Journey of India's new competition law through a practitioner's eye

This short paper has been produced as speaking notes for the Research Symposium on the Political Economy of Regulatory Regimes in Developing Countries, New Delhi, 22-24 March, 2007. The paper will trace the history of how the new law was adopted and the perambulations in the arduous process. A more serious and detailed paper will be produced over time. This is a draft paper and should not be quoted or cited. However comments and clarifications are sought from readers, which can help to produce a better and more rigorous paper.

This paper is divided into four sections: Introduction and Background, which delves into the history; Stakeholders Reaction when the new law was being debated; Institutional Issues in adoption of the new law, and finally Institutional Challenges ahead.

1. Introduction and background

The Competition Act, 2002 (CA,02) was adopted through a strenuous process, mainly due to lobbying by the consumer movement to provide an effective and better market regulatory system to deal with rampant malpractices. Cartels, refusal to deal, anti-competitive mergers and acquisitions, abuse due to dominance etc were rampant and still exist today in the absence of any credible competition law. The new Act was to replace the archaic Monopolies & Restrictive Trade Practices Act of 1969 (MRTPA), which did not provide the necessary checks and measures to curb anti-competitive practices. It is another story that the CA,02 is yet to be operationalised due to it being challenged in the Supreme Court. The process is on, and an amendment bill, to comply with the apex court's views, is expected to be adopted this year. This is not so unusual for adopting a new competition legislation, and has been witnessed in many developing countries. Of course the reasons in other countries for the process of procastrination might not be similar.

Be that as it may, there were three major triggers for the transition from the MRTPA to CA, 02.

First, it was due to a resolute campaign by the consumer movement. The movement in India has a strong place in the policy circles. One major reason for the consumer movement's place is due to the arrival of the Consumer Protection Act in 1986 (COPRA). Before the enactment of COPRA there were about 35 consumer groups in the country, mainly in major cities. By 1990 the number had shot upto a figure of 3000 with a large number of them situated in small towns also. Of course many of the consumer groups are small and localized, and some of them have also shut shop, while newer ones keep on emerging. All this happened due to the availability of district level access to grievance redressal, and that consumer groups could pursue complaints of both complainant consumers and raise class action issues. However about 30 consumer groups, including the one which the author is associated with, command substantial resources to be fairly

Submitted under CUTS Competition, Regulation and Development Research Forum (CDRF) First Research Cycle (2005-2007)

effective. Some of them, like CUTS, have also professionalized and are thus covering a big agenda. Many of them are still growing and expanding. CUTS, a unique southern NGO, has offices in various parts of the country including four centres overseas. All are engaged in competition related work in their respective regions.

The second reason was the amendment in the MRTPA in 1984 which brought in consumer protection provisions on unfair trade practices i.e. misleading advertising and deceptive claims. Many of the 30 odd medium to large consumer groups, which were established around that time, have used the MRTPA to take action against businesses on misleading advertising etc. Complaints by consumer groups have also covered restrictive trade practices such as tied sales, bait and switch etc, especially where consumers at large were possible victims. The MRTPA also provided official recognition to many consumer groups, which included CUTS, thus empowering them.

Thirdly, as an annual exercise the Finance Minister invites various interest groups to present their views on the budget proposals, when participants cannot but raise important policy issues, which may not have anything to do with budgetary allocations etc. After all the Finance Minister is one of the most influential and powerful members of the cabinet, and his annual budget speech does spell out policy measures relating to the economic management of the country. Other interest groups include economists; trade and industry; agriculture; and labour. Consumer groups are not being consulted in such exercise over the past few years due to the whims of the Finance Minister. However during the term of Yashwant Sinha of the BJP as Finance Minister in 1998-2002 ***(chk)***, the consumer movement lead by CUTS advocated for the adoption of a new competition law and the Government was convinced about the need for the same. Indeed this was a part of a bunch of issues raised in these pre-budget consultations but for this paper, I am skipping them.

On 27 February, 1999, Sinha made the following announcement in his budget speech: "The Monopolies and Restrictive Trade Practices Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. Government has decided to appoint a Committee to examine this range of issues and propose a modern Competition Law suitable for our conditions".

