CCI verdicts fail to act as deterrents to malpractice

The competition watchdog’s purpose and relevance is being questioned both inside and outside the commission. Without enforcement, the regulator’s rulings haven’t set any precedents.

By Deepali Gupta, ET Bureau | Updated: Jan 02, 2018, 12.24 AM IST

In most cases, matters are stuck not on merit, but simply rejected as the process and presentation of the case has been found wanting in trial courts.

Five years on, that CCI verdict has lost most of its sting after being tossed back and forth between various courts. Pending judicial decisions has decided a similar fate for most penalties imposed by the commission since its inception in 2009.

After levying fines of Rs 13,981 crore since inception, the CCI has only recovered Rs 96 crore till March 2016. In fact, even its very first landmark verdict against real estate developer DLF for Rs 630 crore continues to linger in Supreme Court. The same is true of a Google verdict, in what was a breakthrough report from the commission ahead of global counterparts, who were also investigating the technology giant for monopoly practices.
Desai’s case too is languishing. “It started out well, but penalties are still stuck in court processes. As a result, cement prices in India are still nearly double those in neighbouring countries,” says Raju John, executive secretary, Builders Association of India, which had backed Desai to take on the strong cement lobby against cartelisation. Today, the decision on the penalty is still awaited from higher courts.

CAUGHT IN A VICIOUS CYCLE

In most cases, matters are stuck not on merit, but simply rejected as the process and presentation of the case has been found wanting in trial courts. The CCI is thus caught in a
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Without enforcement, the regulator’s rulings haven’t set any precedents and do not act as any sort of deterrent whatsoever. “We now use it as a bargaining tool and file applications on behalf of clients,” says a prominent lawyer; thereafter, investigations take long and frustrate some decisions, he adds.

“Clarity will emerge once jurisprudence evolves,” says Ashok Chawla, former chairman, CCI. Jurisprudence is historical examples that guide new decisions of a court.

Stressed with a limited number of demotivated researchers and bureaucrats unfamiliar with the judicial process, combined with the stringent stance of judges in appellate courts, a bulk of the CCI’s outcomes are being returned or overturned on technical grounds.

“A fully functional competition regime was expected to add at least 0.5% to the GDP. Unfortunately, this remains a pipe dream in the Indian context,” says Suhail Nathani, managing partner, Economic Laws Practice. He defends the CCI’s decisions against challenges in its early days.

“The miniscule recovery of fines and delay in the appeal process has also meant that there has been no compensation paid to those affected by anti-competitive conduct,” says Nathani. In the cement case for example, the CCI has powers to ask companies to refund the amount overcharged to each customer, with a receipt.

“In the end, it is the consumer who is suffering. Cement is used not only by builders, but individuals for home repairs,” reminds John of Builders Association.

In India, like the US and EU, the objective of the commission is to protect consumer interest and the law is drafted so some of the penalties collected would be paid to end customers who were affected by cartelisation. So far, though, no consumer has benefitted from this.

The EU commission has levied €9.39 billion of fines since 2013. “Over the past 10 years, we have recovered the large majority of fines imposed,” says Richardo Cardoso, spokesman for the commission.

Since 2009, when the Indian Commission was formed, till March 2016, the body ordered 277 investigations and issued 632 orders. Of these, 360 were challenged in the Competition Appellate Tribunal (Compat) and 114 were sent back to the commission, largely on technicalities. Of the remaining, 30 orders were overturned.
C REAKY APPARATUS
In the case against the Board of Control for Cricket in India (BCCI), the commission did not allow BCCI to refute all the facts and charges it later presented in court, when its penalty was challenged.

In penalties imposed on Coal India and the All India Organization of Chemists and Druggists, the CCI member who signed off the penalty hadn’t been present at the hearings when organisations were defending their stance before the commission.

Similarly, in its case against Adani Gas, when the commission found the court questioning the proof it had, CCI presented new documents as evidence.

The appellate court did not accept these and said CCI must first share and hear the company’s rebuttal, before presenting any further documents in court.

Naval Chopra, partner at law firm Shardul Amarchand Mangaldas, says, “The law needs to be amended to clear confusion on hearings and evidence gathering principles of the CCI… clarify that the law is meant to protect the process of competition and not individual companies.”

In the EU, the chairman of the competition commission signs on behalf of the commission and not an individual. If a penalty is challenged, legal processes are completed in court rather than tossing out the entire research, as per a London-based lawyer.

“In India, it’s considered to be an expert body, not a judicial body, but still expected to follow due process, which any public agency must do,” adds Dhanendra Kumar, former chairman, CCI, highlighting the conundrum. A mail with a detailed questionnaire sent to the current CCI commissioner did not generate a response till time of going to press on Monday.

TEETHING ISSUES
Many believe the CCI should not be put to such high standards of legal procedures because it delays outcomes. The body also shouldn’t have to hear every witness or representation a party wants to make, if it deems it irrelevant or repetitive, they say. “There is no need for all members sitting together to decide on all, even mundane, matters — it’s a waste of time and resources. Prioritise and emphasise timebound decisions,” says Kumar.

A lawyer practicing competition law says, “The Bar is being unnecessarily litigious. This is bound to frustrate the CCI staff,” pointing out that very few cases so far have been overturned on merit.

Hanging cases tend to demoralise the entire team. “Posts in the Director General’s office have always been considered punishment posts,” says a former official of the commission. Researchers are deputed from departments such as tax and police, and the central government. Churn tends to be high. The research team merely comprises 41 posts, from the 197-strong commission. Compare this to the EU Commission, which has a staff of 800, most of which can be designated for research.

As a result, some reports have taken as long as two to three years for the CCI to finalise, instead of the 50 days set out as a guideline. This also results in delaying approvals for mergers and acquisitions, which typically tend to be very time-sensitive. The EU awards default approvals to companies if time limit is exceeded by the competition watchdog.
BLOWN BY THE WINDS OF CHANGE

Earlier this year, the tribunal set up to deal with appeals of penalties was merged with the National Companies Law Appellate Tribunal. “By doing away with the COMPAT, the government practically erased institutional memory that was developed over the years to specifically deal with competition law,” says Economic Laws Practice’s Nathani.

Even after all these years, CCI is still finding its feet. Recent changes in regulations and increases in thresholds and timeframe to approach the commission dilute its authority, says the former official quoted earlier.

The Bombay High Court recently said the CCI was overstepping its jurisdiction as it tossed out an order of cartelisation against incumbent telecom operators that had not enabled interoperability with new player Reliance Jio Infocomm. The former official says decisions such as these undermine CCI and weaken its future stature.

“I feel, for a large country like India, one probably needs to have a few benches — say, in Mumbai and Chennai,” says Kumar. That is the model followed in the US, where punitive action for the antitrust body tends to be jail sentences, not fines. Apart from a 600-strong central body, the US has state laws that oversee competition in all sectors.

The CCI is a young body, compared to the decades and century of its global counterparts. But it is key to regulating a consumer-led market such as India. Experts say its decisions in real estate resulted in the Real Estate (Regulation and Development) Act, or RERA, a new regulatory law. CCI has also effected change in drug distribution. Since its inception, it has gained focus and commanded attention globally. So much so, that the next annual International Competition Network (ICN) Conference is scheduled in India for May 2018.

Now, it needs roots for a firm grip in the Indian consumer market.
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