COURTS & JUSTICE LAW JOURNAL

SUO MOTO POWERS OF THE CCI: A ROAD MIRED WITH PROCEDURAL POTHOLES

Prateek Bhattacharya[*]

I. INTRODUCTION

The boom of the global economy over the course of the last few decades has witnessed a proliferation of both public and private sector enterprises in various industries across the world, with their fingers in multi-jurisdictional pies. This growth of enterprises has engendered the birth of regulatory agencies (i.e., regulators) tasked with oversight over such enterprises and the industries in which they operate. As many of these enterprises operate in niche industries,[1] or the activities of these enterprises require review from a niche perspective,[2] the roles allocated to such regulatory agencies are likewise niche. As a result, regulatory agencies, as we know them today, are governmental bodies exercising some level of

[*] The author is an Assistant Professor and Assistant Dean (Scholarships & International Collaborations) at Jindal Global Law School, O.P. Jindal Global University. The author would like to thank Prof. Deborah Healey and Fadi Metanios for their inputs on the working of the Australian Competition and Consumer Commission. This paper is based on a preliminary draft presented at a workshop on 'The Judiciary and Public Policy: Australia & India Compared', co-hosted by Gilbert + Tobin Centre of Public Law, University of New South Wales, and O.P. Jindal Global University. The author can be contacted at pbhattacharya@jgu.edu.in (ORCID: 0000-0003-1794-3980). All views and opinions reflected in this paper are personal.

[1] For example, oil and gas, energy, railways, technology, telecommunications, etc.

[2] For example, competition, securities, investment, consumer access, etc.

independence from the direct supervision of the executive, and which are allocated the role/ responsibility of overseeing such niche industries, activities, or operations.[3]

With the object of performing such role of oversight, these governmental agencies or regulators, which are themselves creatures of legislative acts/ statutes, are empowered to create rules and regulations that have the force of law.[4] In effect, such agencies/regulators are endowed with the ability to make minor policy decisions owing to the dynamic nature of the industries and/or areas which they regulate, as well as due to their advanced knowledge and expertise in how best to deal with issues that may arise.

Similarly, regulators are also often equipped with the ability to initiate inquiries into potential conduct that may be illegal in nature. Such power to initiate inquiries or investigation on its own is referred to as *suo moto* (or *sua sponte*) powers of a regulator, and not all regulators are vested with the same. The existence of *suo moto* powers may be specific to the nature of activity which a regulator oversees. Further, the scope of a regulator's authority in exercising these powers varies from jurisdiction to jurisdiction.

In this backdrop, this paper seeks to examine the *suo moto* powers of the Competition Commission of India ("**CCI**" or "**Commission**"). The paper shall first discuss the evolution of the adversarial and inquisitorial systems of justice in India, and the need for creation of regulators that can exercise a hybrid judicial system, borrowing elements from both the adversarial and inquisitorial systems of justice. The paper shall proceed to discuss the policy-making powers vested with the CCI in the over-arching context of applicable regulatory theories – in doing so, the CCI's intended functions under the Competition Act, 2002 ("**Act**" or "**Competition Act**") will also be covered, while also drawing comparison with corresponding competition regulators in the United Kingdom and Australia. Thereafter, the paper shall study specific cases where the CCI has exercised its *suo moto* powers. Finally, the paper shall highlight potential issues and inconsistencies that persist in the current and future functioning of the CCI.

[3] Encyclopaedia Britannica, *Regulatory Agency*, *available at:* https://www.britannica.com/topic/regulatory-agency (last accessed Feb. 26, 2020).

[4] *Id.*

II. ADVERSARIAL & INQUISITORIAL SYSTEMS OF JUSTICE

Systems of justice can be broadly divided into two categories: the adversarial system which was followed in England and was transposed to other common law jurisdictions which experienced English colonial presence, and the inquisitorial system which was followed in continental Europe. Both these systems were different approaches taken for conducting trials albeit with the common objective of administering justice.

1. The Adversarial System of Justice

The adversarial system requires the case/ investigation/ trial to be initiated by a complaint filed by an opposing party. Therefore, the pre-requisite to the adversarial system is the presence of adversaries, i.e., opposing sides who take contradictory positions by making arguments,[5] counter-arguments, rebuttals, and sur-rebuttals, with one being in constant competition with the other to best each other by convincing the judge and jury that their interpretation of the facts and legal references is correct. To achieve this process, the adversarial system of justice is flexible in letting the adversaries (and their lawyers) decide how to best structure their issues, what evidence to submit, which witnesses to call, and which legal provisions or judicial precedents to rely on. As may be imagined, the process can be very time consuming, as sufficient and equal opportunity must be given to each adversary to counter the points made by the other, keeping in mind the natural justice principle of *audi alteram partem*. This corresponds to higher costs of litigation owing to substantial time and due diligence required for a case.

In the Indian court system, where there are no trials by jury, the judge adopts a more 'hands-on' approach since they are also the ultimate decision-maker. This often results in trials comprising a back and forth between the bar and the bench, where the judge requires the clarifications and explanations on a real-time basis, and can be adamant about not proceeding with the trial until such clarifications and explanations have been provided by the parties. Consequently, the judge's line of questioning may alter the structure of issues pre-decided by the parties who are expected to accordingly adapt.