Among various arguments, one which convinced the government that globalization through WTO and liberalization through domestic policies etc have changed the economic landscape completely and the MRTPA is not adequate to cope with the same. The same sentiments were also expressed by the Finance Minister in his parliamentary speeches when responding to debates. The MRTPA was also defective as it did not have any clear definitions about several malpractices, and the experience of consumer groups, who had filed hundreds of complaints, was that resolution of complaints took many years. Thus the MRTPA cannot be resurrected and amendments in the MRTPA cannot do the needful. We therefore a new and modern law.

In 1991, as a result of the changed scenario the merger provisions in the MRTPA were thrown out, as if throwing out the baby with the bathwater. There were many cases which escaped the scrutiny of the MRTPA due to this dilution. One signal case was the merger of the TOMCO Ltd (A Tata company manufacturing soaps and detergents) with Hindustan Lever Ltd, a subsidiary of the Anglo-Dutch conglomerate, Unilever. Another case which hit the headlines was the arrival of Coca Cola by taking over the home grown Parle's Thums Up and other soft drinks in its stable. There was no challenge to this, as it involved a sale of brands by the owner to the buyer, and the fact was only made public after the deal was over, but it did cause concern as the takeover would lead only two foreign cola giants in the market: Pepsi and Coke. Another case which raised eyebrows was the takeover of Harbans Lal Malhotra & Sons, a shaving blade manufacturer by the US-based Gillette.

Each of these cases related to consumer goods, thus the consumer movement was quite agitated. They also raised nationalistic sentiments, and the media too cooperated with the movement to highlight the aspect of foreign companies entering the market through takeovers. In India the ghost of East India Company (the route through which the British came into India and took over the country in 1700s) still forms a part of the popular vocabulary. Until recently, every foreign investment proposal has always been situated in this vocabulary.

The HLL-TOMCO merger caused some discomfort in the consumer movement because it would have lead to dominance in the organized soaps and detergents sector, with no possible competition due to imports (until 2001, India maintained a quantitative restrictions regime, which was scrapped after being challenged by the USA among others in the WTO). Many consumer groups joined up to challenge the proposed merger before the MRTPC but failed, because the law did not have any jurisdiction. It then approached the company bench of the Bombay High Court, where the merger could be challenged under the Companies Act on grounds of public interest, but also lost here. The case lead to a better realization in the movement that anti-competitive mergers or takeovers could also lead to reduction in consumer welfare. The movement also raised the issue before the Central Consumer Protection Council, which is another body which provided legitimacy to consumer groups.

It was not so much poverty reduction which was the motive behind this campaign but prices, quality, access and availability were certainly the main drivers of the consumer movement. There was a latent realization, and it was never articulated as such, that better functioning markets can help the poor the most, because they suffer the brunt of poor quality, high prices etc much more than the better off consumers. Transparency and accountability, especially of the state sector was another important driver. After all, nearly all services (power, transport, insurance, water, communications etc) were mainly in the public sector and terribly anti-consumer. An important turn in India had taken place in the commerce sector, when the public sector was brought into the purview of COPRA in 1986, in spite of opposition by bureaucrats (most felt that the public sector is a part of the government and the king-can-do-no-wrong mindset prevailed. That change lead to an amendment in 1991 in the MRTPA to cover the state sector also. The

consumer movement was overjoyed with these important though incremental victories and radical changes. These changes happened due to the consumer movement, which had many supporters and detractors, both in strong measures.

Following the Finance Minister's statement the Government set up the High Level Committee on Competition Policy & Law in 1999 chaired by Mr S. V. S. Raghavan with eight other competent members, which included a consumer representative, the chairperson of the apex body of consumers: Consumer Coordination Council.

2. Stakeholders reactions

It was the campaign by consumer groups that the government took the decision to start the work on a new competition law through the Raghavan Committee. The Committee was named after the 70-year old Raghavan, who had been chairman of two state monopolies in his hey days, the State Trading Corporation of India and the Minerals and Metals Trading Corporation of India. He must have been ruing whatever he had learnt in his earlier avatar, and perhaps this task offered him atonement.

Other stakeholders were not a part of the lobby, but the trade union movement was certainly supportive overtly. The reason for that were mainly two: a) the fight on the HLL/TOMCO merger, which was also contested by both the company unions at the MRTPC and the Bombay High Court, and b) a general left, nationalistic and anti-foreign investment sentiment. Business groups did not wake up about the fact until Sinha spoke to them about it in one his pre-budget parlays with them. Even then they did not take it so seriously, until the debate was kicked off by the Raghavan Committee and subsequently by the parliamentary process.

