COMPETITION LAW REVIEW COMMITTEE

WORKING GROUP I

# REGULATORY STRUCTURE OF COMPETITION LAW

MINISTRY OF CORPORATE AFFAIRS
GOVERNMENT OF INDIA

PUBLISHED BY MINISTRY OF CORPORATE AFFAIRS
GOVERNMENT OF INDIA

MCA.GOV.IN

*First printing, March, 2019*

Working Group on Regulatory Structure

New Delhi
11th March, 2019

Mr. Injeti Srinivas, IAS
Secretary to Government of India
Ministry of Corporate Affairs
Shastri Bhawan, New Delhi – 110001.

Dear Secretary,

The Working Group on Regulatory Structure of Competition Law constituted by the Ministry, vide Order No.5/9/2017-CS dated 13th November, 2018, hereby presents its report to the Ministry, as advised, vide its communication dated 15th February, 2019.

Given the high level of stakeholder interest on the subject, the need for transparency, and the interconnections with the broader process of governance reform in the country, the Ministry may consider releasing this report into the public domain.

Yours sincerely,

(Dr. M. S. Sahoo)
Group-In-Charge

## *Acknowledgements*

Until two decades ago, India's competition regime provided for control and prohibition. The Monopolies and Restrictive Trade Practices Act, 1969 enabled filing of complaints, investigation by the Director General (DG) and a judicial proceeding before the Monopolies and Restrictive Trade Practices Commission (MRTP Commission) having powers of contempt.

In sync with a shift towards a market economy, the Competition Act, 2002 moved away from the erstwhile regime of control of monopolies and prohibition of anticompetitive practices, to that of promotion and protection of competition.

Though the thrust and substance of the law changed, the Competition Act, 2002, as originally enacted, followed the same regulatory structure as in the Monopolies and Restrictive Trade Practices Act, 1969. It provided for a judicial proceeding by the Competition Commission of India (CCI), following an investigation by the DG, generally based on a complaint.

Since the structure did not match the substance and the mismatch was unacceptable in a market economy, the Competition (Amendment) Act, 2007 bifurcated the CCI into two bodies, namely, (a) the CCI, which would function as a market regulator for preventing and regulating anticompetitive practices in the country and to carry on the advisory and advocacy functions in its role as a regulator; and, (b) the Competition Appellate Tribunal (COMPAT), which would function as a quasi-judicial body to hear and dispose of appeals against any direction issued or decision made or order passed by the CCI.[1]

This transformed the CCI into a regulator, the nature of proceedings before it from judicial to regulatory, and the trigger for inquiry from complaint to information.

However, due to legacy issues, certain provisions in the Act and regulations, the CCI continues to operate mostly in an adversarial adjudication mode with a limited proactive role in the form of *suo motu* proceedings and reference functions.[2]

[1] The Finance Act, 2017 amended the Competition Act, 2002 to confer the appellate function under the Competition Act, 2002 on the National Company Law Appellate Tribunal (NCLAT).

[2] References between statutory authorities and the CCI and from the Central Government and State Governments to the CCI for opinion are governed by the Competition Act, 2002, ss 21, 21A and 49(1)

The economy has grown manifold since the enactment of the Competition Act, 2002, making India the sixth largest economy in the world. This implies dramatic changes in the way that markets, consumers and the State operate. Indian markets are vast, growing rapidly and becoming increasingly globalised. The market place is composed of millions of relevant geographical and product markets across the length and breadth of the country. New kinds of markets have emerged; markets have become more complex; sectoral regu-

lations have matured; inorganic growth has become the preferred mode for expansion; and business models have changed. It is now possible to control a product market without controlling any of the enterprises supplying that product. At the same time, consumer awareness of the harms of market power and their rights has been rising. Parallelly, the frequency, intensity and complexity of State interventions – policies, programmes, statutes and subordinate legislation – in India has been increasing. While strengthening the invisible hand of the market, some of them may inadvertently restrict freedom of enterprises or distort the level playing field. Though anti-competitive, these are not illegal and need to be addressed *ex ante*.

These developments call for a well-equipped modern competition regulator with mandate for both *ex ante* and *ex post* regulations to protect economic freedom in markets in India.

The emergence of the regulatory State to share governance with Government is a hard reality. Regulators resemble the State in terms of powers and responsibilities. They share a principal-agent relationship with Government. When regulators fail to perform, Government, as the principal, is often called upon to explain and carry out rescue operations. It is essential to minimize this risk through the design of regulators with quality governance mechanisms, supported by a strong accountability framework.

The thinking about and design of regulators have evolved considerably in the last three decades. A recent legislation, the Insolvency and Bankruptcy Code, 2016, captures some of the contemporary thinking on design of regulators. For example, it provides for Part-Time Members (PTMs) on the governing board of the Insolvency and Bankruptcy Board of India (IBBI), advisory and executive committees and public consultation before notification[3] of any regulations which strengthen the IBBI's democratic legitimacy. The competition regulator should have a state-of-the-art design with appropriate arrangements for governance, independence and accountability matching its mandate.

[3] Insolvency and Bankruptcy Code, 2016, ss 189(1)(d),196(1)(s),197.

Taken together, these developments warranted a fresh look at the regulatory structure supporting competition regime. The Working Group (WG) thanks the Ministry of Corporate Affairs (MCA) for providing an opportunity for doing so. It has designed a regulatory structure that promotes and protects competition and defends[4] the economy from the enemies of competition in Indian markets.

I am grateful to each member of the WG for putting in long hours of work, making significant contributions to its deliberations and reviewing the draft report several times.

I thank Dr. Ajay Shah and Dr. Kaushik Krishnan for drafting this report, Mr. Pratik Datta and Mr. Sunil Kumar for research support and Mr. V. Sriraj and Ms. Bhawna Gulati for providing secretarial support to the WG.

(Dr. M. S. Sahoo)
Group-In-Charge

[4] To draw an analogy, the Brazilian competition authority is called the Administrative Council for Economic Defense (CADE).

# *Contents*

# *The Working Group*

A competition regime rests on three main planks, namely, (a) a competition policy that addresses competition concerns inherent in the ecosystem, (b) a competition law that makes clear what is permissible for enterprises and what is not, and (c) organisational capability of the regulator.

In the present Indian setting, competition policy and competition law are important problems, and require the attention of the policy community. In addition, the regulatory structure of the law needs an overhaul to deal with competition matters in millions of relevant markets in India.

Economic freedom is the foundation of competition. Promotion of competition requires providing, promoting, protecting and enforcing economic freedom, which necessitates a full-fledged regulator. This report suggests a set of reforms aimed at making the CCI such a full-fledged and more effective regulator. The recommendations here are based on learning from the experience at the CCI of about a decade, growing scholarship on regulatory design[5] and emerging best practices in the working of regulators.

[5] A prominent synthesis of this literature can be found in the *Report of the Financial Sector Legislative Reforms Commission*.

The MCA constituted the Competition Law Review Committee (CLRC) on 30th September, 2018. The CLRC in its first meeting on 31st October, 2018 decided to constitute four WGs to study different aspects of competition law. The MCA accordingly constituted the following WGs vide Order No. 5/9/2017-CS, which is placed in the Annexures of this report:

1. Regulatory Structure;
2. Competition Law;
3. Competition Policy, Advocacy and Advisory Functions; and
4. New Age Markets & Big Data.

The regulatory architecture of the Competition Act, 2002 comprises the MCA, the CCI, the DG and the court system, including the

NCLAT. In view of its mandate and the deliberations in the CLRC, the WG restricted itself primarily to the regulator, namely, the CCI. This report presents the work of the WG on Regulatory Structure.

In its work, the WG relied on current and previous Acts and Bills relating to competition law and policy, pronouncements of the Hon'ble Supreme Court in respect of competition law and regulatory agencies broadly, reports of the CCI, an extensive literature survey as well as research inputs from the WG's members. A list of all sources considered can be found at the end of this report. In response to the MCA's invitation, the WG also received comments directly from a few stakeholders and considered them.

The WG met twice on 23rd November, 2018 and 12th December, 2018, and continued deliberations between and after meetings through correspondence. Table 1 presents the attendance in the WG's two meetings.

| Name | 23/11/2018 | 12/12/2018 |
|---|---|---|
| Dr. M. S. Sahoo, In-Charge | ✓ | ✓ |
| Mr. Somasekhar Sundaresan | ✓ | ✓ |
| Mr. Anand Pathak | ✗ | ✓ |
| Ms. Zia Mody | ✗ | ✗ |
| Ms. Pallavi Shroff | ✗ | ✓ |
| Dr. Ajay Shah | ✓ | ✗ |
| Dr. Kaushik Krishnan | ✓ | ✓ |
| Representative of FICCI | ✗ | ✗ |
| Mr. Naveen Raju, Respresentative of CII | ✓ | ✗ |
| Mr. U. K. Sinha | ✓ | ✓ |
| Ms. Smita Jhingran, Convenor | ✓ | ✓ |

Table 1: Attendance in Meetings

Given that the WG comprised very eminent persons from diverse backgrounds, including a few very experienced practitioners in competition law, and that the issues in its ambit were of far reaching consequences, the meetings witnessed very intense, but rich deliberations with many innovative ideas on the table.

Varying viewpoints enabled the WG to delve deep into the issues. Though there were disagreements on certain issues, some on nuance and some substantive, the consensus evolved on broad recommendations in the second meeting, while differing on details.

The WG requested Dr. Krishnan and Dr. Shah to prepare a draft report, capturing the essence of the discussion on the issues and making recommendations. It was agreed that the Members may thereafter suggest modifications to the report. Suggested modifications would be considered and incorporated to the extent possible. If they could not be suitably incorporated, they would be presented as a distinct or dissent view or even the majority view, as may be required.

While the report was being drafted, Ms. Jhingran, vide her communication on 28th December, 2018, informed the WG that she was demiting office as on that date and also attached a note carrying the CCI's views on issues raised in the meetings of the WG.[6] The WG records its appreciation for her immense contribution to its working. Mr. P. K. Singh, Secretary, CCI was nominated as Convenor of the WG, vide Order No.5/9/2017-CS dated 3rd January, 2019.

[6] The CCI elaborated and revisited its views and submitted a new note on 8th March, 2019.

The MCA convened the second meeting of the CLRC on 18th January, 2019 and advised the WGs to present their work and recommendations. Dr. Sahoo prepared a presentation for the CLRC based on the decisions taken by the WG on 12th December, 2018 and circulated it amongst the WG members on 15th January, 2019 for their inputs.

Dr. Sahoo finalised the presentation based on inputs received and made a presentation before the CLRC on 18th January, 2019. Ms. Shroff and Mr. Pathak, who are members of the WG and the CLRC were present at this meeting. Mr. P. K. Singh, newly nominated Convenor of the WG was also present.

The CLRC broadly endorsed the recommendations of the WG, though Ms. Shroff had reservations on some aspects. It, however, suggested that the presence of external PTMs on the Commission was preferred over a statutory advisory committee. Dr. Sahoo conveyed the suggestion of the CLRC to members of the WG, vide his email on 20th January, 2019.

The MCA, vide its communication dated 15th February, 2019, advised the WG to present its report to the Ministry preferably by 23rd February, 2019. Dr. Sahoo shared a summary of recommendations to all members of the WG on 20th February, 2019 for their inputs.

The draft report was circulated five times,[7] each time seeking inputs from Members and incorporating them in successive draft reports. The final report was sent to Members vide mail dated 8th March, 2019.

[7] Draft copies of the report were circulated, vide emails dated 19th February, 2019, 21st February, 2019, 22nd February, 2019, 24th February, 2019 and 25th February, 2019.

While many members confirmed the summary of recommendations sent by Dr. Sahoo and suggested several modifications in the report, two members (Ms. Shroff and Ms. Mody) expressed different views on many aspects and another member (Mr. Raju, Representative of CII) submitted a different view on one aspect. The different views have been presented at relevant places in the report. The CCI sent a revised note, vide a mail dated 8th March, 2019, giving its views on certain recommendations of the WG, which is annexed to this report.

This report supports the recommendations of the WG, including specific "Drafting Instructions" that may be used as a template for updating the Competition Act, 2002. It also includes related "Recommendations" that do not require legislative changes.

# *Key Recommendations*

The WG has made recommendations with a view to making the CCI a full-fledged regulator with *ex ante* and *ex post* responsibilities.[8] The following is a list of key recommendations in this regard:

1. Governance

   (a) The law must view the CCI, as a body corporate, and the Commission, as a governing body of members, separately with clear roles and responsibilities attached to each of them. The CCI must operate under the oversight, control and direction of the Commission.[9]

   (b) The law should require a formal interface between the CCI and society in the CCI's governance. In this regard, the WG considered three options, namely, (i) constitution of an Advisory Committee to advise the CCI on competition matters; (ii) induction of a few eminent persons on the Commission as PTMs; and (iii) institution of an oversight committee to review and guide the performance of the CCI. The WG recommends that:

      i. The law shall provide for the constitution of Advisory Committee(s) to advise the CCI on competition matters. However, care must taken to ensure that its role remains only advisory; and

      ii. A few eminent persons may join the Commission as PTMs.

   (c) The Commission must comprise a Chairperson, as many Whole-Time Members (WTMs) as commensurate with the volume of executive and quasi-judicial work, and PTMs, with an endeavour to match the number of WTMs.

   (d) The CCI has three broad types of functions and powers, namely, quasi-legislative, quasi-judicial and executive (including investigative) functions. Quasi-legislative functions and powers must be exercised by the Commission. Quasi-judicial functions and powers must be exercised by panel(s) comprising the Chairperson and WTMs of the Commission. All other functions and

[8] The CCI also believes that some of the recommendations of the WG will strengthen the regulatory architecture particularly the functioning of the CCI as an independent and efficient regulator (See Annexure).

[9] The Competition Act, 2002 does not envisage a distinction between the CCI as a body corporate under section 7(2) and the CCI as a Commission of members under section 8(1) of the Competition Act, 2002. This report recommends a clear distinction between the two. Consequently, it uses the term *"Commission"* when referring to the group of members who form the governing body of the Competition Commission of India, and the term *"CCI"* when referring to the organisation as a body corporate.

powers shall be exercised by, and in the manner as may be decided by the Commission.

(e) A separate organisational unit of the CCI shall be responsible for each of the distinct types of functions and powers. These units shall operate at an arm's length from one another to act as mutual checks and balances to address public law concerns. In particular, the operations of the executive functions, including investigations, and the quasi-judicial functions must remain firmly insulated from each other. While there should be fungibility of talent as a matter of Human Resources (HR) policy, meticulous care must be taken to avoid conflict of interest with no employee performing multiple roles at a point of time or performing multiple roles with regard to the same matter at any time.

2. Quasi-Legislative Functions

(a) The CCI must use only one instrument of subordinate legislation, namely, regulation. It may, however, issue guidance notes, clarification, FAQs, etc. but these must not constitute "law".

