth, poverty, and the threat to global stability*. Chicago: University of Chicago Press, p. 103.

<sup>27</sup> Majoras, D. P. (2007, March 27). National champions: I don't even think it sounds good. *13th International Conference on Competition, Federal Trade Commission*. Retrieved 16 February, 2016 from [www.ftc.gov/speeches/majoras/070326munich.pdf](http://www.ftc.gov/speeches/majoras/070326munich.pdf)

<sup>28</sup> Consumer welfare does not necessarily imply consumer surplus, as that will be a very narrow and imperfect measure, given that consumer surplus is maximized in perfectly competitive markets which in many cases is neither an achievable nor a desirable goal of competition law. The notion is, thus, fuzzy but implies some notion of maximizing the utility of an average consumer in balance.



follows from the answer we give.... Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules.<sup>29</sup>

The distribution concern in the implementation of antitrust policy, if any, is limited to whether antitrust should adopt a 'consumer welfare' principle rather than a more general neoclassical 'total welfare' principle. In *The Antitrust Paradox*, Robert Bork famously argued that antitrust law should adopt what he termed a 'consumer welfare' standard for illegality, but then equated this standard with general welfare.<sup>30</sup>

Hovenkamp<sup>31</sup> clarifies the concept of consumer welfare standard:

The consumer welfare test is not a balancing test, in the sense that one must attempt to measure efficiency gains and losses and net them out. Under the test, if consumers are harmed (either by reduced output or product quality, or by higher prices resulting from the exercise of market power), then this fact trumps any offsetting gains to producers and, presumably, to others. Theoretically, even a minor injury to consumers outweighs significant efficiency gains. In this sense the consumer welfare test can be easier to administer on a case by case basis than general welfare tests. Even the consumer welfare test can be difficult to administer, however, when a practice impacts different groups of consumers differently. Practices that involve price discrimination, such as variable proportion ties or patent field of use restrictions, typically have this result.<sup>32</sup>

It is obvious that different views of competition imply a different role for antitrust law, which in turn affects the criteria according to which the law is applied. Different policy alternatives can guide antitrust enforcement in developing countries such as India. These include efficiency-based goals (allocative, productive, and dynamic efficiency) and non-efficiency-based goals (protecting small businesses; achieving international competitiveness; eradicating poverty; and promoting fairness, equality, and justice). Jurisprudence emerging from South Africa provides some lessons regarding the

pursuit of non-efficiency goals by competition authorities. Some commentators have observed that 'the pro-poor and pro-development features of its competition law have not stood up robustly in the courts—they are not doing the job for which they were intended'.<sup>33</sup>

Given the variety of goals used to guide antitrust enforcement and that many of them are incompatible, it is highly essential for an enforcing authority to frame its guiding policy in a clear and transparent manner. Such clarity and transparency will allow the enforcement process to be stable, predictable, and accountable. When these aspects are lacking, especially in developing countries, antitrust enforcement could be susceptible to cronyism and nepotism.<sup>34</sup>

In this background, this article discusses the normative basis of the enforcement of the salient provisions of the Competition Act, 2002.<sup>35</sup>

## NORMATIVE BASIS OF THE COMPETITION ACT, 2002

### Decoding the Preamble of the Act

The Preamble of the Act provides an institutional context to the CCI. It states: *An Act to provide, keeping in view of the economic development of the country.* This is a rather unique and unambiguous endorsement of the link between the micro functioning of individual markets and the larger development imperatives of the country. This is also to affirm that competition is not an end in itself, but a means to achieve greater economic goals.

The mandate of the commission, as enshrined in the Preamble of the Act, is (a) to prevent practices having adverse effect on competition, (b) to promote and sustain competition in markets, (c) to protect the interests of consumers, and (d) to ensure freedom of trade carried on by other participants in markets. All four,

<sup>29</sup> Bork, R. H. (1978). *The antitrust paradox: A policy at war with itself*. New York: Basic Books.

<sup>30</sup> 'Total welfare' refers to the aggregate value that an economy produces, without regard for the way that gains or losses are distributed.

<sup>31</sup> Hovenkamp, H. J. (2011). Distributive justice and consumer welfare in antitrust. Retrieved 12 February, 2016 from <http://ssrn.com/abstract=1873463>

<sup>32</sup> Price discrimination resulting in increased output is generally welfare enhancing.

<sup>33</sup> Gal, M. S., & Fox, E. M. (2014). Drafting competition law for developing jurisdictions: Learning from experience. (New York University Law and Economics Working Papers Paper No. 374). Retrieved 12 February, 2016 from [http://lsr.nellco.org/nyu\\_lewp/374](http://lsr.nellco.org/nyu_lewp/374)

<sup>34</sup> Waked, D. I. (2015). Antitrust goals in developing countries: Policy alternatives and normative choices. *Seattle University Law Review*, 38(3), 6.

<sup>35</sup> An attempt is made to decipher the provisions of the Act and extract the underlying objectives as objectively as possible but one cannot escape value judgements in such an exercise.

albeit distinct objectives, have to be seen in unison. Let us try to decode these objectives and try and theorize what goal(s) emerge when one sees these distinct parts as sum of parts of a whole.

Like many other jurisdictions, maintenance of the market processes and rights to engage in commerce are accorded a priority in the Indian Competition Act as well. These are seen as synonymous with striking down or preventing unreasonable restraints on competition. Other associated objectives are freedom to trade, freedom of choice, and access to markets.

However, after competition laws were enacted, a school of thought developed that justified competition laws on the grounds that they resulted in improvements in economic efficiency. In fact, the logic of static analyses of efficiency in markets and the rhetoric of 'protecting the competitive process' as well as a focus on consumer welfare often went hand in hand. Posner,<sup>36</sup> for example, argued in his seminal treatise on US antitrust law that the 'fundamental objective' of such law is 'the protection of competition and efficiency'. This perspective gained considerable currency and accounts for the central role that static economic efficiency still plays in many accounts of competition law and policy.<sup>37</sup>

Is the Commission's intervention in markets limited to protect individual competitors or incumbents or to protect competition as a process to promote efficient markets for the consumer? The above-mentioned unison of the goals of the Act are also parsed in the Preamble of the Act and further reiterated in Section 18 of the Act which states:

Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India.

Antitrust is viewed as a public policy aimed at fostering a public good, that is, competition. Yet, competition is a fuzzy concept and some naive or narrow notions of competition may induce interventions that are against the ultimate intended goal of the law. We believe the

<sup>36</sup> Posner, R. (1978). *Antitrust law: An economic perspective*. Chicago: University of Chicago Press, p. 226.

<sup>37</sup> Evenett, S. J. (2005). What is the relationship between competition law and policy and economic development? In H. D. Brooks & S. J. Evenett (Eds), *Competition policy and development in Asia* (pp. 47–70). London: Palgrave Macmillan.

Preamble of the law has unequivocally endorsed the consumer as central focus for enforcement, but has also set the consumer welfare standard in the context of economic development.

Thus, when seen in conjunction with achieving the goal of economic development, static allocative efficiency (consumer welfare), in certain cases, may have to be forgone for dynamic efficiency. Given the inconsistency between allocative efficiency and dynamic efficiency, the Preamble of the law allows for a wider interpretation of efficiency, encompassing both static and dynamic. Accordingly, the Preamble sets the tone and tenor of the instrumentality of the law.

An emphasis on economic goals inevitably brings economics to bear, where antitrust issues are framed in terms of economic concepts such as market power, competitive effects, entry, and efficiencies, and to interpret the detailed facts involving a particular industry and specific challenged practices through application of the logical framework provided by economic theory. This approach requires a rigorous analysis about the effects of the challenged conduct on competition: identifying the market or markets in which competition has or will likely be harmed and the mechanism by which the challenged conduct does so.<sup>38</sup>

The view that competition law should aim to promote some form of economic welfare is intrinsically linked to the influence of economics and in particular welfare economics, consumer theory and related fields in competition law analysis.<sup>39</sup>

In what follows, we briefly provide our interpretation to the underlying goals of the enforcement of the major sections of the Act.