[5] *Present Indian Judicial System: An Analysis*, *available at:* https://shodhganga.inflibnet.ac.in/bitstream/10603/95269/8/08_chapter%203.pdf (last accessed Feb. 26, 2019) at 73.

Therefore, in the adversarial system, while the judge cannot go beyond the facts and evidence presented by the parties, or make their own investigation or raise legal arguments *suo moto*,[6] the judge's responsibility is to be objective and free from bias like a passive umpire,[7] that ensures the parties play by the rules. This reference is increasingly appropriate, given that courtrooms in jurisdictions which have adopted the adversarial system of justice, are more often than not described as 'battlefields'.[8]

2. The Inquisitorial System of Justice

In contrast to the adversarial system of justice, in the inquisitorial system, the judge's powers are not limited to mere clarification(s) or sole reliance on the submissions of the parties. The judge dons the role of an investigating magistrate with a wide array of powers ranging from calling for evidence and documents, questioning witnesses and suspects, search and seizure of a suspect's premises with the aim of discovering evidence that can be both incriminating and exculpatory in nature – such power would not be unbridled in nature, however, and the parties would always reserve the right to request that a particular fact/issue be analysed in greater detail. The role of the judge is therefore, first and foremost, to conduct a full-fledged and thorough investigation of the facts, documents, records, etc. to uncover the truth. After conducting such investigation, the judge must provide a reasoned analysis of the documents and evidence uncovered and provide an initial decision based on such findings.

In some jurisdictions, the investigating magistrate also has the power to commence investigations on a *suo moto* basis and not on account of a direction from a superior authority or a complaint filed by an aggrieved party. Expectantly, this system of justice would be less time consuming as the parties do not have the flexibility of adducing any or all evidence which they would like to and would instead be constrained by the parameters laid down by the investigating magistrate – essentially, the parties' submissions would be limited to the information requests made by the investigating magistrate, and while the parties are free to provide additional information, the investigating magistrate may disregard it as having no bearing to the investigation.

[6] *Id.* at 74.
[7] *Id.* at 74, 77.
[8] *Id.* at 73.

3. Inquisitorial plus Adversarial: A Hybrid Judicial System

A closer analysis of the inquisitorial system of justice reveals that it is not at odds with the adversarial system and can rather be considered as a refinement of that system, by adding the inquisitorial step before the matter reaches the adversarial stage. This ensures a less time consuming, and correspondingly a more cost effective, process of delivering justice. This hybrid system of justice, which combines the rigidity of the inquisitorial system as the first stage along with the flexibility of the adversarial system as the second stage of the process, has evolved in common law jurisdictions across the world, particularly when dealing with non-traditional disputes, which have been taken out of the ambit of traditional courts (at least at the first instance) and been given to specialised regulators. The scope of duties of these regulators differs from jurisdiction to jurisdiction. Some examples include the Federal Trade Commission and Securities Exchange Commission in the United States which are respectively tasked with competition law and securities law enforcement, the Competition Commission of India ("**CCI**") and the Securities and Exchange Board of India ("**SEBI**") which are similarly respectively tasked with competition law and securities law enforcement, as well as the Australian Competition and Consumer Commission ("**ACCC**") and the European Commission ("**EC**"). These regulators have been entrusted with the inquisitorial powers discussed above and are tasked with conducting an in-depth analysis of the facts of a case and potential violations in their area of expertise. In cases of regulators whose powers are also quasi-judicial in nature, they are also the same authority making the first judicial determination on the alleged legal infringement.

III. REGULATORY POWERS AND THE CCI

1. Regulatory Policy Making

The specialist role played by a regulator demands that it be allowed a certain level of independence, to enable it to effectively carry out its functions. Such independence may include delegated rule-making, or quasi-legislative powers in addition to quasi-judicial powers. The CCI is endowed with quasi-legislative powers under Section 64 of the Competition Act, allowing it to frame regulations for the purposes of the Competition Act. Section 64(2) provides an indicative list of matters where the CCI is at

liberty to make such regulations, including the form in which mergers and acquisitions (i.e., 'combinations') are to be notified to the CCI as well as the filing fee for such notification,[9] the procedure to be followed for engaging experts and professionals,[10] and the manner in which penalties imposed are to be recovered.[11] In addition, Section 36 of the Competition Act provides the Commission with the discretion to regulate its own procedure, in the same way that Civil Court have similar powers under the Code of Civil Procedure, 1908. This rule making power is effective in cases where the CCI requires the discovery or production of documents/ records in order to discharge its investigative functions. The CCI may therefore lay down the rules which would govern such process and which would be binding upon the both the party being investigated as well as the CCI.[12] Such rule making power is in conformity with the Raghavan Committee Report, the legislative document based on which the Competition Act was drafted and finalized, which recognized its need for the Commission to be able to effectively carry out its functions.[13]

The quasi-judicial powers of the CCI are provided for at Sections 26 and 27, read with Section 36 of the Competition Act. Section 26 deals with both administrative orders akin to departmental inquiries such as the commencement of investigations,[14] as well as orders of a quasi-judicial nature requiring an independent application of mind and legal opinion by the Commission.[15] Section 27 squarely covers orders which require a thorough analysis of the Competition Act resulting in findings of an illegal conduct and imposition of penalties – accordingly, Section 27 orders mandate a judicial application of mind, and the CCI is seen as exercising its quasi-judicial functions when passing such orders.