(b) The law must require that draft regulations – new regulations as well as amendments to existing regulations – along with an associated regulatory impact assessment are put out with the approval of the Commission for public comments, in the interest of democratic legitimacy. The Commission must approve regulations only after considering public comments. The CCI should place reasons for rejecting a comment in the public domain.

3. Executive Functions

(a) There was consensus on the fact that the DG is not a separate body corporate and is, in fact, an arm of the CCI. There were, however, two views as to whether the investigative function should be housed within the CCI or outside it. Given that (a) investigation is an executive function in every other regulatory architecture in the country, which is in line with contemporary thinking and practice, and (b) the CCI must have control over all of its resources if it is expected to deliver on its mandate, the WG recommends that the investigative function must be housed inside the CCI.

(b) Investigation must be conducted in accordance with the law and regulations notified in this behalf, in the interest of credibility and ensuring a transparent and predictable rule of law.

(c) The CCI should have such offices at other locations as may be required to provide ease of access to its stakeholders. The units dealing with Surveillance, Investigations, Advocacy and Awareness must be present at multiple locations, as may be decided by the Commission from time to time.

(d) The CCI must deal with alleged anticompetitive conduct, not based only on information but also on the basis of its own surveillance to prevent conduct and practices limiting competition.

(e) The decision of the CCI to pursue a matter must not depend on the ability of an Informant to prove her allegations. The CCI must independently review all information on merits without requiring the Informant's presence, taking care to ensure that the process is not converted into a matter of bilateral dispute.

(f) While the CCI must be the regulator for competition matters for markets in India, the engagement between the CCI and sectoral regulators must be more structured, meaningful and effective. The CCI must build capacity in the ecosystem for competition assessment of state interventions.

4. Quasi-Judicial Functions

(a) In the interest of fair and objective enforcement of the law, adjudication proceedings must commence with the issue of a Show Cause Notice (SCN), based on findings of an investigation, instead of merely forwarding the Investigation Report as it is. The CCI must form a *prima facie* view on findings in the Investigation Report. Where it forms a *prima facie* view that there has been contravention of any provision of the Competition Act, 2002, it shall provide an opportunity to deal with its *prima facie* view by issuing a SCN.[10] The SCN must state the details of any alleged contravention by the noticee and the measures or direction the CCI intends to take or issue if the allegations are established to enable the noticee to respond adequately. The CCI must provide for inspection of relevant material, including material that would be used for pressing charges as well as material that would undermine the charges. It must also supply relevant records, provide an opportunity of fair hearing and dispose of the SCN by a reasoned order.

(b) A panel of any three WTMs, as chosen by the Chairperson, shall be the quorum for adjudication or approval of a competition matter. A panel may or may not include the Chairperson.

(c) The CCI must have the power to settle alleged contraventions of competition law even after detection of contraventions. This is in addition to granting leniency, which is prior to detection.

[10] The Competition Act, 2002 uses the term "contravention" to mean a conduct violative of its provisions.

(d) The CCI must have in-house capacity to recover penalties without having to depend on the revenue authorities, akin to the mechanism adopted by regulators such as Securities and Exchange Board of India (SEBI) for recovery of penalties, to make the penalty effective.

(e) While disposing of a proceeding regarding the contravention of competition law, the CCI may direct any measure or any combination of measures as are permitted under the Competition Act, 2002. The permissible set of measures must include the disgorgement of wrongful gains arising out of contravention, wherever it is feasible and necessary. In the interest of equity, compensation may be provided out of the disgorged amount to victims of contravention in accordance with principles set out in regulations in this behalf.

5. Operational and Financial Independence

(a) The CCI must have powers to govern its human resources.

(b) The CCI must have independence on financial matters. A one-time corpus fund may be made available with it, and financial independence may be built with bolstered revenues from fee earnings.

(c) The CCI may be empowered to charge *ad valorem* fees on a sliding scale, subject to ceilings for varying slabs, on merger filings in accordance with regulations.

(d) The CCI must be exempted from all taxes on its wealth, income and services.

6. Accountability

(a) The Commission must submit a structured annual report, in accordance with Rules mandating effective areas of coverage in the annual report, which would serve as a metric to measure and review its effectiveness and performance.

(b) The Commission must make regulations specifying timelines for disposal of matters at various stages, ranging from investigation to quasi-judicial determination after investigation.

As stated in the earlier section, the different views of members have been presented in the relevant sections of the report. The revised note of the CCI carrying its views is annexed to this report.

# *Motivation*

## *The CCI is a Regulator*

The Statement of Objects and Reasons to the Competition Bill, 2001 envisaged the CCI as a quasi-judicial body consisting of one Chairperson and two to ten Members. It stated:[11]

> *CCI will have a principal bench and additional benches and will also have one or more merger benches.*

Subsequently, the Department of Company Affairs stated before the Parliamentary Standing Committee on Home Affairs that the CCI would be a judicial body.[12] Accordingly, the Committee recommended that the "CCI being a judicial body, should be headed by a Judicial Member".[13]

The law, as originally enacted, accordingly provided that the Commission would conduct a judicial proceeding, generally based on complaints.

While considering a writ petition in respect of Rules relating to selection of the Chairperson and other Members of the Commission, the Hon'ble Supreme Court in *Brahm Dutt v Union of India* noted:[14]

> *The essential challenge was on the basis that the Competition Commission envisaged by the Act was more of a judicial body having adjudicatory powers on questions of importance and legalistic in nature and in the background of the doctrine of separation of powers recognized by the Indian Constitution, the right to appoint the judicial members of the Commission should rest with the Chief Justice of India or his nominee and further the Chairman of the Commission had necessarily to be a retired Chief Justice or Judge of the Supreme Court or of the High Court, to be nominated by the Chief Justice of India or by a Committee presided over by the Chief Justice of India*
>
> *...*
>
> *The arguments in that behalf are met by the Union of India essentially on the ground that the Competition Commission was more of a regulatory body and it is a body that requires expertise in the field and such expertise cannot be supplied by members of the judiciary who can, of course, adjudicate upon matters in dispute.*

[11] Statement of Objects and Reasons Competition Bill, 2001, paras 3-4.

[12] Department-Related Parliamentary Standing Committee on Home Affairs, *Ninety-third Report on The Competition Bill, 2001* (2002) 7.3.

[13] Department-Related Parliamentary Standing Committee on Home Affairs (n 12) 7.6.

[14] *Brahm Dutt v Union of India* (2005) 2 SCC 431.

While disposing of the writ, The Hon'ble Supreme Court observed that if an expert body is to be created, it might be appropriate to consider the creation of two separate bodies, one with expertise for advisory and regulatory functions and the other for adjudicatory functions, along with an appellate body based on the doctrine of separation of powers as enshrined in the Constitution of India.[15]

[15] *Brahm Dutt v Union of India* (n 14) para 6.

The Competition (Amendment) Act, 2007 was enacted in response, creating two separate bodies, namely:

1. the Commission as a seven-member (one Chairperson and 2-6 Members) expert body to function as a market regulator for preventing and regulating anticompetitive practices in the country and to carry on advisory and advocacy functions in its role as a regulator; and
2. the COMPAT as a three-member quasi-judicial body to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission.

The Competition (Amendment) Act, 2007 recast the CCI from a primarily judicial body into a regulator and enhanced its proactive advocacy and advisory roles. It replaced 'complaint' by 'information' as the trigger for a proceeding and thereby changed the CCI's role from resolving adversarial disputes between business rivals to preventing practices having an adverse impact on competition. Importantly, proceedings before the Commission were no longer treated as judicial proceedings.

This would imply that the CCI, unlike a Court, could be a proper party in an appeal against its order. This issue came up when COMPAT held that CCI was not permitted to join appellate proceedings before it. On further appeal by the CCI, the Hon'ble Supreme Court observed that under the scheme of the Act, the Commission is vested with inquisitorial, investigative, regulatory, adjudicatory and to a limited extent even advisory jurisdiction. It held:[16]

> *The Commission, in cases where the inquiry has been initiated by the Commission suo moto, shall be a necessary party and in all other cases the Commission shall be a proper party in the proceedings before the Competition Tribunal.*

[16] *Competition Commission of India v Steel Authority of India Limited* (2010) 10 SCC 744, para 112.

The evolution of competition law, the provisions in the extant law, evidence of legislative intent and judicial pronouncements have clearly settled that the CCI is a full fledged market regulator and not just an adjudicatory body.[17] The CCI has adjudicatory work, but that is regulatory adjudication, and not an adversarial one.

[17] M S Sahoo, *Reforming the Regulatory Architecture of Indian Competition Law: A Practitioner's Perspective* .

To supplement its role as an expert regulator, the CCI has proactive – advisory and advocacy – responsibilities. Given that the ecosystem has a significant bearing on competition, it is the duty of the CCI to assist the Central Government, State Governments and statutory authorities to ensure that their interventions do not have the potential to (i) restrict the ability of enterprises to effectively compete in the market place, or (ii) restrict or distort their choices.

The CCI has extra-territorial jurisdiction to the extent that the conduct of overseas enterprises affect the legitimate (competition) interests of India. The Competition Act, 2002 has an overriding effect over any inconsistent provisions in any other law. It applies uniformly to all enterprises in all sectors irrespective of their ownership.

This choice of building a full-fledged market regulator, in addition to a tribunal, for promoting competition is based on a clear policy rationale.

### *The CCI Today*

Keeping in view the economic development of the country, the Competition Act, 2002 provides for:

(a) preventive measures (advocacy, advisory, awareness, training, prior approval of combinations, etc.);

(b) punitive measures (monetary penalties linked to turnover or profits, imprisonment, etc.) in case of violations of the Act;

(c) remedial measures (cease and desist, division of enterprises, modification of agreement, making an agreement or transaction void);

(d) compensatory measures (compensation to victims); and

(e) Any other measure that the CCI may deem fit under the circumstances.

The Competition Act, 2002 stipulates four statutory duties for the CCI, namely:[18]

1. to eliminate practices having adverse effect on competition;

2. to promote and sustain competition in markets;

3. to protect the interests of consumers; and

4. to ensure freedom of trade carried on by other participants in markets in India.

[18] Competition Act, 2002, s 18.

In the discharge of its duties, the CCI makes regulations to carry out the purposes of the Competition Act, 2002; enforces the provisions of the Act, and regulations made thereunder; advises the Government and statutory authorities on matters of competition; and promotes competition advocacy, creating awareness and imparting training about competition.

THE CCI MAY, on its own motion or on receipt of information from any person or on a reference made to it by the Central Government, a State Government or a statutory authority, initiate an inquiry into an alleged contravention of the Competition Act, 2002. It may call the Informant and any other person for a preliminary conference to form an opinion as to whether a *prima facie* case exists. If it is of the opinion that no *prima facie* case exists, the matter is closed.

If a *prima facie* case exists in the CCI's opinion, it must direct the DG to initiate an investigation. The DG must conduct an investigation, prepare a report on the findings and submit it to the CCI. The CCI may forward the report to the parties concerned.

If the investigation report suggests a contravention of the law, the CCI may inquire into it. After an inquiry, if it finds any contravention, it may pass appropriate orders.

THE COMPETITION ACT, 2002 PROHIBITS any combination of enterprises involving assets or turnover above a threshold, if it causes or is likely to cause an appreciable adverse effect on competition (AAEC) within the relevant market in India. A person proposing to enter into such a combination is, therefore, required to give a notice of the combination along with relevant details to the CCI. If the CCI is of the *prima facie* opinion that the combination has caused or is likely to cause an AAEC, it must issue a notice to the parties to the combination to as to why investigation in respect of such combination should not be conducted.[19]

[19] Competition Act, 2002, s 29(1).

After receipt of the response to show cause, the CCI may call for a report from the DG. If the CCI is of the opinion that a *prima facie* case exists, it may direct the parties to publish details of the combination in the public domain. It may invite objections to the combination from persons affected or likely to be affected by the combination.

On consideration of information and objections, if it is of the opinion that the combination does not or is not likely to have an AAEC, it shall approve the combination. Where it is of the opinion that the combination has or is likely to have an AAEC, the CCI may approve it with suitable modifications or direct that the combination shall not take effect.

## *Future Challenges*

The CLRC was constituted to review the Competition Act, 2002 to ensure that it "*is in sync with the needs of strong economic fundamentals*".[20] It has been almost two decades since the Competition Act, 2002 was enacted. During this period, the Indian economy has grown rapidly. Markets occupy a far more central role in the Indian context today than ever before.

The CCI mostly focused on awareness and advocacy work in its initial days. After the Competition (Amendment) Act, 2007, it began with a small volume of relatively simple adjudicatory matters, and has incrementally built capabilities. Commensurate with this, the complexity of its activities has grown through time. There is now considerable experience to reflect upon what worked and what did not.

[20] Government of India Ministry of Corporate Affairs, 'Government constitutes Competition Law Review Committee to review the Competition Act' (Press Information Bureau 30 September 2018).

As the economy matures, competition concerns will become more important for two reasons. First, a sophisticated economy will have far more products, enterprises and geographical markets. As new markets grow and deepen, the sheer magnitude of activity in competition law goes up.

Second, competitive pressures are limited in an unsophisticated market as there is a slow pace of creative destruction. As the economy gains complexity, there is greater competitive pressure. When it becomes harder for firms to make profits, there is a greater temptation to resort to anticompetitive practices of various kinds.

Parallely, as the CCI's advocacy efforts bear fruit and more people learn about the importance of free and fair markets and the approach shifts from complaints to genuine information, stakeholders will bring more cases of anticompetitive action to the CCI's attention.

For these reasons, the salience of competition law and the magnitude of the CCI's activity, must go up. There will be more information to act on, more complex investigations to complete, more cases of anticompetitive conduct to deal with and more combinations to approve. Additionally, more efforts will be required to prevent anticompetitive elements from sneaking into the ecosystem – institutions and State interventions. These trends will bring greater load upon the CCI in coming years, calling for commensurate strengthening of its structure.

## *Evolution of Regulatory Governance in India*

When India embarked on market-oriented reforms in 1991, there was a desire to break away from central planning. While direct government involvement in the economy has receded, the State still needs to intervene into the working of the economy for the purpose of addressing market failures. There are four kinds of market failures: asymmetric information, externalities, public goods and market power.

There was a wide hope, in the 1990s, that dismantling intrusive control of products and processes, coupled with light touch interventions which address market failures, could be better achieved by independent regulatory authorities. This led to the establishment of several regulators by Parliament.

While the first regulator, Reserve Bank of India (RBI), had been established in 1934, a wave of new organisations came about, starting with SEBI in 1992. Other regulatory agencies were set up including the Pension Fund Regulatory and Development Authority (PFRDA), the Insurance Regulatory and Development Authority India (IRDAI), the Competition Commission of India (CCI), the Insolvency and Bankruptcy Board of India (IBBI), the National Financial Reporting Authority (NFRA), the Telecom Regulatory Authority of India (TRAI), the Central Electricity Regulatory Commission (CERC), the Airports Economic Regulatory Authority of India (AERAI), the Food Safety and Standards Authority of India (FSSAI), and the Real Estate Regulatory Authority (RERA). New regulators continue to be established.