The Raghavan Committee heard various interest groups including professional associations like Company Secretaries, Chartered Accountants, MRTP Bar Assn etc. This limited group of professionals have been dealing with the MRTPA, hence they do have a vested interest. However, none really opposed the law but debated it to get better clarifications. The strongest proponents were again the consumer groups. Few academics also spoke, and as is their wont, they ended up reflecting their half knowledge based upon hurriedly read foreign text rather than offer great insights. Most Indians do not have the humility to accept their ignorance, and thus end up often shooting off their mouths. But, what is most interesting is the debate in the Committee, which exhibited some sharp differences and its after effects on the drafting of the law. Here one must admit the huge capacity of the chairman, Mr Raghavan, a humble, down to earth and a wise man, who could pull them together and submit a report in record time, even if it was not unanimous.

The report invited no less than four dissent/supplementary notes[1], i.e. from more than half the membership.

[1] *Competition policy dilemmas* by T. T. Ram Mohan, Economic & Political Weekly, July 15, 2000

The strongest dissent came from Sudhir Mulji, who felt that we do not need any competition law at all, that was to the extreme right of the mainstream approach. Rakesh Mohan, in his supplementary note, not dissent note, believed that we should proceed slowly by which time the various aspects could be debated vigorously before implementing them. He suggested a cooling off period of 3-5 years during which the authority should conduct advocacy. The concept bill provides for advocacy during the first year, followed by anti-competitive practices in the 2nd year and mergers in the 3rd year. Chakravarthy, his own supplementary note, adopted a position to the left of the mainstream view, i.e. we need a strong competition law and that we should hasten slowly in liberalization and globalization of the economy. He was right in saying that Indian industry is yet small and it needs a level playing field and hence the law must be staggered in implementation. Mohan was concerned that an all powerful authority sitting in judgment on mergers could come in the way of badly needed consolidation in the industry. Narielvala too argued against the pre-merger notification nearly on the same lines as Mohan and went on to say that since the thrust of the law is not on dominance but abuse of dominance, why be bothered about pre-merger notification at all. Other than Mulji, the three other dissenters did have a valid point with similar underpinnings.

This dissent continued to reverberate in the policy circles. Some of these players also participated in a seminar organized in New Delhi on 22nd February, 2001, when the concept bill was being debated. The session was chaired by Shankar Acharya, former Chief Economic Adviser to the government, while panelists included well known economic commentators: Surjit Bhalla and Sudhir Mulji, and the competition expert: Dr. S. Chakravarthy. The last two had also served as members of the Raghavan Committee. By the way Mulji was also a businessman, being the vice chairman of a shipping company in India. Observed John Burton, Senior Economic Adviser, DFID, India in a report to his headquarters:

"*Generally my impression is that the economic press has welcomed this as being 'reform'. Our White Paper is supportive of the concept of developing countries introducing competition policies. I was struck, however, by the near universal hostility to the concept from the panelists, most of the audience, and the chairman.*

"Generally, this was perceived as just another opportunity for government interference in the private sector, leading to more regulation and corruption. My previous assumption had been that this would be helpful because it would help GoI overcome their fears of foreign multinationals acting in an anti-competitive way, to open up further to new competition in the domestic market.

"But there is some strength in the argument that the solution to a market failure may not obviously be found in a new government regulatory body in a country where government failure is rife.

"An interesting point was made in the discussion that the business sector had not engaged on this agenda. The conclusion drawn was that the business sector does not take

the law at all seriously, and thinks this is just another government process of meddling, which they will be able to manage".

Business were certainly the main stakeholders which opposed the bill for both the right and wrong reasons, but the seminarists mentioned above, were not aware and neither had they invited the business to participate, hence the conclusion reported above was not really correct. As early as November, 2000 after the Concept Bill was placed on the government website, heated debate had taken place in business circles. The main opposition to the new law was the need for preview of mergers, when a similar provision had been deleted from the MRTPA to enable Indian industry to grow without shackles and be competitive globally. Their fear was also based on the fact that the authority would be manned by retirees with a command and control mindset, who will be overzealous in using their powers. This major opposition was dealt with by the government by: a) fixing a high threshold for mergers, i.e. merging companies with assets of Rs.100mn and turnover of Rs.300mn only will be scrutinized and only if there is a voluntary notification. However the law as it stands today does provide suo moto powers to the authority to examine any merger.

