Chapter 6

Conclusion and recommendations

“[f]riends of the free market should not forget that the antitrust laws deserve their veneration because they keep government's role as a regulator to a bare minimum.”

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Competition policy and law assists in promoting effective innovation along with shaping the conditions for better access to the market. Both are relevant to all stages and sub-markets within the health care sector. Sound competitive market structures through competition law enforcement may lead to enhancement of medical services, technology and foster innovation within the health industry as a whole. In this senses antitrust law has both substantive and figurative importance.

‘In very fundamental ways, application of antitrust principles to the medical care arena transforms thinking about certain issues.’ Application of the antitrust laws to healthcare alters the way that participants think about the services being provided and received—about the very nature of the healthcare enterprise. Thus, by changing the culture and the climate of the entire healthcare arena, the antitrust law is important in symbolic terms.

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Generally speaking, there are no fixed conditions that will ensure that competition improves health care system’s performance. It usually depends upon the specific problems the health care system is facing and the health care objectives that the healthcare policy wishes to attain. Competition must also be judged in relation to alternative institutions and mechanisms to achieve defined health policy goals.

It is not possible to make general statements such as ‘competition is always bad’ or ‘competition is always beneficial’. Competition is an instrument within a broader framework of organising economic relationships and should be judged on its instrumental value in specific situations and contexts.

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1 Irwin Stelzer in United States v. Microsoft Corporation 253 F.3d 34 (D.C. Cir. 2001)

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However, competition in health care markets benefits consumers because it has been reported to help contain costs, improve quality, and encourage innovation. Healthier citizens build a healthier nation. Through certain sectors of the Indian health care industry have shown exponential growth such as generic drug manufacturing industry, the health care delivery service sector of India still lags behind in comparison to its international counterparts. If given due focus, the sector has the ability to propel GDP growth via multiple spokes, directly and indirectly.4

6.1 CONCLUSION

In this research work after a comprehensive analysis of the anti-competitive agreements in the context of the Indian health care delivery services, following are the general conclusions drawn by the researcher based on the research questions set out at the beginning of the research.

1. Whether sufficient analytical framework exists in India for assessing various types of horizontal and vertical anti-competitive agreements? Are there any criteria's mentioned to understand whether such agreements are anti-competitive?

The substantive provisions under Sec 3 of the Competition Act5 which regulates the anti-competitive agreements in India are not backed by any detailed explanations/statements or guidelines laying down CCI’s objective for treating certain forms of vertical and horizontal agreements as anti-competitive and the method of assessing them. There are few broad types of vertical and horizontal agreements laid down under Sec 3(3) and Sec 3(4), however, they do not cover all types of agreements which may have appreciable adverse effect on competition. Such agreements include research and development agreements, information exchange agreements, specialization agreement, standardised agreements, joint production/purchase or selling agreement. These agreements are entered into on a regular basis in the health care delivery services. Because of the relevance of this industry and the kind of damage that may inflict not only to the industry participants but also to the healthcare

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services provided, it is imperative for CCI to establish an in-depth assessment method or guidelines which provide greater cover and certainty regarding the treatment meted out to all agreements which are anti-competitive.

Further, Sec 19(3) of the Competition Act\(^6\), requires CCI to consider certain factor for determination of appreciable adverse effect on competition by the agreement in question. These factors have not been considered in most of the cases relating to the healthcare industry which have been bought before the CCI. There is a need for providing detailed criteria / competition compliances by CCI which would assist CCI in application of competition law. Such criteria would also help the parties to the agreements in self – assessing the agreements from competition law perspective. This would in the long run bring in greater compliance of the competition law.

2. Can professionals such as doctors and physicians come under the scanner of the Competition Act, 2002?\(^7\)

The Indian competition law does not specifically state its positions on application of competition law on ‘learned professions’. Other competition law jurisdictions such as that of EU and USA have over the years made their position clear on this issue. DOJ and FTC in USA have gone a step ahead and laid down detailed Statements\(^8\) regarding antitrust enforcement policy on health care covering various types of agreements by hospitals and doctors. It would be beneficial in the context of Indian competition law for CCI to come out with certain guidelines or analytical principles on the application of competition law to agreements by entered by and amongst doctors which may have anti-competitive effects on competitive in the healthcare delivery services.