In the process of arriving at such judicial orders, the approach taken by the CCI sometimes differs from the routine procedure set out in the statute

[9] Competition Act § 64(2)(b)-(c).

[10] Competition Act § 64(2)(d).

[11] Competition Act § 64(2)(g).

[12] To clarify, any such rules/regulations formulated must comply with the Indian Evidence Act, 1872. *See* Competition Act § 36(2)(e).

[13] SVS Raghavan Committee Report (2000), ¶ 6.1.4 [hereinafter Raghavan Committee Report].

[14] Competition Act § 26(1). *See CCI v. Steel Authority of India Limited*, 2010 (10) SCC 744 [hereinafter *CCI v. SAIL*]

[15] Competition Act § 26(2), 26(6).

due to the unique nature of the case. For example, when making a determination under Section 26(1) of the Competition Act, the CCI reserves the right to invite an opposite party(ies) for a 'preliminary conference' where it offers such party the opportunity to present its arguments against any allegation raised by a complaint (i.e., an information filed under Section 19(1)(a) of the Competition Act) or any suspicion highlighted by the CCI itself (i.e., in exercise of its *suo moto* powers). While there is no express provision for such preliminary conference, the CCI is well within its power to grant the same and chooses to do so depending on a variety of factors, ranging from the gravity of the case, the extent of information available on record, to whether the opposite party(ies) is coming under the CCI's scanner for the first time or whether they are repeat offenders.[16] Another example is evidenced by the oscillating nature in which the CCI imposes penalties upon opposite parties found to be in contravention of the Act. A cursory review of different orders of the CCI in recent years, passed under Section 27 of the Act, finding enterprises in breach of Section 3 (i.e., anti-competitive agreements) or Section 4 (i.e., abuse of dominance) demonstrates that the CCI's penalties have ranged from 4% of the relevant turnover,[17] to 10% of the relevant turnover,[18] to even 1% of the average turnover.[19]

The primary purpose that a regulator like the CCI has been vested with such a wide array of discretionary powers is due to its responsibility to, *inter alia* "prevent practices having adverse effect on competition" and "promote and sustain competition in markets".[20] Regulating such conduct requires special skills such as an economic understanding of markets, the ability to foretell potential effects on competition in such markets, and making a finely balanced decision so as to neither ignore glaring anti-competitive conduct, nor cause a chilling effect through over-regulation. Accordingly, the CCI's powers have been tailor-made to allow it to adopt a "hands-on" approach

[16] This has been discussed in greater detail at Part IV.2, *infra*.

[17] *In Re: Cartelisation in the supply of Electric Power Steering Systems (EPS Systems)*, Suo Moto Case No. 07 (01) of 2014 (Aug. 9, 2019)

[18] *East India Petroleum Pvt. Ltd. v. South Asia LPG Company Pvt. Ltd.*, Case No. 76 of 2011 (Jul. 11, 2018)

[19] *Maharashtra State Power Generation Company Ltd. and Gujarat State Electricity Corporation Ltd. v. Coal India Limited & Ors.*, Case Nos. 03, 11, & 59 of 2012 (Mar. 24, 2017).

[20] Preamble to the Competition Act.

whereas the Government had taken a backseat by adopting a "hands-off" approach, a symptom of both the endogenous and exogenous factors that have moulded the Indian political economy over the last few decades. The next section will discuss this in more detail, in the context of regulatory theories.

2. Regulatory Theory

In order to better understand how and why regulators such as the CCI are provided a free hand in performing their functions, a background to regulation and the regulatory tool kit is required. Regulation extends to more than a set of legal rules, as it requires a varied, complex, thorough, and pervasive approach with the help of numerous, diverse and inter-connected tools.[21] In the case of competition regulation, the tools range from principles of natural justice to economic theories such as the Kaldor-Hicks efficient. Freiberg discusses the need for regulators to concentrate on the prosaic, day-to-day factors influencing behaviour resulting in the outcomes which attract the need for regulation.[22] Such factors can include social norms, ethical practices, codes of conduct or practice, guidelines, all of which comprise a 'web of influence' establishing the foundations of any regulatory practice.[23]

In the context of the CCI, these norms can include the social norm of traditional Indian businesses to discuss their respective prices or business plans, conduct which is frowned down upon under Section 3 of the Competition Act. It can also include the requirement of enterprises to have a competition compliance programme, which serves as a mitigating factor at the time of imposition of penalties.[24] The CCI goes about regulating this conduct by relying on its own 'soft laws' through rules, regulations, guidelines, and advocacy measures, in addition to the 'hard law' of the