The Commerce & Industry Ministry (CIM) too opposed the bill, because it felt that it would bring back the inspector raj (read merger and other controls). In an elaborate but an inept submission[2] it had an adverse comment about everything possible, including on extra-territorial jurisdiction (the effects doctrine). Incidentally due to some bad experiences in the MRTPA, the new law covers this issue explicitly. The CIM mandarins had not read the draft bill properly. The CIM also opined that this measure will give a wrong signal to the world that India is ready to accept to negotiate on trade and competition at the WTO. However, the Ministry of Company Affairs responded that this law is needed to deal with problems arising out of globalization *due* to the WTO. The CIM even suggested that if at all the law has to be adopted then it should exclude national treatment to foreign companies, which too was rejected as something which will go against our general non-discrimination commitments at the WTO.

Part of the business sector's battle was fought by the CIM, whose role in the current economic scenario is to act as a facilitator and not a controller. Incidentally, unlike most other countries, competition law is not housed in the trade and industry ministry (CIM in this case) but a separate ministry on company affairs. This important ministry has also changed horses now and again depending upon the power of particular cabinet members. It had started as a part of the CIM. Over time it has moved between the Finance Ministry and the Law & Justice Ministry. Today it is a stand alone ministry due to compulsions of coalition politics. This factor is also important on where the competition law is situated in the policy framework. Both the Finance and the Commerce & Industry Ministries would be more influenced by business lobbies, as against the Law & Justice Ministry which is much more further than the others from business influence. As a stand alone Ministry, it is now perhaps in the best position. It does deal with Industry on a regular basis because

[2] Financial Express, May 21, 2001

its main purpose is to administer the Companies Act, 1956. However, here too their interaction is more with the professional body of company secretaries.

The small scale business association too had a strong view. The Federation of Small Industries Associations of India, Chennai made a fervent but confused plea to the Raghavan Committee abut the problems of small industries, which were related to handicaps faced by them in getting credit etc etc. It explained the woes of the small industry about the competition from overseas suppliers, consequent to liberalization of the import regime (due to challenge of the QRs and its removal) pleading for continued reservation and crying about the unfair trade practices of larger businesses. It pleaded for continued reservation to small scale units, though the reservation policy had become an anachronism in many areas because larger units from overseas could sell the same product in the country. This was a wrong and confused appeal and did not relate to the agenda of the Raghavan Committee. Instead it could have researched and demanded an exception from the full application of a competition law as prevailing in many countries, including rich one.

Its woes in terms of larger units exploiting them was echoed by another small scale body in an entirely different context, when it demanded that a healthy competition regime will be advantageous to them. This view was stated by the Federation of Indian Small and Medium Enterprises, New Delhi [3] when the country was opposing a multilateral agreement on trade and competition at the WTO, and the industry body was making a point that such a regime will actually help them.

Media too did some harm with some advocating the law, while others believing that the law will stunt the growth of Indian industry etc. The debate in the media was influenced by the views expressed by people in the Raghavan Committee, and arm chair economists/commentators out of the committee. As usual the status quoists (like in the CIM) found everything wrong in the law.

In sum the Raghavan Committee did its job mainly on submissions made by various interest groups and opinions of its members and the hectic debate surrounding the process. It never ever thought of getting research done on various aspects, even on the crucial aspect of the failure of the MRTPC in busting cartels. The time given was too short and perhaps it did not have resources at its command to commission research. Secondly, the views of the articulate always dominate the process, especially if it comes from well known economists, rather than actual evidence base. This is a typical folly of many of our policy formulating committees that they are neither properly endowed nor given the time to do a scientific study of the problems they are to address. Even the members give their time on a purely voluntary manner without any remuneration, thus offering little incentive to perform.

In the case of the Raghavan Committee it had the advantage of one senior economist of NCAER writing up some chapters, with CUTS providing meat on the basis of their own

[3]

research on the subject. Additionally, one of the members, S. Chakravarthy had fair knowledge of competition law issues through his own diligent reading and exposure at international conferences which he attended as a member of the MRTPC.

3. Institutional issues in adoption of the new law

The Concept Bill was revised in many ways, and finally a draft Competition Bill was placed and adopted by the Parliament in 2003, but was named as Competition Act, 2002 i.e. the year of introduction. One of the critical changes was on the coverage of intellectual property rights. The Committee had recognized that IPRs need to be covered explicitly under the law, but when the bill was drafted, it made it less explicit, i.e. covering only unreasonable restrictions. The Law and Justice Ministry which drafted the final bill carried out these changes, because they felt that while IPRs are exempted entirely from the operation of the MRTPA, how could CA,02 cover it. It is not clear if interested business parties had lobbied behind the scene for the diluted version. However, the good news is that in most competition law jurisdictions, IPR abuses are dealt with under the 'abuse of dominance' provision, so everything is not lost.

