

# SYSTEMATIZING FAIRPLAY

Key Issues in the Indian Competition Law Regime

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This Report is an independent, non-commissioned piece of academic work.

We consulted leading competition law practitioners from Tier-1 law firms and officials in the Ministry of Corporate Affairs, Government of India on a confidential basis during the preparation of this Report. We are grateful to each of them for sharing with us their valuable insights, particularly, on the practice of competition law. The authors would also like to thank Dr. Chintan Chandrachud, Dr. Dhvani Mehta, and Geetanjali Sharma for their comments on an earlier draft of this Report. Errors, if any, are the authors' alone.

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## I. INTRODUCTION

*"I'm not denying that monopolies are terrible things, but I am denying that it is readily easy to resolve them through legislation of that nature."*

- Alan Greenspan<sup>1</sup>

Striking an effective regulatory balance is a vital facet of enhancing the ease of doing business. However, balancing free markets and regulatory intervention has never been easy. This predicament is amplified in case of an economic legislation such the Competition Act, 2002 ("**Competition Act**") which apart from impacting the parties involved, has a significant spill-over effect on markets in general. Several factors such as the long-term consequences of regulatory intervention, the power of the Competition Commission of India ("**CCI**") to impose onerous fines, and the enforcement time and costs involved makes legislation and implementation extremely arduous in case of competition law.

Moreover, the pace of innovation in high-technology disruptive markets, has challenged the traditional understanding of competition law concepts of 'market', 'monopoly', 'dominance', and 'agreement'. Technology-enabled newer ways of doing business, have also made it possible for enterprises to engage in anti-competitive practices on a mass scale through novel means without coming under the lens of the CCI. Even globally, these developments have fuelled a debate on the optimal course of action for competition law agencies.

Given the integrated and complex nature of modern businesses, the current trend in India wherein each regulator, be it the CCI or the Telecom Regulatory Authority of India ("**TRAI**"), operates in a silo to regulate enterprises in its domain is not workable going forward. Another aspect of competition law jurisprudence that has increasingly come under the scanner is compliance with due process and principles of natural justice during investigation and decision-making by the CCI and the Director General ("**DG**"). Moreover, the workload of the CCI and DG has constantly been increasing as the Indian economy grows and markets witness an expansion in terms of size and the number of players. To compound matters, the rapid pace of modern business has made timely adjudication of cases non-negotiable for the competition law framework to remain relevant. The changed rules of the game demand commensurate changes in the governing law and regulations.

Even macro economically, the business milieu has changed considerably, globally and in India, since the enactment of the Competition Act. Almost 15 years have elapsed since the inception of the Competition Act and it is now an opportune time to take stock of its performance and devise a workable way forward. Towards that end, this Report highlights key *structural and procedural* issues in the competition law regime in India and provides broad recommendations to address them.

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<sup>1</sup> Devin Leonard and Peter Coy, 'Interviewing Alan Greenspan on His Fed Legacy and the Economy' (*Business Week*, August 10, 2012), available at: <http://janelwang.com/post/29883689773/alan-greenspan-economist> (last accessed on November 16, 2017).

## II. KEY ISSUES IN THE INDIAN COMPETITION LAW REGIME

### A. Revisiting CCI's Regulation-making power

Regulations framed by an authority in the exercise of powers granted by the enabling statute are a widely accepted form of delegated legislation.<sup>2</sup> Several regulations have been framed by the CCI as well, in exercise of the powers conferred by the Competition Act. A close scrutiny of the content of these regulations would reveal that, in certain cases, the limits of permissible delegation of legislative power are not adhered to. This part lays out what the constitutional limits of delegated legislation are. Correspondingly, a brief examination of the Competition Act, and the regulations thereunder, in light of the principles of permissible delegation is presented.

#### 1. Present Legal Framework and Case for Reform

##### Essential Legislative Functions

It is a settled principle of law that the legislature cannot delegate 'essential legislative functions', or those which amount to determination or choosing of the legislative policy, to a delegate.<sup>3</sup> The delegate may be a regulatory body (such as the CCI or TRAI), or the concerned Government (the Central Government or the State Government). Even though 'essential legislative function' is a term which lacks precise definition, the Supreme Court has attempted to explain it in *Harishankar Bagla v. State of Madhya Pradesh*:<sup>4</sup>

*"9.....The essential legislative function consists in the determination or choice of the legislative policy and of formally enacting that policy into a binding rule of conduct...."*

A succinct description of the principles of permissible delegation can be culled out from *Kishan Prakash Sharma v. Union of India*:<sup>5</sup>

*"18. ....The legislature must set the limits of the power delegated by declaring the policy of the law and by laying down standards for guidance of those on whom the power to execute the law is conferred. Thus the delegation is valid only when the legislative policy and guidelines to implement it are adequately laid down and the delegate is only empowered to carry out the policy within the guidelines laid down by the legislature.....When the Constitution entrusts the duty of law-making to Parliament and the legislatures of States, it impliedly prohibits them to throw away that responsibility on the shoulders of some other authority...."*

<sup>2</sup> For example, the TRAI (Officers and Staff Appointment) Regulations, 2001 issued by TRAI pursuant to powers conferred on it by Sections 10(1) and 36(1) of the TRAI Act, 1997 and the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 issued by SEBI pursuant to the powers conferred on it by Sections 11, 11A(2), and 30 of the SEBI Act, 1992 and Section 31 of the Securities Contracts (Regulation) Act, 1956.

<sup>3</sup> Justice GP Singh, *Principles of Statutory Interpretation* (13<sup>th</sup> edn, LexisNexis 2012), pg. 1009.

<sup>4</sup> *Harishankar Bagla v. State of Madhya Pradesh*, AIR 1954 SC 465.

<sup>5</sup> *Kishan Prakash Sharma v. Union of India*, (2001) 5 SCC 212.

Essentially, delegation of law-making is valid only when:

- (a) the legislative policy and guidelines to implement it are adequately laid down; and
- (b) the delegate is only empowered to carry out the policy within the guidelines laid down by the legislature.<sup>6</sup>

On this account, an analysis of the scheme of competition laws in India reveals that the legislature may have granted discretionary legislative powers to the delegate, the CCI, without laying down any policy or issuing any guidelines in this regard. For example, the CCI has, *vide* Schedule I of the CCI (Procedure in Regard to the Transaction of Business relating to Combinations) Regulations, 2011 (“**Combination Regulations**”) exempted a wide array of transactions from the mandatory prior notification requirement under merger control provisions of the Competition Act. What transactions must be exempted from the purview of merger control provisions of the Competition Act is certainly a policy decision and must not be delegated to the CCI. Regulation 4 of the Combination Regulations states that the exemptions in Schedule I have been granted based on the following:

- (a) *Power conferred on the CCI by Section 36 of the Competition Act* - This section pertains to the power of CCI to regulate its own procedure. Not only is it silent on exemptions from merger control, it nowhere talks about combinations.
- (b) *Duty cast upon the CCI by Section 18 of the Competition Act* - This provision relates to broad responsibilities of the CCI including to eliminate practices having an adverse effect on competition, promote and sustain competition, protect the interest of consumers, and to ensure freedom of trade in Indian markets. It also permits the CCI to enter into memorandums of understanding or arrangements with agencies in foreign countries with prior approval of the Central Government. Once again, it does not specifically provide anything on combinations or exemptions thereof.
- (c) *Mandate given to the CCI to regulate combinations under Section 6(1) of the Competition Act* - This section merely states that no person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition in the relevant market in India and that such a combination shall be void. It must be noted that nowhere does this provision enable the CCI to legislate on what transactions can be exempted from its purview.

Finally, Section 64 of the Competition Act which confers the CCI with regulation-making powers, only speaks of combinations in sub-sections 2(b) and 2(c) in the context of the forms for notifying combinations and the fees that may be levied at the time of notification.

As is evident from the aforesaid, neither is there a specific provision in the Competition Act that empowers the CCI to exempt any combination from the purview of the Competition Act nor has any guidance been provided by the legislature for the exercise of such power by CCI. Thus, it may be argued that absent any guidelines laid down in the parent act, the authority of the CCI to lay down which transactions must be exempt from filing a merger notification needs to be re-examined.

<sup>6</sup> *Tata Iron and Steel Co. v. Workmen*, AIR 1972 SC 1917, pg. 1922.

It is pertinent to note that failure to provide guidance for the exercise of the delegated legislative function renders the delegation invalid.<sup>7</sup> An example in this regard is Regulation 27 of the Combination Regulations which provides as follows:

**27. Appointment of independent agencies to oversee modification-**

*(1) Where the Commission is of the opinion that the modification proposed by it and accepted by the parties to the combination needs supervision, it may appoint agencies, to oversee the modification, on such terms and conditions as may be decided by the Commission.*

*(2) The agencies appointed under sub-regulation (1) shall be independent of the parties to the combination having no conflicts of interest. Such independent agencies referred to in this regulation may include an accounting firm, management consultancy, law firm, any other professional organization, or part thereof, or independent practitioners of repute.*

*(3) The agencies appointed under sub-regulation (1) shall carry out the responsibilities as specified by the Commission from time to time.*

*(4) The agencies appointed under sub-regulation (1) shall submit a report to the Commission upon completion of each of the actions required for carrying out the modification.*

*(5) The payment to the agencies appointed under sub-regulation (1) shall be made by the parties to the combination by depositing it with the Commission or as may be directed by the Commission.*

While the power to propose modification to a combination is provided for in Section 31(3) of the Competition Act, this provision does not set out any guidelines on how such modification will be effected by the CCI. However, Regulation 27 of the Combination Regulations not only provides a detailed procedure for modification, but also for the appointment of independent agencies for overseeing modification. The Combination Regulations also contain details of who can be these independent agencies and empower the CCI to prescribe their responsibilities. The Combination Regulations lay down these details in complete absence of any guidance under the Competition Act. As discussed earlier, in Section 64(2) of the Competition Act, the only provisions touching upon combinations are clauses (b) and (c). While the Competition Act does not deal with the issue of modification in its specifics, the regulations thereunder substantively determine how the CCI is to propose modification of a combination.

Based on the settled position of law, as discussed in the cases cited above, it may be argued that since the legislature has not provided any guidance on the specific nature of modifications to a combination, the delegation is not valid.

### Exceeding the scope of delegation

Delegated legislation which suffers from the vice of being repugnant to the parent act has formed the subject of challenge before various courts. The power to make delegated legislation is derived from the parent act and thus, it is fundamental that the delegate on whom such power is conferred has to act within the limits of authority conferred by the parent act.<sup>8</sup> It is a well-recognized principle of interpretation of a statute that conferment

<sup>7</sup> *Gwalior Rayon Co. v. Assistant Commissioner of Sales Tax*, (1974) 4 SCC 98; See also, *Registrar, Cooperative Societies v. K. Kunjabmu*, (1980) 1 SCC 340.

<sup>8</sup> *Hukamchand v. Union of India*, (1972) 2 SCC 601, ¶ 8.

of rule-making power by an Act does not enable the rule-making authority to make rules which travel beyond the scope of the parent act or which is inconsistent therewith or repugnant thereto.<sup>9</sup>

Notably, certain regulations framed under the Competition Act can be said to be travelling beyond the scope of the parent act. For instance, Regulation 7 of the Combination Regulations reads as under:

**"7. Belated notice**

*Where a notice filed in Form I or Form II under sub-regulations (2) or (3) of regulation 5 of these regulations is received in the Commission beyond the time limit mentioned in sub-section (2) of section 6 of the Act, the Commission may, without prejudice to other provisions including that of section 43A of the Act, admit such notice."*

Section 43A of the Competition Act gives power to the CCI to impose penalty for non-furnishing of information on combinations. Regulation 7 enables the receipt of information on combinations beyond the time stipulated in Section 6(2); however, this acceptance of a belated notice is not envisaged under the Competition Act. Although this issue is no longer functionally relevant as the requirement to notify combinations within a specific time period has been removed *vide* a notification dated June 29, 2017, issued by the Central Government, this provision continues to highlight the fact that the Combination Regulations exceed their delegated legislative scope.

## 2. International Experience

In Singapore, Sections 54-60 of the Competition Act, 2004 ("Singapore Competition Act") contain provisions on merger control. Exemption from mandatory notification requirement is laid down in Sections 54 and 55 read with the Fourth Schedule of the Singapore Competition Act. The general regulations framed by the Competition Commission of Singapore ("CCS") and the Minister for Trade and Industry, such as the Competition Regulations, 2007 and Competition (Notification) Regulations, 2007 deal with mergers tangentially and only detail procedural matters. For example, the Competition Regulations 2007 deal with procedural aspects such as the manner of making an application to vary, substitute or release commitments to the CCS made by parties involved in a merger, the procedure for conducting investigations and so on. The Competition (Notification) Regulations, 2007 are also limited to procedural issues such as who shall make an application for merger review, who all need to be notified of the proposed merger, forms and fee applicable for notifying mergers, obligation of CCS to inform parties of its decision and granting access to files, etc. The CCS has also issued guidelines on Merger Procedures and Substantive Assessment of Mergers but these guidelines are neither binding like the statute, regulations or orders, nor meant to replace them. They are merely explanatory of the existing statutory provisions.

