Report on CIRC and NERA Winter School 2016
28-30 November 2016

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Report on Role of Economics in Competition Law

CIRC and NERA Consulting Winter School

28th -30th November 2016, New Delhi

Objective of the Winter School

The aim of the winter school was to familiarize participants with economic literature in the field of competition law and to equip them with globally applied economic principles and techniques. Competition Law is an economic law and for its effective implementation, it is essential that relevant markets are defined, market power is measured, barriers to entry are identified and competitive effects are analysed It was intended for the benefit of competition lawyers, competition authorities, economic or law consultancies and students pursuing research in competition and regulation. Sophisticated economic analysis is a vital tool in the interpretation and enforcement of competition law. Very often econometric methods are also used by firms when they file merger applications with competition agencies.

Structure and Pedagogy

The winter school was spread over three days and the topics covered included basic economic concepts, introduction to oligopoly and game theory, econometrics, economics of horizontal agreements, exclusionary behavior and vertical agreements, defining market through relevant economic tools, market power, case study analysis, economics of networks and platform markets, merger analysis, and antitrust damages.

All the training sessions began with introduction of the concept at hand to facilitate clarity among the participants on competition law cases. Lectures were interactive that stimulated interest among the participants and fostered interesting question and answers. The idea was to promote strategic understanding and in depth analysis of the topics that were discussed.

Faculty and Participants

The faculty consisted of following experts from the field:

1) Dr. Subramaniam Ramnarayan, Vice President, NERA Economic Consulting.

2) Dr. Sourav Chatterjee, Senior Vice President, BVA Group

3) Payal Malik, Associate Professor of Economics, University of Delhi and Former Economic Advisor, CCI

Day 1: November 28, 2016

The winter school began with Dr. Arvind Mayaram, Chairman Cuts Institute for Regulation and Competition welcome address. The winter school has been CIRC's endeavour to promote training and capacity building in the competition law fraternity in India. Thanking NERA Economic Consulting for coming along with CIRC's effort this year, Dr. Mayaram spoke about the importance of competition and more importantly fair competition for an economy. He contextualized the theme of the winter school by looking at the evolution of the world economy from laissez faire model to a welfare that necessitated a need for regulation to achieve an optimum balance between allowing for profits but prevent profiteering. He highlighted the need for the legal fraternity to understand economics and relate it with their everyday pleadings and judgments for it was important that the competition lawyers and adjudicators apply economics in their work as it will allow them to do better market analysis. He ended with a quote that summed up the importance of understanding economics to competition law, the quote being, "A judge who has not studied economics is a public hazard". Following the inaugural address, Ms. Nidhi Masheshwari, Chief Operating Officer (COO), CIRC welcomed all the participants of winter school. This was followed by a round of introductions ably coordinated by Saket Sharma, the course coordinator for the winter school.

Session 1: Introduction to Basic Concepts of Economics by Dr. Subramaniam Ramnarayan

The first session of Day 1 was conducted by Dr. Subramaniam Ramnarayan on basic economic concepts to familiarize the participants with economic concepts as economists are now being given more voice in all government mechanisms including judiciary and CCI. Therefore, the pleader and the adjudicator should both be prepared with their knowledge of the market and its economics. Competition forces forums to contribute better to the socio-economy of the society and economic theories are needed for identifying strategies adopted by the firms in a market that in turn helps to address antitrust issues. Basic knowledge of these theories would also allow lawyers to understand possible competition effects of common business practices and devise measures and tools to effective implementation of our Competition Laws. He remarked that the session would enable the participants to become sophisticated consumers and disseminate better market awareness. His lecture dealt in detail with the highlighted concepts of static competition and theory of demand and supply, consumer and producer surplus, consumer welfare and total welfare.

He raised the concern that "in a given desirable welfare standard, how do we ensure through policy/enforcement that the market functions effectively in helping to realize that standard?" This is the route in which all the research should be directed.

Session 2: Introduction to Oligopoly and Game Theory by Ms. Payal Malik

Session 2 on Oligopoly and Game Theory was conducted by Ms. Payal Malik. The emphasis of her presentation was on how firm behavior in oligopoly is dependent on rival firms. On the issue of regulatory environment, she commented that regulatory intervention needs to be according to the structure of a market. The Competition authorities ought to focus on whether the players in a market are playing the game in accordance with the market structure leading to fair competition. The consonance of behaviour of these firms should not be detrimental to fair competition. A good market and fair competition is not defined by the number of firms playing in the field, but by competition on qualitative measures. The regulator should not take upon itself to decide as to which firms are competitive and should remain in the market or whether they should leave the market.