However, there are two problems with this: a) the understanding of such a provision is nearly absent in India as there was no case ever tried under this type of provision under any law, and b) laws in India need to be explicitly defined otherwise the interpretation is left to the courts, which can be turned cleverly by smart and highly paid lawyers while defending their clients. In the overall the CA,02 captured all the major issues in its design and coverage. Of course the bite of many of the sections would evolve with case laws, as the law being new there is hardly any precedent to base its action upon. Case laws from other jurisdictions can only be of persuasive value and much of the case law which develops in India would be a challenge. Fortunately, many sections were drafted carefully and would capture the type of anti-competitive practices which India is witnessing.

One important change was in the coverage on extra territorial jurisdiction (effects doctrine) which would allow the authority to check abuses happening abroad but with an effect in India. This too is a politically sensitive issue. For example the MRTPC had taken action against a US-based soda ash cartel which had failed to pass the Supreme Court, because extra territorial jurisdiction was not spelt out in the MRTPA clearly. However, the political lobbying and retaliatory measures adopted by the US were an eye opener. When US President Bill Clinton visited India in ***1900 (chk)*** he had it on his agenda for discussions with the Prime Minister Atal Behari Vajpayee. Later the US International Trade Commission recommended withdrawal of GSP privileges against export of engineering goods as a cross retaliatory measure for the MRTPC's action against ANSAC, the soda ash cartel. These issues were resolved on their own, when the Supreme Court in ***2000 (chk)*** struck down the MRTPC's order against ANSAC because of the infirmity in the MRTPA. The US business lobby has a powerful influence on their polity due to big campaign contributions. Thus, much of US economic policy is determined on sectarian interests.

The CA, 02 moves away from the structural (dominance) approach of the MRTPA and will instead focus on the behavioural aspect i.e. abuse of dominance. Big is no longer bad, but if the big do not behave well then they could be hauled up by the authority. This was quite a turn about in our approach to business. The MRTPA was more of a licencing law, and had acted as a millstone around the necks of business.

Notes a well known commentator, Gurcharan Das: *"The MRTP Act turned out to be one of the most damaging in modern Indian history. Any group with combined assets of Rs.200mn was declared a monopoly and effectively debarred from expanding its business after 1969. A single company, with assets above Rs.10mn, puny by world standards, was similarly placed under 'anti-monopolistic supervision and control'"*[4].

The MRTPA in one manner also covered the abuse of dominance in its coverage on monopolistic practices, but there is not much cogent case law. Besides the MRTPA did not have penalty provisions for any abuse, and in most cases it could order only 'cease and desist'. Compensation could be awarded to a complainant but only when there was a favourable order and the complainant moves the MRTPC for an award. The CA, 02 provides for deterrent penalties.

The other major change in the CA,02 from the Concept Bill was in the process of selection of chairman and members of the Competition Commission of India. The whole problem of the implementation of CA, 02 lies in this very change. It is a gory story of how people jockeyed to put in place favourites and rewarding them for favours done. While the whole story with all details will be captured in the main paper, the problems are described in nutshell below.

The Concept Bill had recommended that the selection process will be through a permanent collegium comprising of the Chief Justice of India; Speaker of the Lok Sabha (lower house of the parliament); Governor of Reserve Bank of India; Finance Minister and the minister in charge of company affairs. It had also proposed that the chairman need not be from judiciary but an expert.

The Bill proposed in the parliament did not carry this provision, and instead provided for a summary selection process to be decided by the government. There was heated debate in this matter, and the Finance and Company Affairs Minister, Jaswant Singh, responded that such a committee will never be able to devote the time required or be able to meet frequently, and therefore a smaller selection committee will be established for the sake of efficiency and speed. Parliamentarians raised the spectre of retired civil servants getting into the chairs through a surreptitious manner, when the then Finance Minister assured the house that the Commission will not be a parking lot for retired bureaucrats etc. That assurance failed. Further, the bill was already passed by the upper house: Rajya Sabha in August 1999 ***(chk)*** but the version which went to the Lok Sabha had some more changes, such as having a Member Administration in addition to the chairman. This was done by the Secretary, Department of Company Affairs to pursue his own personal agenda,

[4] *India Unbound* by Gurcharan Das, Penguin Books, 2002

denouement of which will come later. No other regulatory law has a similar provision. The Finance and Company Affairs Minister may not have also been informed of this small but significant change, and would have signed on the file unknowingly.

