

**03<sup>RD</sup> CUTS-CIRC BIENNIAL CONFERENCE**

**“COMPETITION REFORMS: EMERGING CHALLENGES IN A GLOBALISIG  
WORLD”**

**NOVEMBER, 18-19<sup>TH</sup>, 2013**

**SESSION III: HOW INDEPENDENT AND ACCOUNTABLE ARE COMPETITION  
AGENCIES**

**SPEAKING NOTES: MR AMIT KAPUR, PARTNER, J. SAGAR ASSOCIATES,  
INDIA**

Herewith the broad outline of my keynote. This will of course get adapted / altered to some extent. I was of the view that I should introduce the topic at the first instance setting the stage for individual comments and sum up at the end rather than give a keynote which takes over / covers the entire field.

1. I commend to the house to refocus on the topic in context of the end-game, ie, efficacious and effective competition regulation. To examine the independence and autonomy of competition regulatory institutions in diverse infrastructure sectors, there is a need to define 3 key elements of the topic:-

(a) What is the level and nature of desirable independence in regulatory authorities?

(b) What is the level and nature of desirable autonomy in regulatory authorities?

(c) Which institutions are being evaluated: CCI alone vs. CCI and DG vs. CCI and sector regulators that impact competition vs. all players including governments that impact competitive environment?

2. Once we define the above framework, we must be cognizant of the manifest reality:-

(a) Regulators are still seen as a part of the policy makers. Political executives and bureaucrats transgress into regulators' selection, appointment, and financial allocations.

(b) At the Commission as also senior staff level CCI lacks any representation from professional bodies or private/non-governmental experts and seem to predominantly have retired bureaucrats.

(c) With dominant incumbents/service providers in all infrastructure sectors (with perhaps the salient exception of mobile telephony) belonging to the public sector, inherently their complying with regulatory directives and decisions is predominantly dissatisfactory. They are amenable to pressures of social-welfare economic decisions of Governments which often are non-compliant with the competition law.

3. There is no perceptible evidence of the competition authorities showing willingness, skill and tools of monitoring as also interfering with anti-competitive conduct of PSUs and governmental agencies. This skews the competition. Policy and its efficacy since even today 70% to 80% of the economy is enmeshed in public sector and public procurement with dominant play of SOEs and PSUs.

4. As per accepted best practice, any robust and credible regulatory mechanism must be characterized by certain overarching principles/attributes:

(a) Autonomous, Empowered and Accountable Institution.

(b) Following Due process of law.

(c) With clearly defined objectives, role and jurisdiction of regulatory institution.

(d) Regulatory mechanism must be dynamic and evolving to anticipate and meet emerging challenges.

5. In this context for regulatory authorities, it is useful to focus on the aspects identified below:-

(a) How well defined and delineated are the respective roles of the Government, the Regulators and the Judiciary?

(b) How effectively can the regulatory institution monitor, identify, prevent and/or correct anti-competitive behaviour?

(c) How effective is the performance monitoring of the agency (CCI does not have a clear-cut strategy or a business plan.)

6. Re. Institutional Autonomy necessarily requires the following:-

(a) Selection of competent, qualified and eminent persons through a credible, open and impartial selection process –

(i) Whilst the government shall retain the ultimate right to appoint the regulator, the selection process and mechanism may be made credible.

(ii) There must be a cap on the number of bureaucrats who can be appointed. The entry age for bureaucrats must be restricted at 55 years to ensure that only serious and committed people join.

(b) CCI must be established as an expert body with credible multi-disciplinary composition and expertise.

(c) While there is due process for removal of members (Section 11), it is diluted by section 56 of the Competition Act, which has the potential of being misused to get rid of members at the discretion of the government.

7. Re. Financial Autonomy:

(a) Guarantee financial autonomy by providing a one-time grant so as that CCI is not dependent upon budgetary allocations for its annual work plan and are available to them for use, subject to audit

(b) Inadequate finance can cripple the efficacy, efficiency and autonomy of the regulatory body. Sole dependence on government allocations would be retrogressive leading to compromising the autonomy and should be done away with.

8. Re. Operational Autonomy:

(a) No decision of the CCI in any case should be subject to scrutiny except by the appellate body.

(b) The directions of the Central Government in terms of section 55 cannot be made binding.

9. Re. Regulatory empowerment: functions, powers & objectives. CCI should have the discretion to determine compensation packages for its employees, or at least, be vested with flexibility to deviate from the generally applicable practices to compensate as market conditions.

10. Re. Regulatory accountability:

(a) The regulator shall function within the established principles –

(i) Publish its Annual Reports, result-based annual work-plan with a 3-year perspective; Regulatory objectives, philosophy, and Principles of regulation.

(ii) Submit to the Ministry of Finance or the Planning Commission or the Parliamentary Standing Committee, its Annual financial report; and Annual performance report including the outcome assessment with respect to the Annual Report.

(b) The regulator shall be required to give notice of proposed action/proceedings with a suitable and fair opportunity of hearing to the concerned parties. Within the time-frame stipulated and overarching mandate, the regulators shall secure right of hearing, fair procedure to be followed and reasoned decision-making based on relevant considerations.

(c) The law shall mandate openness, transparency and information-sharing mechanism. The sector regulator's decision-making process shall be conducted in a participative mode. The regulator shall follow a transparent, time-bound and pre-publicized consultation process at the culmination of which it shall record the consultation proceedings and its conclusions.

11. Re. Transparency: Principles to be ensured by law, rules and regulations –

(i) Share with the concerned parties any analysis/document/material/directive under consideration in regulatory processes/decision-making except for specific confidential information;

(ii) Provide an opportunity to object to/ comment on, in writing, during stipulated timeframe;

(iii) Secure a fair opportunity to explain, respond and participate in hearings;

12. Re: Harmonizing with the sectoral regulators ... effective use of section 21 in true spirit.

\*\*\*\*\*