The mere establishment of a regulator does not induce the end of central planning and the efficient curtailing of market failure. A regulator might itself engage in central planning. There is also the possibility that a regulator becomes a power centre, where firms primarily worry about their relationship with it rather than running their businesses. There is a considerable challenge in building State capacity in regulators and creating conditions where regulators competently address market failure while note abusing power or engaging in central planning.

Over the last twenty years, a specialised body of knowledge has arisen, about the working of regulators, that is cross-cutting across the domains in which the regulators operate. The sum total of knowledge and experience, across all the regulatory agencies in India from 1991 to 2018, is now brought to bear upon enhancing the structure of the CCI. This WG is, thus, a part of a larger effort in India, of improving governance through the development of institutional capacity in

regulators.

*Modern Thinking on Regulators*

There are three arguments in placing some functions in regulators instead of departments of government:

1. The regulator is able to setup a specialised cadre that has superior technical and domain knowledge;
2. With such knowledge, and close observation of the industry, an independent regulator is able to move rapidly in modifying regulations, thus giving malleability to laws; and
3. The presence of independent regulators improves legal certainty by ensuring that the stance of regulation does not fluctuate with political changes, and reduces the role of political considerations in transactions.

The third argument, of regulatory independence, requires commensurate design features that create independence. The regulator must exercise its powers without recourse to Government. It should possess resources and powers matching its responsibilities. It should have the authority to control its own organisational design including its HR process. Officers performing quasi-judicial functions should enjoy independence and the protections normally available to judges.

Independent regulators also pose significant concerns. The Indian strategy of fusing legislative, executive and judicial branches in one entity constitutes a remarkable concentration of power, and is inconsistent with the separation of powers doctrine.[21] This concentration of power needs to be balanced by strong accountability mechanisms.[22]

A REGULATOR SUFFERS from a democratic deficit as it is not directly accountable to the people or to their representatives. In the extreme case, we run the risk of veering into 'the administrative State', the rule by unelected officials. Numerous design features are required in order to address this gap in democratic legitimacy, such as having a majority of eminent citizens as PTMs, drawing on expert advice, and undertaking formal consultation processes for regulations, including cost-benefit analysis.

The regulator being the the fifth layer in the hierarchy of delegation, shares a principal-agent relationship with the State.[23] Statutory autonomy in performing its mandate and statutory accountability mechanisms are the balancing pillars required in managing the tensions of this relationship while designing an independent regulator.

[21] M S Sahoo, 'Political economy of Neo-governments' [2012] Chartered Secretary 1530.

[22] Ila Patnaik and Ajay Shah, 'Reforming India's Financial System' (2014) 8.

[23] Dietmar Braun and Fabrizio Gilardi, 'Taking "Galton's Problem" Seriously: Towards a Theory of Policy Diffusion' (2006) 18(3) Journal of Theoretical Politics 298.

Some key principles for State capacity in regulators are that:[24]

1. every organisation requires a governing body that will perform organisation design, establish objectives, and create accountability. The presence of external experts on the governing body creates a counterweight to the management;
2. strong reporting mechanisms must exist so as to achieve accountability; and
3. the processes that define the working of the regulator should be written down in considerable detail in the law, with a particular focus on the rule of law and on the concerns that flow from public choice theory. This is particularly relevant for (a) the working of the governing body, (b) the quasi-legislative process, (c) the investigative and enforcement processes, (d) the quasi-judicial process and (e) the reporting and accountability mechanism.

[24] Financial Sector Legislative Reforms Commission, *Report of the Financial Sector Legislative Reforms Commission* (vol 1, 2013).

The requirements of independence and accountability of regulators are two sides of the same coin. The challenge is to minimize the trade-off between the advantages of governance through a regulator and the apparent threat to democratic accountability.[25]

A comprehensive review of the experience so far to improve the design of regulators and make them more effective is the need of the hour. A thorough inquiry of this nature is found in the *Report of the Financial Sector Legislative Reforms Commission*, which laid down broad principles of regulatory architecture and institutional design for modern Indian regulators.[26]

The tensions inherent in the working and mandate of independent regulators are resolved through good governance structures, detailed procedural guidelines for the exercise of quasi-legislative, quasi-judicial and executive powers, as well as specific structural arrangements to bolster independence and accountability where needed.

The following chapters provide a detailed exposition of the regulatory arrangement that befits a modern competition regulator in India.

[25] Jonathan Westrup, 'The Politics of Financial Regulatory Reform in Britain and Germany' (2007) 30(5) West European Politics 1096.

[26] Financial Sector Legislative Reforms Commission (n 24).

# *Components of a Modern Competition Regulator*

## *Governance*

Regulators are creatures of statutory law. They are set into motion by law to pursue certain objectives using certain powers, as an agent of the State. Modern Indian regulators are set up as bodies corporate by statute. They have a distinct identity in the eyes of the law, can hold property and have legal standing, all of which are essential for them perform their functions.

A body corporate is an ideal structure for a regulator as it encapsulates the principal-agent relationship between the State (the principal) and the regulator (the agent acting on behalf of the principal). How can the State be assured that the regulator will competently deliver on its stated objectives? This tension has been consistently articulated by several Committees set up by the Government of India on regulatory structure from 2013[27] to today.[28]

It is useful to distinguish between the organisation – an office, employees, assets and other resources – and its governing arrangement.[29] The governing body is charged with steering the organisation, establishing its objectives, and holding the organisation accountable for delivering on those objectives. Strengthening the governance mechanisms is one key element in addressing the principal-agent problem.

This includes designing the composition of the governing body, the rules that govern its business and deliberations and how it integrates into the larger organization.

[27] Financial Sector Legislative Reforms Commission (n 24).

[28] Inter-Ministerial Committee for Finalisation of Amendments of the PSS Act, 2007, *Recommendations to Consolidate and Amend the Law Relating to Payments* (Ministry of Finance, Government of India 2018).

[29] As stated earlier, this report follows the convention of using the term *"Commission"* when referring to the group of members who form the governing body of the Competition Commission of India, and the term *"CCI"* when referring to the organisation as a whole.

## *Composition of Commission*

It is difficult for a body to take decisions about itself or its working with complete objectivity or hold itself accountable for its conduct or performance. That is why decisions about organisation and process design are placed in the governing body and not the management.

Conceptually, the governing body's primary responsibility is to act as a hands-on principal to hold the management accountable. It

may, however, be hard for a governing body to hold the management accountable if it has only managers. The governing body, therefore, needs to have an appropriate external interface.

The WG considered and debated three different options of external interface for the governing body in this regard:

(a) constitution of an Advisory Committee to advise the CCI on competition matters;

(b) induction of a few eminent persons on the Commission as PTMs; and

(c) institution of an oversight committee to review and guide the performance of the CCI.

MANY STATUTES ESTABLISHING regulators provide for the constitution of standing advisory committees to serve as a sounding board for ideas and to lend domain expertise, professional wisdom and market knowledge.[30] Even where such a provision does not exist, regulators have voluntarily constituted advisory committees.[31] Given that Advisory Committees serve a very useful purpose, the WG recommends that the law must formalise the CCI's current practice of having Advisory Committee.

However, Advisory Committees alone are unlikely to serve as an effective governance mechanism as their members typically do not have sufficient skin in the game nor the power to hold the CCI accountable. In contrast, an Oversight Committee can review and guide the CCI's performance. However, it adds an additional layer of management and could constrain the independence of the CCI and is, therefore, avoidable.

[30] See for example, the Insurance Regulatory and Development Authority of India Act, 1999.

[31] For example, the Securities and Exchange Board of India Act, 1992 does not require the constitution of any committee. Nonetheless, SEBI has constituted several standing committees as well as issue specific committees. Similarly, the CCI has set up an Eminent Persons Advisory Group.

ALMOST EVERY OTHER regulator has PTMs on its governing body. They attend its meetings, vote on issues and take decisions on its behalf along with other members of the governing body. They have skin in the game while not being beholden to the interests of management.[32] Eminent citizens on the Commission as PTMs will strengthen its democratic legitimacy and accountability.

PTMs on a regulator's governing body are roughly analogous to independent directors on corporate boards. The institution of independent directors has matured into one of the most integral features of good corporate governance.[33] Indeed, all listed companies in India are required to have at least one-third of their boards composed of independent directors.[34] The RBI requires that bank boards should have a non-executive chairperson. The corporate governance problems of commercial firms are much easier than those of government

[32] OECD, *The Governance of Regulators* (2014) .

[33] Shubho Roy and others, 'Building State capacity for regulation in India' in Devesh Kapur and Madhav Khosla (eds), *Regulation in India: Design, Capacity, Performance* (Hart Publishing 2019).

[34] Companies Act, 2013, s 149(4).

regulators, where the need for accountability to the public is even higher.

The international best practice in corporate governance is that for effective accountability to come about, there must be at least an equal number of independent directors as the number of management directors. Therefore, the number of PTMs should match the number of WTMs on the Commission for the PTMs to have effective voice on the Commission's meetings and to challenge the work of the management.[35]

[35] Roy and others (n 33).

The WG (except two members) recommends the formalisation of Advisory Committees as well as the presence of PTMs on the Commission. The Insolvency and Bankruptcy Code, 2016 makes similar provisions in respect of the IBBI. However, two members (Ms. Shroff and Ms. Mody) have argued that the appointment of PTMs is not necessary as the CCI is not a traditional regulator.

**Drafting Instruction 1: Composition of the Commission**

The Commission must have three types of members:

1. *Chairperson* – There must be a Chairperson of the CCI. She will be responsible for the day-to-day administration of the CCI. In the event the Chairperson is not available, the senior most member of the Commission shall act as the Chairperson;
2. *WTM* – As the demand for competition policy and regulation in India grows, there will be a need for greater regulatory and adjudicatory capacity. Consequently, the Chairperson needs to be accompanied by as many WTMs as are commensurate with the volume of work. The WTMs will devote their entire time to the management of the CCI and will not be permitted to take up any other employment during their appointment; and
3. *PTM* – This category will consist of eminent citizens in the fields of law, economics, public administration etc., and are appointed to the Commission on a part-time basis. They will not be involved in the day to day functions of the CCI. A PTM may take up other engagements subject to dealing with conflict of interests, if any, when participating in meetings of the Commission. There must be as many PTMs as there are WTMs.

### *Conduct of Business by the Commission*

This report recommends a clear distinction between the Commission and the CCI. This requires a segregation of responsibilities. As recommended elsewhere the Commission shall perform quasi-legislative functions. Additionally, it may reserve certain business for itself through regulations. The Insolvency and Bankruptcy Board of India (Procedure for Governing Board Meetings) Regulations, 2017

provide a model for this.

**Recommendation 1: Business of the Commission**

The following is an illustrative list of businesses of the Commission:

1. Regulation making;
2. Annual accounts and audit;
3. Annual budget and performance reports;
4. Delegation of powers;
5. Operations manuals for various activities, including timelines for disposal;
6. Expenditures above a certain threshold;
7. Location of office premises; and
8. HR policy.

FOR EFFECTIVE PARTICIPATION of members, meetings of the Commission must be held with adequate notice and a proper agenda. Decisions must be taken with the required majority when the meeting has the required quorum. Formal procedures on agenda setting and voting create pressure upon all members to vote wisely. The Drafting Instructions below suggest one such approach.

IT IS ESSENTIAL in the interests of transparency and accountability that decisions taken in meetings by the regulator are disseminated publicly. This was noted while designing the IBBI:[36]

> *Transparency in the internal functioning of a regulator would imply that a robust standard of documentation is maintained about its internal functioning and the internal decisions taken. Since the regulator plays the role of the state, such documentation should be maintained at a level of detail that is sufficient to support an independent assessment of decisions taken by the regulator. For example, the simplest of these would be minutes of meetings of the board and committees.*

[36] Government of India Ministry of Corporate Affairs, *Building the Insolvency and Bankruptcy Board of India* (2016).

Though it is not a statutory requirement, many regulators in India routinely put out the agenda of each meeting as well as decisions with respect to each agenda item. Mature regulatory jurisdictions often codify standards of transparency. For example, the US Government in Sunshine Act, 1976 requires:

> *... the agency shall maintain ... such a transcript or recording, or a set of minutes. Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any action taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any roll call vote (reflecting the vote of each member on the question). All documents considered in connection with any action shall be identified in such minutes.*

**Drafting Instruction 2: Meetings of the Commission**

1. The Commission must meet as frequently and at such place as may be stipulated in the regulations;
2. Any three Members may require the Chairperson to convene a meeting of the Commission at any time and the Chairperson must convene such a meeting accordingly. If the Chairperson is not available, any three Members may require the Secretary to convene such a meeting;
3. Notice along with agenda papers must be sent to every Member ordinarily seven working days in advance at her usual address in India or by email, as furnished by her to the CCI. If a meeting of the Commission is required to be convened with demonstrable urgency, seven days' notice may be dispensed with by the Chairperson subject to the condition that Members get sufficient notice to enable them to attend the meeting;
4. No business other than that for which the meeting has been convened shall be transacted at a meeting of the Commission, except with the permission of the Chairperson;
5. Five Members, if the Commission has eight or more Members, and three Members, if the Commission has less than eight Members, shall constitute the quorum for the transaction of business at a meeting of the Commission; and
6. All businesses which come up before any meeting of the Commission must be decided by a majority vote of the Members present and voting and in the event of an equality of votes, the Chairperson, or in her absence, the Member presiding, must have a second or casting vote.

Members of a regulator's governing body are obliged to articulate the logic that led up to a voting decision both internally within the regulator and externally to the general public. This is especially true for PTMs, who as eminent persons, are accountable within their communities to explain and defend their voting decisions.

Deliberations on select items may be withheld from publication only for prespecified, valid reasons. This should, however, be the exception rather than the norm. The law must specify reasons for which and procedure to be followed when a regulator may withhold deliberations.