What was done is to set up a 3-member selection committee with the Minister for Commerce & Industry as Chairman, when he was not holding charge of the department of Company Affairs at that time, another unprecedented step. The other two members included a well known lawyer and a distinguished retired civil servant. The rules for the selection were framed by the Ministry of Company Affairs and were quite lacking to be applied in any sense of propriety or vision. They selected the former Commerce Secretary and the former Company Affairs Secretary as Chairman and Member Administration respectively. Both were on the verge of retirement but gravitated into these positions. Two key reasons helped their appointments: a) they were close to the chairman and other powers, and b) because of low salaries, the posts would not have attracted better and younger people from other sectors, and no effort was made at all. That they can get into such positions, is due to the age ceiling being set at a higher level than the civil service age limit (60 years).

This has been a tragic tradition in India and many retiring civil servants and judges manoeuvre the process to get into such sinecure jobs. This is in spite of hortatory statements made by ministers (including assurances given to the parliament) that these jobs will not be parking places for retirees, and that they do need better and professional people to man them, and that there should be higher compensation packages. There are countless stories in India's annals, and some of them are quite hoary. However, some such appointments do prove to be good as the persons have the capability and capacity to deliver the goods required of them. Thus this author does feel that age limits should not necessary deny access to good and even older persons, but the process has to be rigorous and transparent as in some countries, such as South Africa.

These two appointments were the nemesis of the law. A writ petition was filed in the Madras High Court accusing malafide in the matter of the appointment of the Company Affairs Secretary (current incumbent Member of the CCI) because he was directly in a position to 'influence' the appointment. Another writ petition was filed in the Supreme Court challenging the appointment of the former Commerce Secretary as Chairman on the grounds that such appointments should only be made by a judge (read retired), quoting the provision in the MRTPA, which this law would have replaced. The apex court was infuriated and the Chief Justice of India went to the extent of saying that if there was a doctrine of lapse in India as prevalent in the USA, the law should have been struck down *in limine*. He felt that such appointments can one day lead to bureaucrats being appointed as High Court and Supreme Court judges also!

There were other problems as well, such as the authority could send their decisions to High Courts for execution. Anyway the story ended in ***2000 (chk)*** with the observation that Government must respect the doctrine of the separation of the powers of the judiciary and the executive. Thus the matter was settled after a long drawn out battle in the court. Ultimately, the government decided to split the authority into two: a) the Competition

Commission of India to work as regulator to be headed by an expert, and b) a Competition Appellate Tribunal to be headed by a retired judge of the Supreme Court or a retired chief justice of a high court.

The selection process has also been incorporated in the amendment bill on CA, 02, so that ministers and pliant *babus* don't have any discretion. There will be two committees headed by a nominee of the Chief Justice of India along with the Secretaries of the Departments of Company Affairs and of Law and Justice. The matter has not yet been settled, and it is understood that the selection committee for the CCI may comprise of two other experts. The picture will be clear after the proposed amendment bill is tabled in the parliament sometime soon, during the summers of 2007.

The amendment bill was moved in the parliament sometime in 2006, and it was referred to the Parliamentary Standing Committee on Finance, which *inter alia* deals with subjects related to the Ministry of Company Affairs. The standing committee heard all the usual suspects including the author, the Company Affairs Deptt etc and arrived at its conclusions in December, 2006. Among many recommendations, it suggested that all mergers should be notifiable mandatorily. This did not make sense to both this author as well as the Government. Now the bill will be placed in the Parliament in the budget session which is ongoing. It is hoped that the law will be adopted in full and notified before the year is out. There is much pressure on the government including from the Prime Minister, the opposition and the consumer movement to operationalise the law.

4. Institutional challenges ahead

The amendments proposed in the bill may throw up some institutional challenges. Firstly, the role of the CCI itself. In order to comply with the apex court's judgment, the amendment proposes that the word: 'complaint' be replaced by 'information'. This would mean many things, first as pointed by a leading advocate: Ms Pallavi Shroff, who has been a member of the Raghavan Committee, that 'information' cannot be a good substitute for complaint as all matters will be adversarial in nature. This would involve presenting arguments, pleadings on defence and offence etc, and if the CCI acts only on information and disposes the matter on its own without any formal hearing process, it would be opaque and against principles of natural justice.