[21] Arie Freiberg, *Re-Stocking the Regulatory Tool-Kit,* Regulation in an Age of Crises (Dublin, June 2010), *available at:* http://regulation.upf.edu/dublin-10-papers/1I1.pdf (last accessed Feb. 26, 2020) [hereinafter Freiberg]

[22] *Id.*

[23] *Id.*

[24] *See* Competition Commission of India, *Introduction to Competition Law (Part 6 – Competition Compliance Programme)*, at 6, *available at:* https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/Part%206%20Compliance%2021%20Nov.pdf (last accessed Feb. 26, 2020)

Competition Act.[25] These soft laws themselves rely on a framework of procedural rules, institutional instructions, minutes of meetings of members of the Commission, and an established system for collection of evidence.[26]

Market regulators such as the CCI are engendered due to exogenous factors such as market failures. Governments may seek market intervention by either creating markets for which there is a dire need, but which do not presently exist, or by regulating/dividing dominant enterprises through imposition of rules enhancing information sharing.[27] Due to the specialist nature of the requisite regulation, the Government delegates its legislative powers to the regulator. Accordingly, keeping in step with the idea of delegated legislation, the CCI is also empowered to frame its own soft laws, based on the assumption that the CCI 'knows best'. This is highlighted by the reality of challenges faced by constitutional democracy, where seemingly social, economic, or political problems "lie beyond the reach of ordinary judicial proceedings" and require specialist intervention.[28] Thus, the very basis of a court or regulator to delve into new areas of policy making can be legitimised by a clear end explicit indication from the framers that the regulator would and should enter into those areas[29] – Section 64 of the Competition Act serves as such indication of legislative intent.

In the late 1980's and early 1990s, India witnessed the introduction of internal reforms which gradually dismantled the previous 'License Raj' or 'Permit Raj' system, under which private companies had to take the express permission of the Government or a governmental agency before proceeding with their activities. This had caused a severe chilling effect, particularly for Indian companies that were attempting to compete on the international playing field. To add to the internal turmoil, the Indian economy was confronted with the threat of stagnation due to high import tariffs, market regulation, high taxes, and throttling of foreign investment. When the situation became dire, the Indian Government sought the assistance of the

[25] *Id.*

[26] *Id.*

[27] Freiberg, *supra* note 21.

[28] Theunis Roux, *Judicial Policymaking and Legal-Cultural 'Stickiness': An Indian-Australian Comparison* (unpublished paper presented at workshop on *The Judiciary and Public Policy: Australia & India Compared*, co-hosted by Gilbert + Tobin Centre of Public Law, UNSW, and O.P. Jindal Global University) [hereinafter Roux].

[29] *Id.*

World Bank and the International Monetary Fund by a bail out on the condition that India reform its License Raj system which had resulted in this stagnation.[30]

As a result, the internal reforms which led to the economic deregulation of India were the product of both endogenous and exogenous shocks, which destabilised the public and governmental understanding of law and regulation. The Government of India, wary to repeat its mistakes, embraced the idea of *ex-post facto* regulation which would be facilitated by regulators such as the SEBI, the Insurance Regulatory and Development Authority of India, the Petroleum and Natural Gas Regulatory Board, the Telecom Regulatory Authority of India, and the CCI.

3. Functions of CCI

The CCI is tasked with the regulation of conduct, which causes or has the potential to cause an appreciable adverse effect on the state of fair competition in India. It was established by the Competition Act although its powers to find violations of anti-competitive conduct were enforced only in May 2009. The delayed enforcement of the Competition Act was on account of legal challenges against the nature and functioning of the CCI as a judicial authority.[31] This led to the passing of the Competition (Amendment) Act, 2007 which revamped the functioning of the CCI to become the regulator it is today. Off the bat, the CCI was once again thrown off its bearings in the seminal case of *Competition Commission of India v. Steel Authority of India Limited*[32] with litigants questioning the ability of the CCI to pass quasi-judicial orders at a *prima facie* stage without giving the adversarial parties a right of hearing. The Supreme Court of India, recognising that the CCI was vested with administrative, inquisitorial, investigative, regulatory, and adjudicatory powers,[33] clarified that the CCI's preliminary order at its *prima facie* stage[34] was in the exercise of its administrative functions and was not to be confused with its subsequent

[30] Report and Recommendation of the International Bank of Restriction and Development and the International Development Association, Report No. P-5678-IN (Nov. 12, 1991), *available at*: http://documents.worldbank.org/curated/en/999451468260069468/pdf/multi0page.pdf

[31] *Brahm Dutt v. Union of India,* (2005) 2 SCC 431.

[32] *Supra* note 14.