3. Whether the exemptions under Sec 3\(^9\) require amendments or clarifications for effective application of competition law relating to anti-competitive agreements generally and from the perspective of healthcare delivery service industry?

There is a sound basis for providing certain exemptions from the scrutiny of competition law, however, it is always prudent to lay down clear provisions regarding it. This would assist not

\(^6\) Id.
\(^7\) Id.
\(^9\) The Competition Act, supra note 5 at 282
only the competition agency but also the parties to the agreement to assess the concerned agreement from competition law angle. The present Indian competition law lays down the exemptions without detailed provisions on it. This creates an area of uncertainty for application and enforcement of the law.

4. Which aspects of the India healthcare industry have been already scrutinized by CCI from the perspective of anti-competitive agreements?

Since the establishment of CCI majority of cases which have been bought before it relate to drug/medicine supply chain. The complaints initiated are mainly by stockists and distributors of drugs who have been forced by chemist and drug associations to pay certain charges, obtain ‘no objection certificate’ etc. These practices have been termed anti-competitive by CCI. There has been very few cases either *suo moto* or initiated by complainant which relate to the healthcare delivery market specifically. *Hiranandani case* is one such landmark case. Insurance companies have also come under the radar of CCI for cartelisation and bid rigging. The healthcare industry has been shown to have several agreements which have been declared anti-competitive and harmful by competition agencies in EU and USA. Indian competition agency needs to consider such possibilities with the Indian healthcare industry in mind and take proactive steps in form of *suo moto* investigations, sectoral inquires to uproot existing or potential anti-competitive practices and agreements.

5. What has been the investigation and enforcement procedure of CCI in regulating anti-competitive agreements generally? What other mechanism/approach can be used by CCI for effective enforcement of competition law?

Indian competition law enforcement is primarily fine based. CCI has, since its inception levied heavy fines in various cases relating to different economic sectors. In terms of healthcare sector, out of the various cases bought before CCI, inspite of repeated heavy fines, the anti-competitive behaviour at the hands of few seems to have persisted. This has been in the case drug supply agreements bought under the scrutiny of CCI. Enforcement of competition law through fines has not born much fruits in the Indian scenario. Adding to the issue is the fact that there are no detailed provisions relating to the method of computation of

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10 In Re: Mr. Ramakant Kini Informant v. Dr. L.H. Hiranandani Hospital, Powai, Mumbai, CCI case no 39 of 2012.

11 In Re: Cartelization by public sector insurance companies in rigging the bids submitted in response to the tenders floated by the Government of Kerala for selecting insurance service provider for Rashtriya Swasthya Bima Yojna, suo moto case no 02 of 2014.
fines, the factors to be considered etc. This creates lack of uniformity for assessment of agreements and calculation of fine by CCI.

Taking its cue from the more matured competition law jurisdictions, CCI must consider implementing criminal sanctions as well as a clear fining policy. Further, there are various other powers given to CCI and COMPAT (now NCLAT) such as powers under Sec 42, 53Q, Sec 53 N and Sec 42A (power of compensation) etc of the Competition Act, 2002 which have hardly been employed by CCI and COMPAT. CCI needs to step up its enforcement procedures and increase the implementation of these provisions so as to bring in better enforcement and compliance of competition law.

6.2 RECOMMENDATIONS

Based on the conclusions drawn above following are the recommendations humbly submitted by the researcher. For the purpose of brevity and clarity, these recommendations have been divided between legislative recommendations and policy recommendations. The purpose of this distinction is that certain recommendations are submitted for the consideration of the Competition Commission of India, after the examination of the present legal framework in the preceding chapters of this study. These recommendations if incorporated would bring more certainty, consistency and confidence in the understanding as well as enforcement of the provisions relating to anti-competitive agreements not only in the Indian health care delivery services but also in other economic markets of India. The second set of recommendations are broader recommendations which would assist in better implementation of competition policy generally and also assist in achieving health care policy goals of India as a whole. These recommendations are for the perusal of both CCI and the MOHFW.

