Competition and Regulation in India 2007

Edited by
Pradeep S Mehta

25 years CUTS International

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Enhancing Knowledge, Strengthening Capacity

#0715

Reflections

"This is a very timely Report, which takes stock of the regulatory regime in the country, in order to tell us in the government, about what we had promised to do when we came to power, and what we have not been able to do. The document, produced by CUTS, a premier global institution working on Trade and Regulatory issues under the adroit leadership of Pradeep Mehta, has argued well on the need and contours of a healthy competition structure in the economy. It shows the way forward to the government to implement its mandate more effectively, i.e. operationalising an effective regulatory regime, which can help in sharing the gains from liberalisation equally among all stakeholders in India".

–Kamal Nath
Minister for Commerce & Industry, India

"....our economic reform is still in its infancy. The Report prepared by CUTS International, backed by their previous work, lays out the main issues of regulating restrictive business practices in our currently cartelised sectors (private or public), the need for competition laws that strike a balance between different objectives and their implementation in India, and the administrative and political context of the substantial roadblocks on our way. I hope this Report gets the wide attention it deserves so that we are clear about what to do (and what prevents us from doing) in the removal of the roadblocks so that we have a level playing field for all economic players (including the large numbers of small enterprises)".

–Pranab Bardhan
Professor of Economics, University of California

"....captures the flavour of competition regime extant in India and that is desirable *in futuro*. The flavour is at once educative and exciting. Educative in terms of the lessons from the past and exciting in terms of the prognosticated hue and smell of competition for not only the consumers but for all stakeholders and the country as a whole. This first biennial Report is a singular achievement of CUTS, and I welcome this addition to competition literature".

–S Chakravarthy
Former Civil Servant and Member, MRTP Commission

"This new Report goes further to an earlier CUTS report in exploring what has happened, what is happening and what should be done in promoting competition in India. The Report covers the whole rubric of competition promoted through a competition law and policy and a healthy economic regulatory framework in India. I congratulate CUTS and Pradeep S Mehta in bringing out this outstanding Report. I hope that the policy makers will utilise this Report in improving the entire framework of India's competition policy".

–Vijay Kelkar
Former Adviser to the Finance Minister

…. effective enforcement of a competition law designed to ensure that firms do not individually or collectively abuse their market power is a necessary complement to market reforms.This Report is remarkable because it provides us with a thorough, comprehensive, and frank analysis of the Indian reality in this area. It is required reading for all those who have the economic development of India at heart. ….not only takes stock of the important progresses but also of the failures of competition policy in India in recent years, looking at the current situation from the standpoint of consumer benefits. Market reforms and the enforcement of a competition law are most effective for development when they are part of a comprehensive competition policy …."

–Frederic Jenny
Judge, French Supreme Court

"India has just enacted critical changes to its competition law and the study reviews the key policy and operational issues regarding that law. Equally importantly it reviews the other two major fields relevant to competition: government restrictions on competition (which are numerous); and the regulation of monopolies (and others). It seeks both to survey current issues and to look forward to emerging questions".

–Allan Fels
Dean, Australia & New Zealand School of Government, Australia

".... a valuable status report on competition and regulation in India today. It makes the point that competition is especially important for the poor, for whom a gain of even a few rupees from competition adds substantially to consumption. Barriers to entry, implicit and explicit cartelisation, regulatory capture, public sector monopolies, high import tariff barriers, manipulation of anti-dumping rules, and incomplete information are some of the key issues in competition. Farmers get just one-sixth of the retail price of their produce, because of entrenched intermediaries. Yet, there is resistance from vested interests to organised retail chains which can eliminate intermediaries and raise farmgate prices. As this Book shows, action is needed on multiple fronts to increase competition and empower consumers".

–Swaminathan Aiyar
Consulting Editor, The Economic Times, Washington DC

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CUTS Institute for Regulation & Competition
D-217, Bhaskar Marg, Bani Park, Jaipur 302 016, India
Ph: 91.141.228 2821, Fax: 91.141.228 2485
Email: circ@cuts.org
Website: www.cuts-international.org, www.circ.in

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CUTS Centre for Competition,
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Foreword

As soon as the new Government came into power in 2004, it announced its resolve to promote healthy competition in the market place with professionally run regulatory institutions. This timely report assembled by Pradeep S. Mehta and his team takes stock of the progress on the competition scenario in India as the Government has reached a mid-term point, thus offering an insight on where we are, and where do we need to go.