### Drafting Instruction 3: Publication of Minutes

1. The Secretary of the CCI will be responsible for keeping the minutes of deliberations (agenda and minutes) of the Commission;
2. A copy of draft minutes of the proceedings of each meeting of the Commission must be circulated as soon as possible for confirmation by the Members;
3. The deliberations (agenda and minutes) must be signed by the Chairperson or the Member presiding at the succeeding meeting, and taken on record thereafter; and
4. All confirmed minutes must be published by the Commission within three weeks of each meeting, subject to the exceptions to publication obligations.
5. Deliberations (agenda and minutes) on selected items may be published with appropriate delay and masking of identities on a 'John Doe' basis, if such deliberations meet any of the following conditions, –
   (a) they relate exclusively to the conduct of individuals with regard to the performance of their functions within the Commission;
   (b) they relate to information that has been obtained from a person in confidence, where such information is exempt from disclosure by that person under the Right to Information Act, 2005;
   (c) they involve discussion of any specific instance of alleged contravention of laws or censuring any person;
   (d) they disclose information about a particular ongoing investigation;
   (e) they disclose techniques for investigation or inspection;
   (f) they disclose information of a commercial nature which has been obtained for regulatory purposes;
   (g) they would deprive a person of a right to a fair and impartial adjudication; or
   (h) any other condition as may be specified in the regulations.
6. Deliberations (agenda or minutes) on select items must not be published if they meet any of the following conditions:
   (a) they are likely to lead to systemic risk;
   (b) they are likely to significantly frustrate implementation of an action proposed by the Commission, where such action has not been disclosed to the public; or
   (c) they involve discussion of any particular legal proceeding before a tribunal, court or arbitrator.
7. Publication of deliberations may be delayed, redacted or prevented as laid down in Clauses 5 and 6 only if the Commission, in such meeting:
   (a) records the reason in respect of such deliberations;
   (b) the majority of members present at the meeting vote in favour of such action for each portion of the deliberation separately; and
   (c) the vote of each member is recorded and published in accordance with item.

### *Delegation of Powers*

The Competition Act, 2002 does not envisage the role of the Commission as different from that of the CCI. Under the extant framework, no Member or employee of the CCI has any specific, independent responsibility, while the Commission alone has the entire responsibility under the Act.

This framework is due to the CCI having been originally conceived of as a judicial body. As a modern, full-fledged regulator, there is no reason why every matter, including executive and administrative matters,[37] has to be disposed of by the Commission. This restricts the output capacity of the organisation.

In a modern regulator, different matters depending on their importance are disposed of at different levels in the hierarchy of the organisation. The Act should enable sharing of responsibility among members and delegation of powers to different functionaries in the organisation. While quasi-legislative matters need to be dealt with by the Commission and quasi-judicial matters need to be dealt with by panels of WTMs and the Chairperson, executive and administrative matters may be discharged by a functionary – the Chairperson, a WTM or an officer of a certain level – or team of functionaries, as may be determined by the Commission through bye-laws from time to time.

The statutes in respect of several regulators empower the governing body to delegate certain powers and functions to any member or officers of the organisation.[38]

[37] Executive matters are those matters which are critical to the core objectives and functions of a regulator which are neither quasi-judicial or quasi-legislative in nature. Administrative matters are those which are necessary for the proper functioning of a regulator but not critical to its core objectives.

[38] See for example TRAI Act, 1997 s 33, Securities and Exchange Board of India Act, 1992, s 19 and AERAI Act, 2008, s 48.

**Drafting Instruction 4: Delegation by Commission**

The Commission may make bye-laws delegating its executive or administrative functions to a functionary – the Chairperson, a WTM or an officer of a certain level – or team of functionaries of the CCI, subject to such condition as may be provided in the bye-laws. It is clarified for avoidance of doubt that the Commission must not delegate quasi-legislative or quasi-judicial functions.

### *Quasi-Legislative Powers and Functions*

Traditionally, the legislature enacts legislation and the executive implements it. As economies have matured, policy challenges have grown. Today, several aspects of policy making require specialised technical expertise. Policies also need to be responsive to changes in underlying economic and market conditions. Consequently, the elected legislature often enacts a primary legislation that delegates the power to make subordinate legislation to the executive, either

the Ministry or a regulator. The regulator builds necessary technical expertise to frame such subordinate legislation promptly. Being relatively insulated from political compulsions, it is better able to refresh subordinate legislation from time to time. This enables the regulator to respond to everchanging market dynamics.

This institutional arrangement raises two serious concerns. *First*, the regulator being an unelected body suffers from a lack of democractic legitimacy. Delegating legislative powers to such an unelected body may amount to an excessive delegation of powers. To a limited extent, this concern is addressed by requiring all subordinate legislation issued by a regulator to be tabled before the Parliament.[39] Parliamentary oversight may not fully address the democratic deficit problem as the Parliament may not always have the domain expertise or the time to examine every piece of growing body of subordinate legislation. *Second*, there could also be apprehensions of regulatory capture. The market may perceive the regulator to be unduly influenced by certain interest groups either due to political economy factors or even due to cognitive biases of the staff within the regulator. Such perceptions may seriously compromise the legitimacy of a regulator. This is less of a concern in the case of the CCI, which does not have a fixed constituency.

[39] For example, see Competition Act, 2002, s 64(3).

As experience in running regulatory institutions grows, the need has emerged to have strong procedural frameworks to guide the delegated law-making process. From the Securities and Exchange Board of India Act, 1992 to the AERAI Act, 2008, the legislature has matured in assembling the appropriate process for regulators to follow. The state-of-the-art in India today is captured in section 13(4) of the AERAI Act, 2008, which states:

> *The [AERAI] shall ensure transparency while exercising its powers and discharging its functions, inter alia, –*
>
> *a) by holding due consultations with all stake-holders with the airport;*
>
> *b) by allowing all stake-holders to make their submissions to the authority; and*
>
> *c) by making all decisions of the authority fully documented and explained.*

Ideally, the process for drafting regulations should be encoded in the legislation that has established the regulator. This is in line with the Hon'ble Supreme Court of India, which categorically observed in *Cellular Operators Association of India v Telecom Regulatory Authority of India*:[40]

> *We find that, subject to certain well defined exceptions, it would be a healthy functioning of our democracy if all subordinate legislation were to be "transparent" ... we would exhort Parliament to take up this issue and frame a*

[40] *Cellular Operators Association of India v Telecom Regulatory Authority of India* (2016) 7 SCC 703, para 92.

*legislation along the lines of the U.S. Administrative Procedure Act (with certain well defined exceptions) by which all subordinate legislation is subject to a transparent process by which due consultations with all stakeholders are held, and the rule or regulation making power is exercised after due consideration of all stakeholders' submissions, together with an explanatory memorandum which broadly takes into account what they have said and the reasons for agreeing or disagreeing with them.*

In the absence of legislatively mandated regulation-making processes, some Indian regulators have adopted transparent processes for making regulation. The IBBI has issued *Insolvency and Bankruptcy Board of India (Mechanism for Issuing Regulations) Regulations,* 2018 which may serve as a useful guide. The WG recommends that a statute empowering a regulator with quasi-legislative powers should require such a regulator to follow a clear and transparent process for making subordinate legislation.

It is imperative for a state agency to have predictability, consistency and transparency in the application of law. Subordinate legislation, in its ability to coerce and modify the behaviour of market participants, carries a great deal of weight. Other instruments, sometimes used for the sake of convenience, may not go through the sacrosanct process of check and balance that regulations are required to go through. Therefore, such other means of making law is absolutely avoidable. Anything which is not a regulation must not have the force of law.

There is rich jurisprudence on how FAQs and informal guidance do not constitute "law" and therefore, the only instrument of law issued by a regulator should be "regulations", in compliance with the subordinate-legislation-making due process.

The WG recommends that a regulator must issue only one type of subordinate legal instrument. This is meant to ensure that quasi-legislative powers are exercised uniformly through the same regulatory processes. The WG however, encourages the CCI to issue guidance and other instruments such as FAQs bearing in mind that these are not instruments of law and are only meant for advocacy and awareness.

**Drafting Instruction 5: Only One Form of Subordinate Legislation**

The Commission must make subordinate legislation only through regulations.

*Checks and Balances on Regulation Making*

A vexing question that has accompanied the development of regulators all over the world is the extent to which the judiciary can review the quasi-legislative functions of regulators. On one hand, it can be argued that when unelected officials are given the power to write law, this should be accompanied by strong checks and balances.

On the other hand, it can be argued that once a sound regulation-making process and governance arrangement is in place, including the presence of an adequate number of eminent citizens who are PTMs, then there is little to gain from additional scrutiny by courts.

Regulation making is usually in complex, technical areas where expertise is needed. In doing so, the regulator weighs numerous factors. The Hon'ble Supreme Court has observed in *Reliance Infrastructure Limited v State of Maharashtra* that a regulator's "discretion in carrying out [such] a complex exercise cannot be constrained". It is the regulator's duty to fairly and equitably balance various considerations. The regulator is free to exercise its quasi-legislative powers as long as it follows the procedure and considers the factors that are laid down in the law.[41] Indeed, the Court observed:[42]

> *A body which is entrusted with the task of framing subordinate legislation has a range of options including policy options. If on an appraisal of all the guiding principles, it has chosen a particular line of logic or rationale, this Court ought not to interfere.*

[41] *Reliance Infrastructure Limited v State of Maharashtra* Civil Appeal No. 879 of 2019.

[42] *Reliance Infrastructure Limited v State of Maharashtra* (n 41) para 31.

The wide berth given to regulators by courts makes it all the more important for the regulation-making process to be clearly specified in the law. A regulator must exercise its quasi-legislative powers with caution. It must issue a regulation only after proper application of mind and appropriate approval from its highest decision making body, which is usually a governing board. The power to constrain the freedoms of others is very broad, and so it must be exercised by only the highest functionaries of an unelected body.

**Drafting Instruction 6: Regulation Making to Begin and End with the Commission**

The CCI shall commence the process to make regulations on an issue or subject only after a resolution is adopted by the Commission to make such regulations. After completion of the due process, the Commission shall pass a resolution approving the regulation for publication.

A KEY REASON for the existence of regulators is the belief that they possess expert knowledge in their subject. This expertise should not

be presumed. The regulator must conduct a regulatory impact assessment including a cost-benefit analysis while proposing a new regulation or amending an existing regulation. This must address whether the benefits of the intervention outweigh the costs and whether there was an alternative intervention which would achieve the same outcome at a lower cost to society.

**Drafting Instruction 7: Regulatory Impact Assessment**

The CCI shall make a documentation packet which includes:

(a) draft of proposed regulations;

(b) the specific provision of the Act under which the CCI proposes regulations;

(c) a statement of the problem that the proposed regulations seek to address;

(d) an impact assessment of the proposed regulations;

(e) the manner of implementation of the proposed regulations; and

(f) the manner, process and timelines for receiving comments from the public.

A REGULATOR MUST conduct an effective stakeholder consultation before issuing a regulation. This is to strengthen its democratic legitimacy, by permitting the broader society to comment on and make representations regarding future policy changes. Indeed, the Committee of Secretaries has approved a policy for public prelegislative scrutiny in the case of draft legislations and rules.[43] Stakeholder consultation is also useful to bolster a regulator's technical expertise. Proposed regulations should be defensible against public criticism.

[43] Secretary, Legislative Department, DO No 11(35)/2013-L1 (5 February 2014).

OFTEN, IT IS ARGUED that a regulator may need to bypass the process of regulation making to address some imminent emergency. To address this concern, the regulator should be empowered to issue temporary emergency regulations without following the process for regulation making, which must be followed up with the consultative process for finalising the regulation.

IT IS ESSENTIAL THAT the exercise of quasi-legislative power is appropriately balanced through procedural checks. One important check is to ensure that regulations in force continue to be relevant and reflect the policy positions of the regulator. In this regard, it is important for all regulations to be reviewed at regular intervals. The review process should also be designed such that the regulator is able to demonstrate its continued expertise in the field. Results of the review should feed back into the broader democratic landscape.

### Drafting Instruction 8: Stakeholder Consultation

1. The Commission must pass a resolution approving a documentation packet for publication for public comments. The packet must be available for public comments for a reasonable period of time, say a month;
2. The CCI must categorise all public comments received and prepare a category-wise response to all the comments. On consideration of the comments, it must update the proposed regulations, along with necessary justifications for such updates;
3. The original packet of documents, public comments received, cat- egorised comments, the CCI's response to the categorised comments, the updated proposed regulations (if any) along with necessary justifications, must be placed before the Commission for its consideration and approval; and
4. The CCI must notify the regulations as approved by the Commission and make all the background documents publicly available.

### Drafting Instruction 9: Emergency Regulations

1. Where the Commission is of the opinion that a regulation is required to be made or an existing regulation is required to be amended immediately because of an emergency, it may approve and notify such regulation or amendment regulation without following the regulation-making procedure;
2. Whenever the Commission issues an emergency regulation, it must record the reasons for such emergency and publicly disclose the same along with the regulations; and
3. An emergency regulation shall be in effect for six months from the date of its issue, unless the procedure for regulation making is complied with during those six months.

### Drafting Instruction 10: Review of Regulations

1. At some regular interval, say three years from the date of issue of a regulation, a formal review of the working of the regulation must be carried out to address the following:
   (a) Was the problem that motivated the regulation solved?
   (b) Is there a need to review the regulation from the experience of implementing it? and
   (c) Are there alternative interventions possible to achieve the same outcome at lower costs to society?
2. The results of a review must be made publicly available within a reasonable time frame.

## *Executive Powers and Functions*

The CCI exercises large executive powers. It reviews information that is submitted to it, makes decisions on investigation, carries out those investigations, processes complaints and enforces orders. These powers are fundamental to its ability to effectively regulate. However, the manner in which these powers are exercised can unduly burden firms and individuals. Strong executive powers must be balanced against greater transparency and accountability to prevent their abuse. High performance regulators require formal procedures with service level assurances, minimal levels of discretion and the ability to demonstrate that procedures are adhered to including giving reasons for executive action.

Being a full-fledged regulator, the CCI also has advisory and advocacy responsibilities. It should be empowered to play a greater role in proactively guiding the State in ensuring free and fair markets.

This section describes an ideal procedural framework for executive action as well as proactive steps the CCI can take to enhance its effectiveness.

### *Taking Notice of Anticompetitive Conduct*

An enemy of competition is an enemy of the economy. This is why the Act envisages that any person having information about any antitrust activities (anticompetitive agreements and abuse of dominance) may give information to the CCI. This person need not be a complainant.

However, the process envisaged under the law, as well as the practice followed, treats the informant practically as a complainant. The informant provides the necessary details, including evidence of about the alleged antitrust conduct, to the Commission to establish a *prima facie* case. It also provides information and evidence to the DG during investigation. On the completion of investigation, it presents the case, often through an advocate, before the Commission for final determination. The Commission follows an adversarial proceeding in practice. The informant and the respondent play opposite parties before the Commission. Neither the DG nor the CCI explicitly presents or advances the findings of the DG. Neither is a show cause notice issued, nor is there a charge framed against the respondent. Further, the CCI is not expected to go beyond what has been alleged in the information. The process expects the informant to be a Good Samaritan and to spend its time, energy and resources to help the CCI in apprehending the enemies of competition. This inevitably limits the

flow of information.

Often complaints are filed in the garb of information by those who are actually aggrieved by the conduct of the respondent and who are seeking some relief. This explains why a large percentage of cases initiated on the basis of information are closed either at the *prima facie* stage or after investigation as these, being *de facto* complaints, do not involve competition issues.

