A Competition Act by India, for India: The First Three Years of Enforcement Under the New Competition Act

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ABSTRACT

In 2002, India unveiled its new Competition Act. The Act substantially improves upon the previous competition regime, which regulated and condemned dominance even absent culpable conduct. Despite improvements, provisions of the Act have proven difficult for the fledgling Competition Commission ("the Commission") to implement. For one, the Act overwhelmingly prefers rule of reason analysis to per se illegality for horizontal and vertical agreements. While this approach gives the Commission the flexibility to conduct a nuanced inquiry, the economic analysis required is challenging. So far, the Commission has struggled when applying basic antitrust economics in the hundred or so orders that it has issued. Going forward, the Commission should develop systematic approaches grounded in economic principles in order to create clear rules and precedents that will support a competitive market place and promote economic growth. It may be necessary to train the Commission members or replace them with individuals who have a background in antitrust economics. After the Commission has addressed limitations on resources and staff expertise, it should develop enforcement priorities and interpret its guiding statute in a way that is congruent with India's unique economic situation. Most importantly, the Commission should focus on cartel abuses, which would beneficially affect a broad base of consumers.

CONTENTS

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I. INTRODUCTION

In 2002, the Indian government demonstrated its commitment to aligning its antitrust enforcement regime with that of the western world. Since then observers have wondered what principles would drive the Competition Commission's enforcement agenda. This paper attempts to summarize and evaluate the evolution of India's competition policy thus far.

In 2002, India unveiled its new Competition Act, which the OECD has called "close to state-of-the-art."[242] The Act incorporates statutory elements from the U.S., the EU, the UK, Australia, and Canada, and creates a watchdog agency with jurisdiction over abuses of dominance and horizontal and vertical agreements. It also sets forth merger analysis procedures to be enforced by the agency. The Act substantially improves upon the previous competition regime, which regulated and condemned dominance even absent culpable conduct.

Despite these improvements, the provisions of the Act may be difficult for the fledgling Competition Commission ("the Commission") to implement. For one, the Act overwhelmingly prefers rule of reason analysis to per se illegality for horizontal and vertical agreements. While this approach gives the Commission the flexibility to conduct a nuanced inquiry, the economic analysis required is challenging. Capacity issues at the top of the Commission exacerbate this issue. Since creation, the Commission has been short-staffed and operating with a tight budget. As of August 2011, 50 out of 144 sanctioned posts at the Commission and half of the posts at the Director General's office were unfilled. Further, the majority of the members of the Commission, who select cases for investigation and write the orders, have no background in antitrust economics or competition policy. And the members are not rigorously trained in competition law.

[242] *OECD Economic Surveys: India* 14 OECD, 109 (New Delhi, 2007).

So far, the Commission has struggled when applying basic antitrust economics in the hundred or so orders that it has issued. Many decisions lack concrete economic analysis and are instead supported by conclusory statements about market competitiveness. Other orders suggest that the members may be interpreting their mandate to protect consumer welfare by selecting cases that resemble contractual disputes. Further, the Commission has developed a pattern of refraining from making a decision or imposing a penalty when the option is available, which suggests that the members are insecure over their own abilities.

The Commission should develop systematic approaches grounded in economic principles before doling out violations (and imposing hefty fines). Without using economic analysis in the orders that it generates, the Commission runs the risk of penalizing competitive behavior, which would stifle the competitiveness of India's vibrant economy. Alternatively, if the Commission is too timid to take on naked abuses *suo moto,* it will fail to promote market competitiveness and economic growth. Further, the lack of economic analysis in the orders issued has prevented the Commission from establishing clear rules and precedents. And absent clear guidance, the Commission may chill the business community from engaging in pro-competitive behavior with the fear that such behavior would subject it to scrutiny by the Commission.

In order to correct these problems, the foundation of the Commission must be altered. The members should be trained or replaced with individuals who have a background in antitrust economics. In addition, the Commission should alter its enforcement priorities and focus on straightforward abuses, such as naked restraints. Naked restraints, such as horizontal price-fixing, seriously impact consumer welfare in India. A number of studies have alleged that cartels, both within India and internationally, have artificially inflated prices of Indian goods, including diet staples. By taking a hard line against cartels, the Commission would demonstrate its commitment to promoting consumer welfare at its broadest base, which would generate public support for the agency. And focusing on clear violations would provide opportunities for the Commission to refine its skills and develop capacity with a relatively low margin for error.

Part two of this paper provides a brief history of the Competition Act and its predecessor, the Monopolies and Restrictive Trade Practices ("MRTP") Act.[243] Part three describes the structure of the Competition Act and highlights differences from United States competition law. Part four discusses the Commission's enforcement to date, focusing on several landmark cases. Notably, the paper discusses a lack of cartel enforcement despite compelling evidence of concerted behavior and cartelized sectors of the economy. Part five offers recommendations for building a robust competition institution within India.

II. History of Indian Competition Policy

A. MRTP Act

Before the Competition Act was enacted, the Monopolies and Restrictive Trade Practices Act formed the backbone of Indian competition law. The Act was created in 1969 following a government inquiry into private sector concentration. The inquiry produced a report demonstrating that over 85% of industrial areas had a "high concentration of economic power."[244] The Committee ultimately passed the Monopolies and Restrictive Trade Practices Bill (MRTP) with the goal of limiting market concentration by industry.

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[243] The Monopolies and Restrictive Trade Practices Act, No. 54 of 1969, available at http://indiacode.nic.in/.
[244] *Report of the Monopolies Inquiry Commission* (1965).

The MRTP Act was enacted in December of 1969 and it came into force the following year. The MRTP Commission was charged with investigating the conduct of entities suspected of engaging in monopolistic, restrictive, or unfair trade practices. If the MRTP Commission concluded that illegal action had taken place, it could direct the firms to discontinue the practice. The Act also required all large companies (whose assets exceeded INR 20 crore[245]) or "dominant" companies (whose assets exceeded INR one crore and whose share of the market exceeded 25%) to obtain licenses or permits before engaging in mergers or takeovers, establishing new ventures, or substantially expanding old ones. Firms with assets of more than INR 100 crore were prohibited from expanding into sectors not selected by the government.[246] In 1977, unfair trade practices, such as false or misleading advertising, were included in the list of prohibited activities.[247]

The MRTP Act was amended in 1984 to prohibit monopolistic trade practices, which were defined quite broadly. An inquiry could be ordered if the monopolistic company was "unreasonably" limiting competition or if the firm was "unreasonably maintaining or increasing prices and limiting investment." And in 1991, the MRTP Act was amended to eliminate the requirement for government approval prior to conducting a merger or acquisition, which the government believed "had become a hindrance to the speedy implementation of industrial projects."[248]

The MRTP Act ultimately failed for several reasons. First, the MRTP Act's licensing requirement and strict regulation of growth punished efficiency. If a large company wanted to increase production, it would need to apply for a license or permit from the government.

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[245] A crore is a unit equal to ten million.

[246] *See* Dr. S. Chakravarthy, MRTP ACT METAMORPHOSES INTO COMPETITION ACT, 10 (2005).

[247] Unfair trade practices were removed from the scope of the MRTP by the Consumer Protection Act of 1986.

[248] 1991 Amendment Bill.

Second, the MRTP Commission lacked the power to impose substantial penalties for violations. Its primary tools were cease and desist orders, which were often ignored.

The act was also excessively vague. It failed to define many of the anti-competitive acts that it intended to prohibit and the definitions that it included were too general. For example, the broad definition of "unfair trade practices" invited complaints that resembled consumer or contractual disputes. Thus, the MRTP Commission spent much of its limited resources responding to claims about the production of defective goods, deficient services, and related claims that did not allege an injury to competition.[249] The broad language also allowed the MRTP Commission to take on a regulatory gap-filling role. For example, complaints about residential property predominated during this time, which was likely due to the fact that the housing industry is not regulated in India. By contrast, the MRTP Commission was not interested in pursuing cartels. Only seven cartel cases were resolved from 1991 to 2007, and almost all resulted in dismissals because of a lack of evidence of an agreement.[250]

B. Raghavan Committee

In 1991, India began a project of economic liberalization. This move away from "command and control" economic principles culminated in an overhaul of the competition laws. In his 1999 budget speech, the finance minister explained, "The MRTP 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."[251] The Indian government appointed a High Level Committee on Competition Policy and Law, known as the Raghavan Committee, to evaluate the MRTP Act. The Committee's report

[249] *See* Aditya Bhattacharjea, *India's New Antitrust Regime: The First Two Years of Enforcement,* ANTITRUST BULLETIN (Publication Forthcoming).
[250] *Id.*, at 6.
[251] Abir Roy & Jayant Kumar, COMPETITION LAW IN INDIA 44-45 (2008).

found the MRTP to be inadequate "for fostering competition in the market…and reducing…anti-competitive practices…" The Committee made a series of recommendations,[252] which prompted the Indian government to replace the MRTP Act with an entirely new act. Notably, the Committee recognized that substantial expertise would be necessary to institute an effective competition regime. The report explained, "...If the Competition Law Authority is to monitor mergers in India, it will have to be suitably equipped with adequate staff with relevant expertise in law, commerce, economics, and other relevant disciplines. Such expertise will inevitably take time to be developed as we are already seeing in the case of the new regulatory authorities that have been set up recently in the various infrastructure sectors."[253]

C. The Competition Act

i. Delay in Enforcement

The Indian Parliament enacted the Competition Act ("the Act") in December 2002 and it received Presidential assent in January 2003. While the Act was enacted in 2002, Sections 3 and 4 were not ratified or enforced until 2009 and the Commission's first orders under Section 3 and 4 were not announced until February 2010. Sections 5 and 6, which pertain to mergers and acquisitions, were delayed further--two drafts of implementing regulations were notified and then withdrawn in the face of vehement criticism. A third set of regulations was notified in May and the merger provisions were finally given effect in June 2011.