## ANTICOMPETITIVE AGREEMENTS

Section 3 of the Act deals with two kinds of agreements, which can be in contravention of the Act. Section 3(3) of the Act deals with agreements amongst horizontally

<sup>38</sup> Baker, J. B., & Bresnahan, T. (2006, September) *Economic evidence in antitrust: Defining markets and measuring market power* (Stanford Law and Economics Olin Working Paper No. 328). Retrieved 12 March, 2016 from <http://ssrn.com/abstract=931225> or <http://dx.doi.org/10.2139/ssrn.931225>

<sup>39</sup> Lianos, I. (2013, January). *Some reflections on the question of the goals of EU Competition Law* (CLES Working Paper Series 3/2013). Retrieved 21 February 2016 from [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2235875](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2235875)

placed firms such as bid rigging, collusive bidding, cartels, etc. These agreements are dealt on a presumptive standard rebuttable by the parties involved in such agreements. A strict presumptive standard, and rightfully so, is based on the premise that such agreements are most pernicious to consumer and hence have to be dealt severely.

Agreements between firms operating at different levels in the production/distribution chain such as between manufactures and distributors, manufacturers and retailers, distributors and retailers, etc., are subject of Section 3(4) of the Act. These agreements are generally employed to deal with the problems arising in a vertical relationship, where individual self-interest of the manufacturer and distributor may sometimes conflict with their joint interest. These vertical agreements can, therefore, align incentives of the downstream firms with that of the upstream firms.

However, such agreements may also result in reduction in competition at the manufacturer and/or distributor level. Unlike horizontal agreements that are considered illegal *per se*, an 'effects based approach' is followed to evaluate vertical agreements as they have both positive and negative effects on competition and hence on the consumer as well.

The commission shall, while determining whether an agreement *has an appreciable adverse effect* on competition under Section 3, have due regard to all or any of the following factors, namely

1. *creation of barriers to new entrants in the market;*
2. *driving existing competitors out of the market;*
3. *foreclosure of competition by hindering entry into the market;*
4. *accrual of benefits to consumers;*
5. *improvements in production or distribution of goods or provision of services;*
6. *promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.*

Section 19(3) (d), (e), and (f) clearly provides for balancing the observed anticompetitive effect of conduct of such vertical agreements with the accrual of benefits to the consumer, efficiency gains for the producer, and the development impact. Clearly, the determination of an appreciable adverse effect on competition requires the commission to take into consideration both

the efficiencies generated and the effect of the agreements on consumer welfare. Many purely vertical practices including vertical territorial restraints and many instances of tying or exclusive dealing may not result in higher consumer prices at all and have efficiency benefits that serve to explain them. Balancing in such cases is easy and in any case welfare of the consumer can be given more weightage; so, in no case can consumer harm be traded off for some firm-level efficiency.

## ABUSE OF DOMINANCE

According to many observers, there is no clarity in the Act whether a *per se* illegality (form-based approach inference drawn based on examination of the formal features of the impugned conduct) or a *rule of reason* (effects-based approach decision based on holistic assessment including actual or probable anticompetitive effects on relevant market) is to be applied in the adjudication of Section 4 of the Act.

The High-level Committee on Competition Policy and Law (Raghavan Committee Report of May 2000) states that the key questions for adjudication on abuse of dominance are as follows:<sup>40</sup> (a) How will the practice harm competition? (b) Will it deter or prevent entry? (c) Will it reduce incentives of the firm and its rivals to compete aggressively? (d) Will it provide the dominant firm with an additional capacity to raise prices? (e) Will it prevent investments in research and innovation? (f) Do consumers benefit from lower prices or greater product and service availability?

Clearly, the committee envisaged an effects-based approach in the application of Section 4 of the Act. This approach takes into consideration the fact that many business practices may have different effects in different circumstances: distorting competition in some cases and promoting efficiencies and innovation in others. A competition policy approach that directly confronts this duality will ensure that consumers are protected (through the prevention of behaviour that harms them) while promoting overall increased productivity and growth (since firms will not be discouraged in their search for efficiency).

<sup>40</sup> S.V.S. Raghavan Committee Report (2000). *Report of High Level Committee on Competition Policy and Law* (section 4.5 p. 38). Retrieved 16 March from [https://theindiancompetitionlaw.files.wordpress.com/2013/02/report\\_of\\_high\\_level\\_committee\\_on\\_competition\\_policy\\_law\\_svs\\_raghavan\\_committee.pdf](https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf)

By focusing on the effects of a firm's actions rather than on the form that these actions may take, an economics-based approach makes it more difficult for companies to circumvent competition policy constraints by way of attempting to achieve the same end results through the use of different commercial practices. At the same time, this approach provides a more consistent treatment of practices, since any specific practice is assessed in terms of its outcome and two practices leading to the same result will, therefore, be subject to a comparable treatment.

Abuse of dominant position contravention requires competition authorities to show the presence of significant anti-competitive consumer harm, while the dominant firm should bear the burden of establishing credible efficiency arguments. Competition authorities when applying the law have to be careful that statutory provisions do not unduly thwart pro-competitive strategies. Developing a consistent theory of consumer harm provides a logically consistent approach to the assessment of any impugned anti-competitive conduct. Second, it makes it much harder for internally inconsistent or speculative competition concerns to survive the process of assessment.<sup>41</sup>

The explanation of Section 4(2) (a) (i) and (ii) also allows for a rule of reason approach in the application of the law by allowing efficiency enhancing pro-competitive discrimination.

Explanation—For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to *meet the competition*.<sup>42</sup>

Section 19(4) that lists the factors for the assessment of a dominant position by the commission among which 19(4) (l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition; (m) any

other factor which the commission may consider relevant for the inquiry—provide sufficient flexibility to the commission in interpreting dominance.

## REGULATION OF COMBINATIONS

In most jurisdictions, horizontal mergers are evaluated under a *rule of reason* analysis based on the presumption that they often have important efficiency benefits. This is true even in the Indian competition law. As per Section 20(4), for the purposes of determining whether a combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market, the commission shall have due regard to several factors amongst which the following two spell out the philosophy of the merger regime envisaged by the Act:

20(4) (m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition; 20(4)(n) whether the benefits of the combination outweigh the adverse impact of the combination, if any.

In as much as the above-mentioned sections go, clearly, a total welfare standard has been proposed. The country's Finance Minister at a merger workshop organized by the commission also endorsed this. According to him, as long as there is contestability from imports, merger regime should allow for creation of some threshold level of scale to make Indian firms globally competitive.

However, predicting long-run outcomes is a highly speculative venture, while assessment of consumer losses is more-or-less a sure thing. Predicting and quantifying post-merger efficiencies is an extraordinarily difficult task. Here too, competition law allows for giving weight to consumer welfare—as price rise is a factor for assessment of effects of mergers but efficiency and innovation effects are also very crucial for assessing the competitive effects of the merger.

## COMPETITION LAW AND INNOVATION INTERFACE—QUEST FOR DYNAMIC EFFICIENCY

The importance of dynamic efficiency as a legitimate and compelling objective of competition policy has been pointed out in literature as well. As mentioned in the introduction to this article, competition law cannot be seen in isolation from the development goals

<sup>41</sup> Gual, J., Hellwig, M.; Anne, B., Polo, M., Rey, M. P., Schmidt, K., & Stenbacka, R. (July, 2005). *An economic approach to Article 82* (Report by the Economic Advisory Group for Competition Policy [EAGCP]).

<sup>42</sup> It is italicized to add emphasis that pro-competitive strategies that do not harm the consumer are not frowned upon by the law.

of a country such as ours. Pursuit of static efficiency, where competition process aims to achieve immediate welfare objectives with no long-run trade-offs, may not be able to serve the objective of economic development. For instance, Singh<sup>43</sup> argues that competition policy in developing economies should support the overall development path of an economy emphasizing dynamic efficiency goals.

If the competition authority in its capacity as an off-market regulator preserves and promotes a process that ensures competition, it can, thus, act as a driving force such that firms will aim to innovate to gain a cost advantage, to differentiate their products, and/or to bring new products to the marketplace. Competition is, arguably, the strongest incentive for firms to innovate.