In the interest of competition, the Commission should move away from *de jure* information to *de facto* information and consequently from adversarial adjudication to regulatory adjudication. Only then can it defend the economy from the enemies of competition. It should take charge of all information alleging anticompetitive conduct irrespective of the form in which it is received, instead of mostly relying on the informant to establish the allegation. This should be something like the police taking cognizance of an alleged crime, and then taking it over till its logical conclusion. The proceeding before the Commission must be inquisitorial, subject to compliance with the principles of natural justice.

**Drafting Instruction 11: Role of Informant**

The Informant must not have the burden of substantiating allegations and the CCI must be obliged to review all information on merits without requiring the Informant's presence.

UNDER THE CURRENT LAW, any person may submit information of a contravention of the Competition Act, 2002 to the CCI. Upon receipt of this information, if the CCI is of the opinion that there exists a *prima facie* case, it shall direct the DG to cause an investigation into the matter. The Hon'ble Supreme Court in *Competition Commission of India v Steel Authority of India Limited* has held that formation of a *prima facie* opinion departmentally does not amount to an adjudicatory function but is merely administrative in nature.[44]

Though the Competition Act, 2002 requires the CCI to form an opinion, the Competition Commission of India (General) Regulations, 2009 empower the Commission to conduct a preliminary conference at this stage. This often turns into a full-fledged adversarial hearing before the Commission where both the information provider and the opposite party, against whom the allegation has been levelled, are heard.[45] The Commission often passes a detailed order expressing its *prima facie* opinion before directing the DG to initiate investigation.[46]

Forming an opinion is an administrative matter. Long, adversarial hearings for this based on information drains the Commission and limits its capacity in terms of number of such opinions. It imposes

[44] *Competition Commission of India v Steel Authority of India Limited* (n 16) paras 87-91.

[45] Competition Commission of India (General) Regulations, 2009, regs 16, 17.

[46] Competition Commission of India (General) Regulations, 2009 (n 45) reg 18.

huge costs on the parties involved making it difficult for genuine informants to come up with information. As a consequence, the CCI receives and the Commission disposes of a limited number of information. Parties with deep pockets stand to benefit disproportionately from the current arrangement, undermining the broader confidence in the CCI.[47]

[47] In this regard, the *Australian Government Competition Policy Review* has observed that "[M]arket participants differ in their capacity or financial means to engage with the legal or regulatory process. Difficulty in accessing justice in matters of competition policy ... can undermine broader confidence in our regulatory institutions."

In sync with the provisions in the Competition Act, 2002 which require the CCI to form an opinion, and the judgement in *Competition Commission of India v Steel Authority of India Limited*, the WG (except two members) recommends that the CCI shall form an opinion if there exists a *prima facie* case warranting investigation, based on consideration of information and other relevant material, and such formation of opinion, being an executive function, shall not involve the Commission and will not require a preliminary conference or an adversarial hearing. The CCI may gather any material it considers necessary to enable it to form an opinion but must not burden the informant to establish the existence of a *prima facie* case. This is regardless of whether it is done on the basis of information received, through reference by a statutory authority, or on its own motion.

**Drafting Instruction 12: Opinion if *prima facie* case**

1. In cases of alleged anticompetitive agreements and/or abuse of dominant position, the CCI must form an opinion as to whether a *prima facie* case exists.
2. The CCI must not conduct an adversarial proceeding or burden the informant while forming an opinion whether a *prima facie* case exists.
3. Where the CCI is of the opinion that a *prima facie* case exists, it must record its reasons in writing and direct an investigation into the matter. An investigation will begin only when a formal order to investigate is issued by the CCI.
4. Where the CCI directs investigation, it must not publicly disclose either the *prima facie* opinion, or the directions for investigation, till the matter is finally disposed of after inquiry.
5. Where the CCI is of the opinion that no *prima facie* case exists, it must record its reasons in writing and intimate the informant or the statutory authority which made the reference, if any.

Two members (Ms. Shroff and Ms. Mody) are of the view that a preliminary conference may at times be necessary for the Commission to understand the issues at hand and form its *prima facie* view and, therefore, the Commission should retain the flexibility to have a preliminary conference.

The CCI is empowered under section 19(1) of the Competition

Act, 2002 to act on its own motion with regard to a contravention of sections 3, 4 and 5 thereof.[48] However, the data reveal that very few *suo motu* references have been made to the DG.[49] Table 2 shows the number of cases being investigated by the DG broken up by whether reference by the CCI to the DG was based on an external information or *suo motu*.[50]

[48] Competition Act, 2002, ss 19(1),20(1).

[49] See Table B1 Competition Commission of India, *Annual Report 2016-17* (2017) Note that the 2017 numbers are based on information provided below the table.

[50] See Table B1 Competition Commission of India (n 49) Note that the 2017 numbers are based on information provided below the table.

Table 2: Number of External Information Cases vs *Suo Motu* Cases Being Investigated by the DG

| Year | Number | |
|---|---|---|
| | Informations | *Suo Motu* |
| 2010 | 71 | 5 |
| 2011 | 92 | - |
| 2012 | 88 | 6 |
| 2013 | 110 | 5 |
| 2014 | 117 | 11 |
| 2015 | 120 | 1 |
| 2016 | 88 | 7 |

Evidently, there is much scope for improvement in making the CCI a proactive regulator rather than merely being a reactive regulator. Its reliance on external information should not crowd out its own ability to identify *prima facie* contraventions of the Competition Act, 2002 and initiate *suo motu* investigations. Therefore, the WG recommends that the CCI should have a surveillance mechanism to notice anticompetitive conduct and initiate *suo motu* investigations.

**Recommendation 2: *Suo Motu* Cases**

The CCI may deal with alleged anticompetitive conduct, not only based on information but also on the basis of its own surveillance to eradicate practices limiting competition.

### *Investigation and Surveillance*

The DG is the investigative arm of the CCI. It conducts investigations as and when ordered to by the CCI. Based on the findings of such investigations, the CCI conducts inquiries. This is a continuation of the structure under the Monopolies and Restrictive Trade Practices Act, 1969, which provided for a Commission and a DG, but did not provide for a tribunal. The Competition Act, 2002 as originally enacted, conceived the CCI to conduct judicial proceedings. This necessitated the investigation function to be housed separately, in order to avoid conflict of interests. With the transfer of adversarial adjudication to the COMPAT, the CCI is now a regulatory body. However, the office of the DG was not folded into the CCI. This is in contrast to modern regulatory practice. Investigation is a part of the executive function of every other regulatory architecture in the country.

The CCI has the responsibility to prevent and eliminate anticompetitive conduct. The quality and quantity of its output depends to a large extent on the quality and quantity of inputs provided by the investigation. The CCI cannot discharge its responsibilities unless it has full control over investigation. Housing the investigation function within the CCI would:

1. place the investigation function under the full view of the Commission in terms of strategic thinking about the organisation, the organisation design, and resourcing;

2. enable the rotation of officers between investigation and other functions of the CCI;

3. encourage the CCI to build up the investigative capabilities of officers, and to allocate adequate human resources for investigation work; and

4. allow the transmission of knowledge and skill, acquired by the CCI in discharge of its duty, to the investigation team.

Given that the DG is not a body corporate but in fact an arm of the CCI for all practical purposes and for the reasons stated above and in sync with contemporary regulatory practice, the WG (except for two members) recommends that the investigative function should be housed inside the CCI.

This arrangement will require some kind of insulation of adjudicatory work inside the CCI. The Commission needs to ensure that its three wings – quasi-legislative, executive and quasi-judicial – exercise their powers with independence and without intra-institutional bargaining to avoid potential public law concerns.

Two members (Ms. Shroff and Ms. Mody) have argued that in the interests of a fair and independent investigation and the possibility for the DG to come to a finding contrary to the *prima facie* order, it is necessary that the DG is independent. They are of the view that if it is folded into the CCI, the independence and fairness of investigation by the DG is likely to be significantly impacted.

**Drafting Instruction 13: Investigation inside the CCI**

The office of the DG must be abolished and the investigation function must be housed inside the CCI.

Under the current law the DG's role begins when the CCI directs the DG to investigate a contravention of the Competition Act, 2002.[51] However, the Competition Act, 2002 itself does not provide

[51] Competition Act, 2002, s 41.

a clear process for investigation. Instead, the DG's powers are described in great detail in the Competition Commission of India (General) Regulations, 2009, which are made by the Commission. Further, the Competition Commission of India (General) Regulations, 2009 grant the CCI and the DG wide powers to call for information, summon persons, etc.[52] They permit the DG to direct the summoning of any witness, compel the production of any documents and examine any books as they deem appropriate.

In contrast, competition regulators in Australia[53] and South Africa[54] are bound to follow the investigation process laid down in their statutes. Even the International Competition Network (ICN), an international association of competition regulators of which the CCI is a member, has also suggested these principles.[55]

The WG recommends that the statute should provide a clear and formal procedure for commencing investigations, persons who may be investigated and the process relating to providing notice. This is all the more important when investigation is housed inside the CCI.

[52] Competition Commission of India (General) Regulations, 2009 (n 45) reg 44.

[53] Australian Competition and Consumer Act, 2010, Part XID, Part XII.

[54] South African Competition Act, 1998, Chapter V.

[55] International Competition Network, *ICN Guiding Principles for Procedural Fairness in Competition Agency Enforcement* (2018) .

**Drafting Instruction 14: Powers of Investigating Authority**

1. Where the CCI decides to investigate, it must issue an order which must include:
   (a) the authorisation of the Investigating Authority;
   (b) the reason for commencing the investigation;
   (c) the scope of the investigation including persons who may be investigated;
   (d) the relationship between each party who may be investigated and the scope of the investigation, with reasons;
   (e) the duration of the investigation; and
   (f) the method of reporting of the investigation.
2. When an investigation is initiated, the parties under such investigation must be given written notice, which must include:
   (a) the scope of the investigation; and
   (b) the purpose of the investigation.
3. Parties may not be given written notice of an investigation only in cases of urgency and secrecy such as when a dawn-raid needs to be undertaken. However, this may only be undertaken in special cases following the process laid down in the law.
4. The officer empowered to investigate a matter shall continue to have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908.
5. The officer may also require employees, directors or persons under investigation to produce any document or answer questions.

In India, the Competition (Amendment) Bill, 2012, which lapsed in Parliament, had proposed to expressly amend the Competition Act, 2002 s 41 to include greater procedural checks.

Moreover, section 41 of the Competition Act, 2002 confers powers of search and seizure on the DG through a reference to sections 240 and 240A of the Companies Act, 1956. However, the Companies Act, 2013 overrides the Companies Act, 1956 in case of inconsistency. In particular, sections 217 and 220 of the Companies Act, 2013 are similar to sections 240 and 240A of the Companies Act, 1956.

To simplify the process and make it more transparent, the WG recommends that the detailed powers of investigation of the CCI, as specified below, be spelled out in the Competition Act, 2002 rather than through subordinate legislation issued by the CCI. It is the duty of the legislature to ensure clarity of rules and processes in this context.[56] The WG recommends that the statute should provide for clear powers of search and seizure.

[56] OECD, *Regulatory Enforcement and Inspections* (2014) 14.

**Drafting Instruction 15: Search and Seizure**

1. The investigator may enter and search the premises of a person being investigated, seize and retain custody of documents;
2. Prior to doing so, the investigator must make an application to a Magistrate;
3. The Magistrate may authorise the investigator if there is a reasonable belief that a party will not adequately comply with a request for the production of material evidence; and
4. Any seized material must be returned within a reasonable amount of time.

WITHOUT A FORMAL END being prescribed by law, investigations can drag on indefinitely. This can hurt parties being investigated even when there is no evidence or determination of wrongdoing. Requiring an investigation report to be filed within a certain time ensures that there is a clear termination to any investigative process.

**Drafting Instruction 16: Investigation Report**

Every investigation must end with an investigation report. Either an interim report must be issued where an investigation has lapsed, with reasons for not completing the investigation, or a final report must be issued, where an investigation is completed.

### *Advisory and Advocacy Functions*

Sectoral regulators are critical to competition policy. Synergies between them and the CCI can be very useful. Whereas sectoral regulators deeply understand their domain, a cross-cutting competition regulator such as the CCI brings three added advantages:[57]

1. Competition analysis is a specialised skill that is possessed by the CCI;

2. Sectoral regulators can be 'captured' by firms in the sectors they regulate; and

3. Sectoral regulators are often charged with objectives that compete with the broader objectives of competition policy.

[57] Committee on Digital Payments, *Medium Term Recommendations to Strengthen Digital Payments Ecosystem* (Ministry of Finance, Government of India 2016) chap 7.1.

The CCI should act as an important check and balance against failures of competition policy by sectoral regulators.[58] Different institutional frameworks engage with the CCI differently. For example, the Payments and Settlement Systems Act, 2007 disregards competition completely.[59] In contrast, the TRAI is empowered by the TRAI Act, 1997 to "facilitate competition" in the telecommunications sector. This is not a unique case. The Petroleum and Natural Gas Regulatory Board Act, 2006, the Electricity Act, 2003 and the AERAI Act, 2008 all give sectoral regulators powers to oversee competition in their sectors.

[58] Rajiv Mehrishi, Ajay Shah, and Ila Patnaik, Rethinking Competition in India (2018).

[59] Committee on Digital Payments (n 57) chap 7.1.

Sectoral regulators tend to interact intensively with a small number of regulated firms. There is the possibility of the regulator looking at the world through the eyes of those firms, of its being excessively aligned with their interests. In this case, the sectoral regulator runs the risk of accepting anticompetitive practices. As a neutral regulator on the scale of the entire economy, the CCI is likely to be less influenced by any one group of firms.

It is essential to have a competition regulator that oversees all aspects of the economy. This role should fall squarely on the shoulder of the CCI. The Supreme Court has recently held the same with respect to TRAI ruling that the sectoral regulator had exclusive authority to settle jurisdictional facts whereas the CCI had the ultimate authority in determining whether a contravention of the Competition Act, 2002 had taken place.[60] The relationship between the CCI and other regulators needs to be carefully designed.

[60] *Competition Commission of India v Bharti Airtel Ltd* Civil Appeal No 11843/2018.

Sections 21 and 21A of the Competition Act, 2002 provide for references between sectoral regulators and the CCI. Section 49(1) of the Act provides for reference from Central Government and State Government for opinion of the CCI. These activities have been very insignificant.[61] During 2010-17, two references were received by the

[61] See Tables G1, G2, H1, H2 of the Competition Commission of India (n 49).

CCI from Central Government, one from statutory authorities and no reference from State Governments. During the said period, the CCI made five references to statutory authorities.

