

Competition Compliance and Role of CCI: Need to Move Beyond Advocacy

Infusing culture of competition compliance is pivotal for controlling anti-competitive practices by market players. Till now, CCI has followed a unilateral approach of limited advocacy in this area. In tune with the global trend, CCI needs to follow a multi-pronged approach towards promoting a culture of competition compliance in India.

Competition authorities, especially in newer jurisdictions, need to play a proactive role to create awareness regarding benefits of competition in the market. Compliance, necessarily, is a step ahead of awareness regarding benefits of competition law, and involves concrete steps by market players to ensure that their organisations do not engage in anti-competitive conduct. There is no doubt that Competition Commission of India (CCI) needs to play a pivotal role in creating a culture of competition compliance in India. Currently, CCI is following a unilateral approach of advocacy only. This issue note highlights this unilateral approach of CCI and briefly suggest as to what other roles CCI can take up to ensure competition compliance in India.

Creating awareness regarding benefits of Competition Law is important for promoting compliance by the market players. This role of creating awareness also includes educating and apprising market players of likely effects of violating the provisions of the Competition Law. Taking cue from UK OFT's compliance manual, four step competition law compliance process includes risk identification; risk assessment; risk mitigation, and review. Commitment to competition compliance throughout the organisation lies at the core of this four step process.

Worldwide, companies mainly follow a risk based approach to competition compliance. It has been seen that fear of reputational damage and financial penalties act as the key drivers for competition law compliance for businesses. Even in India, there is no doubt that there can be serious implications for infringing the provisions of the Competition Act, 2002 (CA02).

Such implications include heavy fines, damage to reputation of the business, division of the dominant enterprise in case of abuse of dominant position, loss of business to potential investors. Proactive compliance on the part of companies is the key to avoid such risks. As will be seen further, significance given to competition compliance programmes

adopted by organisations is reflected by the enforcement and advocacy practices followed by competition authorities in respective jurisdictions.

In relation to competition compliance, till now, the role of CCI has been restricted to limited awareness generation without proactive advocacy. CCI in some orders directed the infringers to submit undertakings to follow the directions given in the order. Such type of orders to submit undertaking and not to repeat the conduct is different from directing to undergo training for competition compliance or to institute a competition compliance programme in the governance framework of the infringer company. Although in some cases CCI has given directions to the parties to amend their contracts, yet there seem to be no case where CCI has advocated training and adoption of a competition compliance programme to an enterprise.

Till date, there are no sentencing guidelines issued by CCI. Further, the varied nature of penalties imposed by the CCI underlines the lack of clarity and systemisation in competition law.¹ In absence of any guidelines or guidance from CCI on competition compliance, the businesses have to fall back on the orders passed by the CCI. Alas, the decisions, even in similar cases, follow inconsistent approaches, there by adding to the problem. Confederation of Indian Industries (CII) has recommended that companies should be incentivised to ensure competition law compliance and consider compliance as a factor before deciding the quantum of penalty in CA02².

Interestingly, the advocacy literature provided by CCI on its website notes that a competition compliance programme helps benefit from 'leniency' provisions in the Act³. It is also worthwhile to mention here

¹ Pradeep S Mehta, 'Need for a realistic penalty regime', Financial Express, 29th March, 2013, Available at <http://www.financialexpress.com/news/need-for-a-realistic-penalty-regime/1094528/0> (last accessed on 17-10-2013)

² 'Incentivise India Inc. for competition compliance', The Indian Express, 10th June, 2013, Available at <http://www.indianexpress.com/news/-incentivise-india-inc-for-competition-compliance-/1126974/0> (last accessed on 17-10-2013)

³ CCI Advocacy Booklet on Competition Compliance, pg. 4, Available at

that Chairman, CCI has suggested to corporates to set up a high level Competition Compliance Committee in their respective organisations to review competition compliance⁴. We have yet to see takers of this limited advocacy by CCI in the market.

