# Competition Commission of India

# Annual Lecture 2024

- R. Venkataramani, Attorney General for India

1. "What is economic methodology? Economists do it with models because there is no shortage of demand for the curves they supply." This quote is no comment on the discipline of economics but about the wealth of economic arguments that critique or support competition laws.

2. Why do we need a regulation of all human activity is an ancient but perennial question. This question runs through all domains of law. Indeed, law itself is an idea of regulation. In different regulatory domains the question is answered differently. In the field of competition law this question has now travelled seemingly unconnected domains beginning from prevention of unfairness in competition, to price determinations and consumer welfare, and entering the age of common good as the determining factor. Are we transforming what was conceived as a little tool in the field of competition in the ages of Anti trust law to a tool of fairness distribution, and thus of economic control? Or whether this movement is necessary to balance innovation and creativity and distribution of the fruits of innovation as we are entering a new age of social, economic, technology and global relationships, in order that freedom of innovation is not substituted by complete State or other coercive controls? Remember Paul Samuelson's thought that "markets can work but only with government created guardrails." The guardrails include competition regulations, except that the competition law framework may not be equivalent to the sovereign power of the State to occupy basic policy making. I am looking at how the "invisible hand" made famous by Adam Smith, the engine of free market, and the umbrella of social benefit, can coin new ideas of coexistence?

3. In the context of innovation, it is argued "that restraints on innovation can impose a far greater cost on society than simple restraints on competition. second because innovation is behaviourally much less predictable than price competition is, causation and harm are particularly difficult to prove." This gives insights on procedural tools effectiveness and enforcement ease. After all an enforcement that is cumbersome or of evidentiary errors is antithetical to justice fairness.

4. As we are debating the effectiveness of regulating competition -which means taming the shrew- we have in our handbag the advantages of the U S antitrust law, with all its wrinkles, the European Union laws on competition, with its early exclusive focus on European market integration, and about more than 140 countries' experiences now on competition tales. We are called upon to look at organised distribution networks that dominate the economic landscape today. They cover everything from the sale and maintenance of automobiles (including tractors in agriculture sector) and computers to food franchising, drugs and hospital services, education services, entertainment sector, in all of which rules of innovation and establishment sustenance clamour for freedoms. These freedoms seem to be in unease with regulation, sometimes for wrong reasons. Thus the task of navigation between incentives and free riding of market ideas, will be a distinct legal innovation, distinct from other regulatory thoughts like SEBI. Indeed the 2023 Amendments to competition law are going to be experiments of a different kind. They cannot be assessed without a structured social and legal impact studies which will include changes in behavioural components of all actors in the arena. Common examples of human behaviour are how we stuff our baggages in aircrafts without common concerns, and the intervening hands of the air-hostess in baggage setting! Of course competition law is more than the smiling air-hostesses!

5. I wish to quote Adam smith here: “in general if any branch of trade or any division of labour, be advantageous to the public, the freer and more general the competition, it will always be the more so …….. people of the same trade seldom meet together even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices ……. though the law cannot hinder people of the same trade from some times assembling togetherness (for instance of cartels of today) it ought to do nothing to facilitate such assemblies.”

6. Let me look at few broad aspects. They are the international convergence of competition laws and the take offs there from; the challenges to regulatory laws in general; the task of redistribution of economic power between consumers and suppliers and suppliers *interse*; the newly emerging sustainability considerations and competition policy, as the business of sustainability will govern the sustainability of business, and new challenges in the light of digitalisation. We also have questions such as what are the effects of competition laws on wealth distribution and whether competition law could provide a viable and effective instrument to address economic and other connected market inequalities which are natural consequences of market growth.

7. Let me first have brief mention about digitalisation. All competition regulators across the world are grappling with the emerging trends in digital markets. It is old news now that data is the main currency of the internet and access to vast quantities of user data is thus coveted. By now, we have seen action taken by a number of competition regulators worldwide against these gatekeepers of data, especially in circumstances where this access point is used to their own benefit and to the detriment of consumers by stifling competition. The current debate on this, is around the Digital Competition Bill, which is a proposed legislation that seeks to act on the learnings of competition dynamics in the internet and digital world over the last decade. The debate is essentially one of ex-post action

(investigation and sanctions) and the possibility of false negatives on the one hand versus an ex-ante action (bans and prohibitive rules) and the possibility of false positives on the other. The debate is also of casting a wide regulatory net, agnostic of the activity involved versus having more market specific regulations. To aid this, tools such as behavioural economics are useful. Behavioural economics provides insight into human preferences, which the assumptions made in traditional economic models entirely ignore. Such exercises become all the more important when considering the uniqueness of the Indian market, Indian peoples, and the non-uniformity of consumer preferences across regions as well as across different types of population centres.