The Act was initially blocked by a lawsuit that challenged the constitutional validity of its provisions. A writ petition filed in the Supreme Court of India claimed that the head of the Commission must be a member of the judiciary because the Commission would exercise

[252] *Report of the High Level Committee on Competition Policy and Law*, GOVERNMENT OF INDIA, para. 2.9.7 (2000).
[253] *Id.,* at para. 4.7.9.

judicial powers. Despite its discomfort with the appointment of a retired civil servant as the head of the agency, the Supreme Court refrained from passing a definitive judgment because the government stated that it would amend the Act.[254] Accordingly, the Act was amended in 2007 in order to create a substantial role for the judiciary. The 2007 amendments created the Competition Appellate Tribunal (CAT),[255] a three-member quasi-judicial body that must be led by a former judge of the Supreme Court or the Chief Justice of a High Court. In addition, the Chief Justice of the Supreme Court would have primary responsibility in selecting the members of the Committee.

The CAT has two primary responsibilities. First, any individual who wishes to contest an order made by the Commission must appeal to the CAT. Rulings made by the CAT can only be appealed to the Supreme Court. Second, the CAT determines compensation after a violation has been established.[256]

ii. The Commission

Section 7 of the Act creates the Competition Commission of India, the national agency charged with investigating complaints. Unlike the U.S., the Commission has both investigative and adjudicatory functions. It may inquire into violations *sua moto* or can choose to pursue complaints that it receives. Any individual, trade association, or state government body is able to file a complaint with the Commission for a nominal fee. However, unlike the U.S., there is no private cause of action for competition abuses. Thus, the Commission must bear the full brunt of investigating and litigating competition violations without any help from private litigants. Due to its limited resources, the

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[254] Brahm Dutt v. Union of India, 2 Supreme Court Cases 431 (2005). *See also, Act 1 Scene 2: The Drama over India's Competition Law,* ASIA LAW (February 2006) available at http://www.asialaw.com/Article/1971451/Act-1-Scene-2-The-Drama-over-Indias-Competition-Law.html?Print=true&Single=true.

[255] §53A of the Competition Act.

[256] Indian competition law distinguishes between penalty and compensation. While the compensation is paid to the Commission, the winning party may only seek compensation from the CAT. So unless the CAT upholds the Commission's order, there will be no payment of the award.

Commission has been unable to investigate all of the complaints that are filed, which means potentially meritorious claims may never be investigated or resolved.

The Commission consists of six members and one chairperson. Together, the Commission reviews complaints and decides which are worthy of further investigation. Once the Commission decides that a prima facie case exists, the members order the Director General to conduct an enquiry. The Director General heads the investigative arm of the Commission. After a period of time, the Director General submits a report on the facts and law, including his recommendation for further action. The parties involved are given an opportunity to respond, after which the Commission can choose to close the matter, order further investigations, or pronounce an order that directs the guilty party to "cease and desist" from their anticompetitive conduct or pay a fine (not exceeding 10% of the average turnover during the preceding three years). The Commission can also levy a higher fine against cartels, taking three times their illegal profits if this number is greater than 10% of their annual turnover. In addition, the Commission can order the dissolution of a dominant firm. This provides substantial leverage during negotiations with dominant firms who engage in anticompetitive practices.

All competition offenses are treated as civil offenses. Jail time may only be imposed (by an independent magistrate's court) if an individual refuses to comply with the Commissions orders.

Since creation, the Commission has been short-staffed and operating with a tight budget.[257] As of August 2011, 50 out of 144 sanctioned posts at the Commission and half of the posts at

[257] The Commission receives an annual budget from the Ministry of Corporate affairs. The total amount for 2010-2011 was originally INR 4403 lakh (or about $8.9 million), but was further reduced by the Ministry to INR 3306 lakh ($6.7 million). *Competition Commission of India Annual Report*, 41 (2010-2011).

the Director General's office were unfilled.[258] In a 2006 report by IIM-Bangalore, professors and researchers recommended that the Commission have a support staff of 200, consisting of 40% finance professionals and 40% economists.[259] However, in January 2012, I was informed by one of the members that the Commission is staffed by less than 80 people in total.[260]

III. The Structure of the Competition Act

The Competition Act covers four enforcement areas: 1) Anti-competitive agreements, 2) Abuse of dominance, 3) Combination regulation, and 4) Competition advocacy (which will not be addressed in this paper). The language of the Act is taken from competition law from around the world, and provides much more specific guidance than the MRTP Act. For the most part, it defines technical terms and actually lists criteria that the Commission must use when deciding cases.

A. Section 3: Vertical and Horizontal Agreements

Section 3 prohibits both horizontal and vertical agreements. Section 3(3) prohibits four categories of horizontal agreements between enterprises in the same industry (with exemptions for efficiency enhancing joint ventures[261]). These include agreements that i) lead to price fixing, ii) limit or control quantities, iii) share or divide markets, and iv) result in

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258 John Samuel Raja D & Rohit Deb, *Can understaffed Competition Commission of India deliver prudent judgments?*, THE ECONOMIC TIMES (August 15, 2011), available at: http://articles.economictimes.indiatimes.com/2011-08-15/news/29889067_1_cci-members-competition-policy-competition-regulator.

259 *Id.*

260 The Ministry of Corporate Affairs sanctioned 187 posts in January 2009, including 122 professionals (90 at the Commission and 32 in the DG's office) and 63 support staff positions. 27 out of the 32 professional positions in the DG's office were vacant in December 2009. It seems as though the agency employees are too overburdened to concentrate on their duties as well as hiring. As R. Prasad explained during our meeting, "hiring takes more work."

261 Note that a "joint venture" is not defined in the act.

bid-rigging. Unlike the United States, these horizontal agreements are not per se illegal, and instead are *presumed* to have an "appreciable adverse effect on competition" (AAEC) that can be rebutted. In other words, the burden of proof is shifted for horizontal offenses, but otherwise, there is no real difference between horizontal agreements and other offenses.[262]

Section 3(4) identifies vertical agreements that are subject to review under a rule of reason test. The Act requires the Commission to determine whether the vertical agreement will lead to an AAEC. By instituting this version of a rule of reason test, India has bypassed the U.S. common law evolution for vertical agreements. Section 3(4) specifically includes ties, exclusive supply and distribution agreements, refusals to deal, and resale price maintenance as within the Commission's jurisdiction. And Section 3(5) lists exemptions from the application of Section 3, which include conditions that protect intellectual property rights and export cartels (where the harm to competition is inflicted on foreign entities).

B. Section 4: Abuse of Dominance

Section 4 prohibits abuse by dominant entities. The Act uses the EC's *United Brands* definition for dominance*:* a "dominant position" is "a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to i) operate independently of competition forces prevailing in the relevant market; or ii) affect its competitors or consumers in the relevant market in its favor." So far, the Commission has read this test broadly to include relationships characterized by a contractual lock-in.[263]

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[262] The Commission's analysis in FICCI - Multiplex Association of India v. United Producers/ Distributors Forum & Ors., confirms that the Commission will use a rule of reason test even when evaluating cartel cases. *See infra* note 60.

[263] *See* the *DLF* case, Part IV.C, *infra.*

Section 4(2) lists five categories of exclusionary behavior that will be considered abusive: (i) unfair or discriminatory pricing (including predatory pricing); (ii) limiting or restricting production, (iii) denying market access; (iv) making a contract subject to obligations unrelated to the subject of the contract; and (v) using a dominant position in one market to enter or protect another market. Section 19(4) directs the Commission to consider "any or all" of thirteen factors during a dominance inquiry. These include, "relative advantage, by the way of contribution to economic development" by the dominant enterprise and "social obligations and social costs," as well as "any other factor which the Commission may consider relevant for the inquiry."

