Micros of the Macro Law: Economics Actuates Competition Law

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Competition law regulates the business practices of the enterprises in an economy and aims at ensuring a level playing field and induction of competition in the economy. Principal concern of competition law is that market power achieved by enterprises is not misused in a way which harms competition in the economy and consumer welfare through various ways. These include reducing output, fixing and raising prices, suppressing innovation, degrading quality, affecting consumer's choice and supressing entrepreneurial energy of the economy. Competition law aims to protect freedom of competition by defining and enforcing measures preventing restraints of competition. Thus it has macro mandate of ensuring competitive framework in an economy.

The competition authority under the new competition regime became functional in 2009 in India. One avowed objective of the Indian Competition Act as mentioned in its preamble is to promote and sustain competition in markets. Indian Supreme Court in 2010 has clearly noted that CCI is vested with inquisitorial, investigative, regulatory, adjudicatory and to a limited extent even advisory jurisdiction. It further observed that the commission has got vast powers to invoke the provisions to remedy situations having adverse effect on competition in India. The Act incorporates competitive neutrality and aims at regulating anticompetitive agreements, controlling abuse of dominant position and regulates anticompetitive effects of mergers & acquisitions above certain thresholds. The Act also confers extra-territorial jurisdiction to deal with international practices having adverse effect in India.

Competition law in reality is the application of economics. It is clear from the jurisprudence developed world over that competition law has evolved into a highly sophisticated body of law. Generally, there is a thin line of difference between as to what can be termed as competitive or anticompetitive business practice. The role of economics becomes pivotal in deciphering the real impact of business practice in question. It is no surprise that sometimes a business practice can be justified to be not falling foul of competition law in a different economic scenario.

The pivotal role of economics in the Indian Competition Act becomes clear when one sees its application in analysing the market definition, analysing the anticompetitive practices, analysing the ex-post effect of a combination. Following stages can be said to be common in all types of analysis under

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the competition law, viz: defining market or market characteristics, analysing the position of firms in the market and balancing the pro-competitive effects if any with the adverse effect on competition.

Analysis of market conditions by using economics and econometric tools for analysing the data is crucial. Further, economics also helps in understanding the relative position of the enterprises in the relevant market which helps in appreciating the market power attained by the enterprise in question. Use of various economic tests like Herfindahl-Hirschman Index (HHI), Small but Significant and Non-transitory Increase in Price (SSNIP) test etc., are important in determining the market power and abuse of such market power. Market analysis and market enquiries which the commission can undertake also require application of economics and econometric tools for analysing the market situation and the prevalent anticompetitive conditions in the market.

Further with evolution of competition law world over, there is increased use of 'rule of reason' approach and economics in analysing the anticompetitive conduct. The role of economics will be critical in the development of a sound jurisprudence in the field of application of the competition law in India. Economic principles from mature jurisdictions need to be tailored in light of economic realities of India for their adoption and application to interpret provisions in the Indian Competition Act.

Often, while carrying out cartel inquiries, the CCI examines economic evidence such as the level of market concentration, parallel movement of prices, trends in capacity utilisation and variations in cost-structures across firms. One can see a clear transition toward more use of economics as is evident from the orders of the CCI which now contain more economic analysis. In the absence of such economic analysis it is impossible to reach at the conclusion whether there is an appreciable adverse effect on competition or not.

The established trend across competition authorities is the adoption of an effects-based approach based on economic analysis rather than a per se approach of assessing cases under competition law. This sophisticated application of economics to competition law needs to be done very cautiously. In general jurisprudence of competition law, a terminology of Type I and Type II errors has emerged regarding the proper enforcement of competition law. Type I errors (also known as false positives or over-enforcement or false convictions) implies finding an enterprise that is competitive, liable of anticompetitive behaviour. This may be counterproductive and actually stifle competition setting a wrong precedent for other enterprises. Type II errors (also known as false negatives or under-enforcement or false acquittals) implies acquitting enterprises that have in fact acted anti-competitively. It is important for a competition authority that there are no errors in the interpretation and application of competition law. A sound interpretation, analysis and implementation of competition law requires pivotal role of economics.

Understanding economics helps us to understand how markets operate, how firms will behave in particular markets, and whether their behaviour will result in competition that benefits consumers. Competition Law is about economics and economic behaviour, and it is essential for practitioners involved in the subject whether as a lawyer, regulator, competition authority or in any capacity to have knowledge of the economic concepts concerned. Capacity building in this new and emerging field of competition law is of immense importance. It has been stated by Justice Brandeis, "A lawyer who has not studied economics is very apt to become a public enemy". Though it seems to be bit exaggerated, yet in current trend and specifically in field of application of competition law, the economics is pivotal for understanding and effective implementation of competition law.

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