[33] *Id.*

[34] Competition Act, at Section 26(1).

adjudicatory or determinative process.[35] At the same time, the Supreme Court laid down the ground rule that even when such administrative *prima facie* decisions are being passed, the CCI is expected to record some minimal reasoning.[36] In doing so, the Supreme Court clearly laid down the broad divisions of powers to be exercised by the CCI, and the CCI has attempted to abide by such division, going so far as to recognize that the "proceedings before it are not in the nature of a '*lis*' brought by the parties and thus such proceedings are inquisitorial and not adversarial in nature",[37] and a recognition that "proceedings before the Commission are in *rem*, not in *personam*".[38] Arguably, this is at odds with the role of the CCI, as envisaged by the Raghavan Committee Report which was clear in its instructions that the "CCI will have to be a quasi-judicial body with autonomy".[39]

The Supreme Court, in *CCI v. SAIL* also noted that the CCI has the power to commence investigations/inquiries on a *suo moto* basis under Section 19(1) of the Competition Act. This provision forms the basis of such *suo moto* powers, as it allows the CCI to enquire into alleged contravention of Section 3 (i.e., anti-competitive agreements) or Section 4 (i.e., abuse of dominance) of the Competition Act on its own volition. A corresponding *suo moto* power exists under Section 20(1) of the Competition Act for mergers and amalgamations, per which the CCI can initiate inquiries into why such transactions were not notified to the CCI before being consummated. These *suo moto* powers can trace their origins to the Raghavan Committee Report,[40] and have subsequently received the blessing of the Supreme Court that opined that a *prima facie* order directing the DG to commence investigation merely amounts to a departmental inquiry in the discharge of the Commission's inquisitorial functions.[41]

Once the CCI takes cognizance of an alleged anti-competitive conduct at the *prima facie* stage, it directs the Director General of Investigation

[35] *CCI v. SAIL*, *supra* note 14.

[36] *Id.*

[37] *Madhya Pradesh Chemists and Distributors Federation v. Madhya Pradesh Chemists and Druggists Association and Ors.*, Case No. 64 of 2014 (Jun. 3, 2019), ¶ 75.

[38] *Fast Track Call Cab Pvt. Ltd. and Anr. v. ANI Technologies Pvt. Ltd.*, Case Nos. 6 & 64 of 2015 (Jul. 19, 2017), ¶ 77

[39] Raghavan Committee Report, *supra* note 13 ¶ 6.2.2.

[40] *Id.* at 6.1.6, 6.4.0.

[41] *CCI v. SAIL*, *supra* note 14.

("**DG**") to commence a full-fledged inquiry into the matter and submit a detailed report to the CCI. For the purpose of conducting such an investigation/ inquiry, the Competition Act endows the CCI and the DG with powers ranging from search and seizure, requiring production of documents, deposition of any person or witnesses, conducting dawn raids, as well as permitting adversarial parties (i.e., the complainants and the opposite parties who have allegedly committed the anti-competitive conduct) to make submissions.[42] These expansive powers of the CCI have been recognised by the Delhi High Court as being even greater than the powers granted to the police under the Code of Criminal Procedure, 1973.[43] In keeping with the principle of separation of powers, it is imperative that the *prima facie* order does not interfere with its final order. Given that the same persons who passed the *prima facie* order may also play a role in the final decision making process, there is no option to the parties but to repose faith that they will not allow themselves to be influenced by their own initial order. The question, however, is whether mere reliance on faith affords sufficient legal protection to the parties to the dispute, with the practical answer being in the negative. This issue becomes all the more pervasive in *suo moto* cases where, more often than not, the CCI is highly motivated to initiate an investigation into a particular industry and the lack of any mechanism for strict separation of powers may result in the CCI's role becoming compromised.

An additional point to note is that, in the decade since the enforcement of Sections 3 and 4 of the Competition Act, the CCI has been facing a constant resource crunch with a shortage of personnel at all levels. This has often resulted in the CCI risking the 'revolving door' with persons who were previously serving in the DG's office (i.e., the investigative arm of the CCI) being rotated into the CCI's legal division (i.e., the adjudicatory arm of the CCI) due to their prior work experience. These persons are all public service officials, who may have been transferred to the CCI from completely unrelated government departments such as revenue, foreign affairs, corporate affairs, etc. and may therefore be new to law and/or economic theory.[44] This is the reason that the prior work experience of officers in one

[42] Competition Act, § 36, 41.

[43] *See Google Inc. v. Competition Commission of India*, W.P.(C) No. 7084/2014 (Apr. 27, 2015).

[44] For an exposition of this point, *see Lafarge India Limited & Ors v. Competition*

arm of the CCI is coveted by the other arm – unfortunately, this may result in a situation where the same person who was previously part of an investigation at the DG's office being tasked with writing the final order for the CCI's members when rotated into its legal division. Needless to say, this would give rise to significant issues of infringement of the doctrine of separation of powers. The only foreseeable recourse to prevent this, would be to revamp the recruitment process for such officials to make it less bureaucratic (and accordingly, less onerous), to attract qualified applicants in greater numbers.