In sum, the essential legislative functions pertaining to merger control including exemptions have been dealt with by the statute in Singapore and have not been left to be determined by the CCS. This is in direct contrast with India, wherein essential legislative functions and policy including what transactions must be exempt from the Combination Regulations, which external agencies may be appointed to oversee modifications, the responsibilities of external agencies so appointed, etc. are prescribed directly in the Combination Regulations.

<sup>9</sup> *Additional District Magistrate v. Sri Sri Ram*, (2000) 5 SCC 451.

### 3. Recommendations

- A two-fold examination should be undertaken:
  - (a) the Competition Act must be thoroughly examined to ensure that the essential legislative functions are not delegated to the CCI. In areas of permissible delegation, suitable guidelines must be laid down by the legislature in the parent act itself whilst retaining procedural flexibility with the CCI; and
  - (b) delegated legislation framed under the Competition Act should be examined for prescribing essential legislative functions or policy. Wherever the regulations contain policy details that can be shifted to the Competition Act, an amendment to the Competition Act must be suggested.

This will ensure that the Competition Act, as well as the regulations, do not remain susceptible to a challenge to their constitutionality for impermissible delegation of legislative powers.<sup>10</sup> In fact, despite the absence of the threat of a challenge in court, delegation of essential legislative functions is strategically detrimental to a developing economy like ours since it signifies reduced accountability and a democratic deficit.

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<sup>10</sup> See, *A.N. Parasuraman and Ors. v. State of Tamil Nadu*, (1989) 4 SCC 683 wherein the Tamil Nadu Private Educational Institutions (Regulation) Act, 1966 was held to be *ultra vires* and struck down for impermissible delegation of legislative power. One of the main contentions in this case was that the impugned Act did not lay down any guidelines for exercise of power by the delegated authority including the power to exempt certain institutions from applicability of the Act; District Registrar and Collector v. Canara Bank, (2005) 1 SCC 496 wherein Section 73 of the Stamp Act, 1989 was considered to be an excessive delegation of power as it gave unfettered discretion to the Collector to appoint 'any person' to inspect confidential papers without providing any guidelines for the exercise of this power.

## B. Compliance with Due Process of Law by the CCI and DG

Procedural fairness has become an integral part of the international dialogue on competition law enforcement.<sup>11</sup> However, there have been several instances in the recent past where the Competition Appellate Tribunal (“COMPAT”) has set aside CCI orders on grounds of violation of principles of natural justice, including lack of fair hearing and lack of reliable evidence. Similar allegations of non-compliance with due process of law have also been raised against investigations conducted by the DG.

### 1. Present Legal Framework

Section 36(1) of the Competition Act mandates the CCI to follow principles of natural justice in the discharge of its functions. While the CCI is empowered to regulate its own procedure in accordance with the Competition Act,<sup>12</sup> the Act requires that all questions which arise in any meeting of the CCI must be decided by a majority of members, present and voting<sup>13</sup> and the quorum for a CCI meeting has been fixed at three members.<sup>14</sup>

The DG who is appointed by the Central Government constitutes the investigative wing of the CCI.<sup>15</sup> It has been conferred with wide powers under the Competition Act,<sup>16</sup> including the powers to conduct search and seizure (often referred to as ‘dawn raids’), as vested with an inspector under Sections 240 and 240A of the Companies Act, 1956 (“CA, 1956”).<sup>17</sup>

### 2. Case for Reform

#### **Due Process and the CCI**

The Hon’ble Supreme Court has observed that while passing orders and directions dealing with the rights of parties in its adjudicatory and determinative capacity, the CCI is required to pass speaking orders, upon due application of mind responding to all contentions raised before it by the rival parties.<sup>18</sup>

In this regard, COMPAT has clarified that the exercise of powers by the CCI under Sections 26(7) and 26(8) and orders passed under Section 27 of the Competition Act constitutes adjudicatory/quasi-judicial functions of CCI, which require compliance with the principles of natural justice.<sup>19</sup> Sections 26(7)<sup>20</sup> and 26(8)<sup>21</sup> of the Competition Act empower the CCI to

<sup>11</sup> Paul O’ Brien, Krisztian Katona, and Randolph Tritell, ‘Procedural Fairness in Competition Investigations: U.S. FTC Practice and Recent Guidance from the International Competition Network’ (July 2015(1)), CPI Antitrust Chronicle, available at: [https://www.ftc.gov/system/files/attachments/key-speeches-presentations/obrien\\_katona\\_tritell\\_-\\_procedural\\_fairness\\_in\\_competition\\_investigations\\_7-2015.pdf](https://www.ftc.gov/system/files/attachments/key-speeches-presentations/obrien_katona_tritell_-_procedural_fairness_in_competition_investigations_7-2015.pdf) (last accessed on November 16, 2017).

<sup>12</sup> Competition Act, Section 36(1) and CCI (General) Regulations, 2009.

<sup>13</sup> Competition Act, Section 22.

<sup>14</sup> Competition Act, Proviso to Section 22(3).

<sup>15</sup> Competition Act, Section 16.

<sup>16</sup> Competition Act, Section 41.

<sup>17</sup> Corresponding to Sections 217 and 220 of the Companies Act.

<sup>18</sup> *Competition Commission of India v. SAIL*, (2010) 10 SCC 744.

<sup>19</sup> COMPAT Order dated February 23, 2015 in Appeal No. 17 of 2013.

<sup>20</sup> If the report submitted by the DG to the CCI recommends that there is no contravention of the provisions of the Competition Act, CCI must invite objections or suggestions from the concerned parties on the report. If after consideration of the objections or suggestions, CCI is of the opinion that further investigation is required, Section 26(7) empowers CCI to make such an investigation or cause further inquiry to be made in the matter or itself proceed with further inquiry.

conduct an inquiry into a matter of alleged contravention of Section 3 (Prohibition of anti-competitive agreements) and Section 4 (Prohibition of Abuse of Dominant Position) of the Competition Act upon submission of a report by the DG. Pursuant to such inquiry, if the CCI comes to the conclusion that there has been a contravention of Sections 3 or 4, it can pass an appropriate order under Section 27 of the Competition Act, including an order imposing penalty. Elaborating the above principle, the COMPAT has held as follows:

*15. The exercise required to be undertaken by the Commission under Sections 26(7) or 26(8) read with the relevant regulations and an order passed under Section 27 which visits the concerned person with civil consequences makes the functions of the Commission adjudicatory/quasi-judicial. Therefore, before recording an adverse finding against a person and holding him guilty of violating Section 3 or 4 of the Act, the Commission is obliged to comply with various facets of the principles of natural justice. This necessarily implies that while holding an inquiry under Section 26(7) or Section 26(8) the Commission is required to comply with the rule of audi alteram partem and give an effective opportunity of hearing to the person against whom a finding is likely to be recorded on the issue of contravention of Section 3 or Section 4 of the Act not only to controvert the allegation made against him as also the evidence/material proposed to be used in support of such allegation but also produced evidence to show that he/she/it has not violated any provision of the Act. If the Commission wants to rely upon some information/material, which does not form part of the report of the Director General then such information/material must be disclosed to the person concerned and an effective opportunity has to be given to him to controvert the same. The Commission is also required to pass a speaking order to demonstrate application of mind to the relevant factors/considerations and exclusion of irrelevant and extraneous factors/considerations.<sup>22</sup>*

From the above, it is evident that in addition to its statutory duty to observe natural justice, the CCI must follow these principles given it exercises adjudicatory/quasi-judicial functions. However, contrary to the settled position of law, the last few years have witnessed several instances where COMPAT has set aside and/or remanded CCI orders *inter-alia* on grounds of violation of principles of natural justice by CCI or the DG.

For instance, in the Board of Control for Cricket in India (“BCCI”) case,<sup>23</sup> COMPAT set aside a penalty imposed on BCCI for abuse of dominant position on the ground that CCI failed to give BCCI an opportunity of being heard.<sup>24</sup> Similarly, COMPAT set aside a CCI order imposing penalties for contravention of Section 3 of the Competition Act on the ground that CCI failed to notify to the parties reasons for its disagreement with the findings of the DG. It was observed that such an omission by the CCI deprived the affected party of an opportunity to effectively defend itself against the order, which amounted to a violation of the principles of natural justice.<sup>25</sup>

<sup>21</sup> If the report of the DG discloses contravention of provisions of the Competition Act and CCI opines that further inquiry is called for, then under Section 26(8), CCI must hold an inquiry into such contravention.

<sup>22</sup> COMPAT Order dated February 23, 2015 in Appeal No. 17 of 2013.

<sup>23</sup> *Ibid.*

<sup>24</sup> The definition of the relevant market on which the CCI’s decision was based was manifestly different from the definition of the relevant market in the DG’s report at the investigation stage. It was held that BCCI was not given an opportunity to contest the definition of relevant market that formed the basis of the CCI’s decision.

<sup>25</sup> COMPAT Order dated April 18, 2016 in Appeal No. 7 of 2016.

Further, it has become a common practice that the CCI quorum which hears the oral arguments of the parties is different from the quorum that passes the final order.<sup>26</sup> For instance, in the *Cement Cartel* case,<sup>27</sup> the Chairperson of the CCI became a party to the final order that imposed penalties of hefty amounts on cement companies without being a part of the quorum which heard the arguments of the parties. In another case,<sup>28</sup> the final order of the CCI was signed by members who were not present during the oral hearings and had not joined the CCI on the date of oral hearing. These instances indicate that CCI has failed to appreciate that although the Competition Act provides that the quorum of CCI meetings is three members, the principles of natural justice further necessitate that the quorum which passes the final order must be the same as the quorum which hears the oral arguments.<sup>29</sup>

Noting the failure of the CCI to adhere to the principles of natural justice, the COMPAT made a strong observation in a recent case:<sup>30</sup>

*In last few years, this Tribunal has noticed that the Commission has passed several orders in complete disregard to the law laid down by the Supreme Court that while exercising adjudicatory functions, the Commission acts as a quasi-judicial body and it is bound to act in consonance with different dimensions of the principles of natural justice. The Commission has also not realised that as a quasi-judicial body, it is subordinate to the Tribunal established under Section 53A and is bound to follow the law laid down by the Tribunal on the interpretation of the provisions of the Act and the Regulations. It is high time for the Commission to realise that by enacting Section 36(1), Parliament has unequivocally declared that in the discharge of its functions, the Commission shall be guided by the principles of natural justice.....*

### Due Process and the DG

In addition to the aforesaid cases, the COMPAT has set aside<sup>31</sup> CCI orders on the ground that the CCI failed to consider the issue of violation of the principles of natural justice in as much as the investigation conducted by the DG relied on forged and fabricated documents and the appellants were not provided with an opportunity to cross-examine.

The Competition Act has conferred wide investigative powers on the DG, including powers to conduct 'dawn raids', without any guidelines setting out procedural safeguards for the exercise of such powers. Accordingly, concerns have been raised regarding the use of such powers by the DG. At times, it has been alleged that such powers have been used to conduct roving and fishing expeditions. The absence of clear guidelines on scope and extent of such powers results in varying approaches being adopted by the DG in different cases. Issues pertaining to the refusal of the DG to supply a copy of the *prima facie* order to the defendant, denial of access to inculpatory material against companies, denial of

<sup>26</sup> COMPAT Order dated July 1, 2016 in Appeal No. 74 of 2014; COMPAT Order dated May 17, 2016 in Appeal No. 1 of 2014 and Appeal Nos. 44-47 of 2014 and Appeal No. 52 of 2015; COMPAT Order dated December 11, 2015 in Appeal No.105 of 2012.

<sup>27</sup> COMPAT Order dated December 11, 2015 in Appeal No.105 of 2012.

<sup>28</sup> COMPAT Order dated April 27, 2015 in Appeal No. 56 of 2014.

<sup>29</sup> *Gullapalli Nageswar Rao & Ors. v. State of Andhra Pradesh & Ors.*, AIR 1959 SC 308.

<sup>30</sup> COMPAT Order dated September 28, 2016 in Appeal No. 21 of 2016.

<sup>31</sup> COMPAT Order dated January 13, 2016 in Appeal No. 58 of 2015.

opportunity to cross-examine,<sup>32</sup> and presence of legal counsel during investigations<sup>33</sup> are common issues which arise in investigations by a DG.