**Drafting Instruction 17: Sectoral Regulation vs the CCI**

While every regulator should encourage competition in their sector, the ultimate responsibility of managing economy-wide competition issues must be left to the CCI. There must exist a structured mechanism for interaction between the CCI and sectoral regulators:

1. The CCI must review draft regulations issued by sectoral regulator for public comments and provide its inputs on the potential competition implications, if any. These comments would be published by the sectoral regulator, as is done in a well-structured regulation-making process. The regulator must consider the representation made by the CCI before finalising the regulations. If the regulator disagrees with CCI's views, it must provide written reasons.
2. The CCI must be empowered to monitor the effects on competition of any regulatory actions and practices on an ongoing basis. If it determines that a regulatory action is unduly detrimental to competition in a market, the CCI must submit a report on the issue to the regulator. The regulator will be obliged to consider and respond to the report.

   If the regulator and the CCI disagree on the course of action to be taken, the sectoral regulator must address the competition concerns identified by the CCI.
3. Sector regulatory laws must require the CCI and the regulator to enter into a memorandum of understanding to establish the procedures for cooperation between them, which may be modified by them from time to time.

These recommendations have their own limitations in that they presuppose sophisticated regulation making processes at sectoral regulators. If a sectoral regulator merely issues a new legal instrument (possibly a "circular" or a "press release") on a website, then there is no possibility of inter-regulatory coordination through the mechanism described above. This underlines the need for greater regulatory process reform all across India, where all regulators work within a single legal instrument (the "regulation") through a structured regulation-making process. The CCI should build operational capabilities to engage with all these formal regulation-making processes, in the public eye.

The State often intervenes in the market through policies, programmes, statutes and subordinate legisation due to important public considerations. Sometimes, such interventions can create undue competitive advantages or disadvantages[62] The CCI, as an expert body, has a role to play in helping to improve the allocation of economic resources and provide a level playing field without compromising the public interest concern. It is the practice in other jurisdictions that state and central governments and government authorities are guided by their competition regulators in assessing the competition impacts of proposed interventions.[63]

[62] OECD, *Competitive Neutrality: Maintaining a level playing field between public and private business* (2012) .

[63] See for example Chapter 13, *Australian Government Competition Policy Review*.

**Recommendation 3: Competition Assessment**

The CCI must play a consultative role and help develop capacity in the ecosystem to carry out competition assessment of State interventions.

At present, the CCI has offices only in Delhi. While the Act permits the it to have offices elsewhere, it has not happened. Limiting the CCI's presence to Delhi hinders the ability of genuine informants and cements the interests of those firms and people with resources to engage legal counsel and operate in Delhi.

Opening regional offices in major locations is in line with the CCI's role of being a proactive regulator. The CCI has significant jurisdiction in terms of enterprises, products, practices and geography. Anticompetitive practices may take place anywhere in India, and the CCI should be equipped to take notice of them. It should have surveillance of markets all over the country to notice of anticompetitive activity.

The WG recommends that the CCI should have offices at multiple locations to facilitate advocacy and awareness activities, interaction with sectoral regulators, State Governments and local-self Governments, keep an eye on markets, conduct investigations, and be accessible to stakeholders needing its help and guidance. The panel of Members considering SCNs may hear the noticee(s) through electronic means such as video calls to save resources. One member (Ms. Mody), however, is of the view that there is no need to expend additional resources on establishing multiple CCI offices and that the CCI could instead use new means such as video calls to expand its reach.

**Recommendation 4: Multiple Offices**

The CCI may have offices at other locations as may be required to provide ease of access to its stakeholders. Groups dealing with Surveillance, Investigations, Advocacy and Awareness may be present at multiple locations, as may be decided by the Commission from time to time.

## *Quasi-Judicial Powers and Functions*

### *Principles of Natural Justice*

Regulators are authorised by the State, through legislation, to use certain tools to achieve their policy objectives. While there are several *ex ante* tools, it is often the control of *ex post* adjudicatory tools that are most powerful in ensuring compliance.[64] It is this breadth of adjudicatory and coercive powers that makes the process through which they are employed and their governance very important.[65]

The CCI is a State agency that awards punishments. As a consequence, there is a minimum rule of law machinery that must surround it. While designing the IBBI, it was noted:[66]

> *Transparency in ... quasi-judicial functions would require that the regulator document its decisions with reasons. Similarly, it would imply that transparency in process such as show cause notice must state the grounds of the proposed action and information on the basis of which the notice has been issued.*

[64] OECD, *The Governance of Regulators* (n 32) 17.

[65] Roy and others (n 33).

[66] Ministry of Corporate Affairs, *Building the Insolvency and Bankruptcy Board of India* (n 36) 23.

It is important to clarify when an adjudicatory proceeding begins and when it ends. On completion of investigation, an internal team, other than the investigation team, within the CCI should assess whether there has been contravention of the provisions of the Competition Act, 2002, there is a *prima facie* case against the accused and there is material supporting contravention by the accused. If there is, it must issue a SCN, giving the accused an opportunity to show cause as to why action should not be taken against them.

A SCN, as compared to the investigation report, brings consistency, transparency and predictability to the process. A person has a right to know what she is required to meet. Specific allegations of fact and law are required to defend oneself. The WG (except two members) recommends the issuance of a SCN to the accused.

**Drafting Instruction 18: Show Cause Notice**

An adjudication proceeding shall commence with issue of a SCN. A SCN must be in writing and shall state:

1. the provisions of the Act under which it has been issued;
2. the details of the alleged facts;
3. the details of the evidence in support of the alleged facts;
4. the provisions of the Act, or the rules, regulations made thereunder, allegedly contravened;
5. the actions or directions that the CCI proposes to take or issue, if the allegations are established; and
6. the time within which the noticee may make written submission and avail an opportunity of personal hearing.

Two members (Ms. Shroff and Ms. Mody) are of the view that it is not necessary for the CCI to issue a separate SCN to the parties. Ms. Shroff argues: "The report is in itself sufficient and clearly states the allegations that are being investigated and the findings on each count. Perhaps, the DG report that is provided to the parties should specifically provide for a statement of the alleged contraventions as part of the conclusion of the DG report if it does not already have it. This section will clearly indicate the allegation against the company/enterprise and the finding of the DG with respect to that allegation." Ms. Mody argues: "The DG Report currently circulated to parties under Section 26(3) is an exhaustive finding of fact and is sufficient. ... the Commission has already formed its prima facie view under Section 26(1) of the Competition Act. For the Commission to arrive at a second prima facie determination based on the DG's Investigation Report – which should be an independent finding of fact, may not be viewed as being consonant with the principles of natural justice which require parties to be given a fair hearing."

IT IS NOT MERELY ENOUGH to clearly state charges against an alleged offender of the law. They are entitled to a reasonable and effective opportunity to defend themselves. This includes having the ability to inspect relevant documents and evidence, a reasonable period to make representations and an opportunity to a hearing.

**Drafting Instruction 19: Effective Opportunity to Defend**

A person against whom an SCN is issued, must have the opportunity to inspect all relevant material, including material that would be used for pressing charges as well as information and material that would undermine the charges. Additionally, such person must be supplied with all relevant records. The SCN must provide the noticee a reasonable period to study the evidence and make representations to the CCI. This must include the opportunity to a hearing.

*Efficiency*

By law and practice, the Commission as a whole decides competition matters by a majority. All Members of the Commission together determine a matter unlike other regulators where a Member or an Officer usually does so.

All Members are required to go through the entire motion in every matter before the Commission. This means that every Member replicates the same effort. This limits the output capacity of the Commission to that of one Member. In fact, it is less than that for the following reasons:

1. A matter can be determined only after all Members have gone through the relevant papers and they would go through the same at their own pace depending on their other commitments;

2. Members have different perspectives and each of them brings her perspective to the table, and this may prolong deliberations in the matter; and

3. Even after a matter has been determined, draft orders may undergo many rounds of editing and modifications if the Members do not agree on the approach and language.

Determination of competition issues – antitrust as well as combinations – involves sifting through large volumes of papers, consideration of a large number of factors, and adherence to principles of natural justice, all of which are onerous. An antitrust investigation report along with all enclosures may run into 1,000 pages. The replies and submissions of the parties add thousands of additional pages to a case file. Similarly, the files dealing with proposed combinations along with combination review reports are quite bulky. Every member has to go through the entire file thoroughly, for all matters brought before the Commission. The Commission has to provide full opportunity of defence to the parties concerned and consider all relevant factors listed in the Act. Determination of each matter thus

requires considerable time of each Member. Given the limited output capacity of the Commission and the time required to determine a matter, only a very limited number of matters can be determined in a year.

The process followed by the Commission is quite elaborate and is akin to a court proceeding in respect of alleged antitrust activities. A matter may be heard over the course of several days, and for various reasons all Members may not be able to remain present on all these days. In that case, only the Members who were present at all the hearings would dispose of the matter. Some Members would expend time and effort on a matter; but would not be part of the decision making; and this time and effort would in essence be wasted. If the number of Members who were present at all the hearings is less than three, a rehearing would be required.

It makes little sense for seven Members to jointly make a finding in a regulatory adjudication, particularly when the Commission is assisted by professionals representing the parties and by experts having domain knowledge. The output capacity could improve if a particular matter were to be determined by only one Member, so that seven Members could dispose of seven separate matters simultaneously. However, given that competition law is complex, it is advisable that a panel of three Members apply their mind together to every matter including for disposal of a SCN. The panel may or may not include the Chairperson. The composition of the panel may be determined by the Chairperson. This has the benefit of allowing the Chairperson to ensure that the best equipped set of members are appointed to dispose of a matter.

**Drafting Instruction 20: Quorum**

The practice of the Commission sitting *en banc* must be done away with. Rather, a panel of any three WTMs, selected by the Chairperson, will suffice for disposal of a SCN. While selecting WTMs to dispose of a SCN, the Chairperson must endeavour to ensure that there is a good mixture of legal and economic expertise.

Two members (Ms. Shroff and Ms. Mody) hold that the view that the quorum should necessarily consist of at least one member who is judicially trained, given that the Commission is exercising quasi-judicial powers during such a hearing.

Since the CCI is dealing with information and the informant is not a party before the panel of WTMs, it is the duty of the case team to present the case on behalf of the CCI against the party accused of the contravention of the Competition Act, 2002.

In the past, Indian laws and courts used to be quite cagey

about consent settlement. In 2006, a new chapter was incorporated into the Code of Criminal Procedure, 1973 to facilitate plea bargaining, a kind of consent settlement, for some kinds of offences, which attract imprisonment up to seven years. The advantages of this kind of settlement, especially in the Indian context, are that:

1. It frees up the scarce resources of the authorities and the judicial system which are already saddled with a very large number of enforcement actions many of which are awaiting disposal for years;

2. It allows the authorities to impose innovative deterrents upon the respondent while achieving equitable remedies for the victims;

3. It achieves something in days or months, which even decades of trial may fail to do; and

4. It avoids the risk of the respondent going scot free after a prolonged, expensive and valiant legal battle for one or the other technical reasons.

SEBI commenced settlement of proceedings, under a circular issued in 2007, through the consent procedure to achieve appropriate sanction without lengthy and costly legal proceedings. It used to then settle all kinds of defaults as long as the terms of settlement were appropriate. However, the legal validity of the consent mechanism was questioned as it was not explicitly provided for in the Securities and Exchange Board of India Act, 1992. The law was amended in 2014 with retrospective effect to explicitly enable SEBI to settle proceedings relating to alleged defaults on such terms as may be determined by it in accordance with the procedure prescribed in the regulations. Over the years it has settled about a thousand matters.

The Competition Act, 2002 already has leniency provisions which allow for the imposition of a lower penalty than it would have been otherwise. This is allowed based on the idea that enforcement brings with it certain costs, uncertainties and difficulties. These provisions have, however, rarely been used for obvious reasons and these are no substitute for settlement. The need for settlement of competition infractions is higher for two reasons:

1. A definite finding in a given context is extremely difficult as competition law relies heavily on the rule of reason; and

2. The product or conduct in question may disappear much before the authorities take a view of the same.

**Drafting Instruction 21: Settlement**

The CCI may enter into a settlement with a party against whom a SCN is issued at any time before an order is passed by it. The prospect and terms of such a settlement must consider:

1. the gravity of the contravention alleged in the SCN;
2. the conduct of the party upon the discovery of the occurrence of the alleged contravention;
3. the repetitive nature of the alleged contravention;
4. the benefit or unfair advantage gained by the party as a result of the alleged contravention;
5. the loss caused, or likely to be caused, to consumers or other persons as a result of the alleged contravention; and
6. whether the alleged contravention has impacted the integrity of the competition landscape.

A settlement must require the party to pay a settlement amount and disgorge an amount equivalent to the gain made or loss averted by an alleged contravention and/or take corrective steps. Regulations must be made to govern the due process in settlement proceedings. The settlement amount shall be credited to the consolidated fund of India.

The concept of disgorgement stems from the idea that a firm should not be allowed to retain any financial benefit from its illegal activity.[67] It is a monetary equitable remedy that is designed to prevent a wrongdoer from unjustly enriching himself or herself as a result of the illegal conduct. Disgorgement was alien to Indian law until recently. It is now a remedy available under the Securities and Exchange Board of India Act, 1992.[68]

The penal and remedial methods provided for in the Competition Act, 2002 do not provide any relief to the victims of anticompetitive conduct. Disgorgement takes away the profits earned by the wrongdoer from the illegal conduct. It is not concerned with the amount of damages sustained by the victims of the unlawful conduct. Restitution, which is also a monetary equitable remedy, requires a wrongdoer to restore victims of the illegal conduct to the position they would have been in absent the conduct. Thus, the purpose is to compensate victims for their loss, irrespective of the amount of profits earned by the wrongdoer. The difference between the two remedies is essentially one of focus. Disgorgement asks how much did the wrongdoer gain as a result of her illegal conduct, while restitution asks how much were the victims harmed by the conduct.[69]

USA and China allow for disgorgement. However, the use of disgorgement in USA by the FTC has been rare (less than 10 cases since

[67] OECD, *Remedies and Sanctions in Abuse of Dominance Cases* (2006) .

[68] SEBI has issued disgorgement orders under its implicit powers even a decade before it was explicitly granted this power. These orders have been upheld by the Hon'ble Supreme Court.

[69] Fried Frank Harris Shriver & Jacobson, *Fried Frank Antitrust and Competition Law Alert* (2003) .

1980).[70] The enforcement machinery of the antitrust laws in the USA is very different from the one contemplated under the Indian antitrust laws and so caution should be exercised while relying on comparative international practices. In USA, damages can be punitive while in India, they have to be fair and reasonable. Disgorgement is not meant to be a penalty in India and it should be a means of remedy to bring the wrongful gains of a contravenor out of her control. The WG (except two members) recommends that the Commission should have powers to direct disgorgement of wrongful gains arising out of contraventions of competition law.

[70] Maureen K Ohlhausen, *Dollars, Doctrine, and Damage Control: How Disgorgement Affects the FTC's Antitrust Mission* (2006) .

