

REPORT ON

Faculty Development Programme on Competition Law



Background

The Competition Act 2002 (CA 2002) establishes a completely new set of rules unfamiliar to most stakeholders in India. And hence capacity building is the need of the hour. Addressing this concern, CIRC undertook the task of enriching the faculty members from various colleges and universities with the importance of competition law and its basic tenets. This initiative was intended as a step towards plugging the knowledge gap at the level of students who are going to be the future entrepreneurs, lawyers, regulators etc. of the country. In the recent past, there has been a lot of interest in general among the student community about the recently enforced CA 2002. Through their faculty, as a result of this programme, students will be able to explore and access opportunities for training and specialising in Competition Law.

In India, currently Competition Law is being offered only by a few institutions as a part of their subject curriculum. Catering to the need of raising levels of awareness and as part of an advocacy initiative, CIRC has been running a few programmes, amongst others, that are specifically targeted at the student community.

Our efforts culminated in educative lectures and discussions led by national and international experts on two major limbs of Competition Law; Anti- Competitive Agreements and Abuse of Dominance. Please refer to Annexure 1 for the profiles of the subject experts and panellists that were present at the event. For a list of participants please refer to Annexure 2.

Proceedings

We were very fortunate to have with us international experts Dr Frederic Jenny and Dr David Lewis with many years of experience and in-depth knowledge of the competition law issues. The programme began with a welcome address by Mr Arun Talwar, Chief Operating Officer, CIRC who expressed his gratitude for everyone taking out time to be a part of this intellectual exercise. Following the inaugural address, Saket Sharma from CIRC gave a brief presentation on the basics of the Indian Competition Act covering its evolution and a brief background against which the Act came into being. Thereafter, there were two back to back knowledge sessions on Anti-Competitive Agreements and Abuse of Dominance delivered by Dr David Lewis and Dr Frederic Jenny respectively. There was a lively panel discussion by experts from India and abroad on Competition law in which queries by the participants were also addressed. Mr Talwar concluded the event by a formal vote of thanks to the experts and the participants.

Presentation by Dr David Lewis

Dr David Lewis fixated his lecture on Anti- Competitive Agreements, in particular spoke extensively on cartels, the pros and cons of criminalisation of cartels and the centrality of leniency programmes. He also cited prominent examples from various jurisdictions including US, EU and South Africa to make his point.

In his opinion, evidence gathering and detection of collusive practice is very difficult and remains the most challenging part of law enforcement. Cartel offences which carry criminal sanctions like in the US need to be proved beyond reasonable doubt and thus the burden of proof is very high making evidence gathering a toughest experience. Most effective way to tackle cartels is through offering

leniency programmes and plea bargains to the first one amongst the cartel members who co-operates and helps crack the cartel.

Dr Lewis while sharing his experience in South Africa told that the competition authorities are resisting the criminalisation of cartel offences as this would complicate the leniency programmes without which detecting and proving cartels becomes very problematic. He spoke that this view is in contrast to public opinion in South Africa which is in favour of criminalisation of cartel type conduct. Dr Lewis was of the considered opinion that individual reputational harm and damage suffered by an officer of a company found to be engaging in collusive practices plays an important role in having a deterrent effect and also help in effective implementation of leniency programmes.

Presentation by Dr Frederic Jenny

Dr Jenny focussed his presentation on provisions related to Abuse of Dominance. He discussed the basics of the Abuse of Dominance while adopting a comparative approach covering jurisdictions like US, EU and India. Dr Jenny commented on the relative ease and difficulty of bringing a case on the grounds of Excessive Pricing, Refusal to Deal and Fidelity Rebates in the US and Europe.

He briefly talked on how relevant markets are assessed in the different jurisdictions. He went on to further comment on the co- relation between market share and market power and said that demand elasticity for a firm's product or service may be a better approach to assessing power. He brought to our notice the often forgotten fact that most business practices have the potential for both, pro and anti-competitive effects depending on the facts of the case. He spoke of the necessity of a test for analysing Abuse of Dominance.

He gave practical examples while describing three tests for analysing exclusionary practices. The 'profit sacrifice test' states that conduct should be considered unlawful when it involves a profit sacrifice that would be irrational if the conduct did not have a tendency to eliminate or reduce competition. He also spoke of another test called the 'the no economic sense test' which basically states that conduct should be unlawful if it would make no economic sense without a tendency to eliminate or lessen competition. The third test is the 'equally efficient firm ("EEF")' test that aims to identify dominant firm conduct that harms competition by asking whether the conduct would be likely to exclude rivals that are at least as efficient as the dominant firm.

Dr Jenny also described in detail the 'consumer welfare test' for analysing the exploitative practices like that of excessive pricing. This test with its numerous variations attempt to use consumer welfare effects rather than indirect factors such as profit sacrifice to gauge conduct of a dominant firm.

Panel Discussion

There was a panel discussion after these two intensive sessions. The panel consisted of Mr Manas Chaudhuri, Partner, Khaitan & Co; Mr Amitabh Kumar, Partner, J Sagar and Associates; and Professor Harpreet Kaur, National Law University, Delhi. Dr Jenny chaired the panel discussion. The basic points discussed and issues raised by the participants and addressed by the panellists are briefly mentioned below.

Prof Kaur spoke on issues such as tying, bundling and discounts, giving practical examples from the Indian markets. She also went over the basic prohibitions in section 3 of the CA 2002 while making her case that there is widespread ignorance of the law.