6.2.1 LEGISLATIVE RECOMMENDATIONS

6.2.1 Publication of horizontal and vertical guidelines by CCI

Looking at the present provisions relating to anti-competitive agreements under the Competition Act, 2002 along with CCI (General) Regulations, 2009, there is a clear lack of comprehensive framework for the functioning of the substantive provisions under Sec 3. Anti-competitive agreements in all their manifestations are many and complex specially

\[\text{Contravention of Order of Commission, The Competition Act, 2002, supra note 5 at 282}\]

\[\text{Contraventions of order by COMPAT}\]
when dealing with co-operation horizontal agreements such as R&D, specialisation and information exchange agreements. Such agreements require a more detailed guidelines issued by CCI making its stand clear regarding their assessment and treatment in various permutation and combinations. Taking a clue from European Commission which has given a detailed guidelines on both types of anti-competitive agreements, Indian competition authority must also consider laying down guidelines indicating its intent in how to deal with such agreements. These guidelines may include amongst other things the basic principles on which assessments must be made, definition and scope of each anti-competitive agreements, the main competition concerns arising from each, relevant market if required and examples for better understanding of certain types of agreements. Technology and innovation driven industries such as health care industry generally require a greater degree of scrutiny of such agreements since services and goods in this industry are much specialised as well as complex and the end users, mostly the patients have not much understanding of the efficiency, value and quality of the services and products.

Vertical integration agreements or vertical anti-competitive agreements though not treated with the same degree of severity as horizontal agreements have also manifested themselves in matured antitrust jurisdictions such as EU and USA, where evidences of anti-competitive agreements between hospitals and physicians or medical device manufacturers/ distributors have lead to heavy antitrust penalties or settlements. CCI must take guidance from EU and publish guidelines/statements for both vertical and horizontal anti-competitive agreements. This as reiterated earlier will bring much needed certainty on not only the application of law but also help in self assessment by parties wishing to enter into such contract which would otherwise lead them to being declared anti-competitive.

6.2.2 Detailed factors for analysis of anti-competitive agreements

Sec 19 (3) of the Competition Act, 2002, lays down certain factors which CCI has to give due regards to while determining whether an agreement has an appreciable adverse effect on competition. These are six factors which include creation of barrier to new entrants in the concerned market, driving the existing competitors out of the market, foreclosure etc. There are two aspects to consider regarding these factors, one, that they require further explanation for the sake of easier understanding and application in various contexts or types of anti-competitive agreements and two, that these factors have not been applied by CCI while
analysing most of the health care cases. It is submitted by the researcher that these factors are of great significance in assessing and analysing the AAEC in various anti-competitive agreements and hence greater emphasis must be given by CCI and its members in explaining and applying these factors in all cases relating to the question of anti-competitive agreements.

6.2.3 Establishing detailed guidelines on dawn raids

Dawn raids when employed appropriately can be very effective in assisting the investigating and enforcement authorities in speedy detection and curbing of a particular cartel. Though the provision for dawn raids is part of the Competition Act, 2002, making investigation under dawn raid would become more transparent by establishing guidelines on it. Such guidelines will help negate any procedural oversight on behalf of both the investigating authorities and the companies/persons under such surprise check. It would further help such companies/persons to set up a response strategy to handle such raids as well.

6.2.4 Making leniency procedure more attractive

Though the concept of leniency has been introduced within the realm of Indian competition law, yet it has not been used so far. The concept needs to be made more attractive to potential whistleblowers, by bringing in more features and clarity. For example by introducing the idea of leniency plus, where if no leniency is given in one cartel investigation that the person/firm is involved in, then the company/person can take leniency in second investigation he is under. Such steps make the idea of leniency much more appealing to the companies/firms to come out and report a cartel.

6.2.5 Detailed guidelines on the fining policy of CCI

One area that competition law in India needs urgent clarity on is to define and lay down certain guidelines which would help calibrate the proportional penalty to be imposed. These guidelines would lay down certain factors on the basis of which the quantum of penalty would be levied once the agreement is proved anti-competitive. Further, the concept of ‘turnover’ which is presently part of the provisions deciding penalties under Competition Act remains ambiguous. This is because there is no settled position on determination of ‘relevant turnover in a multi-product/service’ business. This glaring gap has been questioned in
relation to healthcare delivery industry in the case of *Hiranandani*\(^\text{14}\). Due to lack of clarity on computation of the penalty CCI awarded heavier penalty due to improper evaluation of relevant turnover. The fining policy which may be adopted or adapted by India on the lines of US which decides a ‘culpability score’ or on lines with the EU guidelines which has set up ‘base fine’ along with certain ‘aggravating and mitigating circumstances’ to be taken into consideration. Establishing a strong and unambiguous fining policy is *sine qua non* for effective and just competition law. Hence, there is a need to create such guidelines under the Indian competition law as well.