However, innovation requires appropriate rewards for successful innovations, for instance, when innovations are significant enough, by placing the innovator in a quasi-monopoly situation, generating large rent opportunities or by granting the innovator intellectual property rights. The link between competition and innovation is, therefore, a complex one, and one that is mediated by the intellectual property rights (IPRs) regime. Allowing fragile monopolies to reward innovation (the abuse of which can be addressed by contestability) is a tight rope walk by the Competition Commission, keeping in mind the dynamic efficiency and long-term productivity implications of the same.

This emphasis on the dynamic aspects of change, the recognition of the central role of the entrepreneur, is in direct conflict to the price theory's focus on static consumer surplus and competition regulation's traditional preoccupation with consumer choice.

In adjudicating such cases, it may be important to ascribe to a dynamic view of competition—concentrated markets will have to be traded off for consumer benefit. One guiding principle that can perhaps be adopted is that only when there are clearly identified concerns to the consumer can an intervention be deemed to be an appropriate regulatory response—and even then only to a degree proportionate to the concern. Regulatory response should exclusively target objectionable activities that hurt consumers (not protect some competitors)

<sup>43</sup> Singh, A. (2002, September 18). *Competition and competition policy in emerging markets: International and development dimensions* (G-24 Discussion Paper Series, Paper No. 18). New York and Geneva.

leaving other pro-competitive conduct that benefits consumers unregulated.

## CONCLUSION

The social goals impacting the interpretation and implementation of the Indian competition law are evolving and are highly dependent on the institutional and political contexts. However, it is important that the application of law be guided by more objective economic goals for it to serve and what better objective can this law fulfil other than an 'efficiency' objective. Adopting an 'economic approach' to the application of competition law provides a reasonably sound and competent framework for generating consumer welfare and economic efficiency.

In disposing of a Civil Appeal no. 7779 of 2010 (*CCI v. SAIL*), the Hon'ble Supreme Court emphasizes the pursuit of efficiency as the objective of the Indian Competition law tracing its history. In its opening paragraphs, the judgement notes:<sup>44</sup>

The earlier Monopolies and Restrictive Trade Practices Act, 1969 was not only found to be inadequate but also obsolete in certain respects, particularly, in the light of international economic developments relating to competition law.... The main objective of competition law is to promote *economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences*. The advantages of perfect competition are threefold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices. These factors by and large have been accepted all over the world as the guiding principles for effective implementation of competition law. (emphasis added)

The Court observes that the main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of a market responsive to consumer preferences. While highlighting the aims of competition law, in the *CCI v. SAIL* judgement, the Supreme Court makes a reference to the relevant laws of other jurisdictions including that of United States, United Kingdom, and Australia. It would not be far-fetched to argue that the court has indirectly hinted that, in future, it shall definitely

<sup>44</sup> The complete judgment was retrieved 15 January, 2016 from <http://judis.nic.in/supremecourt/imgs1.aspx?filename=36828>.

take into account the competition law jurisprudence developed in these jurisdictions while deciding contentious issues.<sup>45</sup>

It would be a mistake to deploy competition law in service of an income distribution and reallocation of resources from efficient firms to smaller firms to maintain some 'ideal' number of firms. The baggage of a planned economic development, where the winners and losers are chosen by command and control mechanism, cannot be transplanted to this modern law. Competition law is an instrument of a capitalist as against a socialist economy and is best suited to promote economic development by promoting efficiency.

<sup>45</sup> Retrieved 12 March, 2015 from <http://competitionlawyer.blogspot.in/2010/09/cci-v-sail-supreme-court-gets-it-right.html>

The Second Theorem of Welfare Economics is a good guide for establishing the objectives of competition law. The implication of the theorem is that the problem of distribution and efficiency can be separated. Competition law is best suited to address the latter. Issues of equity can be addressed by rearranging endowments. In the real world, we can rearrange endowments by lump-sum transfers. Lump-sum transfers are tax/subsidy policies that do not distort competitive prices. Thus, an efficient tax policy and other instruments can serve this role. Let the markets perform the allocative/development role, where prices determined in a competitive economic system indicate relative scarcity. A problem with admitting alternative goals is that the resulting framework becomes less robust and more susceptible to interest group 'capture'.

## *Global Cartels and their Effect on India*<sup>46</sup>

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**C**artels, which are essentially agreements between sellers to not compete but instead collude or between suppliers in a supply chain to the detriment of their customers, are dealt seriously by competition regulators around the world. Investigations lead to fines and even criminal actions in certain countries like the United States, Israel, and Brazil where it is considered to be a criminal activity.

While fines are imposed and collected by the competition authorities, only some countries allow customers who purchased from the cartelists to sue for and recover damages suffered by them. The United States has a long history of allowing the affected parties to sue the cartelists to recover damages through private actions. The EU is paving the way for private actions through a

directive issued by the EC in November 2014. In India, the law allows for purchasers (from a cartel) to sue for damages once the COMPAT finds a cartel following an appeal of the CCI's decision in a cartel investigation.

It is not uncommon to find cartels involving multinational companies operating across national boundaries. Such international cartels affect customers who are spread across the world. These cartels are investigated and—in several instances, with active cooperation among various national competition authorities—are fined by the jurisdictions where the cartels operated.

In recent times, several major competition authorities including the US Department of Justice (DoJ), the Federal Trade Commission (FTC), and the EC have investigated and imposed fines on global cartels involving automotive parts, air cargo, air passengers, car glass, London Interbank Offered Rate (LIBOR), foreign exchange benchmark rate manipulation, etc.

<sup>46</sup> Disclaimer: Views expressed belong to the authors and do not represent the views of their organizations.

The fines imposed in some of these cases are staggering—the DoJ imposed fines of \$2 billion in the auto-parts case, while the EC fined Euro 953 million on the automotive bearings cartel; global fines, penalties, and disgorgements in the LIBOR/Euribor cartel amounted to \$3.7 billion; four of the five banks that were part of the foreign exchange rate manipulation cartel have offered to pay \$2.5 billion in fines to the DoJ. These fines do not, however, reflect or are indicative of the damages suffered by the customers of these cartels.

While bringing damages, actions are fairly straightforward when the seller and the purchaser who are engaging in the transaction belong to the same country, and when the transaction is conducted within the confines of the country's border; the jurisdictional issues get murky when the nationality of the seller and the buyer is not the same and the transaction cuts across borders. In other words, can an Indian company that bought from an international cartel that is being sued in the United States bring a damage claim in the United States? The case law in the United States indicates that this may not be possible. However, the situation in the EU might be different. In a recent judgement, the European Court of Justice (ECJ) has ruled that cartel damages claims can be brought in the EU member country where the cartelists are domiciled.

## GLOBAL CARTELS AND INDIA

Given the recent spurt in allegations of manipulation (and cartelization) of various globally used financial benchmarks including the foreign exchange, precious metals, derivatives and oil indices, and finding of global cartels in air cargo, auto-parts, etc., there is a strong likelihood that companies and customers in India might have been affected by these anticompetitive acts. From the standpoint of Indian customers, two key questions need to be answered. First, if the global cartelists are selling their goods and services to companies and consumers in India at the cartelized prices either in India or abroad, then does the CCI have the jurisdiction to investigate and impose fines on these companies, even if they operate from a foreign country? According to Section 32 (b) of the Competition Act, the CCI can inquire into acts taking place outside India that might have adverse effects on competition in India.

Second, can Indian customers of foreign cartels bring damage claims in the foreign jurisdictions where the cartels operated? As we had stated earlier, this may not

be possible in the United States, but it might be possible in the EU member states. Based on the 21 May 2015 ECJ judgement in the *CDC v. Akzo Nobel and others*, it might be possible to bring claims in the EU jurisdiction where the cartelists are domiciled or in the jurisdiction where the casual event (cartel agreement) happened. Therefore, to the extent that there are cartels that are operated by EU domiciled companies or the main cartel agreement/s were hatched in one of the EU member states, then Indian customers of those cartels may be able to bring claims in those jurisdictions.

We now present an illustrative case of a cartel in the setting of the benchmark price for gold in London, UK—if proved to have existed through the investigations of the US and European authorities—that could have widespread impact in India. The following is a description of how the London Gold Fix is alleged to have been manipulated, and what the repercussions to various parties would be if the allegations were indeed true!

