

Dealing with marketplace bullies - The Hindu BusinessLine

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The Competition Commission of India (CCI) recently passed three high decibel orders in relation to digital markets. These orders covered new ground on market dominance and its abuse, supported by far superior data and analysis. Yet, in his parting interview, former chairperson Ashok Kumar Gupta said: “The need and rationale for ex-ante regulation to supplement these efforts of CCI cannot be over-emphasised.”

The need for ex-ante regulation stems from two strands. First is the ineffectiveness of ex-post actions. The CCI has levied an aggregate penalty of around ₹20,000 crore over the years. The deterrent effect of this penalty is not visible on the ground as realisation of penalty has been negligible, thanks to protracted litigation. Even this penalty comes after prolonged proceedings, which put undue burden on the informant to establish the case and during which the miscreant continues the misconduct.

This largely explains why the CCI receives hardly 100 pieces of information a year alleging anti-competitive conduct, though India is home to a \$3 trillion market, comprising millions of product markets and geographical markets. Further, the rule of reason guides determination of the contraventions of the competition law, where what matters is the ‘context’ rather than the ‘conduct’.

For example, only an enterprise having a position of strength can abuse its dominance. Two reasonable persons would have two opinions if an enterprise has a position of strength. Depending on the skill and expertise of personnel, the kind and extent of information available, and quality of tools and technology used, one may arrive at a false context. In such a situation, enforcement actions to correct (conduct-related) market failures can be counterproductive.

Second is the effectiveness of ex-ante actions. Free and fair competition at the marketplace ensures the optimum allocation of resources and, consequently, optimum economic well-being. If someone abuses its market power to influence either demand or supply for any product, the economy is likely to divert resources from/to other uses to/from this product. This changes the incentive structure and sets in motion a series of diversions.

This destroys competition; no ex-post action can ever reset the clock back to its optimum nor can it make good the loss the consumers and producers suffered during the misconduct. That’s why an enemy of competition is considered an enemy of the economy. It is the duty of the competition authorities all over the world to save enterprises from enemies of competition, which is possible only by proactive regulation and preventive surveillance.

Ex-ante and ex-post are opposites, representing forward looking and backward looking approaches to deal with market misconduct. The Competition Act, 2002, as originally enacted, provided for ex-post action by way of a judicial proceeding by the CCI, following an investigation by the Director General (DG), generally based on a complaint. Since it was not in sync with the standard regulatory

structure, the Act was amended in 2007 to bifurcate the CCI into two bodies, namely, (a) the CCI as a market regulator for preventing and regulating anti-competitive practices, and (b) the Tribunal as a quasi-judicial body to dispose of appeals against CCI's orders.

This transformed the CCI into a regulator, the nature of proceedings before it from judicial to regulatory, and the trigger for inquiry from complaint to information, though process is yet to transit fully from adversarial to inquisitive. Some further changes like making DG a part of the CCI are in the offing, through the amendment Bill presently before Parliament, to better arm the CCI as a regulator, though it falls short of making it a full-fledged regulator.

Market norms

A shift to market economy required two major changes in governance edifice, namely, the institutional environment (shift to an almost complete form of law) and the institutional arrangement (delivery of governance of markets by regulators). This enables regulators to prescribe market norms through regulations continuously to strike the moving targets while keeping the laws relevant to times. It is something like a flight that has developed snag. Only option is keep flying while repairing.

For example, the regulator notices a conduct which distorts resource allocation. It could cover it within the ambit of 'misconduct' by an amendment to the regulations. This would prevent most potential miscreants from continuing the misconduct, while the regulator could penalise the recalcitrant ones for contravention of regulations. This would prevent anti-competitive practices in the economy, which is the prime mandate of the CCI.

A regulator is not worth its name if it does not prevent misconduct. For example, SEBI has prohibited manipulative, fraudulent and unfair trade practices in the securities market. In addition to blanket ban on such practices, the regulations have listed about 20 categories of conduct deemed to be manipulative. The market knows upfront what is permissible and what is not.

A regulator could facilitate building capacity in the ecosystem to ensure compliance with the regulations, encourage the stakeholders to inform aberrations and have mechanisms to detect aberrations. It must penalise the miscreants through enforcement actions, but not to lay down the law.

This model of governance is different from the ex-post approach generally followed in matters relating to civil liberty.

In contrast, the market laws have created regulators to make regulations, apprehend the violators, punish them and rewrite regulations to meet the emerging needs of the market. Such an ex-ante approach to law-making and enforcement is essential in minimising potential violation-overload on the system as well as for harnessing benefits of a market economy better.

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