In this backdrop, the Hon'ble Supreme Court recently while dealing with the scope of the DG's power of investigation, observed that while the starting point of the DG's investigation would be the allegations contained in the complaint, yet if during the investigation other facts are revealed and brought to light, the DG would be well within its powers to include those in its report.<sup>34</sup> This observation of the Supreme Court which is couched in broad terms is likely to have a far-reaching impact on the nature of investigations being conducted by the DG. Of course, one is yet to see how this observation is interpreted by courts in cases where the DG adds parties to investigations without formal CCI orders. Nevertheless, these developments further necessitate that the existing framework under the Competition Act is reviewed to ensure that adequate safeguards are incorporated to ensure procedural fairness in exercise of powers by the DG.

Finally, as we know, investigations (including surprise investigations, 'dawn raids') by the DG are crucial for CCI when considering a matter. However, under the Competition Act, the DG can conduct dawn raids only after obtaining a warrant from the Chief Metropolitan Magistrate of Delhi.<sup>35</sup> From a practical standpoint, this requirement to obtain a warrant specifically from the Chief Metropolitan Magistrate of Delhi may be onerous. Notably, this requirement is absent in other laws like the Companies Act and Reserve Bank of India Act, 1934.<sup>36</sup>

### 3. International Experience

Contrary to the Indian position, the United Kingdom Competition Act 1998 (“**UK Competition Act**”), instead of using terms like ‘natural justice’ which may be open to interpretation sets out in detail the procedure for investigation, search and seizure, notice requirements before conducting investigations/searches, etc. Notably, the UK Competition Act mandates that before making any adverse decision, a written notice and an opportunity to make representation must be given to person(s) likely to be affected by the proposed decisions.<sup>37</sup>

Similar provisions can also be found in the Singapore Competition Act.<sup>38</sup> The CCS has also issued guidelines on the powers of investigation of CCS,<sup>39</sup> including the extent of the investigative powers and the procedures that must be followed while exercising such powers.

<sup>32</sup> *Forech Limited v. Competition Commission of India and Another*, Order dated November 30, 2015 in W.P. No. 11072 of 2015 (High Court of Delhi).

<sup>33</sup> *Oriental Rubber Industries Ltd. v. Competition Commission of India and Another*, Order dated April 22, 2016 in W.P. No. 11411 of 2015 (High Court of Delhi).

<sup>34</sup> Please note that in this case, the Supreme Court was dealing with an issue where the DG relied on communication which was not considered by the CCI while passing an order under Section 26(1) of the Competition Act.

<sup>35</sup> Competition Act, Section 41(3) read with Section 220 of the Companies Act.

<sup>36</sup> Section 45T of the Reserve Bank of India Act, 1934.

<sup>37</sup> UK Competition Act, Section 31.

<sup>38</sup> Singapore Competition Act, Section 68.

<sup>39</sup> Competition Commission of Singapore, Guidelines on the Powers of Investigation, 2016, available at: <https://www.ccs.gov.sg/-/media/custom/ccs/files/legislation/ccs%20guidelines/guidelines%20finalise%20apr%202017/ccs%20guidelines%20on%20the%20powers%20of%20investigation%20apr%2017.ashx> (last accessed on November 17, 2017).

The discussion paper on 'Effective procedural safeguards in competition law proceedings' released by the International Chamber of Commerce ("ICC")<sup>40</sup> and the International Competition Network's ("ICN") Guidance on Investigative Process for competition law enforcement<sup>41</sup> may also be referred to while addressing the issues discussed above in the Indian context.

#### 4. Recommendations

- Detailed procedure for carrying out enquiries and proceedings of the CCI should be set out in the relevant regulations, in line with principles of natural justice and global best practices.<sup>42</sup>
- Procedure for investigations by the DG should be delineated (either in the form of guidelines, guidance notes or practice manuals)<sup>43</sup>. Such guidelines can *inter-alia* deal with issues pertaining to: (a) procedure for inspections; (b) the nature of information that may be sought by the DG, including materiality thresholds (if any); (c) the manner of collecting and submitting information; (d) the manner of taking depositions and conducting cross-examinations; (e) the presence of legal counsel during depositions and cross-examinations; and (f) notifying affected parties about inculpatory evidence gathered by the DG and permitting them to respond. The CCI should also consider making available to the public the manual for investigations to be conducted by the DG.
- Section 41 (Director General to investigate contravention) of the Competition Act should be amended to provide flexibility to the DG to obtain the warrant for conducting a dawn raid from either the Chief Metropolitan Magistrate of Delhi or from the Metropolitan Magistrate/Judicial Magistrate of the concerned jurisdiction in which the dawn raid is to be conducted.

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<sup>40</sup> International Chambers of Commerce, Effective Procedural Safeguards in Competition Law Enforcement Proceedings, June 2017, available at: <https://cdn.iccwbo.org/content/uploads/sites/3/2017/07/ICC-Due-Process-Best-Practices-2017.pdf> (last accessed on November 17, 2017).

<sup>41</sup> International Competition Network, ICN Guidance on Investigative Process, available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf> (last accessed on November 17, 2017).

<sup>42</sup> This recommendation is in line with the observation of COMPAT in the *Cement Cartel Case* (n 21), where the COMPAT while directing the CCI to hear the parties and pass fresh orders in accordance with law, observed that it was high time the CCI laid down guidelines for conducting investigations/enquiries in consonance with principles of natural justice.

<sup>43</sup> We understand that the CCI released a manual for investigations to be conducted by the Director General in 2013. However, the same has not been made public. See, CCI, Release of Investigation Manual for the Office of Director General, May 22, 2013, available at: <http://www.cci.gov.in/node/1600> (last accessed on November 18, 2017).

## C. Overload on the office of the DG and need for the CCI to exercise discretion in ordering investigations

Given that in most cases, the investigation report submitted by the DG forms the primary basis for the CCI's decision, the office of the DG is the most important pillar of the Indian competition law regime. Therefore, efficient functioning of the office of the DG is vital for effective enforcement of the Competition Act.

### 1. Present Legal Framework

In terms of Section 26(1) of the Competition Act, if the CCI on its own or upon receipt of information is of the opinion that there exists a *prima facie* case with respect to anti-competitive agreements or abuse of dominance, it must direct the DG to investigate the matter.

### 2. Case for Reform

A perusal of the Annual Report of the CCI for the year 2015-16 demonstrates that from the time the substantive provisions of the Competition Act were notified in 2009, there has been a steady increase in the number of cases pending before the DG almost every year.<sup>44</sup>

From a total of 277 investigations ordered with regard to violation of Section 3 (Prohibition of Anti-competitive Agreements) and Section 4 (Prohibition of Abuse of Dominant Position) of the Competition Act, up to March 31, 2016, investigation reports are yet to be submitted by the DG in 52 cases.<sup>45</sup> Such a huge backlog at the initial stage itself may among other factors, be attributed *firstly*, to the lack of adequate infrastructure and resources in the office of the DG<sup>46</sup> and *secondly*, need for the CCI to exercise discretion while ordering investigations under Section 26(1) of the Competition Act. This Report focuses on the latter issue as a cause for concern.

From the latest Annual Report of the CCI, it can be seen that out of a total of 707 cases considered by the CCI for violation of Sections 3 and 4 of the Competition Act till March 2016, investigations by the DG under Section 26(1) were ordered in 277 cases. Therefore, in almost 40% of matters related to violation of Sections 3 and 4 of the Competition Act, the CCI ordered the DG to carry out investigations. Interestingly, out of 181 orders passed by the CCI, after completion of investigation, it found contravention of the Competition Act in only 94 cases. The upshot is that the contravention of the provisions of the Competition Act was found in approximately only 50% of the cases ordered to be investigated.

<sup>44</sup> Annual Report of the CCI for 2015-16, pg. 15, available at: <http://www.cci.gov.in/sites/default/files/annual%20reports/annual%20report%202015-16.pdf> (last accessed on November 17, 2017).

<sup>45</sup> *Ibid.*

<sup>46</sup> "It is observed that the investigations are taking increasingly more time for completion. This partly reflects inadequate staff strength in the office of the DG and partly reflects increasing complexity of cases being referred to the DG by the Commission." Annual Report of the CCI for 2015-16, pg. 15, available at: <http://www.cci.gov.in/sites/default/files/annual%20reports/annual%20report%202015-16.pdf> (last accessed on November 17, 2017); Also see, Deepak Patel, 'Not a level playing field' (*SmartInvestor.in*, September 29, 2014) available at: [http://smartinvestor.business-standard.com/market/Compnews-268377-Compnewsdet-Not\\_a\\_level\\_playing\\_field.htm#.WfmlcFuCyM9](http://smartinvestor.business-standard.com/market/Compnews-268377-Compnewsdet-Not_a_level_playing_field.htm#.WfmlcFuCyM9) (last accessed on November 17, 2017).

Admittedly, the burden of proof on the CCI for initiation of investigations under Section 26(1) is not as high as that required to establish infringement of the Competition Act,<sup>47</sup> but the exercise of stronger discretion by the CCI would be helpful in reducing the workload on the DG's office and ensuring more efficient allocation of resources.

Further, another aspect that must be considered is the consequence of initiation of an investigation on the productivity of businesses. In the case of *Google Inc. v. Competition Commission of India*, the Hon'ble Delhi High Court concluded that the powers of the DG under Section 26(1) of the Competition Act are far more sweeping and wider than the power of investigation conferred on the Police under the Code of Criminal Procedure, 1973 ("CrPC").<sup>48</sup> The Court observed that a CCI ordered investigation by a DG, is tantamount to the commencement of trial/inquiry on the basis of an *ex-parte prima facie* opinion.<sup>49</sup> Citing precedents of the Hon'ble Supreme Court of India and the Calcutta High Court, the court observed that an investigation against a public company tends to shake its credit and adversely affect its competitive position in the business world even though in the end it may be completely exonerated.<sup>50</sup> It noted that the very appointment of an Inspector to investigate a company's affairs is likely to receive publicity in the press as a result of which the reputation and prospects of the company may be adversely affected.<sup>51</sup> Considering the implications of the exercise of the sweeping powers of the DG on the business of a company, including on its reputation, the CCI should exercise discretion in ordering investigations by the DG. Notably, at present, there are no guidelines to assist the CCI in determining which cases must be investigated. Consequently, it is unclear what factors the CCI takes into account in deciding to commence an investigation.

### 3. International Experience

In the UK, the Competition Markets Authority ("CMA") follows the 'Prioritisation Principles for the CMA' ("Prioritisation Principles") to make the best use of its resources for the benefit of consumers.<sup>52</sup> The CMA considers a range of factors laid down in the Prioritisation Principles before deciding to commence an investigation. These include: (a) impact on consumers; (b) strategic significance; (c) risks; and (d) resources.

Adherence to the Prioritisation Principles ensures that the CMA (including its enforcement and investigative wings) does not spread itself too thin or drown its limited resources in technicalities and paperwork. Moreover, as stated in the Prioritisation Principles, ensuring that enforcement action is in consonance with defined guidelines, prevents the CMA from imposing unnecessary burdens on businesses.

Section 62 of the Singapore Competition Act read with CCS Guidelines on the Powers of Investigation, 2016<sup>53</sup> lays down that the CCS shall investigate a matter only if there are

<sup>47</sup> AZB & Partners, 'Special Report - India Competition Law - Cartels and the CCI', (*Conventus Law*, August 23, 2016), available at: <http://www.conventuslaw.com/special-report/india-competition-law-cartels-and-the-cci/> (last accessed on November 17, 2017).

<sup>48</sup> *Google Inc. v. Competition Commission of India*, 2015 SCC OnLine Del 8992, ¶ 18E.

<sup>49</sup> *Ibid*, ¶ 18F.

<sup>50</sup> *Ibid*, ¶ 18N.

<sup>51</sup> *Ibid*, ¶ 18N.

<sup>52</sup> Prioritisation Principles for the CMA, available at:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/299784/CMA16.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299784/CMA16.pdf) (last accessed on October 1, 2017).

<sup>53</sup> The CCS Guideline on the Powers of Investigation, 2016, available at: <https://www.ccs.gov.sg/-/media/custom/ccs/files/legislation/ccs%20guidelines/guidelines%20finalise%20apr%202017/ccs%20guidelines%20on%20the%20powers%20of%20investigation%20apr%2017.ashx> (last accessed on September 20, 2017).

'reasonable grounds' for suspecting violation of the Singapore Competition Act. These guidelines also provide that the CCS may use informal meetings to obtain more information and it can use such enquires instead of formal investigation.