## RECENT LONDON GOLD FIX MANIPULATION

Gold is traded on various exchanges around the world, and prices are set—based on supply and demand for gold—on a 24-hour cycle. In 1919, the Bank of England established the London Gold Fix (Fix) to set benchmark prices that could be used to value transactions involving buying and selling of gold, and to value financial instruments that had gold as the underlying asset.<sup>47</sup> In 1987, the London Bullion Market Association (LBMA) was set up by the Bank of England to manage the fix thereafter.<sup>48</sup>

The fix was set through a process where five members of the LBMA—Bank of Nova Scotia (BNS), Barclays Bank Pvt. Ltd. (Barclays), Deutsche Bank AG (DB),<sup>49</sup> HSBC Bank Pvt. Ltd. (HSBC), and Société Générale (SG)—meet twice a day at 10:30 AM GMT and at 3:00 PM GMT, either personally or through conference calls to conduct an auction for the purchase and sale of gold bars.<sup>50</sup> The chairman of the auction called out a price

<sup>47</sup> Consolidated Amended Class Action Complaint. (2014, December). In *Re: Commodity Exchange Inc., gold futures and options trading litigation* (Para 72).

<sup>48</sup> London Bullion Market Association Website. *What we do*. Retrieved 14 December, 2015 from <http://www.lbma.org.uk/what-we-do>

<sup>49</sup> Deutsche Bank discontinued its membership in the fix in May 2014.

<sup>50</sup> Consolidated Amended Class Action Complaint. (2014, December). In *Re: Commodity Exchange Inc., gold futures and options trading litigation* (Para 1).

based on the spot prices prevailing just before the fix and asked the members to submit the quantity of gold bars they were willing to buy or sell at that price. Depending on the excess demand or supply at each price that was announced, the chairman moved the price up or down till the demand–supply imbalance was within 50 bars. The price where the demand–supply imbalance was less than 50 bars was then announced by the chairman as the official AM or PM London Gold Fix.

In 2014, based on the findings of researchers studying the movement of gold spot and futures prices and the AM and the PM fixes, it was alleged that the AM and PM fixes were being manipulated by the members present at the fix to their advantage. The fact that the members (who are part of the fix) are privy to the prices that are fixed by the chairman during the auction process before they are announced to rest of the market and that they have information of the relative buy and sell positions of each other provide them the opportunity to coordinate and take positions and move the fix in a direction that benefits them.

Specifically, the findings show that large downward spikes in gold prices before, during, and after the PM fixing were more in number than during any other time of the day.<sup>51</sup> The analysis indicates that during the years 2001–2013, anomalous statistically significant drop in gold prices surrounding and during the PM fix were observed in 60–80 per cent of the days.<sup>52</sup> While there were several instances when the AM fix was also found to be abnormally lower than the spot and futures prices immediately preceding and following the fix, it was fewer in number as compared to the number of downward spikes pertaining to the PM fix (in case of the latter, the downward spiked were four times the number of downward spikes pertaining to the AM fix).<sup>53</sup> More attention has been paid to the PM fix as it coincides with the start of the trading day at the Commodity Exchange Inc. (COMEX) in New York.

This allegation is currently being investigated by major regulatory authorities including the United States District Court Southern District of New York;<sup>54</sup> the US DoJ; the Commodity Futures Trading Commission; the Swiss Financial Market Supervisory Authority (FINMA);

the Swiss Competition Commission (WEKO);<sup>55</sup> the UK Financial Conduct Authority; and the Federal Financial Supervisory Authority/Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin).<sup>56</sup> UBS AG (UBS) has already settled over alleged trader misbehaviour at its precious metals trading business.<sup>57</sup>

## IDENTIFYING EFFECT OF MANIPULATION IN INDIA

India is one of the largest consumers of gold in the world. Driven by an increasing demand for jewellery as well as gold's role as an asset and a hedge against inflation, in 2014, India's demand for gold amounted to a staggering 842.7 tonnes—nearly 29 tonnes higher than the next largest consumer of gold, China.<sup>58</sup> Despite the increasing demand for gold in the country, gold mining and production remain limited and restricted to a few regions across India.<sup>59</sup> As a result, there is a high dependence on imports.

During a 10-year period starting from 2003, gold imports rose at a compound annual growth rate of 25 per cent.<sup>60</sup> By 2013, gold imports had the second-highest shares in imports (11%) of the total country's imports.<sup>61</sup> Gold is primarily imported in unwrought or semi-manufactured form, although some amount of the gold imports are in the form of jewellery.<sup>62</sup>

Taking into consideration the high dependence on imports by India to meet its demand for gold and the dominance of the London Gold Fixing price as an

<sup>51</sup> Ibid. (Para 10).

<sup>52</sup> Ibid. (Para 12).

<sup>53</sup> Ibid. (Para 111).

<sup>54</sup> Ibid. (Para 26).

<sup>55</sup> Franklin, J. (2015, February 24). *Swiss watchdog says looking at possible gold market manipulation*. Reuters US. Retrieved 14 December, 2015, from <http://www.reuters.com/article/2015/02/24/us-swiss-banks-probe-idUSKBN0LS1RW20150224>

<sup>56</sup> Sanderson, H., & Chon, G. (2015, February 23). *US investigates banks' precious metals trading*. *Financial Times*. Retrieved 12 December, 2015 from <http://www.ft.com/intl/cms/s/0/01bdc380-bb79-11e4-b95c-00144feab7de.html#axzz3cSTSMjvb>

<sup>57</sup> Schäfer, D., & Shotter, J. (2014, November 9). *UBS to settle allegations over precious metals trading*. *Financial Times*. Retrieved 12 December, 2015 from <http://www.ft.com/intl/cms/s/0/428e1400-6804-11e4-bcd5-00144feabdc0.html#axzz3cSTSMjvb>

<sup>58</sup> Sharma, M., & Ananthalakshmi, A. (2015, February 12). *India likely to keep lead over China in gold consumption—WGC*. Reuters India. Retrieved 14 December, 2015 from <http://in.reuters.com/article/2015/02/12/gold-wgc-asia-idINKBN0LG0A120150212>

<sup>59</sup> Gupta, S., Pant, S., Hundekari, N., Roy, S., Pansari, M., Garg, N., & Chakrabarty, A. (2013, November). *All that glitters is gold: India jewellery review 2013* (A FICCI-AT Kearney Report; p. 15).

<sup>60</sup> Ibid., p. 11.

<sup>61</sup> Ibid., p. 13.

<sup>62</sup> Ibid., p. 15.



international benchmark price, it is conceivable that the users of imported gold in the country may be affected by the manipulation of gold prices in the London gold market. The following are the users of gold who could potentially be harmed by any manipulation of the London gold fix.

- *Miners/Refiners:* As mentioned above, gold mining and refining in India is limited to a few regions. In 2014, only one gold mine (Hutti in Karnataka) was in operation and produced a mere 3 tonnes of gold per annum.<sup>63</sup> Out of the 1,000 tonnes of gold consumed in India, only 150 tonnes (15%) are refined domestically.<sup>64</sup> The reason for the low number of mines and thus low production levels is the high costs of mining gold including the regulatory hurdles that are encountered, especially with respect to obtaining licenses.<sup>65</sup> The insignificance of miners in the overall Indian gold market would, thus, not likely be severely affected by the manipulation of gold prices in the London gold market.
- *Importers:* Due to the high demand for gold jewellery and investments and limited domestic mining and production in India, a vast amount of gold is imported. In fact, more than half of India's demand for gold is met by imports. In India, gold can only be imported by certain nominated banks (there are 36 authorized banks), agencies, bullion banks, and select premier trading houses (8 select organizations).<sup>66</sup> The Reserve Bank of India (RBI), which is the country's central bank, permits only nominated banks/agencies to import gold on a consignment basis.<sup>67</sup>
  - Importers charge a commission for importing gold on behalf of purchasers of gold in India. In certain cases, the commission tends to be a percentage of the quantity of gold imported and in certain other cases, it is a percentage of the value of gold imported.