The drafters of Section 4 declined to require that the Commission demonstrate an adverse affect on competition when evaluating an abuse. Section 19 lists factors for the Commission to consider when deciding whether or not a company is dominant, but the Act does not require the Commission to prove that conduct in question is harming market competitiveness. This allows the Commission to condemn exploitative abuses, such as excessive pricing, in addition to exclusionary abuses.[264]

C. Sections 5 and 6: Combinations

Sections 5 and 6 regulate "combinations," which includes mergers, amalgamations, and acquisitions.[265] Combinations that cause or are likely to cause an AAEC in India are prohibited. Any combination that exceeds the monetary threshold limits specified in the Act

[264] Article 102 of the Treaty on the Functioning of the European Union (TEFU) includes exploitative abuses in its abuse of dominance test. The United States limits abuse of dominance to exclusionary abuses.

[265] Acquisition is defined as "acquiring or agreeing to acquire, i) shares, voting rights, or assets of an enterprise or (ii) control over management or control over the assets of an enterprise." *See* §2(a) of the Competition Act. The definition of combination includes "acquiring of control by a person over an enterprise." Thus, a merger can be a combination between two existing companies but also the absorption of one company by another.

must file a premerger notification with the Commission.[266] The Act uses a size of the entity test, measuring the combined size of the acquirer and the target against the threshold, which differs from the U.S., which uses a size of the transaction test. The Act also exempts transactions that take place entirely outside India with an insignificant local nexus and effect on Indian markets,[267] acquisitions where the buyer holds no more than 15% of the enterprise for investment purposes, and intra-group reorganizations. The Act was also altered to include an additional threshold for Commission scrutiny based on the size of the acquired entity. No filing is required if the size of the target enterprise has less than INR 2.5 billion in assets in India and 7.5 billion in turnover in India.[268]

Any entity whose combination meets the thresholds must give the Commission notice of its proposed transaction. After filing, the Commission may approve the combination, or it may propose modifications or block the combination entirely. The Commission has 210 days to conduct its investigation or the combination will be considered approved.

[266] A transaction is required to be notified only if the combined size of the acquirer and the acquired enterprise, upon completion of the transaction, meets the following jurisdictional monetary thresholds (at a conversion ratio of 1 USD = INR 53.12 approximately):
(a) Where the parties to the transaction have a cross-border presence,
(i) Globally: At least 3 billion dollars in assets 9 billion dollars in turnover on a group- wide basis, or at least 750 million dollars in assets or 2.25 billion dollars in turnover on an enterprise-wide basis and
(ii) In India, at least 141 million dollars in assets or 423 million dollars in turnover on a group-wise or enterprise-wide basis.
(b) In purely domestic transactions: At least 1.12 billion dollars in assets or 3.38 billion dollars in turnover on a group-wise bases, or at least 282 million dollars in assets or 847 million dollars in turnover on an enterprise-wide basis.
"Group" is defined to include all controlling entities, controlled entities, and all entities under common control. The definition of "enterprise" includes subsidiaries.

[267] This local nexus requirement for cross-border mergers was introduced in a 2007 amendment to the Competition Act.

[268] Because this change was accomplished through exemption notification instead of an amendment to the act, the exemption will only be available for five years. Rahul Singh, *India's Tryst with 'The Clayton Act Moment' and Emerging Merger Control Jurisprudence: Intersection of Law, Economics and Politics,* (Publication Forthcoming).

While Sections 3 and 4 were ratified in 2009 (following the litigation over the composition of the Commission), Section 5 became effective in July 2011.[269] The delay was the product of aggressive lobbying by the business community. International entities were concerned that the notification and review procedures would impose an onerous burden on foreign firms with small investments in India. The International Bar Association and the American Bar Association each issued memoranda expressing their concerns.[270]

The revised merger regulations include contradictions that are a product of aggressive and uncoordinated lobbying from the business community. The Competition Act's treatment of "groups" provides an amusing example.[271] The Competition Act requires a group of enterprises in common control to have their assets considered in aggregate when evaluating whether the combination meets the Act's asset or turnover thresholds. Groups that exceed the thresholds are subject to premerger notification requirements. The original legislation defined a group to be two or more enterprises in a position to control 26% or more of the voting rights in the other enterprise. This ensured that all entities within a group would be accounted for when calculating the jurisdictional threshold. However, the business community lobbied the Ministry of Corporate Affairs, the sponsoring ministry of the Commission, to raise this threshold. The Ministry assented, clarifying that a group exercising less than 50% of voting rights was exempt from the calculation of jurisdictional monetary thresholds in the 2011 regulations.

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[269] A draft of the merger regulations was issued in February 2011, but were revised and finalized in May 2011.

[270] *See* Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law on the Draft CCI (Procedure in Regard to the Transaction of Business Relating to Combination) Regulations (March 21, 2011), available at http://meetings.abanet.org/webupload/commupload/IC906787/relatedresources/sal_sil_comments_on_india_draft_combination_regulations_final.pdf.

[271] Many Indian corporate entities exist as a group, or a collection of parent and subsidiary corporations that function as a single economic entity. For example, Tata Group, which is one of the largest conglomerates in India by market capitalization and revenue, comprises of 114 companies and subsidiaries. Thus, while the assets of Tata motors may be small under a stand-alone test, Tata group still accounts for a large share of the Indian market.

At the same time, lobbyists for the business community pushed the Commission to exempt intergroup mergers from scrutiny. The final regulations provide a safe harbor for acquisition of control, shares, voting rights, or assets by an enterprise within the same "group." Consequently, under the new regulations, a subsidiary of a corporation would be exempt from seeking the Commission's approval for intergroup acquisitions (unless an independent third party could prove that there would be an AAEC). However, while intergroup mergers are exempt from scrutiny, fewer entities will be given the exemption: the safeharbor will only apply to groups who reach the 50% threshold. As Professor Singh explains, the business lobbies, "through their hectic lobbying endeavors aimed at having their cake and eating it too, appear to have shot themselves in the foot."[272]

The 2011 merger regulations include additional compromises between the government and the corporate community. The original notification thresholds were increased to one and a half times their original size, exempting most transactions from scrutiny.[273] The law does not allow the Commission to voluntarily scrutinize mergers that fall below the thresholds, thus, the regulations deprive the Commission of the authority to review a number of transactions that might have harmful effects on the Indian economy.[274] Perhaps realizing the error of this compromise, the Government of India has proposed to amend the Competition Act in order to raise the thresholds or eliminate them entirely for certain sectors. For example, the Indian government has recently decided that all pharmaceutical mergers should be subject to the

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[272] Rahul Singh, *A Competition Conundrum Brews,* LIVE MINT (May 26, 2011), available at http://www.livemint.com/2011/05/26224745/A-competition-conundrum-brews.html.

[273] Rahul Singh, *India's Tryst with 'The Clayton Act Moment' and Emerging Merger Control Jurisprudence: Intersection of Law, Economics and Politics,* Publication Forthcoming). India now has some of the highest transactions thresholds in the world. *See*, Subhadip Ghosh and Thomas W. Ross, *The Competition (Amendment) Bill 2007: A Review and Critique,* (July 2008), available at http://strategy.sauder.ubc.ca/ross/CompetitionAmendmentBill2007.pdf.

[274] Of course, if the Commission were given unlimited discretion, this would lead to substantial uncertainty within the business community.

premerger notification requirement.[275] However, the legal validity of this extension of the Commission's jurisdiction is subject to debate.[276] And the government has simultaneously decided to exempt all bank mergers from the pre-merger notification requirements.[277] Paradoxically, both the inclusion and exclusion of these mergers have been justified on the grounds of consumer welfare.[278]

The Commission also responded to widespread concern that the 210-day waiting period places an undue burden on the parties to the transaction.[279] The Commission issued a final set of regulations in 2011, clarifying that it would approve a transaction within 30 days if it concluded that there would be no adverse competitive effect. Further the Commission explained that if it had not communicated with a party within 30 days the merger would be considered cleared. The Commission could only take longer than 30 days if it issued a show-cause notice stating that a prima facie case exists that the merger would generate adverse competitive effects in India.

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[275] Recently, several Indian pharmaceutical firms were acquired by multinational corporations. These transactions were not reviewed by the Commission. This has prompted criticism of the thresholds, and attempts by the government to amend the competition laws to impose reduced thresholds for certain sectors. *See generally, CCI Efficacy to Clear Pharma Deals Doubtful: Experts,* BUSINESS STANDARD (October 17, 2011), available at http://www.cuts-ccier.org/Media-CCI_efficacy_to_clear_pharma_deals_doubtful_Experts.htm; Shruti Shrivastava, *CCI gets mandate to approve all phrama M&As*, THE INDIAN EXPRESS (October 11, 2011), available at: http://www.indianexpress.com/news/cci-gets-mandate-to-approve-all-pharma-m&as/858266/0.