### 6.2.6 Specific guidelines on healthcare industry

Various sub markets of the healthcare industry including the healthcare delivery services are in a unique position to not only affect the health of the Indian citizens but the economic development of the country. Recognising this position in its own country, both FTC and US DOJ had as early as 1990s issued *Statement*\(^\text{15}\) on healthcare policy and a study on role of competition in healthcare.\(^\text{16}\) These documents deal with various important aspects of healthcare from competition concerns such as physician, hospital related issues (physician/hospital associations engaging in anti-competitive practices), research in hospital products markets, hospital merger analysis, hospital JVs involving health care equipments, safety zones etc. These documents have helped in not only understanding various types of anti-competitive practices that may permeate within the US health industry, competition concerns arising but also to differentiate between agreements which increase efficiency from those that do not. Indian health care industry which has over the years more private players with access to quality healthcare to millions still lacking urgently requires greater evaluation of the competition concerns that may rise within it. Health care delivery services which form the core of this industry require greater competition scrutiny for improving competition within the market as well as the players. Indian healthcare industry, therefore, requires a tailor made guideline covering various competition law concerns.

\(^{14}\) Hiranandani case, *supra* note 10 at 284  
\(^{15}\) *Statement*, *supra* note 8 at 283  
6.2.7 Regulations of health care professionals under competition law

Under the analysis of the present provisions of competition law in India there is a sense of uncertainty regarding their application on ‘professions’ such as lawyers, doctors and chartered accountants. Adding to this is the fact that there exists no case which has been bought before the CCI or initiated *suo motu* relating to the same. Doctors and their associations have been detected to participate in anti-competitive practices (fee fixing, boycotting, and client allocation) in USA and EU. It is very much possible that such alliance already exists within the Indian health care delivery services. It is submitted in this regards that CCI may as per the powers vested with it under Sec 64\(^1\) make regulations relating to application of competition law to ‘professionals’. Additionally, it may also take *suo motu* cognizance of the anti-competitive practices within the health care industry and investigate such practices by professionals within the industry. This will not only assist in eliminating existing practices which curb competition but also make persons and associations indulging in such practices cautions of the fact that CCI is being vigilant. This step will bring in promotion and sustenance of competition within the Indian healthcare delivery market.

6.2.8 Changes to the present provisions relating to exemptions

There is no doubt that antitrust exemptions are an important aspect of antitrust framework since they provide much needed assurance to the persons entering in such agreements that their agreements are safe from antitrust scrutiny. The Indian competition law under Sec 3 makes JVs which increase efficiency as an exemption to horizontal agreements specifically and certain other exemptions applicable to both horizontal and vertical agreements under Sec 3(5). Though these exemptions have been put in place, they remain larger unexplained under the Competition Act. Their precise scope still requires to be worked out and till that has been done, enforcement of the competition law will remain inadequate. For an effective application of competition law in the health care delivery services, researcher submits that CCI needs to make certain guidelines so as to ensure no anti-competitive agreement under the garb of JV defence remain unchecked. This is especially possible in healthcare sector since, various types of R&D agreements, specialisation agreements, joint production and selling

\(^1\) Sec 64 Power to make regulations:
(h) any other matter in respect of which provision is to be , or may be, made by regulations

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agreement along with information exchanges agreements are very common in this technology driven specialised sector.

Further Sec 3(5) (i) also creates exemption by restricting the right of any person to restrain any infringement or impose ‘reasonable conditions’ as necessary for protection of intellectual property rights. However there are no details given by CCI through regulation/guidelines or explanation laying down the scope of this limitation. The term ‘reasonable condition’ also requires to be explained by CCI for making the application of this section clearer. This clarification becomes more relevant from the perspective of healthcare sector since IPR has a major role to play in this market creating innovative methods, processes and techniques for medical professionals, medicines and devices. Lack of such clarifications or guidelines might create anti-competitive agreements amongst such persons or associations coming up with the new products having IPRs.