<sup>63</sup> Nirmal, R. (2014, October 19). Is India sitting on a gold mine? *The Hindu Business Line*. Retrieved 12 October, 2015 from <http://www.thehindubusinessline.com/features/investment-world/is-india-sitting-on-a-gold-mine/article6516883.ece>

<sup>64</sup> Mayenkar, S. (2014, May 16). First Indian gold refiner approved to join LBMA standard. *Reuters India*. Retrieved 14 October, 2015 from <http://in.reuters.com/article/2014/05/16/uk-india-gold-idINKBN0DW12J20140516>

<sup>65</sup> Op. cit., Nirmal, R. (2014).

<sup>66</sup> Op. cit., Gupta, S. et al. (2013).

<sup>67</sup> Reserve Bank of India (2015, February 18). *Guidelines on import of gold by nominated banks/agencies*. (p. 1). Retrieved 12 October, 2015 from <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=9573&Mode=0>

- The London fix prices are typically used in valuing the gold that is being imported. If the research findings that were reported earlier are true, then in most cases the manipulation resulted in the London fix being set at a price lower than what would have prevailed absent the manipulation. This implies that if the importers' commission is calculated on the basis of this lower (manipulated) price, then the importers would suffer damages as a result of the commission lost.
- *Gold exchange-traded funds (ETFs)*, as mentioned earlier, issue securities that track an industry index, a commodity or a basket of assets which are on an exchange. The fund managers are compensated by the investors for managing the fund. Typically, fund managers earn a fee that is based on the value of fund, that is, the returns to investors.
  - Our research indicates that the RBI stipulates the use of the London fix for valuation of the ETFs. If the manipulation of the London Fix had the impact of artificially reducing the price of gold, then it would have resulted in lower valuations of the gold ETFs. This lower valuation would likely impact (downward) the fee due to the fund managers.

While what has been described above is a hypothetical scenario, assessing who would be impacted, and whether damages were, in fact, suffered and if so, how much, requires an in-depth analysis of evidence of the alleged manipulation, the mechanism of the alleged manipulation, and micro-level trading data.

## CONCLUSION

The bottom-line is that Indian companies that are operating in global markets have to keep an eye out for situations where they are likely to be affected by global cartels. Not only should the CCI be looking to investigate anti-competitive acts taking place in foreign countries that are detrimental to Indian companies and consumers, but Indian companies should be aware of the damages they suffer from such anticompetitive behaviour and the recourse they have to recover those damages. In a recent trend in the EU, large companies such as Michelin, and Deutsche Bahn (a German railway company) have been pursuing claims—and successfully so in some cases—to recover damages from cartelists in various EU member states. This could be the case for Indian companies as well.

# Rushing for Gold or Illusion? Patent Laws, Prizes and Innovation in India Circa 2016

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India has been contesting with many Western economies, notably the United States, for some time now on what should be the country's ideal within-market regime for IPR. Going back to the General Agreement on Tariffs and Trade discussions, pre-1995, IPR implementation in India has undergone shifts on paper over time, but the grouse from Western stakeholders that enforcement of stronger IPR remains far less than optimal, still continues. One recent case, where this issue is again manifesting is in the case of the Government of India with Monsanto, regarding the licensing fees that the latter is charging farmers for patent protected genetically modified seeds.<sup>68</sup> These discussions on IPR go beyond the agricultural sector, however, with repeated conflict zones appearing in the case of medicines, starting with the perverse outcome for the multinational innovator in the now much cited Glivec case of Novartis versus the Government of India.<sup>69</sup>

Is India's dilly dallying stance on a strong IPR regime, that too not just on paper but in terms of enforcement, based on sound evidence-based reasoning?<sup>70</sup> Might these stances be counterproductive for domestic innovation coming out from indigenous entrepreneurial and innovative firms in India? Could there be a flight of innovative entrepreneurial experiments in India to nearby IPR-respecting economy like Singapore? Might there be alternative ways to incentivize innovation in India beyond patent laws? These are questions that are raised looking at India's long history of IPR contests with the West and it remains to be seen how the answers to the above will pan out in the next few years. These are also the set of issues the Government of India needs

to consider while pondering about the optimal patent laws in the country since IPR, in many cases, is a significant positive predictor also of inward foreign direct investment (FDI) that will be required given the current government's *Make in India* mandate.<sup>71,72,73,74</sup>

India's sleepless nights with its patent law tussles also raises the question as to whether beyond patent laws, there might be alternative instruments to incentivize innovation in India? The answer might lie potentially in innovation prizes and challenges. The country seems to be emerging as a crucible for many such contests, although its history in India dates back to at least 1929, when JRD Tata completed the India to England flight to win the Aga Khan prize. Today, we have a plethora of innovation prizes, challenges, and hackathons, rapidly gaining traction across India whether they are promoted and funded by the state or federal government, not-for-profit foundations, private profit-maximizing firms (domestic or multinational), industry associations, investorial community or high net worth individuals among others. One wonders if these prizes will be substantive enough to create *radical innovation* from India; evidence thus far suggests that one has reason to be sceptical.

This should not come as a surprise though, since prizes are a sub-optimal proxy for a more structural IPR regime respecting patents to incentivize innovation.

<sup>68</sup> Retrieved 21 March, 2016 from <http://profit.ndtv.com/news/corporates/article-feel-free-to-leave-india-says-government-to-monsanto-in-gm-cotton-row-1287871>.

<sup>69</sup> Details of the case, was retrieved 15 January, 2016 from [https://en.wikipedia.org/wiki/Novartis\\_v.\\_Union\\_of\\_India\\_%26\\_Others](https://en.wikipedia.org/wiki/Novartis_v._Union_of_India_%26_Others).

<sup>70</sup> A literature review on this issue, was retrieved 21 September, 2014 from <http://ipa-india.org/pdf/study/Sep%202014.pdf>.

<sup>71</sup> Glass, A. J., & Saggi, K. (2002). Intellectual property rights and foreign direct investment. *Journal of International Economics*, 56(2), 387–410.

<sup>72</sup> Branstetter, L. G., & Fisman, R. (2006). Do stronger intellectual property rights increase international technology transfer? Empirical evidence from US firm-level panel data. *The Quarterly Journal of Economics*, 121(1), 321–349.

<sup>73</sup> Blalock, G., & Gertler, P. J. (2008). Welfare gains from foreign direct investment through technology transfer to local suppliers. *Journal of International Economics*, 74(2), 402–421.

<sup>74</sup> Bilir, L. K. (2014). Patent laws, product life-cycle lengths, and multinational activity. *The American Economic Review*, 104(7), 1979–2013.

Zorina Khan<sup>75</sup> in her research on innovation prizes across countries has found that innovation prizes are only effective when market failure occurs, or when solutions are sought for known and narrow articulated problems, and when it is a means to increase market demand through spread of information. In addition, governance issues in prizes are explicitly recognized in her work. Further unlike patents, she argues, prizes fail to generate enough spillover benefits that help in diffusion of innovation and follow on invention. Other researchers build on this work and extend these findings.<sup>76,77</sup> One wonders if Indian firm managers and policy makers are recognizing these challenges of using prizes as an alternative means to spur innovation in an environment where structural changes to the IPR regime remains fragile at best to fundamentally incentivize new ideas in the Indian economy.

The situation is further complicated because additional nuances introduced as a result of competition increase the scope of arguments regarding reward for innovation substantially. To the extent that a prize winner or a patent awardee can equally likely claim monopoly rights on their product perhaps for a certain period of time, competition analysts in India will find a hard time going forward in evaluating the trade-offs involved in access versus innovation and relatedly on the issue of whether there has been dominant abuse because of creation of a monopoly, economic, or legal. Our courts of IP laws, including the Intellectual Property Appellate Board, seem not to be harmonious in their decisions with the outcomes at the competition authority (the CCI) which might create further challenges in how patent laws and prizes are going to be appropriated by inventors and innovators in this country.<sup>78</sup>

<sup>75</sup> Khan, B. Z. (2008). Premium inventions: Patents and prizes as incentive mechanisms in Britain and the United States, 1750–1930. In D. L. Costa & N. R. Lamoreaux (Eds), *Understanding long-run economic growth: Geography, institutions, and the knowledge economy* (pp. 205–234). Chicago, USA: University of Chicago Press.