With regard to the effect of reckless investigations on businesses, the ICC has recently observed that since competition law enforcement proceedings are intrusive and burdensome on parties involved in investigations, agencies should exercise restraint when considering initiating an investigation. It has accordingly, recommended that agencies should give due regard to enforcement priorities when deciding which allegations of anti-competitive conduct to pursue.<sup>54</sup>

#### 4. Recommendations

- The CCI must be directed to only take up matters that ensure most efficient allocation of its resources in terms of real outcomes. Towards this end, detailed guidelines patterned on the 'Prioritisation Principles' of the CMA must be adopted to ensure that only such complaints are investigated which would directly or indirectly affect India's desired competition law outcomes or are strategically significant or there is likelihood of a successful outcome within available resources.
- The appellate tribunal must ensure that while considering appeals against orders passed by CCI closing a matter under Section 26(2) of the Competition Act, it gives due regard to the Prioritisation Principles recommended earlier for the CCI.
- The office of the DG must be adequately staffed with trained and experienced individuals.
- As observed by the Supreme Court,<sup>55</sup> in order to repose confidence in its procedures among stakeholders, the CCI shall benefit from recording at least broad reasons for forming the *prima facie* opinion adopted by it at the time of passing directions under Section 26(1) of the Competition Act.

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<sup>54</sup> For detailed discussion, please see ICC Discussion Paper on Effective Procedural Safeguards in Competition Law Enforcement Proceedings 225/765, June 2017, pgs. 2-3, available at: <https://cdn.iccwbo.org/content/uploads/sites/3/2017/07/ICC-Due-Process-Best-Practices-2017.pdf> (last accessed on September 20, 2017).

<sup>55</sup> *SAIL* (n 18).

## D. Key issues at the Appellate stage

The appellate procedure in the competition law regime aims to keep a check on the investigative and the adjudicatory wings of the CCI. The COMPAT was constituted by Section 53A of the Competition Act as an appellate tribunal for orders passed by the CCI. However, the Finance Act, 2017 vested all functions and powers of the COMPAT with the National Company Law Appellate Tribunal ("NCLAT"). While, the constitutional validity of the Finance Act, 2017 has been challenged,<sup>56</sup> the merger of COMPAT with NCLAT has thrown open some pertinent questions regarding the overall efficacy of NCLAT to handle competition appeals.

### 1. Present Legal Framework

Section 53(B)(5) of the Competition Act provides that appeals filed before the appellate tribunal shall be dealt with *as expeditiously as possible* and an endeavour shall be made by it to *dispose of appeals within six months* from the date of receipt of the appeal. Section 53(T) of the Competition Act allows appeals from decisions of the appellate tribunal to be made before the Hon'ble Supreme Court of India.

### 2. Case for Reform

#### Time taken to dispose appeals

Table A - Cases before COMPAT that remain pending for over a year<sup>^</sup>

	A	B	C	D
Year	Number of Appeals pending at beginning of the year ("Old Cases")	Number of Appeals decided or remanded to CCI from Old Cases	Number of Appeals pending at the end of the year from Old Cases (A-B)	Percentage of Appeals pending at the end of the year from Old Cases <sup>57</sup> (C/A * 100)
2015-16	146	90	56	38%
2014-15	73	29	44	60%
2013-14	135	91	44	33%
2012-13	34	16	18	53%
<b>Average number of cases that remain pending for over a year</b>				<b>46%</b>

<sup>^</sup> All figures have been taken from the Annual Reports of the CCI, available on its website.

<sup>56</sup> *Madras Bar Association v. Union of India*, W. P. No. 15147 and 15148 of 2017 (High Court of Judicature at Madras).

<sup>57</sup> For the sake of convenience percentages are squared off to the next whole figure if the decimal exceeds 0.5%.

A brief perusal of Table A, demonstrates that on an average 46% of the appeals pending before the appellate tribunal at the beginning of a given year remain unresolved for over twelve months. Thus, the appellate tribunal does not comply with the indicative timeline given in Section 53(B)(5) of the Competition Act in almost half of the cases dealt by it.

**Table B - Annual disposal rate of COMPAT<sup>^</sup>**

	A	B	C= B/A * 100
Year	Number of Appeals before the COMPAT <sup>^^</sup>	Number of Appeals decided/remanded to CCI	Disposal Rate per year
2015-16	232	136	59%
2014-15	197	51	26%
2013-14	181	108	60%
2012-13	176	40	23%
<b>Average disposal rate of appeals per year</b>			<b>42%</b>

<sup>^</sup> All figures have been taken from the Annual Reports of the CCI, available on its website.

<sup>^^</sup> Pending from the previous year as well as fresh appeals received during the year.

As evident from Table B, the average rate of disposal of cases by the appellate tribunal is just over 40% cases per year. Thus, timely adjudication of competition law disputes at the appellate stage is far from satisfactory. In addition to the delay at the appellate stage, there lies further scope of appeal to the Hon'ble Supreme Court of India.

The time lag entailed in the appellate procedure must be cut short for the competition law regime to remain relevant and business-friendly in today's rapidly evolving economic scenario. Whilst, the CCI (General) Regulations, 2009 contain broad timelines for enquiries conducted by the CCI, no such provisions exist which provide stage-wise timelines for the appellate process. The Competition Appellate Tribunal (Form and Fee for Filing an Appeal and Fee for Filing Compensation Applications), Rules 2009 as well as the Competition Appellate Tribunal (Procedure) Regulations, 2011 are skeletal and do not contain guidance on indicative timelines for the appellate procedure. The Companies Act, 2013 ("Companies Act") and the rules thereunder provide a detailed framework for company law appeals to the NCLAT and require the NCLAT to make every endeavour to dispose an appeal within three months from the date of filing. However, they also do not provide any indicative stage-wise timelines to dispose appeals.

### Competition law expertise in NCLAT

The impact of economic complexities on modern competition law litigation is widely acknowledged.<sup>58</sup> It is believed that constituting an appellate authority for competition law matters that includes experts in economics in addition to competition law, 'enlarges its knowledge and skill' significantly.<sup>59</sup>

COMPAT, the predecessor of the NCLAT, consisted of three members including a Chairperson who was either a Judge of the Supreme Court of India or a Chief Justice of any High Court and two technical members *with experience of not less than 25 years in, competition matters, including competition law and policy, international trade, finance, economics, and accountancy*.<sup>60</sup>

On the other hand, NCLAT was originally envisaged as an appellate authority for only company law related appeals. Later, it was given the mandate to handle appeals arising under the Competition Act and the Insolvency and Bankruptcy Code, 2016 ("Bankruptcy Code"). Pertinently, Section 411(3) of the Companies Act which provides for qualifications of a technical member of the NCLAT does not require her to possess expertise in competition law and policy or economics. The profile of the present NCLAT members as provided on NCLAT's website indicates that there is no technical member who has prior experience in the domain of *competition law and economics*.<sup>61</sup>

In this regard, reference may be made to the 272<sup>nd</sup> Report of the Law Commission of India which has recommended that *appointments to specialised tribunals should comprise of persons of proven ability, integrity and standing having special knowledge and professional experience or expertise of not less than fifteen years in the particular field*.<sup>62</sup>

Further, while the maximum permissible strength of the NCLAT is 11 members, it currently comprises only three members.<sup>63</sup> Considering that the NCLAT is the appellate authority for the purposes of Companies Act, Bankruptcy Code, and the Competition Act, there is an urgent need to appoint more members to ensure that the volume of appeals pending before NCLAT does not spiral into an untameable problem as has been the experience with several other tribunals in India.<sup>64</sup>

<sup>58</sup> Michael R. Baye and Joshua D. Wright, 'Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals' (2011) 54(1) *Journal of Law and Economics* 1.

<sup>59</sup> OECD, *Judicial Enforcement of Competition Law*, (1996) available at <https://www.oecd.org/daf/competition/prosecutionandlawenforcement/1919985.pdf> (last accessed on September 20, 2017).

<sup>60</sup> Competition Act, Section 53D (Repealed *vide* Finance Act, 2017)

<sup>61</sup> NCLAT website, available at: <http://www.nclat.nic.in/members.html> (last accessed on November 17, 2017); See generally, Karry Lai, 'Indian competition body in struggle with appellate tribunal' (*International Financial Law Review*, November 07, 2017) available at: [http://www.iflr.com/Article/3764870/Indian-competition-authority-in-tug-of-war-with-appellate-tribunal.html?utm\\_campaign=Email+verification&utm\\_content=2017-11-09&utm\\_term=Verification+link&utm\\_medium=Email+operational&utm\\_source=Registration+Form&r=verified](http://www.iflr.com/Article/3764870/Indian-competition-authority-in-tug-of-war-with-appellate-tribunal.html?utm_campaign=Email+verification&utm_content=2017-11-09&utm_term=Verification+link&utm_medium=Email+operational&utm_source=Registration+Form&r=verified) (last accessed on November 17, 2017).

<sup>62</sup> Law Commission of India, '272th Report on Assessment of Statutory Frameworks of Tribunals in India', October 2017, available at: <http://lawcommissionofindia.nic.in/reports/Report272.pdf> (last accessed on November 17, 2017).

<sup>63</sup> Companies Act, Section 410. For present composition please see, NCLAT website, available at: <http://www.nclat.nic.in/> (last accessed on November 17, 2017).

<sup>64</sup> Subhomoy Bhattacharjee, 'Backlogs weigh down tribunals as settlements take years to conclude' (*Indian Express*, August 4, 2015) available at: <http://indianexpress.com/article/india/india-others/backlogs-weigh-down-tribunals-as-settlements-take-years-to-conclude/> (last accessed on November 17, 2017); Vishwanath Nair, 'Pending cases pile up at Debt Recovery Tribunals' (*Livemint*, August 28, 2015) available

### 3. International Experience

#### Time taken to dispose appeals

In the UK, appeals from orders of the CMA are heard by the Competition Appeals Tribunal<sup>65</sup> ("CAT"). The procedure that governs proceedings before CAT is laid down in the Competition Appeal Tribunal Rules 2015<sup>66</sup> ("UK Appeal Rules"). The UK Appeal Rules are supplemented by the Guide to Proceedings in the Competition Appeal Tribunal 2015<sup>67</sup> ("Appeal Practice Direction").

The UK Appeal Rules and the Appeal Practice Direction also lay down in detail the timeline that must be followed once an appeal is filed, including setting the date for the first case management conference, filing the notice of appeal or application for review and for filing the defence. Requirements relating to the content of notices of appeal/applications are also provided for in detail. The objective is that CAT should be able to, on a single reading, apprehend all the essential matters of fact and law that are in the issue so that it can dispose of the appeals effectively.<sup>68</sup>

Further, the UK Appeal Rules lay down in detail the rules and timeline for intervention by third parties in proceedings before the CAT.

#### Case Management

Proceedings before the CAT are characterised by active case management with a view to ensuring that cases are dealt with justly and at proportionate cost.<sup>69</sup> Rule 4(5) of the UK Appeal Rules states that active case management includes the following:

- (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
- (b) identification of and concentration on the main issues as early as possible;
- (c) fixing a target date for the main hearing as early as possible together with a timetable for the proceedings up to the main hearing, taking into account the nature of the case;
- (d) planning the structure of the main hearing in advance with a view to avoiding unnecessary oral evidence and argument; and
- (e) ensuring that the main hearing is conducted within defined time limits.

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at: <http://www.livemint.com/Politics/hNLONGGdDhODVNmiRyxHLM/Pending-cases-pile-up-at-debt-recovery-tribunals.html> (last accessed on November 17, 2017).

<sup>65</sup> Please note the Competition Appellate Tribunal in the UK is also vested with the duty to act as the appellate authority for orders passed by certain other sectoral regulators constituted under various statutes such as the Postal Services Act, 2011, Electricity Act, 1989, and Payment Services Regulations 2009.

<sup>66</sup> Competition Appeal Tribunal Rules 2015, available at: [http://www.catribunal.org.uk/files/The\\_Competition\\_Appeal\\_Tribunal\\_Rules\\_2015.pdf](http://www.catribunal.org.uk/files/The_Competition_Appeal_Tribunal_Rules_2015.pdf) (last accessed on November 17, 2017).

<sup>67</sup> Guide to Proceedings in the Competition Appeal Tribunal (2015), available at: [http://www.catribunal.org.uk/files/Guide\\_to\\_proceedings\\_2015.pdf](http://www.catribunal.org.uk/files/Guide_to_proceedings_2015.pdf) (last accessed on November 17, 2017).

<sup>68</sup> Appeal Practice Direction, ¶ 4.27.

<sup>69</sup> UK Appeal Rules, Rule 4(1) and Appeal Practice Direction, ¶ 7.1; See UK Appeal Rules, Rule 4(2) for what is meant by dealing with a case justly and at proportionate cost.