On the other hand, another former member and competition expert, Dr Chakravarthy points out that if all matters will be decided by the appellate tribunal, then it would become a lawyers' paradise, as no trial will be held during the first stage at CCI. As the law will evolve and hurdles encountered, the situation may change through amendments in the law over time. This author feels that the law will settle over the next 5-10 years at the least. As it stands today many aspects of the law are quite unclear, and various contrarian views will continue to dog the debate.

However one serious problem is that of capacity in the CCI. It has currently a very small staff with the single Member having just two more years to go, and the Director General also having another two years to run. It is manned by deputationists from other

government departments and agencies, many of them having no understanding at all about a competition law. The CCI has also advertised recently for many posts but kept it restricted to government employees, which is not very helpful.

We have often argued that the CCI should attract talent from the market rather than relying upon government employees. The CCI had engaged the Indian Institute of Management, Bangalore which has recommended that talent should be hired from the market and paying them salaries which are higher than government scales. Such a system operates in the capital markets regulator: Securities and Exchange Board of India. Alas, the power of appointments does not lie with the CCI, but with the Government in the Department of Company Affairs. The amendment bill does propose that the CCI will be able to hire and fire its staff, but as of now it cannot do so. If the bill is likely to be adopted in this summer, then the CCI will need to have the staff in place *now* otherwise it will take another 6-12 months for the law to be actually operationalised. The CCI has also received financial support from USAID and the World Bank for capacity building, and both agencies are quite frustrated with the delay.

At this point, it will be important to refer to the USAID support, which is coming through the US Fair Trade Commission and Department of Justice, which will pose another institutional challenge over time. The US competition or anti trust regime has undergone a paradigmatic shift, and is also undergoing some rethink. Lately many of decisions in the US on mergers and acquisitions are not being acted upon as they would be dealt with in the European Union. This type of knowledge may not be really applicable for a young competition authority in India which will need to deal with such situations through a home grown understanding. On the contrary, this author has always argued that capacity building advice can be better obtained from other developing countries, which will be more relevant.

Here I am reminded of a very recent candid comment by the *Business Standard* newspaper's economic commentator, T. C. A. Srinivas Raghavan in his Okonomics column (*Inflation and exchange rate management*) on Friday 16th March: "..most of our policy-oriented economists tend to think that what works in the west is exactly the same way in India. The 'stages of development' problem completely escapes them. Second, because of this aping, Indian economic research is sadly lacking in microeconomic strength. It is mostly what is called *hawa mein baten* (talking in the air)".

Though the commentator speaks about research the same argument applies to capacity building too. Speaking about research, the CCI with the aid of DFID and FIAS of the World Bank are currently engaged in a series of research projects which are examining the market structure in various sectors. This research has been catalysed by an earlier research project done by CUTS: "Towards a Functional Competition Policy for India". This project was also supported by DFID, UK. The series of research projects of both CCI and CUTS in various sectors offers a good database of information on how each sector functions and the type of anti-competitive practices which prevail or are likely to occur. How to use the outputs in its advocacy and enforcement work will be a big challenge to the CCI.

Currently CCI is engaged in advocacy but not at the speed or intensity that is required. After all this is their main task currently as enforcement provisions are yet to be settled through the parliamentary process and notified. Apparently the CCI personnel are cautious, if not apprehensive, that their advocacy activities may create some hostility or adversities. Some of this caution emanates from the fact that the whole law was being being questioned by the apex court, and from the inherent character of the persons in charge of the project. CUTS was invited to submit a proposal in 2005 to develop advocacy materials for CCI but that project was never awarded to either CUTS or anyone. In lieu of that the CCI has produced two small booklets: a) on the CA, 02, and b) FAQs. It however does have a fairly descriptive website.

Other than advocacy, what is also required is to build capacities of all stakeholders to appreciate and build a healthy competition culture. That too is a challenge and will need to be ratcheted up as the CCI comes into full bloom. Without public support or wider understanding the law will not be so effective nor a competition culture built up.

In lieu of conclusion, I would like to quote the immortal lines of Robert Frost: "I have miles to go before I sleep". That about sums up the essay.