I do not propose to argue the case of how competition promoting measures can help higher economic growth, which has been done eloquently in the first chapter: Prologue — An Overview. Added to this, how should the future agenda be steered, with time lines, has been elucidated in the last chapter: the Epilogue — The Way Forward.

The Report has captured all possible elements of the market dynamics *vis a vis* promotion of competition. It has also looked at some sectors, such as telecom and electricity in the area of infrastructure and in the equally crucial area of social infrastructure like health care and education, as case studies. Many other crucial issues will be covered in its next edition in 2009. It is also hoped that this Report will become a regular biennial feature.

One unique feature of the Report is an assessment of the popular perception in the country through an Index. The sample is a robustly constructed number with a healthy mix of informed stakeholders, which has been described in the Report, and I do not wish to say more at this point. It shows that while the landscape of competition is not too vibrant, it is also not bad. Things have changed since the reforms began, and people do acknowledge the same. But is that enough? That is the question which this Report raises and answers.

In the past, the Indian economy was characterised by significant Government involvement marked by dominance of large state-owned public sector enterprises. India embarked on the path of economic reforms during 1990s by shifting to market-driven economic policies. The thrust of reforms has been to preserve and promote competition as a means to ensure efficient allocation of resources, resulting in the best possible choice of quality, the lowest prices and adequate supplies to consumers.

Most importantly, unlike many other reforming economies, India is following a mixed-economy approach, where the public sector is required to compete with the private players, rather than handing over the public sector units to the private sector. Examples of these include: airlines, telecom etc. Exceptions include the electricity sector, while other sectors are being opened up gradually. On the one end of the spectrum, we have one of the lowest rates in the telecom sector with large number of private players. On the other end, we have the electricity sector, where there is hardly any competition and thus poor growth and a huge supply shortage. This conundrum raises two critical issues. First, that of competitive neutrality i.e. providing a level playing field for all. Second is the overlap of the competition authority vs. sectoral regulators. These two issues have been addressed at some depth in this report.

In any economic system, the state can play many roles of which three can be identified as important. These are: (1) as a producer of marketable goods and services, (2) as a regulator of the system, and (3) as a supplier of "public goods" and "merit goods" like primary education and public health.

The decreasing role of state as a producer of marketable goods and services and the increasing role of market in such areas simultaneously enhance the role of state as a "regulator" and "facilitator". The regulatory role comes into play in order to maintain competitive conditions in the market and to ensure that every one follows the basic rules of the game. These issues have been assessed in this report in some depth, and a future agenda has been outlined succinctly.

Since the advent of economic reforms in India, there have been considerable changes in our policy arena, with increased reliance on market forces. Along with policy changes, we have also adopted a new competition law in 2002 as a follow up to our market-oriented economic reforms. The new law has been amended in 2007 and should be fully operational soon. Additionally, we have regulatory laws in several sectors, opened up for private players, which were hitherto reserved for public sector. This upsurge in interest in competition and regulatory laws in India reflects the substantial changes that have been taking place in the policy paradigm.

The productivity and efficiency benefits associated with markets can be reaped only if the market remains competitive. Legislation is required to prevent the degeneration of the market structure to a monopolistic or a near monopolistic situation.

Our new competition law therefore seeks to: a) prohibit anticompetitive agreements (including cartels) which determine prices, limit or control or share markets or results in bid rigging, etc., b) prohibit abuse of dominant position through unfair or discriminatory prices or conditions (including predatory pricing) limiting or restricting production or denying of market access, etc., and c) regulate combinations, (i.e., mergers, acquisitions, etc.) that cause or are likely to cause an appreciable adverse effect on competition.

Regulating cartels and abuse of dominance are two crucial action areas for the new competition authority, as well as the sector regulators. The issues surrounding these two enforcement challenges have been captured in the report with several examples from our own history and other countries. The implementation of the competition law is not without its problems. Whether it be with respect to anticompetitive agreements or the abuse of the dominant position or mergers and acquisitions (M&As), the critical question to examine is whether a particular decision or action has had the effect of reducing competition.

There is, of course, the standard controversy between the structuralist and the behavioural approaches. Two important elements of market structure are market concentration and barriers to entry. Any action by a firm which increases either concentration or the barriers to entry will be deemed, under the structuralist approach, as violative of the maintenance of competition. On the other hand, the behavioural approach looks at the conduct of the firm rather than structural infringements. The structuralist approach minimises the cost of enforcement because it removes the requirement to show that an arrangement is harmful. However, there is no way by which any competition or regulatory authority can get away without establishing that a particular action has had an adverse effect on competition. It needs to establish what actions and under what circumstances will they constitute violation of the principles of competition.