The first Case Management Conference ("CMC") is viewed by the CAT as particularly important since its main purpose is to set a timetable for an oral hearing and to fix a date for that hearing.<sup>70</sup> In setting the date for the first CMC, the CAT's diary is given paramount importance and factors such as availability of legal counsel of the parties are not given any weightage.<sup>71</sup>

In Singapore as well, there exists a comprehensive Competition (Appeal) Regulation that contains provisions fixing timelines for various stages of the appellate procedure as well as the requirement for case management, similar to the UK.<sup>72</sup>

### Appointment of experts

In the UK, while no specific criteria regarding expertise of ordinary members (non-judicial members) are prescribed, the CAT comprises a combination of industry experts, economists, legal practitioners (including experts of competition law), and accountants, among others.<sup>73</sup>

In Singapore, Section 72 of the Singapore Competition Act provides that members of the Competition Appeal Board ("CAB") be appointed based on their ability and experience in the industry, commerce or administration or their professional qualifications or their suitability otherwise for an appointment. The CAB has experts from accounts, business, economics and law.<sup>74</sup>

## 4. Recommendations

- Detailed rules must be drafted governing the procedure for disposing appeals that are presented before the appellate tribunal. Indicative timelines for various stages of the appellate procedure and broad contents of written submissions must be prescribed.
- It must be made mandatory to hold case management conferences right at the beginning of the appellate procedure. This will ensure that the appellate tribunal remains in the driver's seat and proceedings before it is concluded in a timely manner. This recommendation is applicable to proceedings before the CCI as well.
- The appellate tribunal must be adequately staffed. A dedicated bench or designated expert members must be allotted all appeals arising from CCI orders.

<sup>70</sup> Appeal Practice Direction, ¶ 7.5 and UK Appeal Rules, Rules 20(3) and 54(3).

<sup>71</sup> Appeal Practice Direction, ¶ 7.13.

<sup>72</sup> Competition (Appeals) Regulation, 2006, available at: <http://statutes.agc.gov.sg/aol/search/display/view.w3p?page=0;query=DocId%3A%2265221d10-57df-4826-a8c9-cb47dbbc4d0f%22%20Status%3Ainforce%20Depth%3A0;rec=0> (last accessed on November 17, 2017).

<sup>73</sup> For composition of the CAT, please see: <http://www.catribunal.org.uk/246/Personnel.html> (last accessed on November 17, 2017).

<sup>74</sup> For composition of the CAB, please see: <https://www.mti.gov.sg/legislation/Documents/2015.pdf> (last accessed on November 17, 2017).

## E. Interface between CCI and Sectoral Regulators

The interface between competition policy and sector-specific regulation poses complex questions, particularly concerning the jurisdictional mandate for competition law issues. There have been several instances of turf conflicts between the CCI and various regulators and forum shopping by plaintiffs, stemming from a lack of clarity with respect to a delineation of roles and responsibilities between the CCI and sectoral regulators. This conflict has been significantly witnessed in the area of telecom, consumer protection, and electricity regulation.

### 1. Present Legal Framework

The interface between CCI and sectoral regulators can be appreciated by a perusal of the provisions of the Competition Act and sector-specific laws which set out the mandate to regulate competition law issues for the CCI and sectoral regulators, respectively.

**Table C - Mandate of various regulators to promote competition**

CCI: Competition Act
<ul style="list-style-type: none"> <li>• Principal duty of sustaining competition in the market.<sup>75</sup></li> <li>• Overriding effect of provisions of the Competition Act in cases of inconsistency with other laws.<sup>76</sup></li> <li>• Provisions of the Competition Act will be read in addition to and not in derogation of other laws.<sup>77</sup></li> <li>• Empowers a statutory authority to refer an issue to the CCI in respect of an ongoing proceeding before it, in the event any decision which such authority takes or proposes to take is or would be contrary to the provisions of the Competition Act.<sup>78</sup></li> <li>• Empowers the CCI to refer an issue to a statutory authority in respect of an ongoing proceeding before it, in the event any decision which the CCI takes or proposes to take is or would be contrary to the provisions of the Act whose implementation is entrusted to the statutory authority.<sup>79</sup></li> </ul>
TRAI: Telecom Regulatory Authority of India Act, 1997 (“TRAI Act”)
<ul style="list-style-type: none"> <li>• TRAI must <i>facilitate competition and promote efficiency</i> in the telecom sector.<sup>80</sup></li> <li>• <i>Matters related to monopolistic, restrictive or unfair trade practices</i> that fall under the jurisdiction of the Monopolies and Restrictive Trade Practices Commission (presently, the CCI) excluded from the purview of the Telecom Disputes Settlement and Appellate Tribunal (“TDSAT”).<sup>81</sup></li> </ul>

<sup>75</sup> Preamble read with Competition Act, Section 18.

<sup>76</sup> Competition Act, Section 60.

<sup>77</sup> Competition Act, Section 62.

<sup>78</sup> Competition Act, Section 21.

<sup>79</sup> Competition Act, Section 21-A.

<sup>80</sup> TRAI Act, Section 11.

<sup>81</sup> TRAI Act, Section 14.

**Central Electricity Authority: The Electricity Act, 2003 ("Electricity Act")**

- Preamble specifies that the Electricity Act *inter-alia* seeks to *consolidate the laws relating to generation, transmission, ..... of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interests of consumer,...rationalisation of electricity tariff, ensuring transparent policies regarding subsidies....*
- Appropriate Electricity Commission has the power to issue directions to a licensee or a generating company which *enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in electricity industry.*<sup>82</sup>
- Electricity Act has an overriding effect on other laws.<sup>83</sup>

**Petroleum and Natural Gas Regulatory Board ("PNGRB"): Petroleum and Natural Gas Regulatory Board Act, 2006 ("PNGRB Act")**

- Preamble provides that PNGRB Act seeks to *promote competitive markets.*
- PNGRB must *protect the interest of consumers by fostering fair trade and competition amongst the entities.*<sup>84</sup>
- PNGRB is mandated to regulate: (a) *access to common carrier or contract carrier so as to ensure fair trade and competition amongst entities and for that purpose specify pipeline access code;*<sup>85</sup> and (b) *access to city or local natural gas distribution network so as to ensure fair trade and competition amongst entities as per pipeline access code.*<sup>86</sup>

**Real Estate Regulatory Authority ("RERA"): Real Estate (Regulation and Development) Act, 2016 ("RE Act")**

- RERA *may suo motu* make reference to the CCI of any issues in relation to an agreement/action/practice/procedure that: (a) *has an appreciable prevention, restriction or distortion of competition in connection with the development of a real estate project; or (b) has effect of 'market power of monopoly situation being abused for affecting interest of allottees.*<sup>87</sup>

## 2. Case for Reform

It is evident from the aforesaid Table C that while CCI has the primary jurisdiction to regulate matters pertaining to competition in India, sector-specific regulators have also been entrusted with the duty to promote competition in their respective areas. The difference in methods and approaches of regulators often results in divergent outcomes and opinions, bringing forth issues pertaining to conflict of jurisdiction.

<sup>82</sup> Electricity Act, Section 60.

<sup>83</sup> Electricity Act, Section 174. However, Section 173 of the Electricity Act excludes for the purpose of Section 174, any inconsistencies with the provisions of the Consumer Protection Act, 1986 or the Atomic Energy Act, 1962 and the Railways Act, 1989.

<sup>84</sup> PNGRB Act, Section 11(a).

<sup>85</sup> PNGRB Act, Section 11(e)(i).

<sup>86</sup> PNGRB Act, Section 11(e)(iii).

<sup>87</sup> RE Act, Section 38(3).

A recent instance of the implications of such overlap in jurisdiction is the ongoing ‘turf war’ between CCI and TRAI with respect to predatory pricing issues in the telecom sector.<sup>88</sup> This is not an isolated instance. There have been similar instances in the past where the polarity in views of the CCI and sectoral regulators has surfaced.

For instance, in a matter before the CCI,<sup>89</sup> it was argued that the CCI could not claim jurisdiction over the matter since TRAI and TDSAT were already vested with the jurisdiction and responsibility to govern and regulate the telecommunication industry. Rejecting these arguments, the CCI held that while TRAI is the sectoral regulator for the telecom market, any matter that raises concerns centred around anti-competitive practices would fall within the purview of the Competition Act. Similar issues pertaining to the interplay between the provisions of the Competition Act and the Electricity Act with respect to jurisdiction in matters of alleged abuse of dominance arising from computation and levy of Fuel and Power Purchase Cost Surcharge Adjustment approved by the State Electricity Regulatory Commission has also been a subject matter of dispute before the COMPAT.<sup>90</sup> In another case, the Delhi High Court recently dealt with issues pertaining to the jurisdiction of the CCI to entertain complaints regarding the abuse of dominance by a patent holder in light of the provisions of the Patents Act, 1970.<sup>91</sup> Such cases clearly indicate that with the complex structuring of businesses and their operations, questions regarding the jurisdiction of CCI in specific sectors are likely to be raised time and again.

Similarly, in the past CCI has also witnessed a worrying trend of parties filing complaints under the Competition Act after rejection of their claim under consumer protection law. The CCI has noted that the blurring of lines between the jurisdiction of the CCI and the consumer dispute redressal mechanism is a cause for concern.<sup>92</sup>

Further, the overlap between the different regulators often results in inconsistent views by them on similar issues. For example, in the case of Reliance Jio, while the CCI came to the conclusion that free services offered by the company to customers (Welcome offer and Happy New Year offer) did not amount to an abuse of dominant position,<sup>93</sup> TRAI ordered the company to withdraw its Summer Surprise Offer which entailed similar freebies.<sup>94</sup>

While the Competition Act envisages a reference mechanism enabling CCI and sectoral regulators to refer matters to each other in certain cases, this provision has not been effectively put to use.

<sup>88</sup> Amrit Raj, 'CCI to TRAI: Consult us on predatory pricing issues' (*Livemint*, July 28, 2017) available at: <http://www.livemint.com/Industry/uzSqE22Uk4Lgt1jX8PjCOJ/CCI-to-Trai-Consult-us-on-predatory-pricing-issues.html> (last accessed on November 17, 2017); Kiran Rathee, 'CCI tells TRAI to consult it on predatory pricing, market dominance issues' (*Business Standard*, July 28, 2017) available at: [http://www.business-standard.com/article/companies/pricing-market-dominance-its-remit-cci-tells-trai-117072800069\\_1.html](http://www.business-standard.com/article/companies/pricing-market-dominance-its-remit-cci-tells-trai-117072800069_1.html) (last accessed on November 17, 2017).

<sup>89</sup> CCI Order dated March 24, 2011 in Case No. 2 of 2009.

<sup>90</sup> COMPAT Order dated February 16, 2017 in Appeal No. 33 of 2016. In this case, the COMPAT held that there is an implied immunity from competition law in the electricity tariff approved by the appropriate commission in terms of the Electricity Act and therefore, there can be no relief given under the Competition Act.

<sup>91</sup> *Telefonaktiebolaget LM Ericsson v. CCI & Anr*, 2016 SCC OnLine Del 1951. In this case, the Delhi High Court harmoniously interpreted the provisions of the two laws and held that the jurisdiction of the CCI to entertain complaints for abuse of dominance in respect of patent rights cannot be ousted.

<sup>92</sup> CCI Order dated June 29, 2012 in Case No. 25 of 2012.

<sup>93</sup> CCI Order dated July 9, 2017 in Case No. 03 of 2017.

<sup>94</sup> ET Bureau, 'TRAI forces Reliance Jio to withdraw Summer Surprise offer' (*Indian Express*, April 7, 2017) available at: <http://economictimes.indiatimes.com/news/economy/policy/reliance-jio-to-withdraw-summer-surprise-offer-after-trai-prodding/articleshow/58051246.cms> (last accessed on November 17, 2017).

### 3. International Experience

The Singapore Competition Act<sup>95</sup> empowers the CCS to enter into ‘co-operation’ agreements with other regulatory authorities, which may include clauses pertaining to information sharing, consultation, etc. Similarly, in the UK, the CMA also enters into Memorandums of Understanding (“MOUs”) with sector-specific regulators<sup>96</sup> setting out a co-operation mechanism on exercise of their jurisdiction on competition matters. Moreover, in the UK the Enterprise and Regulatory Reform Act, 2013 (“**UK Enterprise Reform Act**”) empowers the CMA to decide which regulator will have jurisdiction in a matter in any concurrent sector, following consultation.<sup>97</sup> This requirement is intended to strengthen the primacy of competition law. The Competition Act 1998 (Concurrency) Regulations 2014 provide in detail the mechanism for coordination between the CMA and sectoral regulators. The CMA has also issued the ‘Regulated Industries: Guidance on the concurrent application of competition law to regulated industries’ which explains application and enforcement of EU as well as UK competition law by the CMA and sectoral regulators.<sup>98</sup>

According to an Organisation for Economic Co-operation and Development (“OECD”), analysis,<sup>99</sup> a key element of cooperation between competition authorities and other sectoral regulators is a timely exchange of information and prior consultation between them on issues that impact each other’s area of operation.

### 4. Recommendations

- Employing the cooperation/ consultation mechanism between the CCI and sectoral regulators may be made compulsory by necessary amendments to the Competition Act and sectoral laws.<sup>100</sup> For example, Sections 21 and 21A of the Competition Act can be amended to say that use of the reference mechanism provided therein is mandatory in case of issues involving concurrent sectors.
- In line with jurisdictions like UK and Singapore, the CCI may consider entering into binding MoUs with sector-specific regulators which effectively sets out the respective roles of the agencies.

