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De Jure Independence of the Competition Commission of India

| Karan Shelke and Saksham Malik



Curated Voices

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ABSTRACT

The independence of statutory authorities like the Competition Commission of India [CCI] is essential for the protection of fundamental rights and socio-economic development of the country. Recent policy developments have shed light on the issue of the independence of the CCI from the central government. The commentary will look at the Indian competition law regime, including the Act and the Bill to delineate the challenges to the independence of the CCI. Further, recommendations on policy and procedural changes that can balance the independence of the CCI with effective oversight will be given.

Keywords: market regulation, competition, economic policy, antitrust legislation, Competition Commission of India

INTRODUCTION

The Competition Act, 2002 (the Act) is the antitrust legislation of India which seeks to prevent anti-competitive behaviour and promote healthy competition in the market. The Competition Commission of India [CCI] is an independent, statutory authority that falls under the ambit of the Ministry of Corporate Affairs. The CCI, like other competition regulators, was created to protect and sustain competition in markets, guard consumer interests, and ensure freedom of trade in India (Competition Act, 2002).

To ensure that these objectives are fulfilled, the independence of the competition regulator from the government is imperative. This paper assesses the de jure independence of the CCI, i.e. the extent of its independence stated by the law, in light of established parameters. At the outset, it is necessary to understand that the independence of an authority is variable, not absolute. The question is not whether the Indian antitrust framework allows the CCI to be independent but to what extent the aforementioned independence is granted. However, independence does not imply an absence of accountability (UNCTAD, 2008, p. 4). To fulfil the objectives of competition law, the CCI must find a harmonious balance between independence and accountability.

WHY IS THE INDEPENDENCE OF A COMPETITION AUTHORITY IMPORTANT

Firstly, the Commission is supposed to assure a level playing field in the market and not favour state-owned enterprises or private players who can lobby the government (OECD, 2016b, p. 6; Aggarwal, 2020; IANS, 2021). Secondly, competition issues require complex social and economic assessments that require the expertise of officials that are typically only part of the Commission (Moe, 1984, pp. 739, 760-761).

Thirdly, enforcing competition law and policy requires sustainable commitment to avoid regulatory uncertainty and consequent implications for consumers and small businesses (OECD, 2014, pp. 50-51). Business objectives are decided keeping the status quo of the regulatory framework in mind. To ensure the long-term sustainability of these decisions, it is imperative that legal requirements are clear and credible. Lastly, independence is crucial to maintain public confidence and to be perceived as impartial and credible which consequently discourages anti-competitive behaviour and assures consumers that the regulator is committed to protecting their interests (OECD, 2012, p. 14).

Assessment of the independence of an authority often consists of its de jure independence, ie. what is reflected in statutes - and de facto independence, ie. what exists in reality. Considering the difficulty in assessing the latter due to the subjectivity involved and absence of credible criteria, analysis in antitrust literature primarily revolves around de jure independence. However, an analysis of the Indian framework of de jure independence of the CCI, in light of the Competition Act, 2002 (the Act) and the Competition (Amendment) Bill, 2020 (the Bill) has not yet been done. This commentary aims to fill this gap.

TO WHAT EXTENT DOES THE INDIAN ANTITRUST FRAMEWORK ALLOW THE CCI TO ACT INDEPENDENTLY?

The extent of the independence of a competition authority has been discussed in scholarly works (Maggetti, 2009, pp. 445) and government documents (OECD, 2016b, pp. 9) in various jurisdictions. Indicators that find reference in most literature pertain to the separation of policy-making functions, appointment of members, and operational and financial independence.

i) Separation of policy-making powers

A separation between functions of drafting policies and regulations can ensure that the relevant instruments are informed by expert input and are independent of external interference. The Act has maintained this by providing that the policies pertaining to competition law are to be created by the Central Government, while the CCI is responsible for creating regulations aimed at, inter alia, determining the cost of production pertaining to matters of abuse of dominance, a form of notice and fees, and the manner of recovering penalties as mentioned in section 64 of the Competition Act (2002).

The Bill disturbs this separation in two ways. Firstly, it transfers the regulation-making power from the CCI to a 'Governing Board', which consists of the Secretaries or their nominees from the Ministry of Finance and Ministry of Corporate Affairs and four part-time members to be appointed by the Central Government, in addition to the CCI members as detailed in section 2 (j) of the Competition Amendment Bill (2020). The amendment dilutes the regulation-making independence of the CCI, which has a bearing on significant aspects of the framework, including the information filing fees.

