The Nature of the Competition Commission of India and its comparison with Competition authorities in different jurisdictions

The preamble to the Competition Act, 2002 ("the Act") lays down that the Act aims to provide for a commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to ensure freedom of trade carried on by other participants in markets in India. Accordingly, the Competition Commission of India ("CCI") has been formed to ensure that the Indian market complies with the objectives of the Act. The Central Government as well as the CCI has been granted the power to make various rules and regulations in order to further the purpose of the Act.

Brahm Dutt v. Union of India, 2005 : Determining the nature of the CCI

The Central Government has been empowered under the Act to make rules in order to further the aims and objectives of the Act.

Accordingly, in 2003, a year after the enactment of the Act, the Central Government made the Competition Commission of India (Selection of Chairperson and other members of the Commission) Rules, 2003 in order to select a chairperson and a committee of members for constituting the Competition Commission of India.

One of the rules (***rule 3***) stated that the Central Government was to constitute a committee consisting of a person who has been

1. a retired Judge of the Supreme Court or a High Court; or
2. a retired chairperson of a Tribunal established under the Act of Parliament; or
3. a distinguished jurist or a senior advocate for five years or more, and
4. a person who had special knowledge of and professional experience of 25 years or more in accountancy, management, finance, public affairs or administration to be *nominated* by the Central Government; and
5. The Central Government was also to *nominate* one of the members of the Committee to act as the Chairperson of the Committee.

It was against this particular rule that a writ petition was filed in the Supreme Court in the case of *Brahm Dutt v. Union of India*, (2005)2 SCC 431.

The essential challenge in the writ petition was on the basis that the CCI is more of a judicial body having adjudicatory powers in the background of the doctrine of separation of powers, the right

to appoint members to the CCI should rest with the Chief Justice of India or any other senior Judge of a High Court. However, it should not rest with a bureaucrat or any other person appointed by the executive without any reference to the judiciary.

Thus, the central issue for determination before the Supreme Court was whether the CCI is a part of the executive or the judiciary.

Disposing off the challenge, the Court observed that

"*if a judicial body is to be created as submitted on behalf of the Union of India consistent with what is said to be an international practice, it might be appropriate for the respondents to consider the creation of two separate bodies, one with the expertise that is advisory and regulatory and the other adjudicatory. This followed up by an appellate body as contemplated by the proposed amendment, can go a long way, in meeting the challenge sought to be raised in this writ petition based on the doctrine of separation of powers recognised by the constitution*."

The judgment in Brahm Dutt case unequivocally expressed that the CCI was vested with a number of adjudicatory functions under the Act.

Formation of an Appellate body pursuant to the *Brahm Dutt case*

The judgment of the Supreme Court was taken into account and the Competition (Amendment) Bill, 2006 was drafted. The Amendment Act was finally introduced in 2007 and provided for an establishment of an appellate body i.e. Competition Appellate Tribunal ("COMPAT"). The role of COMPAT was to hear and dispose of appeals against the decision, direction or order of the CCI.

COMPAT ceased to exist effective 26th May, 2017 when it was decided vide an amendment that the powers and functions vested in the COMPAT would be transferred to the National Company Law Appellate Tribunal ("NCLAT").

Thus, the Competition (Amendment) Act, 2007 does not change the position of the CCI as a regulatory, advisory and adjudicatory body.

Comparing the CCI with other Competition Authorities

The Indian competition act has been drafted with a similar legislative intent as the Clayton Act, 1914 of the United States or the Competition Act, 1988 or the Enterprise Act, 2002 of the United Kingdom.

However, there is a difference in terms of the nature of duty performed by the enforcement agencies established under each of these Acts. In the case of *Competition Commission of India v. Steel Authority of India Ltd.*, this difference was clearly explained by the Supreme Court.

It was observed in this case, with respect to the UK that the Office of Fair Dealing performs regulatory and adjudicatory functions by the Competition Commission and the Competition Appellate Tribunal.

On the other hand, in the United States there are two bodies i.e. the U.S. Department of Justice, which deals with all jurisdictions in the field and the Federal Trade Commission which enforces the U.S. antitrust law and promotes consumer protection.

Regulation of Anti-Competitive Acts

1. **Anti-Competitive Agreements-** S. 3(1) of the Competition Act prohibits any agreement with respect to "production, supply, distribution, storage and acquisition or control of goods which causes or are likely to cause an appreciable adverse effect on competition." The CCI either adopts a *per se* rule or a rule of reason while determining the agreements to be anti-competitive. Under per se rule a conduct is prima facie anti-competitive whereas under *rule of reason* it is further investigated whether the conduct leads to an appreciable adverse effect on competition ("AAEC"). If the conduct does not lead to AAEC then it is not penalised under the Act.
   The use of rule of reason is also prevalent in the competition analysis in the U.S. , the U.K and the E.U.

2. **Abuse of Dominance-** S. 4(1) of the Competition Act, 2002 prohibits an abuse of dominant position. The list of activities which constitute an abuse is similar to those listed in Article 102 of the Treaty on the Functioning of the European Union ("TFEU").

   On the other hand, the Sherman Act of the United States makes monopolisation or an attempted monopolisation illegal. Unlike the Competition Act or the TFEU, it does not list the activities which would constitute abuse.

3. **Merger control-** The major difference between the U.S. and the Indian system of merger control is that since CCI is an administrative body it is empowered to approve mergers, whereas in the U.S. it is necessary for the agencies to approach Federal Courts to enjoin a merger. On the other hand, under the EU law, any concentration which strengthens a

dominant position causing impediment to competition in the European community market is prohibited. Thus, those mergers which impact the EU market are investigated by the European Commission whereas those which do not impact the EU market are investigated by respective competition authorities of the member states.