Explaining the features of 'oligopolistic markets', she gave the example of real estate market, therefore raising attention towards the need for a regulator for that market. She said the regulator should not only regulate prices but quality, practice and services rendered. Ms. Malik insisted that oligopolies cannot be blamed for cartel formations or unfair competition prevailing in markets, as economists end up doing. Oligopoly markets have their own regulation mechanics. Action and reaction are the dynamics and these keep evolving along with the growth in market. Parallel behaviour of firms cannot be termed as colluding. She explained to the participants, the concepts of oligopoly and game theory, solving a game and nash equilibrium, monopolistic competition, sources and reasons for market failure, competition policy versus regulation, and market structures in emerging economies and competition law. She concluded that the policy maker's role should be to promote competition and prevent cooperation, to move the oligopoly outcomes to efficient outcomes and non-cooperative outcomes.

Session 3: Introduction to Econometrics by Dr. Sourav Chatterjee

Dr. Chatterjee introduced 'econometrics to participants as "the use of statistical methods to analyse economic data". He discussed simple and multiple regressions, evaluating regression estimates, common modelling issues, common data issues such as omitted variables, measurement error etc. While addressing the issues of quality of data, quality of data analysis practices and difficulties in availability of data, Dr. Chatterjee discussed about the Error Term. The issue of regression analysis, why error term exists and what impact it has on data analysis, was dealt by him detail.

Dr. Chatterjee described the goal of econometrics as inclusive of the following:

(i) Estimating relationships between economic variables
(ii) Testing economic theories and hypotheses
(iii) Forecasting economic variables
(iv) Evaluating and implementing government and business policy

Covering each head extensively, he concluded by saying that econometric methods depend on the nature of the data used and the use of inappropriate methods may lead to misleading results.

Session 4: Economics of Horizontal Agreements by Dr. Sourav Chatterjee

In his second lecture on day one, Dr. Chatterjee dealt with the economics of horizontal agreements. Horizontal agreements are agreements between actual or potential competitors to restrain rivalry in one form or the other. He remarked that there exists substantial difference in consumer surplus in competitive and collusive markets. He said that cartels are not always about pricing, they can also be about market share and geographical location of the parties. It is therefore, important to monitor the behaviour of the cartel members. Horizontal agreements are more likely to be considered illegal per se than vertical agreements and horizontal restraints are intended at restraining potential competitors.

Depicting and explaining the difference between consumer surplus in a competitive market and consumer surplus in a collusive market through graphs, Dr Chatterjee's lecture was well received. He said that the primary motive of a cartel is to reduce quantity and increase prices and the profits in a cartel are distributed among its members. Talking of 'economic theory of collusive structures' and the types of collusive structures SC also gave models of cartels generally seen based on repeated interactions. He talked of price fixing, bid rigging, market allocation, parallel behaviour of firms in detail and with examples from different industries.

DAY 2: November 29, 2016

Session 5: Exclusionary Behaviour and Vertical Agreements

The second day began with a presentation was given by Dr. Sourav Chatterjee (PhD), on "Exclusionary Behaviour and Vertical Agreements". A very interesting explanation was given on predatory pricing, tying, bundling, and refusal to supply, vertical agreements, resale price maintenance and Most Favoured Nation (MFN) clauses. Predatory pricing was explained in great detail as the pricing below an appropriate measure of cost, highlighting the practice followed in USA regarding the same. Predatory pricing test and cost measures were discussed in detail, while answering questions from the audience. A question was raised from the audience on Jio by Reliance outlining the predatory pricing in India and the conundrum of dominant and non-dominant powers in the India scenario. Mr. Sourav gave detailed explanations, stressing that; it is the end effect that matters eventually in weather it is going to harm the consumer or not. Ms. Kruthika from AZB & Partners, a participant, explained the Section 3 and Section 4 of the Competition Commission of India regarding Anti-competition and Abusive Dominance and in reply Dr. Chatterjee represented the case study of USA vs. American Airlines to explain the basics of the subject at hand.