The other dilemma is on how to strike a balance between competition policy and industrial policy. Many argue that we need to have global size players (national champions) to be able to compete in the global economy, while many argue that we need fleet footed players to be able compete in the global economy. In regard to national champions, the examples from post-war Japan and Korea are quoted, which protected their domestic industry by tariff protection, regulated entry and thus created national champions. However, with good hindsight they too allowed a large number of domestic players, in sectors such as steel, automobiles and electronics, thus creating healthy competition at home. It is only then that the Korean and Japanese manufacturers could become competitive in the global economy. However, the situation has changed hugely since then aided by the World Trade Organisation (WTO) etc, and we cannot take similar approaches in developing our industrial sector. Our local firms do need to face competition at home to be able to compete globally, otherwise if the state has to give them extra protection or leverage, we may end up with crony capitalism, a question raised by the Prime Minister at a meeting in New Delhi, in June 2007.

While competition authorities exist to maintain competition, regulatory authorities for various sectors have also come to occupy an important place. Where competitive markets cannot exist, the regulatory authorities mandate is to mimic competitive outcomes to the extent possible. Infrastructure sectors like power fall mainly in this category. States also generally use regulation with a broad connotation to achieve a wide range of non-market objectives such as ensuring universal and equitable access, consumer protection and maintain safety and healthy standards. More importantly, it identifies and addresses subsidies and cross-subsidies in the provision of services. This, however, is a potential area of political intervention. Government often finds means to get around regulator's prescriptions in relation to subsidies, if they are found to be politically inconvenient.

Apart from political interference, the existence of large number of sectoral regulators together with a competition authority may raise the issue of overlap and conflict. The ideal solution could be to legislate clear mandates for regulators and the competition authority. It is best to leave the determination of competition principles to the competition authority. Across sectors, some common principles of competition must prevail.

Establishment of competition authority by itself does not resolve all problems relating to the creation of competitive conditions. Unless there is a strong political will, even the competition and/or the regulatory authority may not be able to function effectively. However, in order that competition may prevail, competition and regulatory laws need to be supplemented by an appropriate Competition Policy which will ensure a full play of competitive forces. Such a programme must oversee all Government policies so that there is no intended or unintended adverse impact on competition. In general, there should be no barriers to entry. In some areas, minimum criteria for entry may be prescribed. These prescriptions should strictly be in the nature of prudential norms.

A move in this direction has been made by the Planning Commission as a part of the exercise on the 11th Plan Document. That needs to become a part of the public discourse, and then head towards an implementable resolution of the Government. Once adopted as public policy, an assessment must be done of all policies and practices of the Government to draw out and be removed, so that markets function fairly. This report has dealt with the evolution and framework of a Competition Policy in India, and is worthy of reading.

Efficiency is associated with competition. In order to maintain competitive conditions, three things are needed. First, there should be appropriate competition laws to prevent market abuse. This should be preventive in character. Second, this must be supplemented by competition policy which will ensure that all Government policies tend to promote competition. This has a positive dimension because there are many policy-induced anticompetitive outcomes, which have been captured well in the Report. Third, sectoral regulation becomes important in areas where there are natural monopolies. Under such circumstances, it is necessary to establish appropriate relationship between sectoral regulators and the competition authority. The political economy constraints need to be taken into account while framing competition and regulatory laws and more importantly in drafting a competition policy. But if the Government is truly committed to a process of liberalisation, this should become less of a problem. Only if reform is introduced by stealth it becomes a hurdle.

I am indeed happy that CUTS International have brought out this Report, the first of a series, to explore many issues relating to an effective enforcement regime for competition and regulation. I commend this Report to all, who wish to see India progress faster and deliver economic growth with equity.

Dr. C Rangarajan
Chairman, Economic Advisory Council
to the Prime Minister of India

Preface

Competition is to a market economy what a free franchise is to a democracy – it ensures that incumbents have to perform in the knowledge that there are aspirants to power waiting to displace them. That is what promotes efficiency and accountability, ensures access for the citizen-consumer and widens his/her choices.

In India, the importance of competition policy and related regulatory regimes has increased greatly since 1991 when a massive wave of liberalisation eliminated most investment, capital market, foreign trade and price controls. Until then the public interest was sought to be served more through direct regulations that required the prior approval of Government for many commercial decisions. Now, in most sectors of the economy, the protection of public interest rests with the laws governing competition and the regulatory regimes that have been set up for "natural" monopolies and network industries (where the production possibilities of one producer are linked to that of others).