<sup>76</sup> Brunt, L., Lerner, J., & Nicholas, T. (2012). Inducement prizes and innovation. *The Journal of Industrial Economics*, 60(4), 657–696.

<sup>77</sup> Moser, P. (2012). Innovation without patents: Evidence from world's fairs. *Journal of Law and Economics*, 55(1), 43–74.

<sup>78</sup> A discussion on harmonization, was retrieved 31 January, 2016 from <http://www.livemint.com/Opinion/t5aaE6OYAsRyYKavQg6DPI/Is-India-ready-to-reset-its-innovation-mojo.html>.

It is important to note here that India's dealing with the incentives for innovation environment is being keenly watched by peer economies and least developed countries who themselves are going through a flux (or will be going through a flux tomorrow) in adopting the appropriate optimal IPR regime. It is an undeniable fact that innovation is the key to long-run economic growth, as has been shown through seminal Nobel Prize winning work in the literature on endogenous growth theory.<sup>79</sup> Needless to say that the matter is not one that can be decided with a flip of the finger though this big picture about innovation is always lost in the miasma of what should be India's optimal IPR regime. Considerations of newly emerging trade treaties like the Trans Pacific Partnership introduces newer facets in the bargaining power for India with new trading blocs and these would be issues other peer economies will also face tomorrow, that too, across sectors where there will be contests between the innovator and the domestic imitator.

But the only way forward in this confusion is potentially a systematic economic analysis opening up data from both the public and the private side on what are the gains and losses, to producer and consumer, in the short and long run—using which the social planner could arrive at appropriate decisions that they can then cite credibly at international bargaining platform for multilateral trade regarding India's stance on IPR. It is unclear for now whether the Government of India, is willing to take those steps to be guided by evidence-based policy making on this matter (notice, for example, that even today the Indian Patent Office has not been able to digitize all patents granted by them pre-1995 going back all the way since when they were set up, despite the much touted Digital India initiative), but one can remain hopeful that given the long history of patent tussles and innovation prizes in India without much evidence-based policy making and minimal progress on that front, in addition, perhaps there will be a change of mind with a shift in the status quo.

<sup>79</sup> Romer, P. M. (1994). The origins of endogenous growth. *The Journal of Economic Perspectives*, 8(1), 3–22.

# The Economics of Antitrust

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The purpose of this article is to provide an overview of how economic analysis is used in antitrust litigation pertaining to mergers and acquisition and abuse of dominance. Economic arguments become relevant in several facets of antitrust litigation. The primary role of an economist is in determining market definition and measuring market power, having determined the appropriate market in mergers and acquisitions and abuse of dominance case. The next role of an economist arises in the form of calculating damages in case the alleged activities in abuse of dominance were found to be true. In this article, we provide an overview of how economists are involved in antitrust cases.

### MARKET DEFINITION

One of the main questions in antitrust case is: What is the appropriate market? A straightforward answer to that question is, for product X, all the firms that manufacture that product constitute the relevant market. However, when one considers relevant complements and substitutes, such definition tends to be too narrow. We explain this using an example from the anti-cholesterol drug market. Suppose, we are interested in finding the appropriate market for atorvastatin. Then, it is narrow to limit the market for atorvastatin to just the firms that manufacture this drug. Other statins like simvastatin compete with atorvastatin for the doctors' prescriptions. Therefore, a broader market definition for a product, say atorvastatin, should include all those medicines that can influence the consumption of atorvastatin.

Economists typically use cross-price elasticity of demand in this context. Cross-price elasticity of demand is defined as the percentage change in the quantity consumed of

good X for a change in the price of some other good Y. If cross-price elasticity is positive and substantial, one could conclude that these products are indeed substitutes for one another. Any product that has significant cross-price elasticity with product X should belong to the appropriate market for that product. The argument is that any change in the price of the other product is bound to impact consumers' preferences towards product Y.

For markets that are geographically spread—say, for example, hospitals—economists have also used Elzinga and Hogarty test. This test involves two steps. If we want to define an appropriate market for hospital A, for instance, then the first step involves figuring out geographical spread of a significant fraction of the existing hospital patients (typically, 90%). The next step involves identifying all hospitals that a significant number of patients in this region (typically, 90%) visit for their medical needs. The market for hospital A encompasses all those hospitals identified in the second step.

### MARKET POWER

One of the classic definitions of the degree of market power is the Herfindahl–Hirschman Index (HHI). This is defined as the sum of squares of market shares of various players in the market. Say, there are  $n$  firms in the market, each with market shares,  $s_1, s_2, \dots$  and  $s_n$ . Then, HHI for the market is defined as  $HHI = s_1^2 + s_2^2 + \dots + s_n^2$ . If there is a monopoly in the market, then HHI is simply equal to  $100^2 = 10,000$ . On the contrary, if there are several market participants with insignificant market shares, HHI tends to be closer to zero. Antitrust authorities all over the world have developed their own rules of thumb to define whether or not a market is highly, moderately, or not at all concentrated. Further,

they rely on these guidelines for clearing any merger and acquisition request.<sup>80</sup> Economists have also developed a test called small but significant non-transitory increase in prices (SSNIP) in order to see if there is any market power. The test measures what the extent of loss in market is for a small upward change in the price of a product. The idea behind the test is that if a small increase in price leads to a significant erosion in the market, then the presence of market power (or concentration) may not have any anti-competitive effects.

One caveat that needs to be kept in mind while discussing market power is that market concentration per se need not be anti-competitive. Any exploitation of market power could result in a spate of entry given the increased profitability or perhaps, the consumers may cease to consume the product any more. In such cases, presence of market power is unlikely to have any anti-competitive effect. Another caveat that arises in this context pertains to *cellophane paradox*. In 1956, the US Justice Department has concluded that Du Pont, which manufactures cellophane has no dominant position in packaging industry because any increase in prices is bound to attract substitutes in packaging industry. However, later studies have argued that such substitution is only possible at the prevailing prices of cellophane, which are already significantly higher when compared to the marginal cost of producing cellophane. They further argue that, had cellophane market been competitive, consumers would have preferred not to substitute cellophane with other packaging material in the first place.

## DAMAGES CALCULATION

Illegal conduct by a party affects economic interests of entities of a country and frequently leads to quantifiable economic damages suffered as a consequence of the conduct. In antitrust cases, the issue is one of subverting competition by economic entities (frequently business enterprises), and the relevant competition law of the land governs acceptable behaviour. In this segment, we discuss a conceptual framework for estimating economic damages resulting from antitrust actions. The framework is conceptually straightforward and adaptable

<sup>80</sup> For example, Federal Trade Commission defines whether or not a market is un-concentrated or moderately or highly concentrated based on HHI. Clearing a merger depends on the likely change in HHI as a result of merger. These guidelines are retrieved 15 January, 2015 from <http://www.justice.gov/atr/horizontal-merger-guidelines-08192010#5c> [Section 5].

to varying situations, and can be implemented with the help of data that are generated by enterprises in their normal course of business.

Assume that there is an allegation against entity X of a particular misconduct in violation of Companies Act, for a period of time  $t_1$  to  $t_2$ . Such an entity could be a corporation, or a person, or an association of corporations. It is presumed, as a result, that another entity, or a combination of entities, including perhaps the general public, suffered harm stemming from that particular misconduct. In many jurisdictions, in such cases, experts specializing in economic matters are called upon to help courts decide the appropriate amount of damages. Such economic experts could be retained by lawyers representing the plaintiffs, or the defendants, or both.

The first element of any damages calculation is a damages model or a framework. Such a framework could be borrowed from the existing theoretical and empirical economic literature. For example, a frequent antitrust violation encountered by competition authorities across the world is collusive price fixing by competitors. In this instance, the relevant theory of industrial organization and markets that deal with instances of collusive behaviour by firms will be invoked. The analysis then follows by comparing two situations: a factual situation in which the alleged violation took place and a counterfactual situation where the alleged violation of antitrust behaviour is absent. This second scenario is commonly referred to as the 'but-for' world. An assessment of the market that would have existed in the but-for world is necessary to arrive at any damages estimate. Here, a but-for world would be a hypothetical situation where the collusive price fixing by the competitors did not happen and the economist is required to make an assessment of the price that would have prevailed in such a scenario. Once the but-for world is modelled, the economist then moves on to make quantitative assessments of various types. There are several potential routes that can be taken by the economist here, depending on the parties that are harmed. If the harm is on a competitor, the relevant metric on which damages should be assessed could be foregone profits or additional losses incurred due to the infringement. If consumers are harmed in the process (which is usually the standard adopted in antitrust cases; if an infringement harms a competitor but results in gains for the consumers as a whole, then there is very little economic logic in protecting the possibly inefficient competitor), then the overall consumer loss in welfare has to

be computed. Going back to the price fixing example, the relevant metric in this case is the extent of overcharge on the consumers as a result of price fixing, and the number of additional consumers that would have been served had the but-for price prevailed. An accurate assessment must credibly answer both of these questions.