Session 6 and Session 7: Market Definition and Market Power

Market Definition and Market Power were the topics of presentations in Session 6 and Session 7 by Dr. Ramanarayanan, Ph.D. He explained to the participants the meaning and effects of the market. Various approaches to define relevant market was hypothetical monopolist test, price correlation, own price elasticity and cross-price elasticity. The delineation of market was essential to determine market power, abuse of market power and in merger control. Market Power is the ability of a firm to profitably raise prices, decrease quality or retard innovation in relation to competitive levels for a significant period of time.Through detailed examples he demonstrated the causes and the consequences of market power. He applied the SSNIP (Small but Significant Non-transitory Increase in Price) test to validate his assertions. He said that “critical loss” is determined based on facts, and whether sufficient customers will switch to make the product sustainable or not and marginal rise in the profits is contingent on the same. To substantiate his point he presented the case study of the DoJ analysis, which had traced the merger of Kelvinator with Electrolux. He explained the concept of a cluster market which said, if competition barriers are similar and conditions are similar then a cluster market can be created while marketing a certain product. Questions were raised by the participants to clarify what exactly is market dominance and is market dominance necessarily bad for the consumers. Answers were provided with examples to enable the participants to understand in a lucid manner. Overall both the sessions were very interactive and informative.

Session 8:

Session 8 was based on case study and being an interactive session saw active participation from the students. The eight participants were divided into two groups and a case study was given to them. Each of the group was supposed to pick a side to validate their side of the case as presented in the case study. One side was representing the counsel of informants and were drafting their arguments in the light of the relevant product and geographic market in which the entities were operating, and the illegality of the arrangements in terms of Section 4 and 19(4) of the act as presented in the case study. On the other hand, the other group was tasked to prepare arguments by considering themselves to be the counsel of the company mentioned in the case study. The panellists were Ms. Payal Malik, Dr. Subbu Ramanarayanan, and Mr. Amitabh kumar. This interactive session session not only enlightened the participants about the laws and acts to deal with competition in the market but also enabled them to take part in a make-belief court session.

DAY 3: November 2016

Session 9: Antitrust Damages

The first session of the third day was conducted by Dr. Sourav Chatterjee on Antitrust Damages. The logic of antitrust damages is to award damages to a plaintiff so that his position in the market is restored to a position where he would have been prior to violation taking place. The damages are caused by cartels and exclusionary practices. Cartels have the effect of reducing the intensity of competition among competitors and they generally result in higher prices and lower quantities for consumers. A key element of cartel damages is to determine overcharge which represents the amount by which the cartel raised the price of the relevant product. The magnitude of total damages also depends on the duration and coverage of the cartel. The damages are calculated by comparing the existing scenario with a counterfactual scenario. There are three approaches for quantifying the damages viz. Before-and-after approach, yardstick approach and geographic area approach. Before and after approach includes examining the product price before, during and after the alleged practice violation. The yardstick approach examines the price movements of a comparable product which is the yardstick. The geographic area approach relies on the product price from a region or part of the world where the alleged violation did not occur.

The damages caused by exclusionary practices are much more complex. It is important to identify the extent to which the illegal practice is the cause of the competitive harm. Two practices being correlated do not prove that they have resulted in causing harm to their competitors. It is necessary to assess the correct cause of plaintiff's loss. Losses might be due to factors other than malpractices. Estimation of damages can be based on a flawed theory of competitive harm.

Session 10: Economics of Network and Platform Markets

Session 10 was taken by Ms. Payal Malik on network and platform markets. She highlighted that Network Industries are not monolithic in nature. Network Industries rely hugely on complementarity and network externality. The components of network industries need to be paid equal attention. Exclusive deals between firms for instance between a ticketing agency and an event management company is an effort at reaping the benefit of complementarity. Another example of Jio offering free calls and data services is an attempt at reaping the benefit of complementarity and is an example of network externality. It is their attempt at expanding their consumer base. She also emphasized that price of a product and cost of product need not be aligned together. Firms often have a range of products and services at their disposal. Even if they offer free services as witnessed in the case of Jio, they can earn more from other value added services too. She also discussed the conditions under which new firms can enter network industries and the associated costs and benefits of entering network industries.