<sup>95</sup> Singapore Competition Act, Section 87.

<sup>96</sup> MOU dated December 2015 between CMA and Payment Systems Regulator, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/487947/PSR-CMA\\_memorandum\\_of\\_understanding.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/487947/PSR-CMA_memorandum_of_understanding.pdf) (last accessed on November 17, 2017); MOU dated February 2016 between CMA and Office of Communications, available at: [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0021/83523/cma\\_and\\_ofcom\\_mou\\_on\\_use\\_of\\_concurrent\\_consumer\\_powers\\_webversion.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0021/83523/cma_and_ofcom_mou_on_use_of_concurrent_consumer_powers_webversion.pdf) (last accessed on November 17, 2017).

<sup>97</sup> Enterprise and Regulatory Reform Act, 2013, Sections 51-53.

<sup>98</sup> CMA, Regulated Industries: Guidance on concurrent application of competition law to regulated industries CMA10, March 2014 available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/288958/CMA10\\_Guidance\\_on\\_concurrent\\_application\\_of\\_competition\\_law\\_to\\_regulated\\_industries.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288958/CMA10_Guidance_on_concurrent_application_of_competition_law_to_regulated_industries.pdf) (last accessed on November 7, 2017).

<sup>99</sup> OECD, Relationship between Regulators and Competition Authorities, 1998, DAFFE/CLP(99)8, available at: <https://www.oecd.org/competition/sectors/1920556.pdf> (last accessed on November 7, 2017); UNCTAD, Best Practices for Defining Respective Competences and Settling of Cases, which Involve Joint Action by Competition Authorities and Regulatory Bodies, August 17, 2006, available at: [http://unctad.org/en/Docs/tdrbpconf6d13rev1\\_en.pdf](http://unctad.org/en/Docs/tdrbpconf6d13rev1_en.pdf) (last accessed on November 7, 2017).

<sup>100</sup> The Draft National Competition Policy, 2011 also analysed the interface between the CCI and other sectoral regulators. It recommended that coordination between sectoral regulators and CCI should be made mandatory through suitable provisions in the Competition Act and relevant sectoral laws. For details, please see MCA, Draft National Competition Policy (2011) available at: [http://www.mca.gov.in/Ministry/pdf/Draft\\_National\\_Competition\\_Policy.pdf](http://www.mca.gov.in/Ministry/pdf/Draft_National_Competition_Policy.pdf) (last accessed on September 10, 2017).

- Following the example of the UK Enterprise Reform Act, the Central Government can lay down conclusively which regulator shall have primary jurisdiction in competition law matters in case of concurrent powers.

## F. Need to Revise Definitions

The Competition Act is a multifaceted legislation and at its core lie complex economic principles. Whilst flexibility in interpretation is desirable, consistency and resonance with fundamentals of economics are pre-requisites for meaningful interpretation of the Competition Act. Lack of clarity in terms of definitions reduces the effectiveness of any law in general and a commercial law such as the Competition Act in particular.

### 1. Present Legal Framework

This part discusses by way of example few terms that are used in the Competition Act and either need to be defined or the existing definition needs clarification.

- (a) 'Public interest' and 'sovereign functions' - Section 54 empowers the Central Government to exempt certain enterprise(s) from the application of the entire Act or specific provisions contained therein on grounds of security of State, public interest and performance of sovereign functions of the Government. Additionally, the definition of the term 'enterprise' in Section 2(h) of the Competition Act carves out 'any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space' from its purview. This assumes significance as provisions regarding abuse of dominance (Section 4) and merger notification (Section 5) are applicable only to 'enterprises'.
- (b) 'Turnover' - Section 27(b) relies on 'turnover' of an enterprise for the purposes of computing penalties that may be levied. The term 'turnover' is also relevant in determining whether an entity needs to notify a proposed combination under Section 5 of the Competition Act. The definition of the term 'turnover' in Section 2(y) of the Act only states that 'turnover includes the value of sale of goods or services'.

### 2. Case for Reform

- (a) 'Public interest', 'sovereign functions' - Although exemption from applicability of the Competition Act for certain government entities/functions is provided in Section 54, it is ambiguous as to what constitutes 'public interest', 'sovereign functions', etc. as these terms have not been defined in the Act. Even the carve-out for government activity provided in the definition of 'enterprise' does not specify the scope of the term 'sovereign functions'. As stated earlier, whether a government entity falls within the definition of 'enterprise' has wide ramifications including a determination as to whether it can be prosecuted under Sections 4 and 5 of the Competition Act.

In fact, there have been instances of divergent interpretations of these terms by the CCI and COMPAT as well as courts in the past. By way of example, in a case concerning the Public Works Department of the Government of Haryana ("PWD"), the CCI held that the PWD was exempt from the purview of the Competition Act as it was '*not directly engaged in any economic and commercial activities*'.<sup>101</sup> However, this order was reversed by the COMPAT.<sup>102</sup> Similarly, the Hon'ble Delhi High Court reversed the CCI's finding in a case wherein the CCI concluded that the Indian Railways performed 'sovereign functions' and exempted it from the purview of the Competition Act.<sup>103</sup> The

<sup>101</sup> CCI Order dated January 12, 2015 in Case No. 70 of 2014.

<sup>102</sup> COMPAT Order dated February 16, 2016 in Appeal No. 45 of 2014.

<sup>103</sup> *Union of India v. Competition Commission of India and Ors.*, 2012 SCC OnLine Del 1114.

COMPAT has often criticised the CCI for resorting to a 'simplistic' interpretation of the term 'sovereign functions'.<sup>104</sup>

Since, certain activities of the government may be classified as sovereign functions whilst retaining their commercial nature, it is advisable to limit the scope of the exemption in Section 54 as well as the scope of the proviso in Section 2(h) of the Competition Act and specify exclusively the entities that are exempted from provisions of the Act.

- (b) 'Turnover' - The term 'turnover' is used in Section 27 of the Competition Act in the context of quantification of penalty and in Section 5 to determine the threshold for merger notification.

The Hon'ble Supreme Court of India, in its judgement in the case of *Excel Crop Care v. Competition Commission of India*<sup>105</sup> held that for the purposes of determining the quantum of penalty, the term 'turnover' used in Section 27(b) of the Competition Act must be interpreted as relevant turnover. This interpretation by the Hon'ble Supreme Court was contrary to the meaning ascribed to it by the CCI, which had interpreted 'turnover' to be the total turnover of the concerned entity. It must be realised that imposition of penalties based on 'total turnover' is much greater than that computed using 'relevant turnover' criteria. Thus, clarifying the definition of the term 'turnover' in the Competition Act is necessary in order to lay down conclusively the quantum of penalties that may be levied by the CCI under the Act.

Further, the advent of e-commerce adds to the ambiguity in the interpretation of key terms such as 'turnover'. For example, in e-commerce where online retailers provide a platform for vendors and buyers to interact, the payment from the buyer to the vendor may pass through the online retailer who would pass it on to the vendor after taking its commission. In such cases, to consider the total price of goods sold, which flows through the online retailer as its turnover would be unfair. As it is merely a service provider, the appropriate measure for the turnover of an online retailer should be the commission it earns on each sale made through its platform.<sup>106</sup>

Finally, it is unclear whether the tax component is to be excluded in the computation of 'turnover' for the purpose of determining the need to comply with the mandatory pre-merger notification requirement under Section 5 of the Competition Act. The only place where vague guidance on interpretation of turnover vis-à-vis tax is provided is the Notes at the end of Form II used for merger filings under Section 6(2) of the Act. Note 6 to Form II (annexed to the Combination Regulations) states that indirect taxes shall be excluded in the calculation of total turnover.

Given the potentially substantial penalties that may be attracted for not notifying a transaction to the CCI, businesses require greater clarity on how to calculate their 'turnover' so that they can make a decision to notify or not notify with reasonable confidence.<sup>107</sup>

<sup>104</sup> COMPAT Order dated March 1, 2016 in Appeal No. 63 of 2014.

<sup>105</sup> *Excel Crop Care v. Competition Commission of India*, 2017 SCC Online SC 609.

<sup>106</sup> AZB & Partners, 'India - Calculating Turnover: Challenges and Ambiguities' (*Conventus Law*, July 14, 2014) available at: <http://www.conventuslaw.com/archive/india-calculating-turnover-challenges-ambiguities/> (last accessed on September 10, 2017).

<sup>107</sup> *Ibid.*

### 3. International Experience

While definitions of terms, used in national competition law, are typically specific to each country and usually evolve from market practice, overall policy considerations and interpretation by domestic courts; international best practices may provide valuable guidance. In this regard, a detailed study of interpretation of key terms such as 'assets', 'turnover', 'enterprise', etc. in competition law jurisdictions abroad must be carried out. For example, whilst in France 'turnover' for mandatory pre-merger notification is the total 'pre-tax' turnover, in China, relevant taxes and surcharges are excluded from the calculation of 'turnover'.<sup>108</sup> Similarly, in the EU, the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings<sup>109</sup> clearly states in Regulation 5 that 'value-added tax and other taxes directly related to turnover' must be deducted while calculating the total turnover.

With respect to exemptions from competition law, certain advanced economies such as UK, Hong Kong and Singapore have adopted an approach wherein they not only lay down broad criteria (such as public policy, realisation of net economic benefit) based on which specific practices/entities may be exempted, but they also provide for certain industry-specific exemptions.<sup>110</sup> For example, the Third Schedule to the Singapore Competition Act provides that prohibitions contained in Section 34 (Anti-competitive agreements) and those in Section 47 (Abuse of Dominant Position) shall not be applicable to any agreement or conduct which relates to any 'specified activity'. The term 'specified activity' has been clearly defined with an aim to strike a balance between generalized exemption criteria as well as industry-specific exemptions.<sup>111</sup>

### 4. Recommendations

- In the interest of comprehensiveness and clarity, definitions of key terms, where missing, must be provided in the Competition Act. Further, existing definitions and exemptions that are vague, must be clarified. Where a definition may not suffice, detailed guidance must be issued to clarify CCI's position regarding the subject matter.
- Regarding exemptions, a suggestive approach could be to include as part of the Competition Act a narrowly drawn public policy/national interest criteria as well as a schedule containing names of specific industries/enterprises that are exempted based on policy considerations. It is recommended that exemptions for government-owned entities must be narrowly drawn. To ensure accountability, guidance must be issued by the CCI to lay down the factors that shall be considered by it while exempting enterprises on the public policy/national interest criteria. It must be made mandatory for the CCI to provide reasons for deviating from the guidance issued by it.

<sup>108</sup> UK Practical Law, Merger Control Thresholds, available at: [https://uk.practicallaw.thomsonreuters.com/2-557-0145?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/2-557-0145?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) (last accessed on November 8, 2017).

<sup>109</sup> European Commission, Council Regulation (EC) No 139/2004 of January 20, 2004 on the control of concentrations between undertakings, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=EN> (last accessed on October 5, 2017).

<sup>110</sup> UK Competition Act, Competition Ordinance (Hong Kong) and Singapore Competition Act; Also, see generally, Ariel Ezrachi, 'Sponge', The University of Oxford Centre for Competition Law and Policy, Working Paper CCLP (L) 42, available at <https://www.law.ox.ac.uk/sites/files/oxlaw/cclp42.pdf> (last accessed on November 16, 2017).

<sup>111</sup> Singapore Competition Act, Third Schedule.

## G. Need for CCI to issue Guidance

Globally, it is common for competition regulators to issue guidance notes (UK)/guidelines (Singapore) as it is widely accepted that an effective regulator is required to provide certainty and stability in terms of the interpretation of law and positively engage with the concerned stakeholders.

### 1. Present Legal Framework

The substantive provisions of competition law presently flow mainly from the following: (a) the Competition Act; (b) Regulations issued by the CCI such as the Combinations Regulations; and (c) Notifications issued from time to time by the Ministry of Corporate Affairs, Government of India (“MCA”).