It is noteworthy to add here that the Report of the Competition Law Review Committee ("**CLRC Report**") has failed to take cognizance of these issues and has, in complete contrast, suggested that the DG's office "need not function as a separate body as it aids the CCI in discharging its inquisitorial rather than adversarial mandate".[45] While this statement is not incorrect insofar as the CCI's inquisitorial functions are concerned, it is lacking insofar as the CCI's adversarial mandate comes into play where the issues discussed at the above paragraph may arise. In fact, the CLRC Report has gone to the extent of recommending that the DG's office be integrated with the CCI with the aim of achieving "administrative efficiencies",[46] in complete disregard for any semblance of separation of powers. This departure from independence and fairness of investigation by the DG in favour of an "additional layer of institutional costs/issues" has been criticised by the CLRC's own committee members.[47]

The additional layer is evidenced by the CLRC Report's recommendation that a 'Governing Board' be created to drive the CCI's policy decisions and for performing a supervisory role and specifically notes that such a Governing Board should not be involved in the discharge of the CCI's adjudicatory functions.[48] In doing so, the CLRC Report is nudging the CCI towards an 'Integrated Agency Model',[49] which would

Commission of India and Anr., Competition Appellate Tribunal Appeal No. 105 of 2012 (Dec. 11, 2015), at 51 [hereinafter *Lafarge COMPAT Order*].

[45] Ministry of Corporate Affairs, Government of India, *Report of the Competition Law Review Committee* (July 2019), at 5, 23.

[46] *Id.*

[47] Annexure IVB, *Observations of Mrs. Pallavi Shroff*, CLRC Report, at 196, ¶ 5.

[48] *Id.* at 22. This suggestion has made its way into the Competition (Amendment) Bill, 2020 which is currently pending before the Indian Parliament.

[49] *Id.* at 24.

mirror the functions of its counterpart regulators in other jurisdictions, while also avoiding the higher probability of confirmation bias which surrounds the bifurcated agency and integrated agency models of institutional frameworks for regulators.[50] While such a nudge is arguably in the correct determination, in terms of efficiency and productivity of a regulator, it is necessary to highlight that the possibility of confirmation bias in the integrated agency model cannot be completely ruled out, and that model relies on a support system provided by specialized appellate bodies to parties aggrieved by the Commission's decision. Such an appellate body would necessarily need to be an expert body with access to the time and resources required to decide appeals without delay.

However, the ground reality is that appeals from CCI decisions are made to the National Company Law Appellate Tribunal ("**NCLAT**"), which is tasked with adjudicating upon cases involving company law as well as insolvency and bankruptcy law, in addition to competition law. Further, there are no specialized benches at the NCLAT and its sitting judges/members are retired judges of the high courts or the Supreme Court of India, none of whom have any known experience/exposure to issues of competition law arising out of the Competition Act before their appointment to the NCLAT.[51] As a consequence, there is no scenario where competition law cases are heard by persons who have official experience or exposure to competition law or the Competition Act. In such a scenario, where the appellate body on which the institutional framework of competition law depends may be unreliable, even the slightest possibility of confirmation bias poses a significant threat to the legitimacy of that very framework.

4. Competition Regulators in Other Jurisdictions

A. European Commission

The European Commission ("**EC**") derives its substantive powers of competition regulation from Articles 101 and 102 of the Treaty on the Functioning of the European Union ("**TFEU**"). However, the procedural

[50] *Id.*

[51] The respective profiles of the judges/members of the NCLAT is testament to this fact. *See* National Company Law Appellate Tribunal, *About Chairperson*, *available at:* https://nclat.nic.in/?page_id=115 and National Company Law Appellate Tribunal, *NCLAT Members*, *available at:* https://nclat.nic.in/?page_id=117 (last accessed Feb. 26, 2020).

statute for implementation of Articles 101 and 102 is Council Regulation No. 1/2003 ("**Regulation 1/2003**").[52] An examination of Regulation 1/2003 demonstrates that many of its powers are similar to those of the CCI. For instance, Article 7.1 of Regulation 1/2003 permits the EC to make a decision requiring undertakings or association of undertakings to bring an infringement of TFEU to an end where it finds such an infringement pursuant to action taken either on a complaint or "on its own initiative". This *suo moto* power of the EC extends to interim measures ordered by the EC on account of urgency due to risk of serious and irreparable damage to competition.[53] The respective competition authorities of the Member States of the European Union also exercise similar powers under Regulation 1/2003.[54]

There are other similarities between the principles followed by the CCI and those of the EC. For instance, Recital 32 discusses the natural justice right of *audi alteram partem*, in the same way that the CCI follows this principle in the discharge of its adversarial and adjudicatory functions. Further, the investigatory powers of the CCI as discussed above mirror those of the EC, whose powers of inspection include entry into premises, examination of books and records and obtaining copies of these documents, and requiring depositions of officials and representatives of the entity being investigated.[55]

Regulation 1/2003 also demonstrates the integrated agency model followed by the EC due to its reliance on a system of an appellate institution in the form of the Court of Justice, which is empowered to review all decisions of the EC.[56] This is akin to provisions relating to the NCLAT in India under Chapter VIIIA of the Competition Act. However, where Regulation 1/2003 provides a blanket power to review ***all*** decisions taken by the EC, Section 53A(a) provides an exhaustive list of which decisions of the CCI can be appealed against. This poses a severe handicap for the parties

[52] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003), *available at:* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R0001&from=en (last accessed Feb. 26, 2020)

[53] Regulation 1/2003, Art. 8.