8. Ever since the intrinsic limits of competition law were highlighted by judge Frank Easterbrook in his seminal article "the limits of antitrust", there is a burgeoning literature on the subject of under enforcement or over enforcement, the combinations of relatively centralised enforcement of competition law and decentralised private enforcement and the variations of the enforcement mechanisms. Given the existing framework of our competition law and the lessons learnt and to be learnt will need placing our debates a little beyond our domestic frontiers and at the same time to pursue our specific national matrices.

9. The five forces that shape industry competition namely:
    1. rivalry among existing competitors,
    2. threat of new entrants,
    3. bargaining power of suppliers;
    4. bargaining power of buyers,
    5. as also the perpetual threat of substitute products i.e. new products or services.

    For example, we can see the market of commercial aircraft with Airbus and Boeing. The rivalry between dominant producers are strong, the threat of entry, substitutes, and the power of suppliers are benign as it is called. While in the passenger carrier services the Indian scene has shown many stories of the rise

and the fall. Again in the movie space, with the proliferation of actor and players in substitute forms of entertainment, the power of producers and suppliers of movies which is critical assumes importance. The photographic film industry is another example with Kodak and Fuji who had to cope with the advent of digital photography. In many of these instances intermediates customers gain significant bargaining power when they can influence the purchasing decisions of customers downstream. Consumer electronic retailers, jewellery retailers, and agricultural equipment distributors and even packaging industry are examples of distribution channels that exert a strong influence on end customers. The e-commerce platform and its monopoly by few international giants is another example. They very width of their control and user inclinations, zealously created by these giants can be an area for scrutiny and fittingly e-commerce policy as one among the hundred-day agenda of the government to come in. CCI has many such fishes to catch. How do we articulate fairness and equal or level playing field in all these areas? How do we look at start-ups and the excuses if any we may have to provide for their economic deviancy only to enable over a period of time, their sustainability itself as in promotion of fair competition? In all these is the role of the law an intruder or a necessary intervenor?

10. In all these the consensus in the international community about the role of competition law is not very evident. The year 1984 saw the Havana charter which included a chapter on restrictive business practices.

11. All regulatory ideas are either simple (prohibition) or multi aspected like restrictions coupled with permissions. In both cases we use sanctions and penalties as instrumental tools. Almost all laws use combinations of these. But what combinations are relevant and ideal for a particular area of human activity will depend upon the desirability and manageability of procedures, and outcomes, as also the wise scope for freedoms, all of which will serve common welfare. In the context of every class of service or goods common welfare will mean sections of the community or the whole of the community, as the case

maybe. Where pharmaceutical and health services are concerned it will mean community as a whole. In other contexts, it can be like education sector, real estate sector, hospital sector, communications or transport sector and all their subdivisions. But in every sector many products and services are interconnected or some standalone.

12. I will deal with this inter connectedness aspect a little later. A common feature one can notice as technology develops is the push or drive to connect two or more markets together. It has been noticed that in technology rich markets competition policy disputes involve claims about interconnection, compatibility or interoperability. The good old Motion pictures patent case of 1917, involved tying arrangements. The Micromax case dealt with by CCI on a complaint from Micromax that Ericsson was indulging in unfair trade practices by demanding unfair, discriminatory and exorbitant royalty, for its GSM technology related patents is a contemporary example which the U S supreme court would have nodded. We have a large volume of studies and reports, and judgements that take us into witnessing the patterns and history of all market arrangements to generate, capture, retain and control the demand and supply element of free markets. The field of law and economics which has studied all this, as Professor Sunstein notices (2016) has altered and challenged our legal thinking in relation to all regulatory domains.