Another exemption Sec 3(5) (ii) allows export cartels to function as cartels from India till they function only to export their products and not within the internal Indian market. Healthcare industry of India is growing at a fast pace with focus on creating a niche for itself healthcare markets outside India. Such export cartels in , drugs and medical devices manufacturing may have sever implications on healthcare markets around the world as well as provide confidence to cartels members to collude within India too. The present position of the Indian competition law, researcher submits is flawed and requires adequate re-assessment. Since there are no substantive studies to prove the effects of such cartels are felt only in the external market, India needs to reconsider its position from the perspective of antitrust scrutiny of export cartels. It my either create a registration process for such cartels not only for the purpose of identification but also accountability of these cartels in cases of negative effects within and outside the country.

6.2.9 Introduction of imprisonment in all contraventions under the Act and defining imprisonment computation guidelines

Under Indian competition law there is no direct sanction of imprisonment for persons who engage in anti-competitive practices unlike that under the Sherman Act, 1890. As seen in US, awarding of imprisonment has achieved great success in identifying and deterring ‘hard core cartels’. In India, neither heavy penalties nor the leniency programme has been able to
effectively bring out or detect cartels as envisaged initially. Hence, it is time that the Commission considers introducing a tougher tool for curbing pernicious forms of cartels affecting the Indian economy. EU which does not have presently imprisonment provisions within its competition laws has given flexibility to its Member States to adopt rules regarding the same. Many countries including UK have criminal sanctions such as imprisonment in place within their domestic competition laws. India can also consider introducing specific criminal sanctions of imprisonment for engaging in anti-competitive practices such as bid rigging. Many EU Member states such as Austria, Germany and Italy have put in place a separate imprisonment penalty for bid-rigging. India which is dependent on a lot of public procurement of goods and services not only in healthcare services but also other market, such stringent provisions will help curb bid riggings in India since already there have been several cases\(^{18}\) showing such anti-competitive practices existing within Indian markets.

Additionally there are certain provisions under the present Competition Act, where due to non-compliance of the orders of CCI, COMPAT (now NCALT) can impose imprisonment or fine or both. Presently, there are no guidelines or rules made by CCI for computation of such imprisonment terms. It would add to the clarity and transparency of the determination process if certain benchmarks are made by CCI which would guide the Tribunal in deciding the terms of imprisonment in highly specialised sector specific competition cases.

### 6.2.10 Private enforcement

The process of discovering a cartel or other anti-competitive agreement is long and costly for both the investigating and enforcement authorities. To reduce the time frame and make the process more cost effective, US and EU have introduced successful concepts such as ‘consent decree’, ‘commitments’, and ‘settlements ’within the competition law framework. Such steps are welcomed by both the competition authorities as well as undertakings/persons under investigation.

\(^{18}\) Cartelization by public sector insurance companies, *supra* note 11 at 284
India has the concept of ‘plea bargaining’ which was introduced in the Criminal Procedure Code by the 2005 Amendment. It is can be invoked by the accused of offences whose punishment is less than seven years or fine and the offence does not fall under the category of socio-economic offences or crimes against women and children. It can be of great use for mitigating the terms of sentence in case of violation of Competition Act, 2002. However, the statutory basis of application of plea bargaining under the Indian competition law is unclear as there is no mention within the Competition Act, 2002 or case on the same till now. It would be useful if CCI under Sec 64 may consider formulating some guidelines on this behalf. It can also introduce other options such as commitments or consent decree based on national/international practices making the enforcement expeditious and cost effective. For this to happens it is the modest submission of the researcher that CCI must start advocacy so that members of various industries including healthcare sector along with consumers become aware of such powers and use them as tools for curbing anti-competitive practices.

6.2.11. Power to conduct sector –wide investigations

CCI presently does not have any specific power to conduct sector –wide investigations either in absence of any evidence that an unlawful activity is being conducted/practiced within an industry or to assess the competitiveness in a particular industry.