Competition authorities follow varied approaches to infuse competition compliance culture in their jurisdictions. These approaches include: advocating competition compliance through various media, directing competition compliance training, directing competition audits to infringers, tailoring compliance programmes, certifying compliance programmes, considering effective compliance programmes in mitigating fines and so on. The Brazilian law provides guidance on how to design a compliance programme by setting out the requirements and conditions for the competition authority to issue a Compliance Certificate valid for two years. A company has to provide a description of the programme, disclosing the standards and procedures which employees have to follow, and the designation of managers to coordinate and supervise the programme's proposed objectives to obtain a certificate.

It is trite that one size does not fit all applies to competition compliance programmes also. Recognising this fact, the Australian Competition and Consumer Commission (ACCC) provides four different templates prepared for different sizes of companies ranging from Level 1 for micro-businesses and Level 4 being designed for large corporate entities. These templates are prepared depending on the size and risk profile of the company as different components will need to be included in a compliance programme to ensure that it is effective in achieving compliance.

Fair Trade Institute, which is an affiliate of the antitrust authority in Japan, helps companies establish and implement compliance programmes. A sample compliance programme has also been developed there. Further, the infringing companies were ordered to prepare and amend the guidelines to comply with the Japanese Antimonopoly Act including establishing rules concerning the punishment of the directors and employees responsible for a violation. In one case in Japan, the infringing companies were ordered to provide

<http://www.cci.gov.in/images/media/Advocacy/CCP2012.pdf> (last accessed on 09-10-2013)

⁴ CCI holds round-table meeting with top corporates, emphasises Competition Compliance for Good Corporate Governance, Available at <http://pib.nic.in/newsite/erelease.aspx?relid=91809> (last accessed on 12-10-2013)

training on the Japanese Antimonopoly Act for sales staff and to conduct periodic audits by legal affairs personnel.

Sentencing guidelines⁵ in US, a jurisdiction which criminalises antitrust violations, indicate that an effective compliance and ethics programme might reduce the fine that will be imposed. Further, US sentencing guidelines also note that effective compliance and ethics programme need to promote an organisational culture that encourages ethical conduct and a commitment to compliance with the law. In case of South Africa, the Commission often requires the companies to give an undertaking to implement a compliance programme in the context of enforcement action.⁶

CA02 chalks out a wide mandate for CCI as has also been affirmed by decision⁷ of the Supreme Court. Even section 27 of CA02, empowering CCI to issue orders, is worded in general language and CCI can pass any order which it deems fit in a case. Thus, a shift is needed in the current unilateral approach towards inculcating a compliance culture in India. A multidirectional approach will incorporate, besides section 27 orders, guidance in the form of publicly available material and special sector specific reports. Compliance training is necessary to incorporate compliance programme in corporate governance framework. Making compliance part of corporate philosophy will work if this is included in yet to be formulated sentencing guidelines of CCI.

These lessons from various jurisdictions can be helpful for CCI to develop a multipronged approach for promoting a culture of competition compliance in India. Such initiatives by CCI will induce companies to consider integrating an effective competition compliance programme within their corporate governance framework. To sum up, competition authorities worldwide are following multiple approaches to create and promote a culture of competition compliance. Moving ahead, as illustrated above from the practices of international jurisdictions, will help in ushering competition compliance and competition culture in India. After all, India being a new kid on the block has the last mover advantage.

⁵ US Sentencing Guidelines, Available at http://www.uscourts.gov/Guidelines/2012_Guidelines/Manual_PDF/2012_Guidelines_Manual_Full.pdf (last accessed on 11-10-2013)

⁶ See for example the South Africa Competition Tribunal's order confirming the South Africa Competition Commission's consent order with Pioneer Foods, Available at <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/CC-Pioneer-Foods30Nov2010.pdf> (last accessed on 12-10-2013)

⁷ Competition Commission of India v. Steel Authority of India Limited (2010) 10 SCC 744

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the views or position of CUTS Institute for Regulation and Competition (CIRC).

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