

THE COMPETITION COMMISSION EXAMPLE SHOWS RIGHT STRUCTURING OF REGULATORS, AMONG OTHER ATTRIBUTES, IS ESSENTIAL FOR OPTIMISING THEIR CAPABILITIES

Board versus board

REPORTEDLY, COMBINATION NOTICES were piling up with the Competition Commission of India (CCI), as it did not have the requisite quorum (three Members) since October 2022 to take a view on them. The 'doctrine of necessity' was invoked in February 2023 to address this issue for the time being. When a third member is appointed, the issue will be resolved.

However, a sustainable solution requires addressing three structural limitations. First, the law typically creates a Board governed by a Board, an Authority by an Authority, a Council by a Council, a Commission by a Commission, etc. For example, the Securities and Exchange Board of India Act, 1992 establishes a Board, namely, the Securities and Exchange Board of India. The general superintendence, direction, and management of the affairs of this Board vests in a Board of Members. In simple words, the former Board is an entity, while the latter is its Governing Body. Most statutes, however, do not distinguish between these two. The Competition Act, 2002 does not distinguish between (a) the CCI as an entity having an office, employees, assets, and other resources, and (b) the Commission of Members (Commission) having the responsibility to steer the entity, establish its objectives, and hold it accountable for delivering on those objectives. Consequently, the CCI cannot transact any business if the Commission does not have a quorum.

Second, the Act envisages that every decision on behalf of the CCI shall be taken by the Commission in a meeting. This severely limits the capacity/output of the CCI to that of the Commission. A regulator performs three sets of functions: quasi-judicial, quasi-legislative, and executive. The statute generally specifies functionaries like a whole-time member, adjudicating officer, and disciplinary committee to perform quasi-judicial work. It mandates the Governing Board to perform quasi-legislative functions and

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to provide direction to the organisation. It enables the Governing Board to delegate executive and administrative tasks to different functionaries like the secretary, executive director, and chief general manager, who discharge the duties and functions on behalf of the regulator, in the manner prescribed. Such delegation expands organisational capacity and ensures timely service delivery.

The third relates to the general fabric of the statute. Most statutes have provisions like: "All questions which come up before any meeting of the Commission shall be decided by a majority of the Members present and voting.." The statute, however, does not spell out which questions to come up with. Many regulators have found working solutions essentially because of their role envisaged in the respective statute. The Competition Act, as originally enacted, provided for judicial proceedings based on a 'complaint'. The law was amended in 2007 to convert the CCI into a regulator and proceedings before it to be inquisitorial, which is triggered by an 'information'. Since the amendment was not comprehensive, the CCI remains trapped in a judicial body with the soul of a regulator. The entire organisation with hundreds of employees exists only to support the meetings of the Commission.

A notice of combination is neither a

complaint nor information. It is like filing a prospectus for an initial public offer with Sebi. An empowered officer clears the prospectus in accordance with the operation manual, and regulations laid down by the Governing Board. Approval of combination by the Commission is as much an executive function as clearance of a prospectus by Sebi. This is why the competition law provides for approval of combinations through green channel in some cases and the Competition (Amendment) Bill, 2022 proposes deemed approval of combinations if a view is not taken within 21 days. Even if the Governing Board has been superseded or does not have a quorum, the executive functions of the regulator and consequently the

market transactions do not suffer. The Competition Law Review Committee in 2019 noted these limitations. It recommended that the law must view the CCI as a body corporate, and the Commission as a governing body of members—separately, with clear roles and responsibilities attached to each of them. The former shall operate under the oversight, control, and direction of the latter. It also recommended that the Commission may make bye-laws delegating its executive or administrative functions to a functionary—the chairperson, a member(s), or an officer(s) of a certain level, subject to such condition

as may be provided therein. These recommendations could be incorporated into the Bill, presently under consideration by Parliament. When this is done, the empowered functionary would approve combinations in accordance with the established procedure, without troubling the Commission. This would expand the capacity of the CCI manifold.

Given the size of the Indian economy, which encompasses markets for millions of products and inputs for them, the CCI should also conserve its energy/resources for more pressing tasks. In the current framework, the CCI scrutinises combination notices to ascertain if consolidation of control over enterprises has an appreciable adverse effect on competition within relevant markets. However, what matters from a competition perspective is the consolidation of control over market power. Control over two large enterprises may not necessarily mean control over markets. This precisely explains why only about 2% of merger filings are approved with remedies. Similarly, there can be control over markets without any consolidation of enterprises. The competition law should regulate control of market power rather than control over enterprises, which is the job of the securities regulator. Regulation of control over enterprises, without control over the market, is not only an unreasonable restriction on business but an avoidable burden on the CCI.

For a fast-growing, fifth-largest economy in the world, holding up business decisions by regulatory delays is indefensible. The full economic/opportunity cost of such delay is too high to be ignored. In a globalised business world, when countries enable business growth with larger playing fields and softer rules, India should not remain oblivious to the new realities and slide back. The capacity constraints of authorities need to be eased in tune with the dynamic requirements of a fast-paced economy. Much of the regulatory capabilities, processes, and regulations must be made contemporary—very fast.