**Drafting Instruction 22: Disgorgement**

The CCI may direct any person who made profit or averted loss by indulging in any activity in contravention of the Competition Act, 2002 to disgorge an amount equivalent to the wrongful gain made or loss averted by such contravention. In doing so, the CCI may, as far as practicable, also restitute those parties who have been affected by the contravention, if:

1. the loss suffered by the persons is directly attributable to the contravention;
2. the persons who have suffered loss due to the contravention can be reasonably identified; and
3. the amount disgorged is sufficient to provide restitution to similarly placed persons.

Two members (Ms. Mody and the Representative of CII) do not support disgorgement. Ms. Mody argues that disgorgement is not in line with global practices. Mr. Raju, representative of CII, has argued that the potential misuse of such significant powers in the hands of a regulatory authority will be a concern to industry.

Today, the CCI relies on revenue authorities to recover penalties due from parties. The CCI has levied an aggregate penalty of Rs.13,087 crore in 109 cases and realised a penalty of Rs.44 crore till 31st March, 2017.[71] This has the potential to render the penalty ineffective. The WG recommends that the CCI be given greater powers to enforce recovery of penalties levied by it.

[71] See Table D2 of the Competition Commission of India (n 49).

### Drafting Instruction 23: Recovery of Penalties

The CCI may recover penalties without having to depend on the revenue authorities, akin to the mechanism adopted by regulators such as SEBI for recovery of penalties, to make the penalty effective. In doing so, its legal framework must be governed by sections 220 to 227, 228A, 229, 232, the Second and Third Schedules to the Income Tax Act, 1961 and the Income Tax (Certificate Proceedings) Rules, 1962. In recovery, the CCI may recover a penalty through:

1. attachment and sale of movable property belonging to the defaulter;
2. attachment of the bank account of the defaulter;
3. attachment and sale of immovable property owned by the defaulter;
4. where the defaulter is an individual, arrest and detention of such individual in prison; or
5. appointing a receiver for the management of the movable and immovable properties belonging to the defaulter.

# *Cross-Cutting Design Principles*

Having laid out the structure of a modern competition regulator, this Chapter briefly addresses important design principles that were not explicitly discussed.

## *Separation of Powers*

Regulators are statutorily empowered to perform the three functions of the state – regulation-making (quasi-legislative), administration (executive), and adjudication (quasi-judicial) – at the cost of blurring the principle of separation of powers. This is a conscious decision taken by the Parliament in empowering regulators to help them efficiently perform the task for which they were created.

This has led the Hon'ble Supreme Court to observe in *Clariant International v SEBI* that:[72]

> *Integration of power by vesting legislative, executive and judicial powers in the same body, in future, may raise several public law concerns as the principle of control of one body over the other was the central theme underlying the doctrine of separation of powers. Our Constitution although does not incorporate the doctrine of separation of powers in its full rigour but it does make horizontal division of powers between the Legislature, Executive and Judiciary.*

[72] *Clariant International v SEBI* AIR 2004 SC 4236.

The task of setting up a governance structure of a regulator is to prevent regulatory excesses, minimise democratic deficit, and make the regulator restrict itself to effectively performing its mandated responsibilities. Separation of powers is effected at the operational level through clear firewalling of staff between different functions of the regulator. The WG has delineated clear functions in the previous sections.

While there may be fungibility of talent as a matter of HR policy, meticulous care must be taken to avoid conflict of interest with no employee performing multiple roles at a point of time or performing multiple roles with regard to the same matter at any time.

**Drafting Instruction 24: Separation of Powers**

1. An employee must not perform two kinds of functions at a point of time.
2. When an employee is shifted from one function to another, care must be taken that she must not deal with the same matter as she was earlier, in her previous role.

## *Operational Independence*

An authority having the responsibility to deliver on its mandate must have independence. The CCI is largely independent as it exercises most of its powers without recourse to the Government. Its Members have a secure tenure of five years, their terms cannot be varied to their disadvantage and they cannot be easily removed. The CCI is not susceptible to the influence of the regulated as it does not have a constituency of identified 'regulated' firms or persons. The CCI's real independence, however, hinges on the capability of its human resources, including Members.

A key determinant of regulatory independence is how an agency is structured, including at the level of individual employees.[73] What separates successful government agencies from those that fail has "less to do with finances, client populations, or legal arrangements than with organisational systems".[74] For a regulatory agency to be independent and effective, it needs to be able to build and nurture a cadre of its own staff.[75] This includes making decisions on the internal organisational structure of the regulator.[76] Having the power to conduct its own hiring also enables a regulator to set up a specialised workforce that has the right technical knowledge.

Modern regulators have the power to develop their own recruitment criteria and processes. For example, SEBI is empowered under section 9 of the Securities and Exchange Board of India Act, 1992 to appoint its officers and employees and decide on the terms and conditions of their service. Similarly, IBBI is empowered under section 194(2) of the Insolvency and Bankruptcy Code, 2016 to appoint its officers and employees and decide on the terms and conditions of their service including salaries and allowances. However, such details in respect of the CCI and the office of DG are determined by rules.[77]

Governance structures and HR policies for the regulator should support transparency, professionalism, and results oriented management.[78]

[73] Christopher Carrigan and Lindsey Poole, Structuring Regulators: The Effects of Organizational Design on Regulatory Behavior and Performance (2015).

[74] JQ Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* (Basic Books 1989).

[75] Roy and others (n 33).

[76] Patnaik and Shah (n 22).

[77] Sections 63(da)-63(g) of the Competition Act, 2002.

[78] OECD, *Regulatory Enforcement and Inspections* (n 56) 14.

**Drafting Instruction 25: Officers and Employees of the CCI**

The CCI must have power to decide matters relating to its human resources. It must have powers to make regulations to determine the procedure of selection, terms, compensation and conditions of the appointment and service of persons.

INDEPENDENCE IN STAFFING DECISIONS IS IN ITSELF INSUFFICIENT if a regulator does not also have the financial independence needed to hire and retain the right talent.[79] Regulatory independence requires that government involvement in the financial matters of a regulator be minimal. Moreover, a regulator should have the freedom to allocate resources in the manner that it considers most appropriate to meet its regulatory objectives.[80]

[79] Roy and others (n 33).

[80] See also Financial Sector Legislative Reforms Commission (n 24) Table of Recommendations 3.8.

Regulation is a resource intensive function. Markets evolve rapidly and regulators need the capability and resource to keep pace. A regulator's financial independence allows it to "have the required flexibility and human resources that are more difficult to achieve within a traditional government setup."[81] Funding must be commensurate to the needs of the regulator to effectively fulfil its legal objectives.[82]

[81] Financial Sector Legislative Reforms Commission (n 24) s 3.5.

[82] OECD, *The Governance of Regulators* (n 32) 98.

Sectoral regulators are often able to find financial independence by levying fees on regulated firms. The CCI does not have a ready base of regulated entities from which to finance its operations. However, it does have the ability to finance itself through fees collected with respect to mergers and combinations.[83] So far, the CCI has charged a flat, tiered fee for such proposals. It stands to reason that the CCI should place higher financial burden on firms that increase its work load and functions.

[83] Section 6(2) of the Competition Act, 2002.

Precedent for such financing exists in the context of Indian capital markets. SEBI charges fees for review of offer documents relating to public offerings, be they by companies, mutual funds or indeed in respect of combinations covered by Takeover Regulations. This has also been upheld by the Hon'ble Supreme Court in *BSE Brokers Forum v SEBI* where the following broad principles were laid down:[84]

[84] *BSE Brokers Forum v SEBI* (2001) 3 SCC 482.

1. The statute should empower the regulatory body to levy a fees to carry out its functions.
2. The fees being charged by the regulatory body should not be excessive and should be in the public interest
3. The fees should only be used for performing the regulatory body's functions as prescribed by the statute.
4. The regulatory body can choose the measure of levy, provided that it withstands the test of reasonableness.

**Drafting Instruction 26: Funding**

1. The CCI must have independence on financial matters.
2. A one-time corpus fund may be made available with the CCI, and financial independence may be built with bolstered revenues from fee earnings.
3. The CCI may charge an *ad valorem* fee on mergers and combinations instead of a fixed, tiered fee.

KEEPING IN MIND THE NEED FOR FINANCIAL INDEPENDENCE, the requirement for funds and the work of the regulator, most regulators are exempt from paying tax. This is true of SEBI[85] and TRAI[86], to name a few.

[85] Section 25 of the Securities and Exchange Board of India Act, 1992.

[86] Section 32 of the TRAI Act, 1997.

**Drafting Instruction 27: Exemption from Tax**

Nothing contained in any law or enactment in force, in relation to taxation, including the Wealth Tax Act, 1957 and the Income Tax Act, 1961, will make the CCI liable to pay wealth tax, income tax, service tax, or any other tax or duty with respect to its wealth, income, services, profits or gains.

## *Accountability Mechanisms*

IN A DEMOCRATIC SET UP, every agency is accountable to ensure that it does not drift away from its mandate. The current arrangement of accountability of the CCI is reasonably satisfactory. However, it would be useful to strengthen it further by measures such as: (a) periodic evaluations of its performance by the Commission itself; (b) a series of continuous and event specific disclosures, in the interest of transparency; (c) disposal of various tasks by the CCI by reasoned orders[87] and in a time bound manner, after following the due procedure, (d) subordinate legislation based on cost benefit analysis and public consultation, and (e) guidelines to provide for factors to be considered in determination of issues and the procedure to be followed for the same, to the extent not provided in the Act.

[87] *Rangi International Limited v Nova Scotia Bank* (2013) 7 SCC 160.

A key element of accountability is the inclusion of PTMs on the Commission. They are the pathway through which society exerts influence upon the management of the regulator.

In addition, accountability can be enhanced through well formulated review processes and clear timelines for regulatory action.

A REGULATOR SHOULD SUBMIT AT LEAST TWO ANNUAL REPORTS.

One should be an audited report of its financials. The other should be a performance report which should be as comprehensive and objective as possible. In particular, the CCI should create and publish performance targets, all of which should be published in its annual report. The performance measurement system itself should be reviewed every three years to incorporate global best practices. Similarly, the financial reporting should require that the regulator produce a financial statement mapping expenditure to each function mentioned out in the performance report, and not just a standard balance sheet. For example, AERAI is an Indian regulator which complies with high standards of transparent financial reporting. The annual financial statements of AERAI are made in accordance with the general reporting standards mandated under the Companies Act, 2013.[88]

[88] Ministry of Corporate Affairs, *Building the Insolvency and Bankruptcy Board of India* (n 36) 22.

Such financial and performance reporting helps the Commission to (a) make strategic decisions about spending and performance and establish a link between the two, and (b) identify areas of concern, and guide the management towards remedial actions. It also helps Parliament and the public at large to review regulatory quality given the financial resources available.

Regular performance assessment is a critical channel through which regulatory accountability operates. It is essential that a review of any regulator should capture whether it has fulfilled its *regulatory objectives*. For any review to be meaningful, there should be clarity on the outcomes that should be achieved. This clarity on objectives is essential for obtaining accountability in regulation.

**Drafting Instruction 28: Performance Review**

The Commission must submit two annual reports:

1. An audited report which is comparable to traditional financial reporting; and
2. A performance report which measures each activity of the regulator as objectively as possible. To do so, the regulator must create and publish performance targets. All performance measures, against their targets, must be published in the annual report. The performance measurement system must be reviewed every three years to incorporate global best practices.

With particular reference to competition regulator effectiveness, the *Competition Agency Evaluation* and the *Australian Government Competition Policy Review* both provide useful starting points for agency evaluation. Based on them, a framework for assessment is provided below.

**Recommendation 5: Metrics for Performance Assessment**

1. Quantification of agency activity and productivity, including
   (a) Number of enforcement actions or decisions made
   (b) Sanctions imposed or obtained
   (c) Number of investigations initiated and closed
   (d) Number of complaints addressed
   (e) Investigations or enforcement actions by type of enforcement
   (f) Remedies imposed or obtained
   (g) Advocacy actions
   (h) Identifying potential areas of reform across all levels of government
   (i) *Ex post* evaluation of some merger decisions
   (j) Market studies including an annual competition analysis
   (k) Studies undertaken or produced
   (l) Number of government policies reviewed including commercial and procurement policies
   (m) Appeals
   (n) Intermediate investigative steps or actions
   (o) Appearances before or comments to legislative bodies, courts, sector regulators
   (p) Policy statements and guidelines issued.
2. Quantification of overall benefits or impact
3. Qualitative review and reputational feedback, including
   (a) Length or timeliness of investigations
   (b) Whether the agency has achieved its strategic objectives and goals
   (c) Percentage of investigations closed in an initial phase
   (d) Percentage of investigations that lead to enforcement actions
   (e) Success rates for advocacy efforts
   (f) Reputation surveys among firms, the legal community, academia, consumers and the press.

In a vibrant market place, products and enterprises develop and disappear at high speed. Potentially anticompetitive action by a dominant player may quickly wipe important sources of innovation and competition. Dynamic markets necessitate interventions, especially pre-emptive measures, that are expeditious. Even combinations need to be handled fast. Economic assets have values that are determined by wide market forces. Working quickly to review

combinations ensures that the value is kept intact. Market players also benefit from certainty in knowing that matters will be handled expeditiously and predictably. When a public authority clearly articulates that activities will be performed within strict timelines, this gives comfort to all parties. For example, the Insolvency and Bankruptcy Code, 2016 specifies timelines for various tasks by market participants as well as the Adjudicating Authority.[89]

**Drafting Instruction 29: Timely Disposal**

The Commission must make regulations specifying binding timelines for disposal of matters at various stages, ranging from investigation to quasi-judicial determination after investigation and approvals.

[89] For example, section 7(2) of the Code requires the Adjudicating Authority to ascertain the existence of default within 14 days of the receipt of the application. Insolvency and Bankruptcy Code, 2016.

*Annexures*

No. 5/9/2017- CS
Government of India
Ministry of Corporate Affairs
****

*5th Floor, 'A' Wing, Shastri Bhawan*
*Dr. Rajendra Prasad Road*
*New Delhi-110001*
*The 13th November, 2018*

**ORDER**

**Subject: Constitution of Working Groups of the Competition Law Review Committee- regd.**

In accordance with the deliberations of the 1st meeting of the Competition Law Review Committee held on 31st October, 2018, the following four Working Groups (WG) are constituted:-

i. **WG on Regulatory Structure** (Dr. MS Sahoo- WG I/C)
ii. **WG on Competition Law** (Dr. S Chakravarthy- WG I/C)
iii. **WG on Competition Policy, Advocacy and Advisory Functions** (Prof. Aditya Bhattacharya- WG I/C), and
iv. **WG on New Age Markets & Big Data** (Shri Harsha Vardhana Singh- WG I/C).

(The composition of the Working Groups is annexed as *Annexure-I)*.