[276] *See* Rahul Singh, *India's Tryst with 'The Clayton Act Moment' and Emerging Merger Guidance: Intersection of Law, Economics, and Politics,* (Publication Forthcoming).

[277] The Banking Laws Amendment Bill, 2011, Bill No. 18 of 2011, available at http://www.prsindia.org/uploads/media/Banking%20Laws/Banking%20laws,%2018%20of%202011.pdf.

[278] *See* Rahul Singh, *India's Tryst with 'The Clayton Act Moment' and Emerging Merger Guidance: Intersection of Law, Economics, and Politics,* (Publication Forthcoming).

[279] In the US, the waiting period is 30 days. *See*, Hart-Scott-Rodino Antitrust Improvements Act of 1976, Public Law 94-435. In the EU, a phase I decision is reached within 25 days. Phase II decisions, which tend to involve complex transactions) are issued in 90 days.

So far, the Commission has met the 30-day deadline for the 17 mergers that it has cleared.[280] And the decisions thus far have not revealed a nationalist sentiment: the Commission has not provided enhanced scrutiny for the combinations involving international actors.[281] However, the bulk of the mergers have been intergroup mergers, which do not require complicated analysis.

D. Implementation Challenges

The drafters of the Competition Act sought to correct many problems that the MRTP Act had created. In many ways, the Act is a substantial improvement. The Competition Act excludes "unfair" trade practices from the Commission's jurisdiction (such claims are now under the jurisdiction of the Consumer Protection Act) and does not try to restrict the size of firms or ownership concentration. The Act does not focus on dominance as a basis for investigation, and instead directs the Commission to evaluate conduct. The Act further allows the Commission to impose substantial fines and other penalties. And unlike the MRTP Act, the Competition Act gives the Commission power to investigate and punish activities outside of India that have a substantial affect on the Indian economy.[282] Thus, the Commission will be able to "pass such orders as it may deem fit" to combat international cartels.

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[280] The Commission has passed final orders regarding mergers within 24 calendar days. *See*, Rahul Singh, *India's Tryst with 'The Clayton Act Moment' and Emerging Merger Guidance: Intersection of Law, Economics, and Politics,* (Publication Forthcoming).

[281] *Id.* He notes that 8 out of the 9 merger orders issued before December 28, 2011 involved foreign acquirers and this has not impacted the Commission's analysis.

[282] This is in stark contrast to the MRTP Act, which did not allow the MRTP Commission to reach extraterritorial abuses. In 2002, the Supreme Court removed all foreign conduct from the purview of the MRTP Act in Haridas Exports v. All India Float Glass Manufacturers' Association, 6 Supreme Court Cases (2002). A summary of the case appears in Aditya Bhattacharjea, *Export Cartels: A Developing Country Perspective*, 38(2) JOURNAL OF WORLD TRADE 331, 342-44 (2004).

However, the application of the law may prove to be challenging for a fledgling agency. For one, in certain sections, key terms have not been defined. It remains to be seen how the Commission will quantify an "appreciable" effect on competition[283] or what will count as "control" in an acquisition. Further, the Act's attempt to guide the Commission's market definition analysis may have backfired. The Act asks the Commission to consider the "relevant product market" and the "relevant geographic market" when engaging in market definition.[284] It further clarifies that the relevant product market is dependent upon interchangeable goods and services, and the relevant geographic market is determined by the homogeneity of the conditions of competition and whether these conditions are distinguishable from those found in neighboring areas.[285] This language attempts to guide the members' analysis and serve as a baseline from which to begin a more rigorous analysis. Instead, the members have relied on the statutory language to justify their own intuitions about the relevant market and have refrained from utilizing a formal test, such as a SSNIP test, that would help the Commission understand buyer preferences and the degree of product substitution.[286]

Further, the Act overwhelmingly favors an unstructured rule of reason approach for horizontal and vertical agreements. As mentioned, horizontal agreements are not illegal *per*

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[283] To be fair, the U.S. and EU do not offer much clearer guidance—"appreciable" is not qualitatively different than "substantial" in "substantial lessening of competition" or "significant" in "significant impediment to effective competition."

[284] Section 2(r) of the Competition Act ("'relevant market' means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets").

[285] Section 2(t) of the Competition Act ("'relevant product market' means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by the reason of characteristics of the products or services, their prices and intended use"), Section 2(s) of the Competition Act ("'relevant geographic market' means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas").

[286] *See infra,* part IIIA.

se, but are instead presumed to have an AAEC under Section 3. This presumption can be rebutted by a demonstration that there are offsetting benefits to the agreement.

By applying a rule of reason framework for horizontal restraints, the Act applies a more lenient standard than the United States.[287] Despite the added flexibility, a rule of reason test poses a greater challenge for the fledgling agency. Rule of reason tests require more sophisticated economic analysis and have a larger margin for error than a *per se* rule. The benefits of a clear rule would be especially great for an agency with limited experience and resources.[288] Horizontal agreements between unrelated entities are not likely to have a pro-competitive purpose. And because the rule of reason approach may generate underdeterrence (especially when applied by a fledgling agency), a *per se* prohibition should be used. Further, the lack of clear rules and bright-line tests will contribute to legal uncertainty in the business community.

Section 19(3) of the Act, which was modeled after Article 101(3) of the Treaty of the Functioning of the European Union ("TEFU"), provides additional loopholes.[289] Section 19(3) requires the Commission to have "due regard" to six factors when determining whether an agreement has an AAEC. The Act specifies both "aggravating factors" and "mitigating

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[287] Naked restraints are *per se* illegal in the United States. Horizontal agreements that fix prices, limit outputs, divide markets, and set up boycotts are also *per se* illegal. However, the courts will do a quick look rule of reason test before applying the *per se* rule in certain circumstances (for example, it the agreement advances the pro-competitive purposes of a productive business collaboration). BMI v. CBS, 441 U.S. 1 (1979).

[288] *See,* Eleanor Fox, *Economic Development, Poverty and Antitrust: The Other Path,* 13 SOUTHWESTERN JOURNAL OF LAW & TRADE IN AMERICAS 211, 220 (2007).

"Most developing countries have insufficient resources to run their competition offices. They are short of staff, especially staff members who are economics experts. This suggests that brighter-line rules might be needed, whether they tip in the direction of more or less aggressive enforcement. The kind of analysis suggested, for example, by the U.S. Supreme Court in California Dental Association, might be too complex and of uncertain application. Yet the focused analysis suggested by Justice Breyer's dissenting opinion – relying on experience and theory that rules against advertising discounts raise prices – might prove more appropriate."

[289] Article 101(3) requires that an agreement share the benefits with consumers, not involve restrictions that are unnecessary to attaining the efficiency objective, and not substantially eliminate competition.

factors."[290] Mitigating factors include benefits to consumers, improvement of production of goods and provision of services, and the promotion of development.[291] The Act does not require that the benefits be balanced against the losses to other parties. For example, section 19(3) can be used to protect agreements that promise dynamic efficiencies but it does not make clear that the efficiencies must exceed adverse affects.

The Act also includes a list of criteria for the Commission to consider when determining whether a combination is likely to have an AAEC. Surprisingly, an efficiency defense is not included. Instead, Section 20(4) asks the Commission to consider "whether the benefits of the combination outweigh the adverse impact of the combination, if any." While the Act does not clarify which benefits may count, it does at least specify that the benefits must exceed potential adverse effects.

The exclusion of a competitive effects test in Section 4 is also worrisome. By not requiring proof of an AAEC, the Commission preserves the opportunity to condemn exploitative behavior (such as excessive pricing) as abusive. But if an abuse can occur without proof of a corresponding effect on competition, the Act gives the Commission substantial authority to render "abusive" conduct *per se* illegal once dominance has been established.[292] This lack of a competitive effects screen is exacerbated due to the Act's broad articulation of dominance. As we will see, the Commission may view any kind of lock-in, such as a contract between two parties, as evidence of a dominant position. So far, it appears that the Commission has

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[290] In FICCI-Multiplex, the Commission interpreted clauses (a), (b) and (c) of section 19(3) to be "aggravating factors" and clauses (d), (e) and (f) to be "ameliorating factors." FICCI Main Order, page 93, available at http://www.cci.gov.in/May2011/OrderOfCommission/FICCIOrder260511.pdf.

[291] This deviates from Article 101(3) of the TEFU, which *requires* that an agreement share the benefits with consumers, not involve restrictions that are unnecessary to attaining the efficiency objective, *and* not substantially eliminate competition.