It must be noted that the Bill allows the Board to issue and amend regulations without publishing the draft and responding to public comments online in the existence of "urgency in the public interest", an opaque condition that has not been explained in the relevant section 64A of the Competition Amendment Bill (2020). Secondly, the Central Government has been given additional wide-ranging powers, "in consultation with the CCI". This includes notifying additional jurisdictional thresholds for filing a merger notification as detailed in sections 6(a) and 5(c) and prescribing criteria to exempt certain combinations as mentioned in sections 6(f) and 63(ad) of the Competition Amendment Bill (2020). Importantly, these changes can potentially impact the efficiency of relevant policy instruments as power gradually shifts from a regulatory authority composed of antitrust experts to officials of the Central Government and part-time members whose qualification criteria are still unclear. Various other countries follow a stricter approach to the separation of policy-making powers. In Mexico, the commission not only has the power to enact and implement regulations but also has the power of constitutional recourse before the country's supreme court if the federation violates its authority (OECD, 2016b, p. 11).

ii) Appointment of members of the CCI

The issue of credible commitment to a policy arises when the preferences of policymakers in power change over time (Majone, 1994, pp. 77, 88-90). These may happen due to various factors, including a change in government. Delegation of authorities to an agency helps ensure credible commitment to policies as they are insulated against election cycles and political changes (Moe & Caldwell, 1994, pp. 171, 173-174). Stability and long-term commitment are significant for competition law as economic legislations impact the business objectives of small traders, investment strategies of cor-

porations (OECD, 2014), and insulation of consumers from unfair prices and conditions. However, this commitment often suffers as appointment of members of authorities is frequently made in line with the ruling party's objectives.

It is not unprecedented to witness a change in the members of competition authority in line with a new government's objectives. In the United States of America, the appointment of Ms. Lina Khan as the latest chair of the Federal Trade Commission [FTC] was largely informed by President Biden administration's focus on curtailing the power of major technology companies. To ensure long-term sustenance of antitrust objectives, various jurisdictions attempt to protect the appointment of commission members from political change. The FTC does that by appointing its members for seven years, which allows for their term to be extended across the presidential term of four years (OECD, 2016a).

In India, the Act achieves mixed success in guarding against this problem. Section 9 of the Competition Act (2002) provides that the Committee has limited representation from the Central Government. However, it fails to extend the term of the CCI members beyond election cycles. The members of the CCI are appointed in accordance with prescribed qualifications, which are detailed in section 8(2) of the Competition Act 2002). The appointment is undertaken by a Selection Committee for a period of five years, in accordance with section 10 of the Competition Act (2002), which does not allow the appointments to be guarded against a change in party in power. Assuming that the current CCI members fulfil their current terms, their term will complete in 2023, with the Lok Sabha elections scheduled for the year after. A change in government or even a reshuffling of the Ministry of Corporate Affairs may lead to a change in preferences pertaining to the antitrust policy in India which can subsequently reflect in the appointment of the members. The Bill fails to fix this as it maintains the status quo. The current government's focus on prioritising ease of doing business and regulating players in digital markets may therefore witness change through subsequent election cycles.

iii) Operational and Financial Independence

A commission's operational independence necessitates that it has powers of general superintendence, direction, and control in administrative matters. These include, among other things, the manner in which members of staff are appointed and day-to-day operations of the authority are performed. Under section 13 of the Competition Act (2002), this power vests with the CCI's chairperson. However, the Bill transfers these powers to the Board, which as discussed earlier, includes Secretaries in Central Ministries and part-time members appointed by the Central Government.

Further, in order to maintain independence of the Commission, the Act needs to guard against the use of budgetary restrictions as a manner of curtailing or penalising the CCI as well as the use of funding as a vehicle of capture by private entities. This is crucial to ensure the maintenance of a level playing field and maintaining a perception of legitimacy and impartiality of the Commission. Antitrust literature indicates that in addition to funding from the Government, the presence of alternative sources of funding, creation of a fund, transparent allocation of a budget and discretion in spending the money are conducive to the independence of an authority (UNCTAD, 2008, p. 9). Section 50 of the Competition Act (2002) provides that the CCI's functions are performed through a fund which shall consist of grants from the Government, fees received under the Act and interest accrued on these. Section 47 of the Competition Amendment Bill (2020) expands the scope of this to include sums received from other sources as may be decided by the Government. The Act establishes a standard that performs better than various jurisdictions like Jamaica where alternative sources of funding are not established (UNCTAD, 2008, p. 9).

Moreover, the Act does well to protect allocation transparency and spending discretion as it currently provides that sums shall be granted after due appropriation made by Parliament and the fund shall be administered by a committee of members of the CCI. This positive stance has been retained in the Bill and helps in insulating the Commission from operational and financial restrictions.

RECOMMENDATIONS: HOW TO BALANCE INDEPENDENCE WITH ACCOUNTABILITY?

Accountability of a regulator is typically ensured through effective performance reporting mechanisms (Monti, 2014, p. 10), placing decisions in the public record, administrative answerability, and a stable judicial review mechanism (Bergman, 2008, p. 387). The Act does a good job at ensuring this by mandating the CCI to have its accounts administered by the Comptroller and Auditor-General of India. The CCI must also submit an annual report to the Central Government which shall be laid before the Parliament, in accordance with section 53 of the Competition Act (2002). Furthermore, the CCI publishes its orders pertaining to various provisions on its website regularly and its decisions can be appealed before the National Company Law Appellate Tribunal, High Courts and the Supreme Court of India.