Session 11: Economics of Merger Analysis

Merger analysis was the topic of discussion in Session 11 that was conducted by Dr. Subramaniam Ramnarayan. Merger analysis tends to be prospective in nature. He underlined the need for such an analysis as mergers can have the effect of reducing competition in the market. It could lead to harmful effects on price dimensions, quality dimensions and on innovation. Merger analysis gazes into the future even before the merger has been finalized for the simple reason that once the merger is done, it is very difficult to break firms apart. US horizontal merger guidelines recommend a 5 step approach for assessing mergers: defining relevant markets, analyzing market structure, assessing competitive effects, assessing entry conditions and evaluating claimed efficiencies. There is increased use of Unilateral Competitive Effects (UPP) in carrying out merger analysis because it screens the way mergers can be screened. UPP does not provide an estimate of post merger analysis, it only points to the likelihood of price increase.

Session 12: Panel Discussion on Challenges in applying Economics to Competition Law in India

The panel discussion was on challenges of applying economics to competition law in India. The panelists included distinguished members such as Augustine Peter (Member CCI), Amitabh Kumar (Member, Governing Nisha Kaur Uberoi (Co- Head, Competition Law, AZB & Partners), Payal Malik (Associate Professor, Delhi University) and Geeta Singh (Partner, Genesis Analytics). It was moderated by Dr. Sourav Chatterjee (Senior Vice President, BVA Group) with inputs from Dr. Subramnaiam Ramnarayan.

Highlighting the theme for the discussion, Mr Peter remarked that the theme is very important in today's context. CCI has taken inputs from law firms with respect to remedies, mergers etc. CCI is still away from the goal of successfully bringing together law and economics and it is taking steps in the aforementioned direction. It has a set of young economist who are being trained and the endeavour is to rope in more economists. His remarks were followed by those of Amitabh Kumar. He that fresh law graduates are a talented lot who soon find their feet in competition law in one year. If pushed further, they would soon become familiar with economics too. At CCI, economists do not get adequate mention. The reports furnished by them do not get sufficient acknowledgement. The reports given by economist need to be in simple terms so that the judges would understand. There is requirement of more economists at CCI rather than being staffed by lawyers only.

Payal Malik highlighted the use of economics in competition law can be viewed from the prism of demand and supply. There is a need for economists who are also trained in industrial organization theory. For instance, National Law School has brought appreciation but not deep integration of law and economics. Some guidelines can be brought on the table by the commission that can help achieve this integration.

Carrying the discussion forward, Ms Uberoi pointed out that while the competition act allows for lawyers and accountants to appear in the hearing, the economists are not allowed to present a client. This discrepancy needs to change. At National Law School, while economics is taught as a compulsory course, competition law is taught as an optional course. Further, the client are also cost conscious. They resist hiring an economist for fear of escalating costs associated with a case. In her view, economists bring great value to a case because at the end, competition law is an economic based law.

Ms. Geeta Singh posited that there is sufficient supply of trained economists to meet the demand but the challenge lies in finding individuals with experience in the field. The issue in India remains that the economic analysis which is produced is premised on poor choice of models and the resultant evidence produced is of poor quality. The need of the hour is constructive thinking and identifying where the bottlenecks lie. The CCI can also play a significant role in making the demand for economists specific.

Dr Sourav Chatterjee then veered the discussion towards the issue of quality of data. He exhorted the panelists to share their thoughts on the issue of data disparity. Was it the case that the commission has one type of data and the private bodies had another kind of data. Reacting to the above point, the issue of credibility of data presents itself as a serious challenge. Ms. Malik added that it was indeed the case that parties had greater access to data while Ms. Uberoi pointed out that there has also been resistance by parties. The data also needed to be segregated sector wise. It was pointed out by Mr. Amitabh Kumar that at one point CCI was pondering over the feasibility of establishing a data centre however later it was considered futile due to the need of constantly updating the data. Mr. Peter highlighted that the exercised of data collection has been hampered in the post 1991 liberalisation of the Indian economy. Prior to 1991, data collection was done by government departments, many of which have either been reformed or stand abolished.

Dr Chatterjee also asked the panelists to share their thoughts about when they hire economists and what was the value addition brought to the table by the economists. Ms. Uberoi observed that economists bring significant value to the table. On cases of relevant market delineation, it was particularly useful to hire economists. However, Mr Kumar provided the counter view that not all cases required economists.

Following this insightful panel discussion, vote of thanks was extended by Ms. Nidhi Maheshwari, COO, CIRC followed by certificate distribution and high tea.