[292] *See,* Subhadip Ghosh and Thomas Ross, *India's New Competition Law: A Canadian Perspective*, 23 CANADIAN COMPETITION RECORD 23, 34 (2008).

learned from its MRTP-era mistakes and has refrained from condemning dominance without proof of a corresponding abuse.[293]

IV. Enforcement of the Act to Date

During its first three years of enforcement, the Commission has issued over one hundred orders under Section 3 and Section 4 of the Competition Act. While the Commission has done an excellent job responding to inquiries (and denying complaints that fail to allege competition abuses), the Commission has struggled when applying basic antitrust economic analysis. This is primarily due to a skill deficit—the members are not trained in antitrust economics, and while they have all held high positions in the Indian government, none have a background in antitrust enforcement. Not surprisingly, the Commission has developed a pattern of opting out of making a decision or imposing a penalty when the option is available. And the Act's inclusion of flexible tests has further exacerbated the Commission's capacity constraints.

A. MCX and Market Definition

Market definition is the first step in abuse of dominance analysis. An incorrect definition of the relevant market can lead to the condemnation of competitive behavior or the exoneration of abusive conduct. However, the Commission has not yet articulated a consistent approach to market definition and has failed to use rigorous economic analysis when defining markets.

[293] The TEFU technically includes exploitative abuses, but the EC rarely chooses to penalize behavior that is solely exploitative.

In the controversial *MCX Stock Exchange Ltd. & Others v. National Stock Exchange of India Ltd. & Others* case, the Commission imposed a large penalty on the National Stock Exchange after a market definition disagreement. The facts of the case are as follows. In 2008, MCX (Multi Commodity Exchange of India Limited) launched a stock exchange with permission to operate in the currency derivatives segment. The National Stock Exchange, India's largest equity and derivative trading platform, was MCX's main competitor for currency derivatives (or CD) services. In 2009, MCX accused NSE of using its dominant position to harm competition in the market. Specifically, NSE used a transaction fee waiver for the CD transactions and also refrained from charging an admission fee for membership in its CD segment (which was allegedly subsidized by entry fees for other operations). These fee waivers (which were the exchange's primary source of revenue) allegedly made it impossible for MCX to operate profitably.

The Commission concluded a two-year investigation by finding NSE guilty of abusing its dominant position in the currency derivatives segment of the stock exchange services market. The Director General initially defined the relevant market to be the entire stock exchange services market in India (including equity and derivatives). He analyzed competitive constraints as well as demand side substitutability to arrive at this conclusion. The Commission majority disagreed with this conclusion, and instead defined the market to be "stock exchange services in respect of currency derivatives." The Commission focused on demand side substitutability, explaining: "detailed analysis of the relevant market [which was not included in the 172 page opinion] led to the conclusion that the CD segment a) is not conventionally interchangeable with the [other segments], and b) currency derivatives, equity and equity derivatives neither have the same characteristics nor the intended use."[294]

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[294] MCX Main Order, page 70-71, available at
http://www.cci.gov.in/May2011/OrderOfCommission/MCXMainOrder240611.pdf .

Notably, the Commission refused to use a formal SSNIP test, the hypothetical monopolist test used to define markets in a number of jurisdictions, including the United States. In a SSNIP test, the competition authorities begin by defining the narrowest product-market and evaluate whether a hypothetical monopolist would be able to profitably increase prices. If too many customers would switch to substitute products in response to the price increase, the narrow market will not be considered the relevant market and the substitutable product is added to the market. In rejecting this test, the Commission explained, "The Commission finds it rather unnecessary to dive into technical tests such as SSNIP… an attempt to determine even hypothetical competitive prices would be nothing more than pure indulgence of intellect and unwarranted misuse of an econometric tool, which in itself is not error-proof."[295] Instead, the Commission relied on the "undisputed fact" that the underlying assets, equities, and currencies are entirely different because they are not "interchangeable or substitutable" for products in other segments. While the Commission refused to endorse a formal SSNIP test, its focus on substitutability resembled the SNNIP inquiry in some respects. However, the Commission's refusal to apply a concrete test frustrated those who hoped that the decision would provide a market definition framework for future litigation.

Later, in the landmark *DLF* case (which will be discussed in detail later in the paper), the Commission retreated from its anti-SSNIP sentiment. In the *DLF* order, the Commission majority found that SSNIP "is often applied in abuse of dominance cases." However, it concluded that SSNIP would have led to the same result, but the conclusion was not supported with economic analysis. And in a later case, the Commission defined the market without mentioning SSNIP at all.[296] Thus, the members have avoided demonstrating the validity of their market definition choices with economic analysis, instead using conclusory statements about SSNIP to rubber-stamp their intuitions.

[295] MCX Main Order, page 99-100.

[296] Case 08/2009, M/s JAK Communications Pvt. Ltd. Chennai v. M/s Sun Direct TV (P) Ltd., Main Order, page 3, available at http://www.cci.gov.in/May2011/OrderOfCommission/JAKMainOrder010911.pdf.

B. Arriving at Abuse of Dominance in MCX

In *MCX*, the Commission found that the NSE was dominant in the relevant market based on its dominance in other segments, its early start in the business, its reserves, and its profit surpluses. The Commission declined to rely on predatory pricing regulations, and instead found NSE guilty of unfair pricing because it had waived its transaction fee, the exchange's principal source of revenue in the currency derivatives segment. The Commission believed that NSE used waived this fee with the objective of pricing MCX out of the market. It held that "zero" pricing is undoubtedly below cost and ignored NSE's justification that it ran the currency derivative segment without incurring any costs.

The Commission avoided complicated predatory pricing analysis by choosing to penalize NSE for unfair pricing. However, the Commission did not specify a measure of cost that it used to determine that the pricing was unfair. The order did not mention average variable cost, average fixed cost, or marginal cost. Instead, the Commission relied on its intuition that pricing at zero could not be above or at cost. While this may have been the correct outcome, an examination of NSE's cost structure was an essential analytic step. The Commission should be careful not to come down strongly on pricing or discounting that appears "too low"—low prices benefit consumers and should not be discouraged.

The dissenting position, which concurred in the market definition but refused to find a dominant position, also erred in its application of the Competition Act. The dissenting opinion concluded that cross-subsidization cannot constitute an abuse. But they did not need to go this far—without dominance, there could be no abuse. Thus, it appears that the members of the Commission are still coming to terms with the contours of the Competition Act.

It is not clear that the *MCX* case was rightly or wrongly decided. While the Commission found no evidence that the segments of the stock exchange were cross-subsidizing each other, there was ample evidence that the NSE's fee waiver was foreclosing competitors from the market. Competitive foreclosure is central to the predatory pricing inquiry in the U.S. At any rate, the lack of rigorous analysis, which seems to be an exercise in avoidance, is disconcerting. Before *MCX*, the Commission had issued only minor penalties and cease and desist orders. By imposing a substantial penalty on the NSE, the Commission demonstrated that it would take a hard line against abuses by dominant firms. Further, the Commission revealed that it is willing to scrutinize the conduct of any firm that enjoys a dominant market position. If a dominant firm excludes others from participating in adjacent markets, it may be heavily fined. However, without clear analysis, Indian businesses cannot be sure which factors will lead to a substantial penalty like the one that was imposed in *MCX*.

C. *DLF* and Abuse of Dominance –Ghosts from the MRTP era?

In another landmark case, *Belaire Owner's Association v. DLF Limited and HUDA*, the Commission fined India's largest real estate firm INR 630 crore, vindicating a group of homeowners in a high-end housing project who alleged that DLF had delayed the completion of building plans. The homeowners alleged that DLF had abused its dominant position and imposed arbitrary, unfair, and unreasonable conditions on the apartment owners. The complaint listed 21 unreasonable conditions (such as "abnormal delays") that were forced on them.

The Commission defined the relevant market to be the high-end residential market in an area of Delhi called Gurgaon.[297] As was previously discussed, the Commission purported to use a SSNIP test, intuiting first that a customer who wanted to live in Gurgaon would not look elsewhere, and that a 5% increase in the price of neighboring flats would not cause buyers to shift to the Gurgaon development (or, that the two residential areas were not substitutes). The Commission relied on industry report market share data in order to conclude that DLF had a dominant market position (its share was 50% of the market).[298] The Commission found DLF guilty of abuse of dominance, finding the terms of the agreement as well as DLF's conduct to be unfair and exploitative.

Critics of this decision believe that the Commission erred in allowing the complaint to proceed. The complaint, which resembles a contractual dispute, would not survive under Section 2 of the Sherman Act. For one, there is no remedy for exploitative abuses under U.S. law--U.S. courts have emphasized that the competition laws exist to protect competition and not consumers.