Mr Kumar spoke on the issue of Abuse of Dominance and flagged some pertinent issues in determining dominance and its abuse. He said that the objective of antitrust legislation in the US and EU is quite clear. The US law believes in the principle of total welfare and minimal intervention and so the threshold of 70% market share for ascertaining dominance of firms in markets is used. The EU jurisprudence is unique because of the goal of integration and common market. However, as per his view, the Indian law is enacted not only for the welfare of consumers but also to enhance the functioning of other economic agents. This approach according to him is not well focussed. He noted that in the EU abuse is defined by an inclusive list whereas in India the CA 2002 provides an exhaustive list within which a certain activity must fall to be considered as an Abuse of Dominance.

Further, he quoted few Indian case examples of market definition that are debatable in his opinion. In one case, the question before the CCI was whether the Indian Railways is dominant in the market for transport of goods in containers. The CCI found no dominance as it defined the market to include transport by road and sea as well. As per his view, market research suggests that beyond a certain number of kilometres road transport gets too expensive and consumers prefer other modes. From this perspective, debatable question is that whether road and rail transport fall within the same relevant market.

Mr Chaudhuri commented on the lack of consistency in the application and implementation of the law across various domestic industries. He cited the examples of the cement and tyre cartel cases decided by the Commission where cement companies were penalised but tyre companies were let off the hook. In response to a question raised by one of the participants, he added a new dimension to the discussion by mentioning the provisions of the Companies Act 2013 which states that if an individual has been fined (over INR 1,000) or imprisoned for an offence under the Competition Act (among other Acts) then he is not eligible for the posts of managing director, whole-time director or manager.

A query was raised regarding Refusal to Deal which in India seems to be part of both section 3 and section 4. Dr Jenny and Mr Amitabh brought some clarity on this question notwithstanding their admittance that it was slightly misleading. There was also a question from the audience which brought to light the confusion between the Consumer Protection Act and CA2002 which was then clarified by Mr Amitabh. Unfair trade practices which were earlier the domain of MRTP Act have not been transferred to the Competition legislation. Instead it has now come under the purview of the Consumer Protection Act. Mr Talwar thanked all the panellists and the participants for the lively discussion and for attending the event.

ANNEXURE 1

Dr Frederic Jenny

Dr Jenny is a Professor of Economics at ESSEC Business School in Paris. He is currently Conseiller en Service Extraordinaire, Cour de Cassation (Member of the French Supreme Court) and Chairman of the OECD Competition Law and Policy Committee. He was closely involved in the establishment of what is now Autorité de la Concurrence (Competition Authority) in France and latterly became its Vice-President, and has an internationally recognised reputation for his work in the competition field.

Dr David Lewis

Dr Lewis is currently Executive Director, Corruption Watch, South Africa. David Lewis chaired the Competition Tribunal for a decade from its founding in 1999 and received his training in economics from the universities of the Witwatersrand and Cape Town (UCT). He has served and has been serving on the board of the many national and international organisations. In 2009 Lewis was appointed an extraordinary professor at the Gordon Institute of Business Science. A year later, UCT awarded him an honorary doctorate in economic sciences.

Mr Manas Chaudhari

Mr Chaudhuri is a partner with and co-head of the competition/antitrust team of Khaitan & Co, one of the largest and most experienced practices in India. He was the additional registrar at the Competition Commission of India (CCI) for several years prior to joining private practice in 2006. Prior to his work with the CCI, he was the joint legal director for the Monopolies and Restrictive Trade Practices Commission, the predecessor to the CCI. Manas served as a civil judge in the West Bengal State Judicial Services during the late 1980s. He also worked as the legal adviser for Tea Board India.

Mr Amitabh Kumar

Mr Kumar is currently a partner at Jyoti Sagar Associates. He is a retired Indian Revenue Service Officer, and has handled diverse assignments in the sphere of Regulation, Public Finance and Policy in an illustrious career of 31 years. He has served as the first Director General of the Competition Commission of India from 2004 to 2009. He was involved in the Policy and Regulatory Framework set up in the initial years of the Competition Authority. Recently, he was member of a committee appointed by the government to recommend a National Competition Policy document and necessary amendments to the Competition Act, 2002.

Professor Harpreet Kaur

Prof Kaur is Professor of Law at National Law University, Delhi. She has specialised in commercial laws and completed her Doctor of Laws in Corporate Liability. She has more than 13 years of work experience in Teaching and Research. Her research interests include business laws, labour laws, consumer protection, corporate laws, corporate governance and competition law. She has presented research papers in reputed national and international conferences and participated in Management Development Programmes.

ANNEXURE 2

There were approximately 40 participants representing teaching faculty from different law schools, colleges and universities. Law schools, colleges and universities represented were :

- Amity Law School, Amity University, Delhi
- Amity Law School, Amity University, Noida (Centre I & II)
- Atma Ram Sanatan Dharm College, University of Delhi, Delhi
- B.S.A Institute of Law, Maharishi Dayanand University, Rohtak
- Campus Law Centre, University of Delhi, Delhi
- Faculty of Law, Jamia Millia Islamia, Delhi
- Faculty of Law, National Law University Delhi
- Guru Gobind Singh College of Commerce, University of Delhi, Delhi
- IMS Law College, Chaudhary Charan Singh University, Delhi
- Indian Law Institute (ILI), Delhi
- Institute of Law and Research, Faridabad
- Keshav Mahavidyalaya, University of Delhi, Delhi
- School of Law, ITM University, Gurgaon
- TERI University, Delhi

The event was very well received and the participants valued the opportunity to interact with the national and international experts on Competition Law.



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