The next step for an economist is to create a statistical/econometric model, with clear distinctions between the actual and the but-for world. It is important to understand that such statistical models are not exact descriptions of reality, but rely on foundations of economic theory to derive sensible economic conclusions about the real world. As such, there are some simplifying assumptions that any model would rely on, and it is important to be aware of the limitations that such simplifying assumptions may impose.

For instance, in the price fixing example,<sup>81</sup> there are two possibilities: (a) prices in the market with the misconduct could be compared to prices at a comparable market where the misconduct was absent during the same period (the *yardstick* method) or (b) prices could be compared during the time of misconduct to the prices at the time when the misconduct was not prevalent for the market at issue (the *benchmark* method).<sup>82</sup> Assume that the economist adopts the benchmark method, which is the more common method undertaken in the US jurisdiction, and further assume that the damages are limited to only the period in which misconduct happened. The economist then sets up a regression model.<sup>83</sup>

$$p_t = \beta_0 + \beta'_1 X_t + \beta_2 D_t + \beta'_3 D_t X_t + \varepsilon_t$$

Here,  $p_t$  represents price at time  $t$ , and  $X_t$  represents a set of explanatory variables which are assumed not to be causally affected by the misconduct. The choice of variables in  $X_t$  must be determined by use of economic theory. For instance, in this case,  $X_t$  might include relevant economic variables such as those representing general macroeconomic conditions, any entry or exit of firms, any merger and acquisition of firms in the

market, costs of production, etc. The specification, due to McCrary and Rubinfeld,<sup>84</sup> allows for both direct and indirect changes to prices through changes in  $X_t$  during the period of misconduct. If during any time period  $t$  (a sub-period of the total time period considered for analysis), the misconduct takes place,  $D_t = 1$ . Thus, the but-for world could be created in a straightforward fashion by using the above equation to recompute prices, replacing  $D_t = 0$  for the infringement time period  $t$ . The difference between the prices when  $D_t = 1$  and  $D_t = 0$  represents the extent of overcharge. In other cases, economists may make use of the forecasting method: splitting the sample period into parts when the infringement did not occur versus when it occurred. The analysis would then proceed as follows: first, a regression equation would be used to estimate the coefficients during the period when the infringement did not happen. These coefficients would then be used to forecast the prices that would have prevailed in the period of infringement, absent the misconduct. The difference between the actual and the forecasted prices could be used to measure the extent of overcharge. If necessary, more complex models could be used in the spirit of Porter,<sup>85</sup> where the demand curves and supply curves were explicitly modelled and prices predicted based on more sophisticated econometric techniques.

In the Indian context, the Competition Act 2002<sup>86</sup> provides the legal framework for the prohibition of anti-competitive agreements and abuse of dominant position under Sections 3 and 4, and Sections 5 and 6 govern mergers and acquisitions and its regulation. The CCI is the competition regulator of the country and can either on its own cognizance or by receiving a complaint from an informant initiate inquiries against alleged breaches of competitive conduct. The economic analysis is conducted by a DG and other employees. The CCI can gather evidence from the relevant entities using the same powers vested in a Civil Court under Section 36 (2), which gives it the ability to summon and examine a person under oath, require discovery and production of evidence pertaining to the matter, receive evidence on affidavit and requisitioning any public record or document or copy of any record from any office, subject to provisions of Sections 123 and 124

<sup>81</sup> This portion borrows heavily from McCrary, J., & Rubinfeld, D. L. (2014). Measuring benchmark damages in antitrust litigation. *Journal of Econometric Methods*, 3(1), 63–74.

<sup>82</sup> Ibid.

<sup>83</sup> Such models are usually called reduced form models, and the estimated coefficients do not have any causal interpretation. In many contexts, such reduced form models are sufficient for the damages computation purposes, if they accurately predict prices.

<sup>84</sup> Op cit., McCrary & Rubinfeld (2014).

<sup>85</sup> Porter, R. H. (1983). A study of cartel stability: The joint executive committee, 1880–1886. *The Bell Journal of Economics*, 14(2), 301–314.

<sup>86</sup> The Competition Act, 2002. Retrieved 3 March, 2015 from [http://www.cci.gov.in/sites/default/files/cci\\_pdf/competitionact2012.pdf](http://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf)

of Indian Evidence Act (1872). Thus, in our opinion, the Competition Commission has a lot of legal authority to compel production of evidence that can be used for estimating damages.

However, one aspect of the Indian competition law renders the calculation that we describe above somewhat moot. In cases pertaining to agreements and abuse of dominance, Section 27 (b) of Competition Act 2002 caps the penalty of such behaviour to 10 per

cent of the average of the turnover for the last three preceding financial years, or in case of a cartel, three times the profit of each member of a cartel during the period the cartel was in existence. We feel such a penalty is arbitrary and need not be fair to any party, the aggrieved, or the infringing. The widely accepted and used method is the one we outline above. We hope that the Competition Act is modified so as to enable a more accepted and, in our opinion, better way to estimate damages arising from anti-competitive conduct.

## Competition Law Compliance in India

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Corporate compliance is a significant part of corporate governance initiatives globally. Cartels are a problem for corporate governance akin to other illegal corporate acts such as bribery or accounting fraud. Cartels include practices such as fixing prices, dividing markets, bid rigging, group boycotts, among others. Within the context of competition law, mitigating the risk of cartel behaviour occurring and endeavouring to ensure compliance by companies remain critical issues in corporate governance, particularly given sizeable fines for cartels and the significant reputational damage to companies (and litigation risk) following on from a cartel finding.

Although competition law compliance activities take many forms, this article focuses on the compliance function specific to cartel-related enforcement, as cartels and information exchanges between competitors have become perhaps the area of most significant emphasis in recent years in terms of detection of illegal (or potentially illegal) activity and its prosecution worldwide, including India. Cartel enforcement has become global, with increased international cooperation to improve enforcement across competition authorities. As a result, companies must now be concerned about compliance, detection, and punishment not merely in 'traditional' jurisdictions (e.g., the United States and Europe)

but across the world. What had once been behaviour that was accepted (and in some cases indeed facilitated) by government is now globally understood to harm consumers. We also recognize that any antitrust compliance initiative will typically occur in the context of a broader, company-wide compliance programme addressing a broad range of legal and ethical risks.

We suggest that the best approach to competition law enforcement requires rethinking for companies to move beyond merely warning as to the traditional enforcement approach (increased fines and incarceration) that many authorities and academics take. Instead, an important part of competition law enforcement should emphasize creating pro-compliance cultures in companies. These efforts in competition law compliance build on existing programmes for compliance in Indian companies, post-Satyam.

Companies need to be actively encouraged to undertake a more central role in changing values and ensuring genuine compliance efforts to supplement enforcement by competition law authorities. For compliance to take hold, a company needs to ensure that it has appropriate internal incentives to align its policy to comply with the law. The same is true of competition law authorities: to ensure a change in normative values and the adoption of a compliance culture, competition law authorities need to be more creative in their enforcement activities, and ensure that robust and credible compliance programmes are encouraged and appropriately incentivized.

\* This article is adapted from Riley, A., & Sokol, D. D. (2015). Rethinking compliance. *Journal of Antitrust Enforcement*, 3(1), 31–57.