At first glance, it appears that the *DLF* signals that the Commission's resources are being diverted from legitimate competition concerns. But supporters of the decision argue that the Commission was faithful to the Competition Act in taking on this case. As mentioned, the Competition Act allows the Commission to consider exploitative abuses as well as exclusionary abuses (absent a competitive effects test, the Commission is free to condemn a broad range of conduct by a dominant body as abusive). This is disconcerting and perhaps should be altered in later amendments to the Act.

[297] Case 19/2010, Belaire Owner's Association v. DLF Limited and HUDA, Main Order at page 46, available at http://www.cci.gov.in/May2011/OrderOfCommission/DLFMainOrder110811.pdf.

[298] The Commission did not conduct their own economic analysis to test the propositions set out in the market reports.

Defenders of the decision further point out that the Commission is mandated to protect the consumer, and under this theory, they argue that penalizing the real estate firm with a hefty fine will incentivize housing developments to treat their customers fairly. In addition, the choice to adjudicate matters of this kind may serve to fill regulatory gaps. There is no regulation of real estate and development in India, and contract cases often languish for many years in court. However, this does not mean that the Commission is the appropriate body to resolve these issues. If the Commission turns its attention to contractual disputes, which seem to be under the jurisdiction of the Consumer Protection Act, they will be forced to divert resources from other matters, which may result in a net consumer welfare loss. In many ways, it is surprising that the Commission chose to investigate this case at the exclusion of other compelling claims. A cynical view is that this case proves that the Commission will use its grant of discretion to protect India's richest citizens, such as the wealthy homeowners who brought the complaint in *DLF*.

D. Lack of Enforcement in Cartel Cases

While the Commission has taken a hard line against abuses by dominant entities, it has declined to engage in substantial enforcement efforts against horizontal agreements. The Commission has investigated only a handful of cartel abuses and has found an actionable violation in three.[299] In these cases the Commission imposed paltry fines on the guilty parties despite its power to levy higher fines against horizontal agreements.[300] And it has dismissed

[299] Three actionable violations have been found in cartel cases (both were collective boycott cases): Mr Vijay Gupta v. M/s Paper Merchants' Association, Main Order available at: http://www.cci.gov.in/menu/OrderVijay150411.pdf; Delhi and Others and FICCI - Multiplex Association of India v. United Producers/ Distributors Forum & Ors., Main Order available at: http://www.cci.gov.in/May2011/OrderOfCommission/FICCIOrder260511.pdf; and M/s. FCM Travel Solutions (India) Ltd., New Delhi v. Travel Agents Federation of India & Ors., Main Order available at: http://www.cci.gov.in/May2011/OrderOfCommission/fcmtravelmainorder17nov2011.pdf.

[300] In the Multiplex Association of India case, the Commission held that the Copyright Act gave a movie producer cartel no protection, and held that the producers had engaged in "cartel-like" behavior that was reachable under Section 3. The Commission then analyzed the factors listed in Section 19(3) and found that the

several promising cases even after the Director General's investigation found evidence of a *prima facie* case.

In *Neeraj Malhotra v. Deutsche Post Bank Home Finance,* the Commission dismissed (in a 4 to 2 decision) an allegation that an Indian Banking Association violated Section 3 of the Competition Act. During his initial investigation, the Director General found sufficient evidence to support a Section 3 claim, including minutes from a 2003 meeting held by the Indian Banking Association ("IBA") in which a group of banks decided to limit market competition by fixing a prepayment charge on loans and to generate fee based income through these fixed charges.[301] The banks justified this agreement by claiming that the levied prepayment charges were important in order to "prevent migration of borrower accounts from one bank to another," and "to dissuade the borrowers from shifting to other banks," among other things.[302] Despite this compelling evidence, the Commission dismissed the Section 3 claims as unsubstantiated. The Commission also dismissed abuse of dominance

producer's behavior had had an AAEC on competition. But when it came time to determine the penalties, the Commission focused on two mitigating factors (that it had previously discounted). First, the Commission noted that the dispute began before the Competition had become effective (although some of the exclusionary behavior continued afterwards). Second, the Commission emphasized that the MRTP Commission had passed an injunction against the multiplexes in 2007. Case 01/2009, Main Order of the Commission, at 122, available at http://www.cci.gov.in/May2011/OrderOfCommission/FICCIOrder260511.pdf. The Commission concluded that the ends of justice would be met by imposing a fine of 100,000 INR on each of the 27 defendants along with a cease and desist order. This was contrary to the penalty provided in Section 27 of the Competition Act, which would have been equal to three times the profits earned during the period of agreement, or ten percent of turnover, whichever is higher.

[301] The DG highlighted a statement from the IBA Circular which said, "At the meeting the need for a common approach in fixing prepayment charge on loans was suggested by some of the members. After detailed discussion, the Committee, while fully appreciating the market dynamics, decided that a suitable communication be sent to member banks bringing out the viewpoints expressed by the members so that the member banks could take a decision on levy of commitment charges and prepayment charges." Neeraj Malhotra, Dissenting Order by R. Prasad, page 5, available at http://www.cci.gov.in/menu/RPrasadDissenting.pdf. Various other circulars were sent out, including one that "specifically spelt out levying of 0.5%-1% prepayment charges as reasonable and the decision in this regard was left to banks to decide." Neeraj Malhotra, Order of Commission, page 147, available at http://www.cci.gov.in/menu/OrderOfCommission.pdf.

[302] Neeraj Malhotra, Dissenting Order by R. Prasad, page 6, available at http://www.cci.gov.in/menu/RPrasadDissenting.pdf.

claims (even with evidence that the prepayment penalties were being used in order to prevent locked-in customers from switching to other banks).

It is not clear why exactly the Commission shied away from condemning this straightforward cartel abuse. In the U.S., this evidence would be sufficient for a finding of a horizontal agreement between unrelated rivals, which is per se illegal. And while the Section 101 of the TEFU allows the EC to hear defenses before condemning an agreement, the bank justifications would have certainly failed to excuse this concerted behavior.

The Commission's reticence may be due to a lack of capacity. The opinion did not rely on antitrust economics to support its finding. The Commission majority instead emphasized the fact that the banks had not adopted an entirely uniform prepayment charge (all the banks charged a rate between 0% and 2%, with almost all charging 1%). And the majority opinion emphasized that while the circular specified a "reasonable" rate, it stated that it "should be left to the banks to decide."[303] Thus, there was not unequivocal evidence of an agreement, according to the Commission.

If this evidence is not sufficient to establish an offense under Section 3, it is not likely that the Commission will ever be able to investigate and condemn horizontal agreements by competitors. Cartel cases are notoriously difficult to prove—very often the illegal concerted behavior will be hidden from the authorities. But in this case, the Commission had direct evidence of a meeting between competitors and an agreement to fix a fee rate. It is not clear why the Commission was willing to impose a hefty penalty on the DLF housing group but refrained from condemning the explicit horizontal agreement made between sixteen of India's largest banks.

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[303] Neeraj Malhotra, Order of Commission, page 147, available at http://www.cci.gov.in/menu/OrderOfCommission.pdf.

In another case, the Commission found "cartel-like behavior" between film distributors and producers, but then imposed a paltry fine.[304] The Commission collected just one lakh[305] from each of the guilty film distributors and producers despite the fact that the Act specifically defines the penalty for cartel violations at three times the company's profit or 10% of its turnover, whichever is higher.[306] Critics reasoned that corruption at the Commission might have contributed to the lenient outcome.

Circumstantial evidence suggests that corruption may have affected the Commission's investigation in *Deutsche Bank.* For one, the complainant (a lawyer) failed to respond to the commission after the director general filed his investigation report.[307] Many speculate that he was paid off or threatened, an occurrence that is not uncommon in high stakes cases in India. While his absence should not have adversely affected the Commission's investigation, his disappearance means that there has been no appeal of the Commission's order. While the Act states that "any person aggrieved by any order of the Commission" may appeal the order, no borrower has stepped in to do so.

Finally, the lack of cartel enforcement has rendered the Competition Act's leniency program completely ineffective. The leniency program provides reduced fines for whistleblowers to incentivize self-reporting.[308] The program was heralded as an important tool for the Commission to use to unearth cartel activity. However, the program has failed to inspire any

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[304] *See*, footnote 30.
[305] A lakh is a unit equal to one hundred thousand.
[306] Critics allege that the commission has selected its cases with an eye towards preferential treatment for complainants with deep pockets, and will take a lenient attitude when cases allege abuses by wealthy defendants. However, the Commission has imposed hefty fines on large business in other cases, such as MCX, which complicates this theory.
[307] Rahul Singh, *The Contours of Competition,* LIVE MINT, (December 13, 2010), available at http://www.livemint.com/2010/12/13214927/The-contours-of-competition.html?h=B.
[308] *See,* §46 of the Competition Act.

cartel participants to come forward. Until the Commission begins to enforce Section 3 and impose fines, the leniency program can provide no benefit to whistleblowers.