With regards to combinations, the CCI offers informal consultations prior to the filing of a notice of the proposed combination.<sup>112</sup> Currently, there is no provision in the Competition Act or the regulations thereunder that makes it mandatory for the CCI to issue guidance as part of its functions.<sup>113</sup>

### 2. Case for Reform

The Report of the High-Level Committee on Competition Policy and Law (“Raghavan Committee Report”), to which the genesis of modern competition law in India can be attributed, recommended as follows:

“Parties subject to Competition Law, should be helped to comply with it and to plan their activities accordingly. Much of this assistance could come through the publication of enforcement guidelines articulating how the CCI will interpret and apply the law. There is also a need for a process whereby parties can attain advance rulings from the CCI, concerning planned courses of action.”<sup>114</sup>

Similarly, the Eleventh Five Year Plan (2007 - 2012) while reviewing the role of the CCI in creating awareness on the benefits of competition states as follows:

“The Commission (CCI) should formulate, publish and post in the public domain, guidelines covering various dimensions related to competition law for enhancing public awareness. Such guidelines will help enterprises by bringing greater clarity about the provisions of the competition law and the manner of its enforcement.”<sup>115</sup>

Clearly, these recommendations have not received due weightage by the CCI or law makers. Unlike certain advanced jurisdictions (discussed below) it is not mandatory for the CCI to

<sup>112</sup> The Order of the Secretary of the CCI that enables parties to seek informal consultations for proposed combination notices is available at: [http://cci.gov.in/sites/default/files/cci\\_pdf/ConsultationPrior250511.pdf](http://cci.gov.in/sites/default/files/cci_pdf/ConsultationPrior250511.pdf) (last accessed on November 17, 2017).

<sup>113</sup> Combination Regulations, Regulation 33 (CCI's Power to Issue Directions) states that the CCI may, from time-to-time, in discharge of its duties, issue general or sector specific directions, guidelines, clarifications or circulars for regulation of combinations.

<sup>114</sup> Report of the High-Level Committee on Competition Policy and Law, 2000, ¶ 6.4.6, available at: <https://theindiancompetitionlaw.wordpress.com/tag/report-of-svs-raghavan-committee-2000/> (last accessed on November 17, 2017).

<sup>115</sup> Chapter 11 of the 11th Five Year Plan, pg. 253, available at: [http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11\\_v1/11v1\\_ch11.pdf](http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11_v1/11v1_ch11.pdf) (last accessed on November 17, 2017).

issue guidance notes to clarify its understanding of various provisions of the law. Consequently, in fifteen years of existence, the CCI has issued 'one' guidance note.<sup>116</sup> Apart from the uncertainty that lack of clarity breeds for the industry, it also results in poor optics for the CCI. The regulator is presumed to have excessive discretion in the absence of any indicative guidelines to which it is required to adhere while interpreting and applying the law.<sup>117</sup>

Recently, in the case of *Excel Crop Care v. Competition Commission of India*, the Hon'ble Supreme Court took note of the lack of guidelines available for quantification of penalties that may be imposed under the Competition Act.<sup>118</sup> Ultimately, to arrive at a conclusion related to quantification of penalty, the Court relied on guidelines issued by the European Commission in the EU<sup>119</sup> and the Office of Fair Trading in the UK<sup>120</sup> as well as case law from various foreign jurisdictions. In this case, legislative lacuna ultimately resulted in binding guidelines being supplemented by the Hon'ble Supreme Court. This may be undesirable considering competition law is highly technical and requires a multi-disciplinary approach to rule-making.

In the context of penalties, Sections 43A, 44 and 45 of the Competition Act provide wide powers to the CCI. Unfettered discretion to CCI coupled with lack of clarity on quantification of penalty manifests as a gross injustice to the concerned enterprises and may also lead to erosion of trust of businesses in the CCI.

### 3. International Experience

Section 38(1) of the UK Competition Act makes it mandatory for the director of the national competition authority to publish guidance as to the appropriate amount of penalty that may be imposed under the Act. Further, Section 38(8) of the Act, makes it mandatory to give due regard to the guidance published under this section at the time of imposing penalties. The guidance published by the director requires the approval of the Secretary of State (UK), thereby ensuring a system of checks and balances on the powers of the director in this regard.<sup>121</sup>

In Singapore as well, the CCS has published 'Guidelines on the Appropriate Amount of Penalty' to elaborate as to how it determines appropriate penalty under the applicable competition law.<sup>122</sup> Even generally, the Singapore Competition Act vests CCS with the power

<sup>116</sup> CCI, Guidance on Non-Compete Restrictions, available at: [http://cci.gov.in/sites/default/files/Non-Compete/Guidance\\_Note.pdf](http://cci.gov.in/sites/default/files/Non-Compete/Guidance_Note.pdf) (last accessed on November 17, 2017).

<sup>117</sup> Gal, Michal S. and Fox, Eleanor M., 'Drafting competition law for developing jurisdictions: learning from experience' (2014), New York University Law and Economics Working Papers. Paper 374, pg. 24, available at: [http://lsr.nellco.org/nyu\\_lewp/374](http://lsr.nellco.org/nyu_lewp/374) (last accessed on November 17, 2017).

<sup>118</sup> *Excel Crop Care v. Competition Commission of India*, 2017 SCC Online SC 609, ¶ 83, 84, 97 and 107.

<sup>119</sup> European Commission, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02), available at: [http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52006XC0901\(01\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52006XC0901(01)) (last accessed on November 17, 2017).

<sup>120</sup> Office of Fair Trading, Guidance as to the appropriate amount of a penalty OFT423, September 2012, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284393/oft423.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284393/oft423.pdf) (last accessed on November 17, 2017) (Please note that currently the Competition and Markets Authority regulates the competition law regime in the UK).

<sup>121</sup> UK Competition Act, Section 38, available at: <http://www.legislation.gov.uk/ukpga/1998/41/section/38> (last accessed on November 17, 2017). Please note that there have been certain changes to the UK Competition Law regime post the Enterprise and Regulatory Reform Act, 2013. However, the requirement to publish guidance on amount and nature of penalty to be imposed is still in force.

<sup>122</sup> Competition Commission of Singapore, Guidelines on the Appropriate Amount of Penalty, December 2016, available at: <https://www.ccs.gov.sg/-/media/custom/ccs/files/legislation/ccs%20guidelines/guidelines%20in%20chapt>

to issue guidance in relation to anti-competitive agreements and abuse of dominant position.<sup>123</sup> A guideline detailing the process and explaining the contents of the application form for obtaining a guidance from the CCS has also been framed.<sup>124</sup>

In the US, the Federal Trade Commission ("FTC") is one of the primary bodies in charge of competition law enforcement. The Code of Federal Regulations gives stakeholders the power to request advice from the FTC, with respect to a course of action which they propose to pursue. In case, the FTC rescinds or revokes the opinion, it is required to give notice of such rescission or revocation to the concerned party so that they may discontinue the course of action taken pursuant to the advice. The FTC is also authorized to publish industry guides that contain administrative interpretations of the laws the FTC administers, to ease the public's conformity with those laws.<sup>125</sup>

#### 4. Recommendations

- The Competition Act should be amended to make it mandatory for the CCI to either *suo moto* or on requests by stakeholders, publish guidance to clarify its position on interpretation and enforcement of the provisions of the Competition Act in relation to certain contestable issues. Well-defined criteria must be set out for the issuance of guidance such as novelty of the query, public interest. etc. Further, any such guidance must be approved by the nodal ministry to avoid misuse of discretion. CCI must also be required to provide reasons if it takes a view divergent to the guidance issued by it. Where such guidance would apply to a specific sector, the CCI should consult the concerned sectoral regulator prior to issuing guidance.

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ers%20with%20layout%20aug%202017/11%20ccs%20guidelines%20on%20the%20appropriate%20amount%20of%20penalty%202016.ashx (last accessed on November 17, 2017).

<sup>123</sup> Singapore Competition Act, Section 43 (Notification of Guidance in case of anti-competitive agreements) and Section 50 (Notification of Guidance in case of abuse of dominant position).

<sup>124</sup> Competition Commission of Singapore, Filing Notifications for Guidance or Decision with respect to the Section 34 Prohibition and Section 47 Prohibition, available at: <https://www.ccs.gov.sg/~media/custom/ccs/files/legislation/ccs%20guidelines/guidelines%20in%20chapters%20with%20layout%20aug%202017/10%20ccs%20guidelines%20on%20filing%20notification%20for%20guidance%20or%20decision%20with%20respect%20to%20sect%2034%20and%20sect%2047%20prohib%202016.ashx> (last accessed on November 17, 2017).

<sup>125</sup> Relevant provisions of the Code of Federal Regulations are available at: <https://www.ecfr.gov/cgi-bin/text-idx?SID=60de28defcc80bb44e5764b8412aacbe&mc=true&node=sg16.1.1.a.sg0&rgn=div7> (last accessed on November 17, 2017).

## H. Technology and Competition Law

The exponential growth of computing power and the expansion of internet access has paved the way for newer business models and has led to automation of various business processes. This has fuelled discussions on the interplay between competition law and innovation in digital markets. Accordingly, this part identifies potential competition law implications of issues presented by developments in the digital markets.

While the CCI has been careful to avoid any hasty intervention in the technology market, emerging issues necessitate that CCI adopts a dynamic approach to ensure promotion of innovation without distortion of competition in the market.

### 1. Present Legal Framework

Unlike other jurisdictions discussed below, CCI has not issued any guidance on the application of the Competition Act to technology markets. Allegations against the conduct of companies operating in the digital markets are analyzed under Section 3 (Prohibition of anti-competitive agreements) and Section 4 (Prohibition of Abuse of Dominant Position) of the Competition Act. However, Section 3(5) of the Competition Act clarifies that ‘reasonable conditions’ necessary for protecting intellectual property rights (“IPR”) would not constitute anti-competitive agreements. The term ‘reasonable conditions’ has not been defined in the Competition Act.

### 2. Emerging Issues

#### **Application of traditional competition law definitions and tools**

Traditional competition law concepts like ‘relevant market’, ‘market power’, ‘abuse of dominant position’, ‘predatory pricing’, etc. are likely to pose interpretational issues in the context of digital markets. For instance, the traditional tools of market determination and establishing an abuse of market dominance may not be relevant for digital markets, especially in cases where the companies provide zero-price services to consumers in exchange of data.

Further, the multiple roles played by entities operating in an online environment enable them to indulge in activities which may have anti-competitive effects. In this regard, one may refer to the recent decision of the European Commission to fine Google €2.42 billion for violating EU antitrust rules by abusing its dominance as a search engine.<sup>126</sup> Similar allegations pertaining to abuse of dominance by Google by engaging in practices such as search bias, search manipulation, etc. to promote its vertical services (like YouTube, Google Maps, etc.) have also been raised before the CCI.<sup>127</sup>

#### **Pricing**

Many online businesses resort to practices like deep discounting, cash-back offers and such other pricing strategies to attract new users. The scale of such practices and the sustained periods for which they are continued have the potential to create barriers to competition.

<sup>126</sup> It was found that Google had systematically given prominent placement to its own comparison shopping service and demoted rival comparison shopping services in its search results. European Commission, Press Release, Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service, June 27, 2017, available at: [http://europa.eu/rapid/press-release\\_IP-17-1784\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1784_en.htm) (last accessed on November 15, 2017).

<sup>127</sup> CCI Order dated April 3, 2012 in Case No. 07 of 2012; CCI Order dated June 20, 2012 in Case No. 30 of 2012; and CCI Order dated March 26, 2014 in Case Nos. 07 and 30 of 2012.

Such practices give rise to concerns that the market may eventually tip in favour of businesses which may not necessarily have a technologically superior product or service but succeed in obtaining large sums of capital and entice users in the early days, using subsidies and later recoup their losses through elevated pricing.<sup>128</sup> So far, the CCI has tread carefully on this issue. In fact, in a recent matter pertaining to allegations of abuse of dominance and predatory pricing against a cab aggregator, CCI expressed its hesitation in interfering in a nascent market on the grounds that such interference may disturb market dynamics and pose a risk of prescribing a sub-optimal solution to a nascent market.<sup>129</sup>

### IPR and Competition Law

As rightly pointed out by the Raghavan Committee Report<sup>130</sup> the interface between IPR and competition policy has the potential to raise Competition Policy/Law problems and accordingly, competition law and policy needs to have necessary provisions and teeth to examine and adjudicate upon anti-competitive practices that arise from agreements pertaining to grant of IPR.

The interface between IPR and competition law has been a subject matter of debate in several jurisdictions especially, in cases pertaining to licensing of Standard Essential Patents (SEPs)<sup>131</sup> on Fair, Reasonable and Non-Discriminatory (“FRAND”) terms. While the Indian jurisprudence on FRAND licensing practices is at a relatively nascent stage, stakeholders have approached the CCI and various High Courts with such issues, a case in point being the Ericsson litigation involving eight SEPs of Ericsson.<sup>132</sup> Further, the Department of Industrial Policy and Promotion (“DIPP”) released a discussion paper<sup>133</sup> seeking public comments on legal and regulatory issues pertaining to SEPs and FRAND licensing, including the competent authority to define SEPs or set out FRAND terms.<sup>134</sup>

The interplay between IPR and competition law is also visible in licensing agreements for the transfer of technology and know-how, which may contain restrictive clauses such as tie-in arrangements, grant-back provisions, exclusive supply arrangements, etc, which limit how the licensed technology may be used.