[54] Regulation 1/2003, Art. 5.

[55] Regulation 1/2003, Art. 20.

[56] Regulation 1/2003, Recital 33.

being investigated and aggrieved by certain orders of the CCI, due to the absence of any legal recourse following the proper channels of appeal.[57]

B. Australian Competition and Consumer Commission

The ACCC is Australia's competition and consumer law regulator with the aim of protecting consumer welfare, ensuring fair markets, and regulating industry by preventing anti-competitive behaviour and promoting fair competition.[58] The ACCC was established in 1995 with the amalgamation of the Australian Trade Practices Commission and the Price Surveillance Authority to administer the Trade Practices Act, 1974, which was subsequently renamed to the Competition and Consumer Act, 2010 ("**Competition and Consumer Act**"). The ACCC is responsible for the enforcement of the Competition and Consumer Act. In order to achieve its purpose of making markets work for consumers, the ACCC employs strategies such as maintaining and promoting competition, supporting fair trading in markets affecting consumers and small businesses, protecting the interests and safety of consumers, promoting efficiency, identifying market failures, and undertaking market studies in furtherance of such strategies.[59] Accordingly, the ACCC comes out with a yearly enforcement and compliance strategies.[60]

In cases of competition law enforcement, the ACCC may commence and complete investigations against any person, i.e., corporation and/or an individuals who the ACCC reasonably believes has breached the

[57] Examples of such orders are decisions taken by the CCI under Section 26(7) and (8) of the Competition Act.

[58] About Us, *Role of the ACCC*, *available at:* https://www.accc.gov.au/about-us/australian-competition-consumer-commission/service-charter#role-of-the-accc (last accessed Feb. 25, 2020).

[59] About the ACCC, *Our Role*, *available at:* https://www.accc.gov.au/about-us/australian-competition-consumer-commission/about-the-accc (last accessed Feb. 25, 2020).

[60] The priorities for 2019, which is applicable to the time of writing this paper, include misuse of market power, anti-competitive conduct in the financial services and essential services sectors, collection and use of consumer data by digital platforms, customer loyalty schemes, and advertising and subscription practices.

Competition and Consumer Act, whether such breach is criminal[61] or civil[62] in nature. Such investigative powers of the ACCC include search and seizure powers,[63] as well as the requirement of disclosure of documents and information, including cartel information.[64] All these powers fall under the *suo moto* powers of the ACCC. This is in addition to the avenue available to complainants to initiate private enforcement actions against persons for alleged infringement of the Competition and Consumer Act.

IV. CCI'S *SUO MOTO* POWERS IN LIGHT OF PROCEDURAL INADEQUACIES AND INCONSISTENCIES

The above discussion can be primarily crystallised into two points: First, there is an underlying issue of non-compliance with the principle of separation of powers, in relation to the manner in which the CCI conducts its functions, particularly in how the aforementioned 'revolving door' facilitates officials in the DG's office to be transferred to the CCI. Consequently, the CCI is prone to procedural inadequacies due to the absence of any rules or guidelines taking cognizance of this issue and taking corrective measures to address the same. Second, the wide allowance permitted to the CCI in the discharge of its functions, leaves room for the exercise of such functions in an arbitrary and discretionary manner. Since the CCI has neither laid down nor follows any hard and fast rule for all cases, this discretionary power has given rise to inconsistencies. These points shall be further discussed in the section below.

1. Separation of Powers and Procedural Inadequacies

The Raghavan Committee Report, which is the legislative document based on which the Competition Act was drafted and finalized expressly recognized the need for the separation of investigative, prosecutorial, and adjudicative functions in relation to the application of competition law.[65] It also recognized the need for a system of checks and balances to be in place

[61] Please note that investigation into cases concerning hard core cartels are conducted by the Australian Government Solicitor. *See* Competition and Consumer Act, Part VI, § 79.

[62] Competition and Consumer Act, Part VI, § 76.

[63] *Id.* at Part XID.

[64] *Id.* at Part XII.

[65] SVS Raghavan Committee Report (2000), *supra* note 13, ¶ 4.8.4(4), 6.1.5(c).

for ensuring that due process of law is followed.[66] The Raghavan Committee Report proceeds to discuss the need for a strict separation of the prosecutorial wing of the CCI from the investigative wing where each wing should be independent and not be burdened with the functions and responsibilities of the other.[67] However, none of these suggestions or recommendations of the Raghavan Committee have made their way into a set of rules or guidelines for the DG and the CCI to remain at arm's length from each other. As discussed above, rather than address this procedural inadequacy, the CLRC Report's recommendation would be to integrate the DG's office, in its entirety, with the CCI.

It is therefore clear that the principle of separation of powers, which is itself one of the principles of natural justice, is ingrained in the legislative intent behind the Competition Act. Failure to subscribe to this intent is a failing on the part of the regulator and amounts to the non-observance of natural justice that is itself prejudicial to any party aggrieved by the CCI's order.[68] While it is arguable that the DG merely investigates on behalf of the CCI, and should not be considered a mere puppet of the CCI, it is important to remember that the DG acts on the instructions and directions of the CCI when commencing inquiries under Section 41 of the Act. Therefore, both optically and for all practical purposes, the DG serves at the pleasure of the CCI, and any semblance of independence becomes highly circumspect.