V. How to build a robust competition institution in India?

The Commission's first three years of antitrust enforcement have been successful in many ways. They have made good on their promise to review mergers quickly. They have worked hard to clear a heavy docket, including many cases that had been left behind during the transition from the MRTP Act. They have properly dismissed consumer protection suits that do not allege a Competition Act violation. In many ways, they have made the most of their limited resources.

However, several issues remain. Serious capacity issues are crippling the Commission's enforcement efforts. In order to correct these problems, the foundation of the Commission must be altered. The members must either be trained or replaced with individuals who have a background in antitrust economics. And they should begin to use economic analysis when arriving at conclusions in the orders. This will help them develop precedent that the business community can rely on. Further, the Commission must change its enforcement priorities and focus on cartel abuses. For one, taking a hard line on cartel abuses would result in significant consumer benefits and promote a competitive market, increasing overall welfare, which would improve the Commission's institutional standing. Further, the economic analysis used in demonstrating a naked restraint would arguably be simpler than the nuanced inquiry for abuse of dominance violations such as predatory pricing (in which the Commission would not only need to define markets, but also determine the correct measure of cost, and so on). Thus, taking on relatively straightforward abuses would help the Commission develop institutional capacity with a relatively low margin for error.

A. Training

The biggest impediment to well-reasoned orders is that the members are not trained in competition law. The majority of the members who issue the decisions are ex-bureaucrats who have had impressive careers in government, but in fields outside of competition law. For example, Amitabh Kumar, the first Director General of the Competition Commission, was a former Income Tax Commissioner. He knew nothing about competition law when he arrived and taught himself competition law in order to prepare for the job.[309] Without proper training, the Commission will continue to engage in rough and ready economic analysis, resulting in poorly reasoned decisions.

Further, the members of the Commission have not taken an aggressive approach to enforcement which indicates that they may be insecure about their own skills. When given the chance to refrain from deciding a case, they have done so. For example, as of August 2011, the Commission had taken up 82 cases but had pronounced a judgment in just three.[310] And the members have chosen to investigate only a handful of cases *sua moto*. Further, the Commission has imposed penalties in a small number of cases (without explanation as to why these cases warranted such hefty penalties). These facts support the conclusion that the members of the Commission are insecure about their skills and ability. And without taking on an active role in enforcement efforts, the Commission is prohibited from doing much to promote a competitive market.

However, so long as capacity continues to be an issue, this insecurity may be a blessing. As mentioned, the Commission's penalties have been modest thus far (except for recent abuse of

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309 Interview with Amitabh Kumar, January 15, 2012.

310 John Samuel Raja D & Rohit Deb, *Can understaffed Competition Commission of India deliver prudent judgments?* THE ECONOMIC TIMES (August 15, 2011) available at http://articles.economictimes.indiatimes.com/2011-08-15/news/29889067_1_cci-members-competition-policy-competition-regulator.

dominance cases) and the large majority of their decisions have been uncontroversial. But the Commission may burden the growth of the Indian economy if it imposes hefty penalties and blocks mergers without an understanding of basic antitrust concepts.

B. Corruption

It is unclear whether the Commission's mistakes have been the sole product of capacity issues or whether they have also been undermined by corruption. On the one hand, the Commission does not seem to be favoring big business, at least in its merger analysis.[311] However, there are inexplicable contradictions in their orders thus far. Why, for example, did the Commission target DLF, while refraining to investigate the alleged price fixing in *Deutsche Bank*? Why did the leading plaintiff disappear in the *Deutsche Bank* case? And is there any truth to the rumors that the *MSX* majority opinion was written by a team of lawyers?[312]

The limited resources allocated to the agency only exacerbate corruption. The Commission should also be as independent as possible and free from all political interference. For this reason, it is a mistake to staff the Commission exclusively with ex-bureaucrats who may not be invested in their new duties. For one, critics allege that the members may be pre-occupied with notions of rank and seniority. For example, two members were outraged with the appointment of Ashok Chawla as agency chief because he had previously held a less senior

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[311] Professor Singh points out that the Commission has pushed back against corporate lobbies by adopting a literal interpretation of the merger regulations. This has led to "absurd interpretational outcomes" and "portends high transaction costs for the businesses." Rahul Singh, *India's Tryst with 'The Clayton Act Moment' and Emerging Merger Control Jurisprudence: Intersection of Law, Economics and Politics,* (Publication Forthcoming).

[312] Srivatsa Krishna, *Four vital steps to fight corruption,* THE TIMES OF INDIA (June 19, 2011), available at http://articles.timesofindia.indiatimes.com/2011-06-19/all-that-matters/29676836_1_power-sector-corruption-quality-power.

government position.[313] The members even threatened to quit if the appointment succeeded. Other individuals have alleged intimidation within the branches of the Commission has contributed to an environment where members of the staff are afraid to disagree with their superiors.[314] This environment is not conducive to the generation of neutral outcomes that would solely facilitate market competitiveness.

The Commission could also improve the transparency of its processes. The Commission has not made public the complete set of investigations that it has opened, nor has it make the entire set of Director General's reports available for public scrutiny. Doing so would help alleviate corruption concerns.

C. Precedent

The Commission should to use rigorous economic analysis to create precedents that the business community can understand and rely on. Once the Commission is comfortable applying antitrust economics, it should articulate economic frameworks for each decision. So far, the Commission's orders have offered very little guidance. The Commission has chosen to apply a SSNIP test when performing market definition in a handful of cases. In other

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313 Ronojoy Banerjee, *Senior CCI Members Oppose Ashok Chawla as New Chief*, THE FINANCIAL EXPRESS (June 27, 2011), available at http://www.financialexpress.com/news/senior-cci-members-oppose-ashok-chawla-as-new-chief/809087/1.

314 John Samuel Raja D & Rohit Deb, *Can understaffed Competition Commission of India deliver prudent judgments?*, THE ECONOMIC TIMES (August 15, 2011), available at http://articles.economictimes.indiatimes.com/2011-08-15/news/29889067_1_cci-members-competition-policy-competition-regulator. ("There is an inherent conflict of interest in this directional flow of orders and division of responsibilities. Asks a senior official in the DG office: 'Do you expect us to submit a report that is contrary to the commission's finding that there is a violation of competition laws when my performance rating and budget approval is in their hands?' Of the 60 investigations completed by the DG, only thrice has it reversed the initial opinion of the CCI members to say there is no violation.")

Perhaps members of judiciary would be in a better position to focus on the merits of the case. In the *Steel Authority of India* case, the Supreme Court overturned an order by the CAT which disagreed with the Commission's finding. This was a momentous moment because the chief of the CAT, a recently retired Supreme Court judge, was overruled by inferior justices.

cases, they have described the test as an "indulgence of intellect." The Commission would be wise to take a consistent approach to market definition so that entities planning mergers or engaging in aggressive behavior may be on notice that their behavior may bring them under scrutiny of the antitrust laws. And adopting economic tests and articulating bright-line rules would help the Commission avoid the chilling of pro-competitive behavior.

D. Carving out Enforcement Priorities

After the Commission has addressed its capacity issues, it should carve out enforcement priorities and refrain from becoming backlogged by a flood of meritless complaints.[315] The Commission has stated that it intends to pursue a greater number of cases *suo moto.*
This approach, if thoughtfully pursued, is a necessary step.

i. Enforcement Priority: Hard Core Cartels

Judge Posner once wrote that the focus of the antitrust laws should be limited to (1) cartels and (2) horizontal mergers large enough to create monopoly power or to facilitate cartelization.[316] If the Commission wishes to achieve its consumer protection mandate, it must take a hard line on cartels. The Commission would do well to focus their attention on horizontal abuses for several reasons. For one, the Commission would not need to engage in a complicated inquiry. Once evidence of a horizontal agreement has been found, the agreement will be presumed to have an AAEC. By focusing on straightforward abuses, the

[315] For one, the Commission has so far been focusing on clearing its docket and responding to claims (a number of which do not allege competition abuses). In many cases, the Commission will accompany a dismissal for failure to allege a competition abuse with lengthy analysis. For example the Commission dismissed Suomoto v. North Delhi Power Ltd. & BSES & Ors., Case 19/2008 available at http://www.cci.gov.in/May2011/OrderOfCommission/SuomotoMain19-2008.pdf. for the failure to implicate a competition issue. But this is embedded in a longer discussion about whether or not fast-running electricity meters were actually running fast. This additional analysis is a pure waste of resources.
[316] Richard Posner, *The Chicago School of Antitrust Analysis*, 127 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 925 (1979).