### Big Data, Algorithms and Competition Law

Technological developments enable companies in the digital markets to collect, process and exploit enormous amounts of personal and non-personal data. While such data collection and processing for commercial purposes have traditionally been a question of privacy law and/or consumer protection laws, recent high-profile mergers and acquisitions (case in point being the Facebook/Whatsapp merger) in the digital market have raised questions of

<sup>128</sup> Smriti Parsheera, Ajay Shah and Avirup Bose, ‘*Competition Issues in India’s Online Economy*’, National Institute of Public Finance and Policy Working Paper No. 194, March 31, 2017, available at: [http://www.nipfp.org.in/media/medialibrary/2017/04/WP\\_2017\\_194.pdf](http://www.nipfp.org.in/media/medialibrary/2017/04/WP_2017_194.pdf) (last accessed on November 17, 2017).

<sup>129</sup> CCI Order dated July 19, 2017 in CCI Case No. 6 and 74 of 2015.

<sup>130</sup> Report of the High-Level Committee on Competition Policy and Law, available at: [https://theindiancompetitionlaw.files.wordpress.com/2013/02/report\\_of\\_high\\_level\\_committee\\_on\\_competition\\_policy\\_law\\_sys\\_raghavan\\_committee.pdf](https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_sys_raghavan_committee.pdf) (last accessed on November 17, 2017).

<sup>131</sup> A patent that protects technology which is essential to comply with a standard.

<sup>132</sup> *Telefonaktiebolaget LM Ericsson v. CCI and Anr* W.P.(C) 464/2014 (High Court of Delhi) which raised interesting questions pertaining to the interplay between the Patents Act, 1970 and Competition Act in relation to SEPs.

<sup>133</sup> DIPP, Discussion Paper on Standard Essential Patents and their Availability on FRAND Terms, March 1, 2016, available at: [http://dipp.nic.in/sites/default/files/standardEssentialPaper\\_01March2016\\_0.pdf](http://dipp.nic.in/sites/default/files/standardEssentialPaper_01March2016_0.pdf) (last accessed on November 17, 2017).

<sup>134</sup> Currently Standard Setting Organizations set out FRAND terms for their members. Such significant issues if left to the discretion of the SSOs are bound to raise disputes and create uncertainty.

a possible competition impact of gaining control over large datasets. It has been pointed out<sup>135</sup> that in such cases, the competition authorities while imposing notification thresholds for mergers fail to take into account the future competition impact where an established enterprise, motivated by the prospects of gaining access to a variety of additional data sources, buys a small entrant that it sees as a data-driven innovator or with access to valuable data. Although neither enterprise may qualify under the traditional 'assets' and 'turnover' thresholds, they may be in a position to distort competition owing to possession of a large amount of data.

Further, with the automation and digitisation of processes, there is an increasing reliance on algorithms, which includes pricing algorithms adopted by cab aggregators and online intermediaries. While as of now, there is no empirical evidence of the impact of algorithms on the actual level of prices and on the degree of competition in markets, studies have been undertaken internationally<sup>136</sup> to analyse the competition law implications of algorithms, which enable businesses to enter into anti-competitive arrangements that do not necessarily require the reaching of an agreement in the traditional antitrust sense.

### 3. International Experience

Globally,<sup>137</sup> several studies (by OECD, CCS, European Parliament, etc.) have been undertaken to understand the impact of technological innovations and the expansion of the digital markets from a competition law perspective.

Certain jurisdictions have issued guidelines on the applicability of the competition law to IPR / technology transfers. For instance, EU exempts technology licensing agreements concluded between companies with limited market power from competition law scrutiny under certain conditions.<sup>138</sup> Similarly, in the US<sup>139</sup> there are guidelines setting out the antitrust enforcement policy with respect to licensing of IPR. In Singapore, CCS has released guidelines on the treatment of IPR<sup>140</sup> which sets out CCS's approach in assessing agreements and conduct which concern IPR.

<sup>135</sup> OECD, Big Data: Bringing Competition Policy to the Digital Era, October 27, 2016, available at: [https://one.oecd.org/document/DAF/COMP\(2016\)14/en/pdf](https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf) (OECD Big Data Paper) (last accessed on November 17, 2017).

<sup>136</sup> OECD, Algorithms and Collusion - Background Note by the Secretariat, June 9, 2017, available at: [https://one.oecd.org/document/DAF/COMP\(2017\)4/en/pdf](https://one.oecd.org/document/DAF/COMP(2017)4/en/pdf) (OECD Algorithms Paper) (last accessed on November 17, 2017).

<sup>137</sup> DotEcon, E-commerce and its impact on competition policy and law in Singapore, Final Report, October 2015, available at: <https://www.ccs.gov.sg/-/media/custom/ccs/files/media%20and%20publications/publications/occasional%20paper/e-commerce%20in%20singapore/dotecon%20ecommerce%20final%20report.ashx> (last accessed on November 17, 2017); OECD, The Digital Economy, 2012, available at: <http://www.oecd.org/daf/competition/The-Digital-Economy-2012.pdf> (last accessed on November 17, 2017); Nicolai Van Gorp and Dr Olga Batura, 'Challenges for Competition Policy in a Digitalised Economy', Study prepared for the European Parliament's Committee on Economic and Monetary Affairs, July 2015, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/542235/IPOL\\_STU%282015%29542235\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/542235/IPOL_STU%282015%29542235_EN.pdf) (last accessed on November 17, 2017); OECD Big Data Paper; OECD Algorithms Paper; Autorite de la concurrence and Bundeskartellamt, Competition Law and Data, May 10, 2016, available at: <http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf> (last accessed on November 17, 2017).

<sup>138</sup> European Commission, Regulation (EC) No 772/2004 on the Application of Article 81(3) of the Treaty on the Functioning of the European Union (TFEU) to Categories of Technology Transfer Agreements and Guidelines on the application of Article 101 of the TFEU to technology transfer agreements, 2014/C 89/03.

<sup>139</sup> U.S. Department of Justice and Federal Trade Commission, Antitrust Guidelines for Licensing of Intellectual Property, January 12, 2017, available at: <https://www.justice.gov/atr/IPguidelines/download> (last accessed on November 17, 2017).

<sup>140</sup> Competition Commission of Singapore, Guidelines on Treatment of Intellectual Property Rights, available at:

German law<sup>141</sup> has been recently amended to address the issues raised by digital markets. For instance, it has been clarified that services provided free of charge may constitute a market within the meaning of competition law. Further, going forward, merger control rules will be applicable to cases in which the value of the consideration for the target is over €400 million, even though the target generates no or very little turnover in Germany despite its significant activity in Germany. It is believed that the Whatsapp/Facebook merger was a trigger for introduction of this criteria.

#### 4. Recommendations

- To understand and address competition law implications of the issues discussed above, CCI should adopt an informed and evidence-based approach. In line with other jurisdictions, it is advisable to conduct studies, including market studies<sup>142</sup> to understand the effects of these technological developments on the Indian competition landscape.
- In so far as issues pertaining to SEPs and FRAND licensing are concerned, there is a need to set out a framework for SEPs and FRAND licensing, including identifying the competent authority for defining SEPs.
- Efforts should be made to build technical expertise among the competition law authorities by engaging expert advisors, participating in industry-wide coordinative processes and training exercises.

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<https://www.ccs.gov.sg/legislation/-/media/custom/ccs/files/legislation/ccs%20guidelines/iprjul07final.a.shx> (last accessed on November 17, 2017).

<sup>141</sup> Ninth amendment to the Act Against Restraints of Competition which came into force on June 9, 2017.

<sup>142</sup> For instance, the CMA recently released a report on its market study of digital comparison tools across various sectors and recommended steps for companies and regulators to ensure effective competition and protect consumer interests.

### III. SUMMARY OF RECOMMENDATIONS

To conclude, we have provided below a summary of our recommendations along with the name of the nodal authority responsible for the suggested reform.

Sr. No.	Recommendation	Nodal Ministry / Regulator
<b>Revisiting CCI's Regulation-making powers</b>		
1.	Examine the Competition Act to ensure that essential legislative functions are not delegated to the CCI. In areas of permissible delegation, the legislature must lay down suitable guidelines on the substance of the law, in the Competition Act itself while retaining procedural flexibility with the CCI.	MCA in consultation with the Ministry of Law and Justice, Government of India
2.	Examine delegated legislation framed under the Competition Act to check if it lays down substantive rights or policy. Wherever the regulations contain policy details that can be shifted to the Competition Act, amend the Competition Act suitably.	MCA
<b>Compliance with Due Process of Law by the CCI and DG</b>		
3.	Delineate detailed procedure for carrying out inquiries and proceedings of the CCI.	MCA and CCI
4.	Delineate the investigation procedure for the DG in the form of guidelines, guidance notes or in a publicly available practice manual.	MCA and CCI
5.	Amend Section 41(3) of the Competition Act to provide flexibility to the DG to obtain the warrant for conducting a dawn raid from either the Chief Metropolitan Magistrate of Delhi or from the Metropolitan Magistrate/Judicial Magistrate of the concerned jurisdiction in which the dawn raid is to be conducted.	MCA
<b>Overload on the office of the DG and need for the CCI to exercise discretion in ordering investigations</b>		
6.	Identify what are India's desired competition law outcomes and what outcomes hold strategic significance for our economy.	MCA in consultation with an Expert Committee comprised of representatives of relevant Central Government ministries, Niti Aayog as well as experts from law, economics, finance, and public policy

7.	Adopt guidelines patterned on the 'Prioritisation Principles' of the CMA followed in the UK. The objective for such guidelines must be to ensure that only such complaints are investigated which would directly or indirectly affect India's desired competition law outcomes or are strategically significant or there is likelihood of a successful outcome within available resources.	CCI
8.	Ensure that NCLAT while considering appeals against orders passed by CCI closing a matter under Section 26(2) of the Competition Act, gives due regard to the Prioritisation Principles recommended earlier for the CCI.	NCLAT
9.	Adequately staff the office of the DG with trained and experienced individuals.	MCA
10.	Record broad reasons for forming the <i>prima facie</i> opinion at the time of passing directions under Section 26(1) of the Competition Act.	CCI
<b>Key issues at the Appellate stage</b>		
11.	Draft detailed rules to govern the appellate procedure, including rules prescribing indicative stage-wise timelines and broad contents of written submissions.	MCA
12.	Impose mandatory requirement to hold case management conferences right at the beginning of the appellate procedure.	MCA
13.	Ensure that NCLAT is adequately staffed. A dedicated bench or designated expert members must be allotted all appeals arising from CCI orders.	MCA
<b>Interface between CCI and Sectoral Regulators</b>		
14.	Amend the Competition Act to provide a mandatory cooperation/ consultation mechanism between the CCI and sectoral regulators. This can include amending Sections 21 and 21A of the Competition Act to provide that use of the reference mechanism provided therein is mandatory in case of issues involving concurrent sectors.	MCA in consultation with the ministry in charge of the relevant sector
15.	Consider entering into binding MoUs between the CCI and sectoral regulators which effectively sets out the respective roles of the agencies.	CCI and MCA in consultation with the relevant sectoral regulator and the ministry in charge of the sector

16.	The Central Government can lay down a mechanism to conclusively determine which regulator shall have primary jurisdiction in competition law matters involving concurrent sectors.	MCA in consultation with the ministry in charge of the relevant sector
<b>Need to revise Definitions</b>		
17.	Insert definitions of key terms, where missing, in the Competition Act. Clarify existing definitions and exemptions that are vague.	MCA
18.	Issue detailed guidance where a definition may not suffice, to clarify CCI's position regarding the subject matter.	CCI
19.	Regarding exemptions, a suggestive approach could be to include as part of the Competition Act a narrowly drawn public policy/national interest criteria as well as a schedule containing names of specific industries/enterprises that are exempted based on policy considerations. It is recommended that exemptions for government-owned entities must be narrowly drawn. To ensure accountability, issue guidance to lay down the factors that shall be considered while exempting enterprises on the public policy/national interest criteria. As stated earlier, make it mandatory for the CCI to provide reasons for deviating from the guidance issued by it.	MCA
<b>Need for CCI to issue Guidance</b>		
20.	Amend the Competition Act to make it mandatory for the CCI to <i>suo moto</i> or on request made by stakeholders, publish guidance to clarify its position on certain contestable issues. Well defined criteria must be set out for the issuance of guidance. Provide for approval of the guidance by the MCA to avoid misuse of discretion. Mandate provision of reasons if CCI takes a view divergent to the guidance issued by it. Where such guidance would apply to a specific sector, CCI should consult the concerned sectoral regulator before issuing guidance.	MCA
<b>Technology and Competition Law</b>		
21.	Conduct studies, including market studies to understand the effects of technological developments on the Indian competition landscape.	CCI
22.	Develop a comprehensive regulatory framework for SEPs and FRAND licensing, including identifying the competent authority to define SEPs.	Ministry of Commerce and Industry, Government of India.

23.	Build technical expertise among competition law authorities, by engaging expert advisors, participating in industry-wide coordinative processes, and training exercises.	CCI
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