2. *Audi Alteram Partem* and Procedural Irregularities

Another principle of natural justice relevant here is that of *audi alteram partem*, i.e., the right to a fair and proper hearing. The Supreme Court has clearly laid down in *CCI v. SAIL* that such a right of hearing is not required at the *prima facie* stage in relation to orders passed under Section 26(1) of the Act.[69] This is on account of such *prima facie* orders falling within the administrative components of the CCI's scope of powers, and thus amounting to little more than a departmental inquiry. One would think that such a clear direction from the Supreme Court would have cleared any confusion on the topic – however the ground reality is different. The CCI,

[66] *Id.* at 6.1.5(i).
[67] *Id.* at 6.1.8.
[68] *Lafarge COMPAT Order*, *supra* note 44, at 96.
[69] *Supra* note 14.

in its decisional practice, has demonstrated a haphazard approach to this direction from the Supreme Court – some *prima facie* orders do not accord adversarial parties the right to a hearing or 'preliminary conference', while other orders do. In some cases, the CCI has even invited submissions from the adversarial parties, even though there is no statutory requirement to entertain the same.[70]

This discretionary process of picking and choosing which cases or parties should be granted the right to attend the CCI's 'preliminary conference' before it opines on whether the case *prima facie* has competition law issues is little more than blatant 'cherry-picking' by the CCI with no legal backing. In doing so, the CCI has informally created a substantive route of inquiry, where it goes beyond merely reviewing the information received but also decides on which course the investigation should take.[71] The acceptance of additional information and the hearing of parties and their legal counsel at the *prima facie* stage has resulted in changing the nature of a simple 'departmental inquiry'[72] as envisaged by the Supreme Court into a 'fishing and roving exercise', where the CCI has already stacked the deck against the party being investigated. Unsurprisingly, when discussing the need for separation of powers, the Raghavan Committee Report also expressly warned against such 'fishing and roving' enquiries designed to threaten and harass corporates.[73] The CCI has therefore developed an informal practice that is both in utter disregard for the legislative intent with which it was created, and has resulted in a high degree opaqueness and unpredictability for market participants. The continuation of such procedural irregularity may result in adverse effects on investments by creating a chilling effect on the market.

V. CONCLUSION

Competition law in India, much like that in the European Union, Australia, and the United States keeps in mind, the welfare effects to the

[70] *See* Indranath Gupta, Vishwas H. Devaiah, and Dipesh A. Jain, *CCI's Investigation of Abuse of Dominance: Adjudicatory Traits in Prima Facie Opinion*, *in* A. BHARADWAJ ET AL. (EDS.), COMPLICATIONS AND QUANDARIES IN THE ICT SECTOR (Springer 2018), Ch. 9 at 185, 195-196.

[71] *Id.*

[72] *Id.*

[73] Raghavan Committee Report, *supra* note 13, ¶ 6.2.1.

end consumer. This is evidenced by the Preamble to the Competition Act which includes the protection of consumer interests in its statement of objects and reasons. This can be further buttressed by the language of the Raghavan Committee Report, which recognizes consumer interest as the ultimate *raison d'être* of competition policy.[74] Accordingly, consumer welfare can be considered to be a driving force behind the CCI, which may explain the CCI's inclination to be as efficient and productive a regulator as possible, often at the cost of due process natural justice.

However, such an approach is naturally not conducive in the longer term, where these procedural oversights have resulted in remand orders passed by the erstwhile COMPAT,[75] as well appeals filed before the Delhi High Court[76] or the Supreme Court of India.[77] It is therefore imperative that the CCI overcome the procedural inadequacies and inconsistencies in which it is mired, through a framework of rules and regulations in exercising its powers of delegated legislation. Such a step would not only increase the transparency of the regulator but would also serve as an incentive for increased investment and innovation into the Indian market. While consumer welfare is one of the elements provided for in the Preamble to the Competition Act, it is not the only one – it is therefore equally important for the CCI to promote and sustain competition in markets in India.

[74] Raghavan Committee Report, *supra* note 13, at Preamble, ¶ 1.1.9.

[75] *See, for example*, *Lafarge COMPAT Order*, *supra* note 44, *The Board of Control for Cricket in India v. Competition Commission of India and Surinder Singh Barmi*, Order of the Competition Appellate Tribunal, Appeal No. 17 of 2013 (Feb. 23, 2015*), Interglobe Aviation Ltd. (IndiGo Airlines) v. Competition Commission of India and Ors*., Order of the Competition Appellate Tribunal, Appeal No. 7 of 2016 (Apr. 18, 2016).

[76] *Mahindra & Mahindra and Ors v. Competition Commission of India*, W.P.(C) 6610/2014 (Dec. 11, 2018)

[77] *CCI v. SAIL*, *supra* note 14.