Commission would be able penalize culpable parties with a smaller margin for error. This would also give the members time to develop their skills before they take on more complicated cases.

Further, by coming down strongly on cartel abuses, the Commission would help the Commission gain public approval. Horizontal price-fixing imposes tangible consumer harms. And a number of studies have alleged that cartels, both within India and internationally, have artificially inflated prices in a number of sectors. The public may be more likely to support an agency that penalizes collusive behavior in order to benefit the general public.

While the Commission would be wise to address the cartel abuses that have been filed by private parties, the Commission should also try launch *sua moto* investigations of sectors that are allegedly cartelized. So far, complaints have alleged abuses in the cement, steel, tire, and trucking industries.[317] But the Commission may also find a range of abuses in the Indian healthcare industry. In India, pharmacists often negotiate terms with drug manufacturers. Further, tying has been alleged to exist between hospitals and pharmacies. These abuses have a substantial negative impact in India, where the high cost of healthcare is the number one factor causing an Indian family to fall below the poverty line.[318]

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317 *See,* G.R. Bhatia, *Combating Cartel in Markets—Issues & Challenges,* page 5, available at http://www.competition-commission-india.nic.in/speeches_articles_presentations/GR.BhatiaArticle.pdf; Ritu Raj Arora and Runa Arkar, *Detecting Cartels in the Indian Cement Industry: An Analytical Framework,* available at http://www.iitk.ac.in/infocell/announce/convention/papers/Industrial%20Economics%20%20Environment,%20CSR-01-Ritu%20Raj%20Arora,%20Runa%20Sarkar.pdf.

318 *Healthcare Costs Pushing Indians Below Poverty Line: WHO,* THE ECONOMIC TIMES (November 1, 2011), available at http://articles.economictimes.indiatimes.com/2011-11-01/news/30345823_1_poverty-line-healthcare-medical-council.

Other developing countries have focused on price-fixing for staples, such as milk, bread, transportation, and utilities, which harms the broadest base of consumers.[319] Researchers at CUTS, an independent consumer organization, have found that seller cartels target basic necessities, such as diet staples.[320] By targeting such abuses, the Commission would demonstrate its commitment to protect consumers at all income levels.

Further, the Commission should begin to initiate investigations against international cartels. The U.S., Canada, and Europe have imposed penalties on international cartels for decades in the potash, soda-ash, and bulk-vitamin industries. A study by Levenstein and Suslow calculated that developing countries were substantial importers of these cartelized products.[321] For years, CUTS has asserted that the Indian economy has been adversely impacted by soda ash and bulk vitamin cartels. In the 1990s, CUTS began to investigate an alleged global conspiracy to fix the prices and sales volume of vitamins. The organization estimated that the cartel was extracting $25 million in illicit profits due to the cartelization of the Indian market throughout the 1990s.[322] The organization documented the evidence that it collected, and passed on the information to the Director General of the MRTP Commission. However, after a preliminary investigation, the DG reported that no case could be made. However, Section 32 of the new Competition Act makes clear that extraterritorial abuses are within the Commission's jurisdiction. The Commission would do well to re-open investigations in these and other sectors.

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319 The South African Competition Commission has investigated and penalized a bread cartel with a substantial fine. *See,* The Competition Commission v. Pioneer Foods (Pty) Ltd, 15/CR/Feb07, available at http://www.comptrib.co.za/cases/complaint/retrieve_case/1120.

320 *See,* Eleanor Fox, *Economic Development, Poverty and Antitrust: The Other Path,* 13 SOUTHWESTERN JOURNAL OF LAW & TRADE IN AMERICAS 211, 114 (2007).

321 Margaret Levenstein and Valerie Y. Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 ANTITRUST LAW JOURNAL 802 (2004).

322 *See*, Pradeep S. Mehta, *Competition Policy and Consumer Welfare, A Functional Competition Policy for India*, CUTS CENTRE FOR COMPETITION, INVESTMENT & ECONOMIC REGULATION, 127 (2006).

Finally, recent acquisitions of Indian pharmaceutical companies by multinational firms have raised substantial competition concerns.[323] As mentioned, this has resulted in complaints that the merger thresholds are too high and should be calibrated by sector. Another solution would be to amend the Act to allow the Commission discretion to review mergers that do no meet prescribed thresholds if an AAEC was likely to occur. However, this approach would add to uncertainty and would likely meet resistance from the business community.

ii. State Owned Enterprises and Liberalization

In India, State-owned monopolies are widespread and dominate the infrastructure industries. In the past few decades, an emphasis on privatization inspired the government to offload government shares in more than forty state owned enterprises. However, the government still maintains a control over India's most profitable companies.[324]

The Commission has expressed interest in privatizing state owned enterprises and breaking apart certain industrial sectors.[325] R. Prasad, a member of the Commission (known for his many dissenting opinions) explained that this is a high priority for the Commission. He hopes to continue to re-open investigations against Coal India within the next six months.[326]

The question of industry privatization is complex and has vocal supporters and detractors. It is not clear that privatization will guarantee greater efficiencies and consumer choice (especially in the case of natural monopolies with large economies of scale). And if a publicly owned entity is sold to a private monopolist, this will likely result in greater consumer

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[323] *Pharma acquisitions to be routed through CCI,* THE HINDU (October 11, 2011), available at http://www.thehindu.com/news/national/article2526526.ece.

[324] Madhu Bala, *Economic Policy and State Owned Enterprises: Evolution Towards Privatization in India* (November 14, 2006), available at http://mpra.ub.uni-muenchen.de/17946/1/MPRA_paper_17946.pdf.

[325] Vinod Dhall, *Competition Law & Policy in India;* Presentation prepared by the Competition Commission of India (June 2004), available at http://cci.gov.in/images/media/presentations/1vinod_dhall_16june04.pdf.

[326] Interview with R. Prasad, January 14, 2012.

harm.[327] However, in general, freeing up the market has generated great economic benefits for developing countries. To the extent that privitization is a "competition policy" issue, the Commission will not have a substantial role to play. However, if the Commission continues to scrutinize state-owned monopolies, this would at least re-open the question of whether the Indian system results in consumer harm.

VI. CONCLUSION: AN ANTITRUST REGIME BY INDIA, FOR INDIA

In re-drafting its competition laws, the Indian government chose to adopt a competition enforcement regime inspired by the laws that have matured within developed nations. The Competition Act borrows statutory language from competition law in the western world and thus benefits from the evolution of antitrust enforcement that has occurred over the last century. But while Commission's starting point is an amalgamation Western competition law, its enforcement has been unique. India must continue to develop enforcement priorities and interpret its guiding statute in a way that is congruent with its unique economic situation. As Eleanor Fox has said, "the challenge is to understand when foreign [competition] law is appropriate and when it is not."[328]

India has one of the fastest-growing economies and a vibrant private sector. However, this growth has not changed the economic position of half of India's population, which still lives under the poverty line.[329] Going forward, the Commission should continue to foster market efficiency and support a competitive marketplace that will promote economic growth. It should not overly burden business with uncertain rules for compliance. But the Commission

[327] This was the case in Mexico, where a private company was effectively protected by the government in order to benefit its president. *See,* Mary Anastasia O'Grady, *A Telecom Monopoly Cripples Mexico*, WALL STREET JOURNAL, (Feb. 10, 2006), at A19.
[328] *See,* Eleanor Fox, *Economic Development, Poverty and Antitrust: The Other Path,* 13 SOUTHWESTERN JOURNAL OF LAW & TRADE IN AMERICAS 211, 221 (2007).
[329] *Oxford Poverty and Human Development Initiative Country Briefing: India*, (July 2010), available at http://www.ophi.org.uk/wp-content/uploads/Country-Brief-India.pdf.

must also calibrate its competition priorities in order to protect a broader base of consumers. It may choose to enforce its laws with an eye towards upward mobility for the poor. In order to do this, it must begin taking a harder stance against cartel enforcement.

The Commission has chosen to depart from U.S. and EU antitrust jurisprudence in several respects. While I have criticized its abuse of dominance analysis, some may argue that the Commission's heavy scrutiny of conduct by dominant entities is sensible. The Commission may wish to ensure that dominant firms are not using their power and leverage to exclude smaller firms. An enforcement policy that handicaps dominant firms in order to protect competitors (who are likely to be smaller start-up firms) departs from the U.S. model but may promote economic mobility. The Commission may decide that this tradeoff is worthwhile in order to promote development. However, the Commission will harm India's market competitiveness if it punishes efficiency. This could cripple major industries and harm the global competitiveness of its strongest sectors. Thus, the Commission must not lose sight of economic efficiency in its quest to promote development and upward mobility. Only time will reveal whether the Commission will successfully balance these objectives.