2. It is requested that the findings of the each Working Group may be presented to the Competition Law Review Committee within four Weeks from the date of issue of this order.

(Abhijit Phukon)
Director

To,

1. Chairperson, Competition Commission of India (CCI)
2. Chairperson, Insolvency and Bankruptcy Board of India
3. Shri Haigreve Khaitan, M/S Khaitan & Co.
4. Shri Harsha Vardhana Singh, IKDHVAJ Advisers LLP
5. Ms. Pallavi Shardul Shroff, Advocate, M/S Amarchand Mangaldas & Co.
6. Dr. S. Chakravarthy, IAS (Retd.), Hony. Visiting Professor, ASCII
7. Shri Aditya Bhattacharjea, Professor of Economics, DSE, University of Delhi
8. Shri Anand S. Pathak, Managing Partner, P&A Law Offices

*Contd.....*

*Copy to:-*

9. CEO, Niti Aayog, Niti Bhawan, New Delhi (*with the request to nominate an officer not below the rank of Joint Secretary*)
10. Shri Dhammu Ravi, Joint Secretary, Department of Commerce, Udyog Bhawan, New Delhi
11. Dr. Shashank Saksena, Adviser (FSLR), Department of Economic Affairs, North Blcok, New Delhi
12. Shri Amit Mehta, Joint Secretary, Department of Consumer Affairs, Krishi Bhawan, New Delhi
13. Shri Ravinder, Joint Secretary, Deptt. of Industrial Policy and Promotion, Udyog Bhawan, New Delhi

*Copy also to*:-

a. PS to CAM
b. PPS to Secretary, Corporate Affairs
c. Joint Secretary (Competition), MCA
d. Secretary, CCI (*with the request to circulate this order to the Convenor of each Working Group for further necessary action*)

(Abhijit Phukon)
Director

*Annexure-I*

**Composition of the Working Groups of the Competition Law Review Committee**

**CLRC**

**WG on Regulatory Structure**

**Dr MS Sahoo – WG I/C**

1. Shri Somasekhar Sundaresan
2. Shri Anand Pathak
3. Ms. Pallavi Shroff
4. Ms. Zia Mody
5. Prof Ajay Shah
6. Dr Kaushik Krishnan
7. Representatives of FICCI, CII
8. Shri CB Bhave/ Shri UK Sinha
9. Ms. Smita Jhingran (Secretary CCI – Convenor)

**WG on Competition Law**

**Dr S Chakravarthy –WG I/C**

1. Ms. Pallavi Shardul Shroff (M/s SAM)
2. Shri Anand Pathak
3. Shri Samir Gandhi (Partner, AZB & Partners)
4. Ms. Nisha Oberoi (Partner, Trilegal)
5. Shri Haigreve Khaitan (Khaitan & Khaitan)
6. Shri Ramji Srinivasan (CLBA)
7. Representatives of FICCI, CII, IVCA.
8. Ms. Jyoti Jindgar (Advisor CCI– Convenor)

**WG on Competition Policy, Advocacy and Advisory Functions**

**Prof Aditya Bhattacharya – WG I/C**

1. Dr. S. Chakravarthy
2. Shri Harsha Vardhana Singh
3. Shri Sunil Nathani
4. Reps of ASSOCHAM & PHD
5. Impact Assessment Study - commissioned by CCI - IIM(A)/BCG/McKinsey&Co /Bain&Co.
6. Shri Manoj Pandey (Advisor CCI – Convenor)

**WG on New Age Markets & Big Data**

**Shri Harshvardhan Singh – WG I/C**

1. Prof Aditya Bhattacharya
2. Shri Kunal Bahl - Snap Deal
3. Shri Naveen Tiwari - InMobi
4. Shri Deepinder Goyal - Zomato
5. Shri Bhavish Agarwal - Ola
6. Shri Vijay S Sharma - PayTM
7. Shri Ramji Srinivasan
8. Shri Samir Gandhi
9. Shri Sohan Mukherjee
10. NASSCOM, & IVCA
11. Ms. Payal Malik (Advisor CCI) - Convenor

*Views of the CCI*

**CCI Views on the Recommendation of WG-I of Competition Law Review Committee (CLRC) on Regulatory Architecture of Competition Law**

Competition Commission of India (CCI) is grateful to WG-I for conducting an in-depth study on the desirable regulatory architecture of CCI and coming up with an excellent report. The recommendation on autonomy in financial and HR matters are most welcome and these will go a long way to strengthen the regulatory architecture, particularly the functioning of CCI as an independent and efficient regulator. However, owing to its decade of enforcement experience, CCI has reservations with respect to some of the recommendations on governance and enforcement architecture. These are brought out as under:

**A. Part-Time Members:**

- Unlike sectoral regulators, CCI largely works as an enforcement agency adjudicating on *ex-post* matters such as prohibition of certain agreements, abuse of dominant position and undertakes *ex ante* regulation of combinations. Sectoral regulators, like SEBI, TRAI and RBI, regulate businesses under their purview through rules that are frequently revised based on the changing market compulsions, whereas CCI enforcement function is a fact-intensive inquiry done on a case by case basis. The rules/regulations of the sectoral regulator discipline or impact the day to day affairs of the businesses falling under their domain. They further regulate the market by issuance of licenses to the market participants as well as monitor compliance of *ex-ante* rules by stakeholders. However, CCI's rule making power is minimal and largely confined to issuance of procedural regulations as substantive provisions are contained in the parent legislation i.e. Competition Act, 2002 (Act). While external expertise and stakeholder involvement (through the presence of Part-Time Members) is a need in processes that result in *ex ante* rule-making relating to day to day affairs of business(es), CCI has no such role under the Act. The limited *ex ante* function of CCI is in the area of combination/merger but here again, the substantive principles are already laid out in the Act.

- Considering the nature of functions discharged by competition agencies, the present structure of CCI is considered more appropriate. Under the present scheme of the Act, the operational independence of CCI is higher than the proposed governance structure involving Part-Time Members for the overall general superintendence and the CCI down below to discharge the day-to-day enforcement functions. The functional autonomy and independence of CCI in decision making could be compromised by the presence of Part-Time Members. It may, thus, have some impact, albeit indirect, on CCI's freedom in respect of adjudicatory functions. Further, the proposed governance mechanism may lead to delays in quasi-legislative and administrative decision making.

- It may be pertinent to note that bodies like AERA, PNGRB, CERC and WDRA do not have a governance structure envisaging presence of Part-Time Members. Like CCI, these bodies have whole time members only, discharging functions under the relevant statute.

- Further, no other evolved or known competition regime is seen to have a governing board as proposed. For example, there is no concept of Part-Time Members in most of the evolved competition authorities like US, Brazil, South Africa and Russia. In US, neither the FTC not the antitrust division of DOJ has the concept of Part Time Members. Similarly, in Brazil, the Competition Tribunal is composed of a President and Commissioners, all of whom are exclusive and full-time members of the Tribunal. The legislative scheme of the competition law in South Africa also envisages that all the members of the Competition Commission are full-time members. However, the law does not contemplate participation of external inputs in the general superintendence of the Competition Commission. All these organisational structures suggest that Competition Authorities do not necessarily require a governing board with external Part-Time Members. This is apparently on account of the fact that the role of competition authorities is more of enforcement than making delegated legislations that prescribe substantive norms for doing business.

- Moreover, the proposed synergies to be achieved by the presence of Part-Time Members are presently met by existing alternative inclusive mechanisms [Eminent Persons Advisory Group (EPAG), public consultation in regulations, expert inputs from industry specialists, professionals from various disciplines who participate in regular lecture series and programmes carried out under international cooperation *etc.*].

**B. Creation of Benches:**

- Unlike sectoral regulators like SEBI, TRAI and RBI, the enforcement by CCI cuts across sectors and involves multi-disciplinary approach. Cases from diverse sectors come to CCI, which require multi-disciplinary expertise for in-depth and holistic assessment of the economic realities of the markets. For such decision making, a collegium system is more efficient mechanism to arrive at a balanced decision and gives scope for plurality of views. Thus, at least a quorum of 3 members would be required to ensure the sanctity of such decision making. The Chairperson of CCI can be allowed to constitute multiple quorums, each of which would take the final decision regarding contraventions under the Act. It is desirable that all these quorums locate themselves at one place so that there is consistency in enforcement. However, if need be, the Commission may decide to conduct hearings at a place outside Delhi.

- However, CCI welcomes the suggestion of WG-I for establishing regional offices for promoting advocacy and conducting surveillance/investigation.

**C. Merging of DG with CCI:**

- The investigation functions with the DG and the quasi-judicial functions with the Commission should remain segregated.

- Liberal economic reforms have necessitated modern market regulators housing rulemaking, investigation and adjudication functions within the same authority.

Nevertheless, strong internal checks and balances are to be put in place to insulate different functions of regulators from one another.

- The extent of integration of different functions and their insulation from one another depends upon the nature of functions discharged by the regulatory/expert authority. As stated earlier, CCI is largely an enforcement agency unlike sectoral regulators like SEBI, TRAI and RBI whose primary function is to set down standards of behavior expected from regulated entities. These standards determine how market participants have to interact with the regulator, consumers, markets and other regulated entities. These standards also become the surveillance norms to monitor compliance by regulated entities. Here, the surveillance and investigation enables the regulator to understand the market realities on a real time basis, and the knowledge gained plays a key role in designing and revising rules/standards. Thus, an absolutely integrated agency like SEBI achieves the said synergy for the purpose of constant rule-making.

- In case of CCI, the substantive competition norms are contained in the Act itself. CCI largely inquires into anticompetitive conducts and acquisitions on a case to case basis and determines whether the behavior of the concerned parties amount to a contravention of the provisions of the Act. In case of contravention, the Act contemplates significant punitive measures against the delinquent entities. In this context, the optimal regulatory architecture for competition enforcement must ensure that commitment bias does not influence investigation and the final determination.

- The current arrangement, with a functionally segregated DG office, has ensured sufficient autonomy to conduct unbiased investigation. Over a decade of enforcement experience, it is seen that DG was able to conduct impartial investigation without any commitment bias and arrive at findings contrary to the *prima-facie* order of the Commission, if necessary. Similarly, after investigation by the DG, the Commission has differed from the views of investigation on several occasions. This shows that the present segregation of investigation and adjudicatory functions of CCI has facilitated independent and efficient functioning of respective capacities. This independence would be lost if the DG office were to be folded into CCI completely and the same is likely to prejudice the checks against commitment bias.

- The present structure is working fine with many decisions getting upheld by the Supreme Court which shows robustness of the decisions making by the Commission and as such there seems to be no reason to make any change.

**D. Disgorgement Powers:**

- CCI is not in favor of introducing disgorgement powers under the Act as it is not a common mandate of the competition regimes across the globe. Competition agencies like US and China have such power under their respective legislations but even these agencies hardly exercised it. The need for disgorgement process would also depend upon the extent of penalty envisaged and levied under the Act for ant-competitive

conducts. Sufficient deterrence against anti-competitive conduct can be achieved only when the punitive costs under the competition law is higher than the gains arrogated through such conduct. Thus, disgorgement and penalty mechanism interface with each other from a policy perspective. While determination of illegal gains involves a complex estimation exercise, a sufficient level of deterrence through penalty is more desirable for effective deterrence and administration. The recommendation, if any, of WG-II with respect to penalty would also be relevant in this regard.

- WG-I has recommended the disgorgement powers to the Commission. However, if at all disgorgement to be introduced, it would be appropriate to vest such powers with NCLAT, which is presently the forum for quantifying damages suffered due to contraventions under the Act and granting compensation.

**E. Issuance of SCN:**

- WG-I has recommended that adjudication proceedings must commence with issuance of a Show Cause Notice (SCN), based on findings of an investigation, instead of merely forwarding the Investigation Report as it is. It is submitted that the DG is a part of the Commission, although functionally independent. Under the current scheme of the Act, the practice has been that the DG conducts a detailed investigation, examines the material gathered thereof and writes a comprehensive investigation report with its recommendations to the Commission. Thus far, the investigation reports of the DG include a summary of the findings/recommendations at the end of the report. The Commission considers such arrangement to be sufficient and any additional summarisation in the form of SCN over and above the Investigation Report of the DG may not communicate full import of the investigation.

- It is clarified that forwarding of investigation report to the parties is not a mechanical process. Upon preliminary consideration, if the Commission is satisfied with respect to the completeness of the investigation report, the same is forwarded to the parties. However, there have been several instances where the Commission has differed from the DG or supplemented its conclusions with additional material brought to the notice of the Commission or added additional charges based on the material discovered during investigation. Such decisions of the Commission are communicated to the parties by way of notice accompanying the investigation report of the DG. Thus, the extant law and practice provide sufficient room to address the apprehensions regarding observance of principles of natural justice in quasi-judicial determinations.

**F. Settlement and Consent Mechanism:**

- The desirability of settlement and consent mechanism is being examined by WG-II as part of the changes to substantive provisions of the Competition Act, 2002. Thus, WG-II would be in a more appropriate position to make recommendations in this regard.

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# *Acronyms*

*AAEC* appreciable adverse effect on competition. 20

*AERAI* Airports Economic Regulatory Authority of India. 22, 32, 59

*CCI* Competition Commission of India. 4, 9–11, 13–22, 26, 27, 29–47, 49, 50, 52–54, 56–59

*CERC* Central Electricity Regulatory Commission. 22

*CLRC* Competition Law Review Committee. 9–11, 21

*COMPAT* Competition Appellate Tribunal. 4, 18, 40

*DG* Director General. 4, 9, 14, 20, 38, 40–43, 56

*FSSAI* Food Safety and Standards Authority of India. 22

*HR* Human Resources. 14, 23, 28, 56

*IBBI* Insolvency and Bankruptcy Board of India. 5, 22, 27, 28, 33, 47, 56

*ICN* International Competition Network. 42

*IRDAI* Insurance Regulatory and Development Authority India. 22

*MCA* Ministry of Corporate Affairs. 6, 9–11

*MRTP Commission* Monopolies and Restrictive Trade Practices Commission. 4

*NCLAT* National Company Law Appellate Tribunal. 4, 10

*NFRA* National Financial Reporting Authority. 22

*PFRDA* Pension Fund Regulatory and Development Authority. 22

*PTM* Part-Time Member. 5, 11, 13, 23, 26, 27, 29, 34, 58

*RBI* Reserve Bank of India. 22, 26

*RERA* Real Estate Regulatory Authority. 22

*SCN* Show Cause Notice. 15, 47–50, 52

*SEBI* Securities and Exchange Board of India. 16, 22, 26, 51, 52, 56–58

*TRAI* Telecom Regulatory Authority of India. 22, 44, 58

*WG* Working Group. 6, 9–14, 22, 26, 27, 33, 39–43, 46, 47, 53, 55

*WTM* Whole-Time Member. 13, 27, 31, 50

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