For many companies, the incentives may already be in place for some level of expenditures of resources on competition law compliance effort. However, the incentives may not be sufficient to encourage the ongoing high level of effort and resources required to ensure (and continuously maintain) a robust compliance programme. There is also an internal 'competition' for resources (even within larger companies, and between various compliance topics)—where competition law is seen to be 'merely' punitive (rather than encouraging and incentivizing compliance activities), the compliance efforts may lose out in the internal allocation of resources to other compliance areas such as anti-bribery and corruption/Foreign Corrupt Practices Act (FCPA) compliance, where compliance efforts are perceived as being rewarded (or are at least perceived as being beneficial to the company in terms of providing a complete or partial defence when individuals within the company break the law, despite the company's compliance policies).

If competition law authorities, such as CCI, thought more creatively about how competition law compliance programmes could be used as part of enforcement, they could encourage a wider range of companies to spend more time and resources on compliance. This creative thinking could take a number of forms—the most obvious perhaps is providing mitigation of fines or defences if companies could demonstrate they had 'adequate procedures' in place (similar to the UK Bribery Act). Thought could also be given to removing parental liability for the acts of subsidiaries where the parent company has a credible competition law compliance programme which the subsidiary clearly violated. In addition, competition law agencies could consider the use of (requirement to adopt or improve) a competition law compliance programme in settlements and other enforcement decisions (including the possible use of 'no-action' agreements/commitments similar to US Department of Justice Non-Prosecution and Deferred Prosecution Agreements). But a desire to mitigate fines should not be the only aim of a competition law compliance programme. The proper role of the programme should be to ensure compliance with the law and to promote ethical behaviour by and between companies.

There are a number of behavioural drivers of compliance and non-compliance in competition law. Some of the behaviour may be based on financial gain but in other cases, the wrongdoing may not be motivated by performance pay but by personal and emotional factors such as one's ego (organizing the cartel despite company

policy made the individual feel important) or where the individual is motivated by revenge (organizing a cartel despite company policy because the individual felt overlooked in his/her career). The Organisation for Economic Co-operation and Development (OECD) suggests that the factors that drive non-compliance include 'an ambiguous commitment—or no commitment—to compliance by management, uncertainty about legal requirements, employee naiveté and/or simple error, "rogue" employees, arrogance, and competing interests from other compliance areas'.<sup>87</sup> These drivers need to shape potential policy responses.

Understanding the drivers of compliance and non-compliance has important implications. The relative costs and benefits of compliance may shape the behaviour of companies and the decision to comply with the law. Some companies will invest more than others in compliance efforts and some organizational structures, corporate policies, and norms make shaping a genuine commitment to compliance easier. The different behavioural drivers can be addressed internally through risk assessments. Such risk assessment varies across companies and within a company depending on the level of employee, industry, country, and existing norms. This makes a one-size-fits-all approach difficult to implement and probably inappropriate. In some cases, companies may not properly assess the risks of non-compliance. The inability or failure to identify such risks impacts company behaviour. If, however, a company fails to address compliance issues, then over time, behaviour that is illegal or potentially illegal may become embedded as part of the organizational norm. At some point (and this process may be gradual), an organization may reach a tipping point in its culture in which illegal activity (whether in competition law non-compliance or in other areas) becomes one of the defining elements of the organization.

A robust compliance programme can fight against such a 'slide' in corporate culture towards illegality as a cultural norm. Changing the culture of a company involves changing incentives to promote compliance and to promote the ethical value of compliance. By changing organizational culture and behaviour, the cost of detection of wrongdoing may be decreased, as more people within the company will be on the lookout

<sup>87</sup> OECD (2011). Promoting compliance with competition law. *Competition policy roundtables*. Retrieved 2 February, 2016 from <http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf>



for illegal behaviour and will have greater incentive to report it in others (and avoid it themselves). A pro-compliance culture also raises the cost of participation for cartel activity as the potential cartel member now must contend with an increase in the probability of detection. In those situations in which individuals receive rewards for their cartel participation, where internal monitoring of cartel activity is not strong, and where country level norms about collusion do not emphasize a societal moral failure, these norms may serve to reinforce inappropriate behaviour within a company.<sup>88</sup>

The strongest driver for compliance with competition law should be the desire to conduct business ethically and to be recognized as doing so. However, one of the critical lessons that in the compliance function must explain to employees at various levels of the company and to the board of directors are the negative repercussions for the company of competition law non-compliance, in terms of reputational damage and a negative market correction or reaction. Put differently, the stock of a company will take a hit for its lack of compliance in terms of internalizing the actual cost of the government fines and potential private suits. In the absence of international standards relating to competition law compliance programmes, the business sector has taken the initiative to provide some guidance on how to create robust and credible competition law compliance programmes. In particular, the International Chamber of Commerce (ICC)—the global business organization representing businesses both large and small in over 80 different countries—has taken a leading role in helping to shape thinking on credible competition law compliance efforts. Prompted by suggestions from DG Competition, the UK Office of Fair Trading (OFT) (now the Competition and Markets Authority (CMA) and other competition law authorities, the ICC Task Force on Antitrust Compliance and Advocacy produced an antitrust compliance ‘Toolkit’ for business, and launched this at the International Competition Network (ICN) in Warsaw in 2013.<sup>89</sup>

This Toolkit has been designed by business for business and has benefited from contributions from competition law specialists from over 30 companies and law firms around the world and from the practical

experience of in-house competition law compliance efforts. The Toolkit provides practical competition law tools for SMEs and larger companies wishing to build or reinforce a robust compliance programme. It seeks to complement materials produced by competition law authorities and other sources of guidance, by focusing on practical steps companies can take internally to embed a successful compliance culture.<sup>90</sup> There is no compelling reason why CCI could not build on the work of the ICC (or other organizations) and produce its own guidelines on the elements of a robust antitrust compliance programme. Doing so would further enhance compliance and so support the policy objectives of antitrust enforcement.

Competition law authorities are increasingly engaging in discussions with business about the benefits in promoting compliance, although often the debate on the side of the authorities focuses exclusively (or almost exclusively) on enforcement, fines, and leniency. While enforcement remains essential and fines obviously have an important role to play, the real debate should be about how to change normative societal values, so that competition law compliance is on the agenda not because of a fear of enforcement, but rather because ethical and compliant business is ‘the right thing to do’. Going forward, Indian companies should devote sufficient resources and training for competition law concerns both in India and abroad. In being proactive, Indian companies can avoid significant costs.

## CONCLUSION

### Viswanath Pingali

Keeping in mind the need for various managers to know about (and more importantly comply with) competition law, this colloquium has put together articles that deal with different facets of this law—its journey from its previous avatar of MRTP Act, current goals of competition law, how economics plays a role in evaluation of cases, its applicability across international boundaries, its relationship with intellectual property regime, and compliance programmes that

<sup>88</sup> Sokol, D. D. (2012). Cartels, corporate compliance, and what practitioners really think about enforcement. *Antitrust Law Journal*, 78(1), 201–240.

<sup>89</sup> ICC (2013). *The ICC Antitrust Compliance Toolkit*. Retrieved 2 March, 2016 from <http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/competition/icc-antitrust-compliance-toolkit/>

<sup>90</sup> The Toolkit is arranged into 11 chapters covering the following topics: (1) Compliance embedded as company culture and policy, (2) Compliance organization and resources, (3) Risk identification and assessment, (4) Antitrust compliance know-how, (5) Antitrust concerns-handling systems, (6) Handling internal investigations, (7) Disciplinary action, (8) Antitrust due diligence, (9) Antitrust compliance certification, (10) Compliance incentives, (11) Monitoring and continuous improvement.

need to be in place in order to comply with this law. While this colloquium covers wide range of topics, the list is by no means exhaustive. Comparison of competition law across various jurisdictions, impact of other laws enacted by governments on competition in the economy, and in-depth analysis of some of the recent decisions by the CCI are a few areas that readily come to mind. One hopes that future colloquia in this area address these equally important issues.

While several advanced economies have had robust competition policies and resultant competition laws

in place, India has joined the club only a few years ago. Therefore, this law is still nascent in the Indian context. In the United States and Europe, the case law has emerged through a series of discussions, debates and analyses between various entities like the policy makers, the judiciary, academia, and the industry over a long period of time. For the Indian law to be effective, and for its contribution towards holistic development, such deliberations are essential. We hope that this colloquium would lead to such constructive dialogue!