The antitrust framework, therefore, has sound accountability mechanisms in place, which need to be complemented with stronger standards of independence. In pursuance of this aim, this paper suggests the following recommendations:

- Separation of powers between the CCI and the Central Government, as provided in the Act, needs to be maintained. If the Board is to be given the power to make regulations, transparency mechanisms for the same need to be strengthened. The Board should not be exempted from publishing drafts and responses online, except in consonance with clearly established parameters.
- The CCI undertakes routine merger control assessments, which provides it with a unique vantage point to understand the need for parameters for notifications and exemptions. The role of the Commission in developing these standards needs to be increased substantially. This may be done by transferring the power to the Commission or at least making it a part of the Governing Board's functions.
- The tenure of members of the CCI needs to be increased to ensure that it extends across election cycles. This will help resolve the issue of credible commitment to policy.
- Considering the need for operational independence of the CCI in its daily affairs, the Board's involvement in the control of administrative matters needs to be minimal. The framework should ensure that the Board does not act as a catalyst for governmental interference in the functioning of the CCI.
- Provisions enabling financial independence can be further strengthened by the Central Government by identification of additional sources of income, in consultation with the members of the CCI.

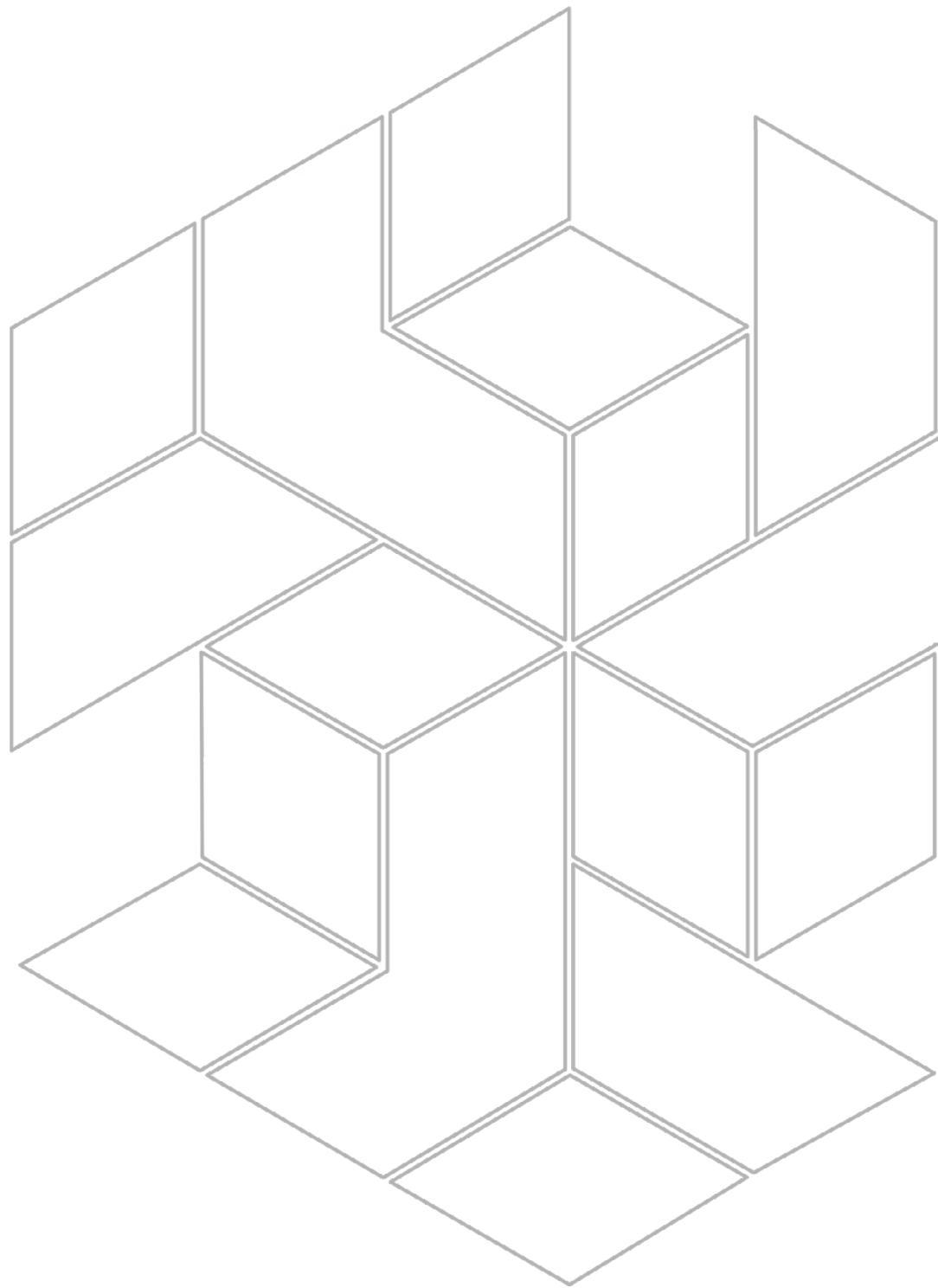
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