13. John Kenneth Galbraith writing in 1950 and talking about how powerful buyers might offset powerful sellers charging monopoly prices used the term “countervailing power”, to describe the power equations in markets. Writing on the economic and legal analysis of Antitrust law in the U S, Carl Keyson and Donald Turner, while acknowledging the existence of powerful buyers in some situations had almost discounted their significance for Antitrust. What is this matching of powerful buyers with powerful sellers? The presence or absence of powerful buyers, all of us know is a factor that goes into merger analysis. Probably we are talking about bilateral monopoly of buyers and

sellers and all its spectrum, and the relevance of strengthening this in the entire debate on competition law. How do we design and promote this distribution of powers and bring in the public interest power as the moving hand of demand and the market duty to supply and how do we harmonise the private initiatives to create, innovate and equitably retrieve the due returns of innovation and creativity.

14. We also need to keep talking about why some laws are so effective being obeyed by citizens and enforced by functionaries of the State, and some are not? Perhaps every law goes into disputant state, but the nature of dispute marks the distinction. Many litigations are in the realm of procedures, or misapplication or even discriminatory application. Kaushik Basu asks this simple but important and puzzling question "why merely putting some "ink on papers" should change human behaviour?" Changing human behaviour in the world of markets where freedom is the driving force, is no easy task. At a practical level we are called upon to ask the question - is the competition law adequate to this task, for the law is called upon to deal with the emanations of market power in all its manifestations. Just as human innovations are dynamic so also market manoeuvres. Imagine pillows which are too hard and painful to the neck and those which are too soft which sink under the weight of our heads. We want the market to be malleable and non-resistant. The challenge therefore is to have a basket of principles that will not treat the market as a sinner, (though sinners are the fishes that abound) but to provide very relevant empowering and synthesising principles.

15. The move towards sustainability takes us into more insightful and engaging areas. The existence of dominance and abuse of dominance without reference to other factors need not be the only major concern as we step into this area. We have the E U investigation in the Philips/Osram case which found that their agreement in the LED market was a measure of encouraging sustainable innovation without monopolising or limiting competition. Another

instance is the Sydhavnens Sten and Grus case, where the European court of Justice was invited to address exclusive waste processing contracts, where a municipality excluded a qualified company. This case sets some criteria for addressing dominant abuse for environmental reasons. The European Commission scrutinised the Aurubis/Metallo case where the their merger showed significant environmental benefits. The CECED case is another example of promotion of energy efficiency by European appliance manufacturers. Sections 19, 20 and 54 of the competition Act have some potentials in this regard.

16. Before concluding few words on privacy and competition. Privacy and data have now assumed greater importance in the competition discourse. If I am not wrong, it began with the German competition authority looking at privacy from a competition AND constitutional lens. With an increasingly expansive recognition of privacy as a fundamental right, tied with the importance of the data protection laws, its filtering into competition was inevitable. The CCI is already seized of cases in this sphere, whilst constitutional cases are pending in our Supreme Court. Establishing the contours of privacy from a competition perspective is important. Therefore, it is imperative that a regulator always be keeping up with the times. In this regard, CCI's 2020 market study on e-commerce in India was a welcome step, since it noted contemporaneous conduct, and gave indications as to what kind of market conduct may result in competitive harm. Such studies should be carried out with sufficient frequency for keeping pace with the evolving landscape in the digital and internet markets. In addition to this, having detailed guidelines based on such studies of the Indian market, will give the market players useful signposts as to the likely proscribed conduct. This would foster greater certainty, would empower smaller players, and caution larger ones on practices which are harmful to competition. In other words, the CCI has to speak through more than its decisions.

17. John M. Keynes took a dim view what capitalism can do and this was after the ravages of the World Wars. The following words capture the big doubts about what capitalism can deliver.

> "The decadent international but individualistic capitalism in the hands of which we found ourselves after the (First World) war, is not a success. It is not intelligent, it is not beautiful, it is not just, it is not virtuous – and it doesn't deliver the goods. In short, we dislike it and we are beginning to despise it. But when we wonder what to put in its place, we are extremely perplexed;"
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> *John Maynard Kynes, 'National self-sufficiency', 1933*

18. However, with all the developments, changes and regulations of free market, if Keynes were to talk about it today, he might have probably reflected differently. We are in fact talking about a different picture and what competition regulation policies can do. That is why I talked about an innovation generating free market will be the material resource of the community that will be used for the common good.

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