While there is a developing practice of consultation between the CCI and the sector regulators, as practice develops there is likely to be a need for a more detailed framework of coordination between the sector regulators and, also, the scope of the CCI’s powers where it has concerns that markets may not be functioning effectively but where there are no concerns that individual companies may be infringing competition law. European Commission has been given this power and exercising it, it has conducted inquires in various sectors such as air transport, audit services, consumer IT services, healthcare, pharmaceuticals etc. Such inquires have further lead to competition law investigations against specific companies along with ‘industry-wide remedies such as changes to law and regulations.’

20 Suzanne Rab, Indian Competition Law an international perspective, CCH, (2012)
Many sectors in India including the health care delivery services would greatly benefit from investigations of such a nature, if CCI is given such powers.

6.2.12 Impact assessment and competition compliance evaluation

Putting in place a competition law, is not enough until the impact of the law and its application/enforcement is assessed. One critical power which has not been stated categorically under the Competition Act, 2002, is the power of CCI to conduct impact assessments. These assessments may be based on a particular industry or application of certain provision of law across various industries. For example, in the area of this research work there have been number of cases decided by CCI and COMPAT which relate to health care industry. Some of these cases are directly relating to particular types of anti-competitive agreements such as fixing trade margins, NOC and boycotts. These cases with similar issues kept reoccurring for couple of years and CCI inspite of the reoccurrence and fines did not conduct an impact assessment of these decisions given in these cases in the drug supply chains.

There have been several landmark cases\(^{21}\) in other Indian industries whose assessment post CCI’s decision requires a thoroughly conducted impact assessment in the concerned industry. Such an assessment will contribute to not only better understanding of the ramification of the decisions on the industry but also check whether there is effective enforcement and compliance of these decisions. This will assist in progression of the Indian competition law according to the behaviours/responses and needs of the Indian industries.

6.2.13 Greater punishment for certain forms of anti-competitive agreements

Though all anti-competitive agreements may have AAEC some have more harmful effects than others in the market and on the consumers eventually. For instance bid-rigging in public procurement of goods and services. Such conspiracies take resources from purchasers and taxpayers, diminish public confidence in the competitive process, and undermine the benefits of a competitive marketplace.\(^{22}\) These can have detrimental effects when public procurements are for the purpose of medical and healthcare. It would serve as a deterrent if the penalties for bid rigging may be increased specifically or even criminal sanction such as imprisonment.

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\(^{21}\) In re: Shamsher Kataria v. Honda Siel Cars India and Others, Case no 03/2011 and In re: Builders Association of India v. Cement Manufacturers’ Association, ACC Limited and others, Case no 29 of 2010

may be awarded to persons found part of bid rigging conspiracies. European Union member States such as Germany and Austria have as part of their national competition law imprisonment awarded to such persons. It would do Indian public procurement system much good if CCI implements such changes from the perspective of collusive tendering/ bid rigging.

6.3 POLICY RECOMMENDATIONS

If competitive forces are to be encouraged, the Ministry of Health and Family Welfare will need a more pro-competitive strategy. Following are some recommendations put forward by the researcher.

6.3.1. Increasing the scope of competition advocacy

Apart from speeches, conferences and workshops to various elements of the Indian markets, another step in the direction of competition advocacy may be CCI greater advisory role in guiding Central and State governments on competition law issues relating to healthcare. This would further help in creating of policies both centrally and locally which will have sound basis for assessing the implications for competition and consumers of the proposed legislative or regulatory action

6.3.2. Establishing permanent evaluation system in healthcare

Presently in India there are no standard evaluation systems set in place within the health care industry to assess its various components, their functioning and effectiveness. These relate to hospitals, their method of maintaining records, method of making bills, setting prices for medical treatments, drugs and devices, method of deciding fees of doctors etc. Once the Indian health care industry establishes and enforces strictly a permanent evaluation system it will aid in comparing performances between different institutions (nationally and internationally) and figure out the inadequacies in the health care delivery services. This will in turn encourage policy measures leading to improves health care system with competitiveness amongst its market participants.

6.3.3. Create inter-sector communication

Health care industry with its various sub-industries is managed chiefly by Ministry of Health and Family Welfare (MHFW) for all health plans and Ministry of Chemicals and Fertilizers
for procurement of chemical and their supply. For CCI to effectively enforce competition law in the health care delivery services, functional communication is essential. Once the health care system employs a proper roll or roster system having hospital statistics along with standardised computer medical records, this information would immensely assist not only the Ministry of Health for collecting and analysing clinical, administrative and consumer data but also assist CCI in better implementation of competition law. Presently due to the present lack of availability of sufficient accurate data it may be difficult for the competition agency to identify patterns of collusive behaviours and agreements and investigate. All this is possible only by way of a fruitful communication between various ministries and regulators. Countries such as US have already taken the above mentioned steps in bring more clarity regarding the medical data.

6.3.4. Increasing access of the information to regulators and consumers

For CCI as well as other regulators to evaluate policies and ensuring unintended consequences are addressed with the goals set in place, it is crucial for the various sectoral regulators and consumers to have access to information. This would help both the authorities to re-adjust their actions or regulations, assist in self assessment of parties to agreements in avoiding violating competition law as well as keep the information at the disposable of the consumer.

6.3.5. Country wide implementation of Clinical Establishment Act, 2010

There are various aspects of healthcare delivery services which are partially or completely unregulated. For example, the diagnostic centres and medical devices used. India has implemented Clinical Establishment (Registration & Regulation) Act, 201023 for prescribing basic minimum standard of facilities and services of particular types which is being provided by a ‘clinical establishment.’ These clinical establishments include diagnostic centres; however, this Act is not applicable to the entire country as few States have bought it into force.24 Ensuring proper implementation of the Act will bring about better management of

24 This Act has come into force in the States of Arunachal Pradesh, Sikkim, Mizoram, Himachal Pradesh and all Union Territories (namely Andaman & Nicobar Islands, Chandigarh, Dadra & Nagar Haveli, Daman & Diu, Lakshadweep and Puducherry) except Delhi from 01 March 2012. The States of Uttar Pradesh, Bihar, Rajasthan, Jharkhand and Uttarakhand have adopted the Act by passing resolution in their respective State assemblies. All clinical establishments in above mentioned States and Union Territories will need to register under this Act. Other states may adopt the law by passing a resolution in their state assemblies under clause (I)
clinical establishments and help identify as well as curb anti-competitive practices within the sector.

There is a growing belief that fostering competition can be an effective tool in achieving important benefits for a country and in turn its citizens. This can be done through ‘intelligent, vigorous and nonpartisan antitrust enforcement’. In today’s increasingly global and technologically complex healthcare services, Indian healthcare sector requires a systematic review with effective competition in mind. Presently in India the public expenditure on healthcare is only four percent of its GDP which is less than half of its counterparts such as Brazil and South Africa. With an increase in private sector’s participation, the inequality of access if any to healthcare sector has worsened. This has led to a bulk of healthcare delivery services being either unavailable to the majority or being paid for out of pocket. If healthcare sector in its entirety is revamped with competition policy in mind, competition in turn will encourage innovation, growth and access to healthcare delivery services at a competitive cost.

Competition law in every country requires to be set up keeping the country’s unique economic, social, cultural conditions and aspirations in mind. Anti-competitive agreements have been known to distort many a markets within the national as well as international markets through cartels, price-fixing, boycotts etc. Indian competition law enacted in the year 2002 is a decisive step towards its commitments to handling anti-competitive practices and promoting free market mechanisms with minimum governmental interference. However, the provisions under the Competition Act, 2002 which relate to anti-competitive agreements require further deliberation at the hands of the Indian competition agency. Some provisions under Sec 3 require further regulations or guidelines expatiating the intent of the legislation whereas some such as those relating to export cartels require re-examination since such anti-competitive behaviours in international markets reverberate within the national markets as well. For further effective competition within the Indian healthcare market, anti-competitive agreements entered between the doctors and physicians also requires to be categorically placed under the scrutiny of competition law. The provisions relating to investigation and enforcement in case of anti-competitive agreements also require certain practical additions for making them more operative and fruitful.

The Competition Act, supra note 5 at 282
Indian competition law aims to prevent practices having adverse effect on competition and ensure protection as well as promotion of competition for the various elements within any given market. To achieve this, especially in a vital sector such as health care delivery market which caters to the health care needs of India, anti-competitive agreements require effective monitoring, enforcement and compliance of competition law. This will in turn bring about overall welfare of the people by way of providing them better access and quality of health care delivery services at better costs. Reiterating India’s strong commitment to open, competitive, effective competition law and enforcement in the long run will assist in upgrading the India healthcare services.