The primary goal of competition and regulation policies is usually defined as the promotion of consumer welfare. Thus, in standard economics the costs of imperfect competition have often been measured in terms of the loss of consumer's surplus. However, in practice this goal has to be balanced against other public objectives relating to the environment or defence or balanced regional development. A different type of concern, quite prominent in India, relates to protection for small enterprises.

The imperfections in competition that need to be addressed have to be defined with some care. Looking at the issue simply in terms of the number of producers is seldom enough. Besides the number of market players, which defines the range of choice for the consumer, one must also consider entry-exit barriers, collusion between enterprises and similar factors to identify potential abuse of market power.

Each sector is in some ways special. The possibility of abuse of market power depends on a variety of factors. To start with one must ask whether the product or service produced is tradeable or non-tradeable (not just in technical terms but as determined by policy, which may make some naturally traded goods, non-traded). The organisation of the industry matters, not just in terms of size structure, but also the mix of public and private ownership, the role of conglomerates with linked interests in upstream or downstream industries, the ownership structure of the firms (e.g. the role of big business families). The role of public authorities as controllers of a natural resource or as purchasers or as environmental/municipal managers is also important.

In the face of this diversity of determining conditions, what is needed is a flexible surveillance of market behaviour. The principles enshrined in the laws relating to competition have to be applied with a good understanding of industrial economics, a discipline that combines the usual tools of micro-economics with an analysis of market structure and industrial organisation.

Similar arguments apply in the case of regulatory regimes for natural monopolies where they may be competition for markets but not competition in markets and network industries where the supply options available to one producer are affected by the commercial decisions of other producers. The goal of the regulator is quite clearly to protect the consumer interest, or, if a broader set of goals is considered, the public interest. But this does not translate into a standardised approach that defines what decisions should be regulated and how. The remit of regulation may range from a minimal regulation of technical standards, to ensuring open access to shared facilities like transmission lines, rail track, roads and ports and at the other end to full-fledged controls in the form of tariff fixation and production licensing.

India is at an early stage in developing an arm's length regime for competition and regulation. New authorities have been set up at a rapid pace and many of them are struggling to find their feet. The centre-piece of the regime, the Competition Commission, is not yet operational in any meaningful sense. There are questions about jurisdiction and a shortage of qualified staff. These teething problems will be solved. But for the regime to work effectively we need a continuing debate and dialogue on the economics of competition and regulation policy. This is the basic aim of this Report.

Competition & Regulation in India, 2007 is itself an experiment. No such Report has been attempted in the past and there is no template for structuring such a Report. Because it is a first Report, it contains a certain amount of methodological material that hopefully will stimulate a debate on how we should look at these issues of competition and regulation policy. It also contains an evaluation of where we are and where we need to go, particularly in the Prologue and Epilogue. Detailed sectoral studies of telecommunications, electricity and also of two social sectors, education and health will help to illustrate the need for methodological flexibility not just in analysis but also in implementation. Given the importance of this area of policy, the survey of popular perceptions contained in the Report is particularly valuable.

The preparation of this Report was guided by a National Reference Group (NRG) whose membership is given as an Annexure to Editor's Note. The

Reference Group met four times and helped to shape the orientation of the Report. In an endeavour where there was no standard template to guide the work, the stimulating debates in the Reference Group played a vital role in crystallising the conceptual and substantive elements in the Report. I would like to thank all the participants in the Reference Group meetings for giving so generously of their time and for the high quality of the discussions. However, the analysis and conclusions in the Report are those of the authors and the members of the Reference Group should not be assumed to be in agreement with them.

The responsibility for the preparation of this pioneering Report rested with a team led by Pradeep S. Mehta. It included staff of CUTS other than T. C. A. Srinivas Raghavan, Consulting Editor of *Business Standard*, which have been detailed in the Editor's Note. I would like to thank them for their diligence and dedication and the skill and intelligence with which they have put together this timely and important Report.

I would like to end with a special word of thanks to Pradeep without whose drive and dedication this Report would never have been written. He has been a pioneer in the field of consumer protection in India and this concern has led him to provide much needed leadership in other areas like trade policy and competition policy. His enterprise in starting the CUTS Institute for Regulation & Competition (CIRC) and launch of this Report are further examples of his commitment. He deserves the gratitude of all who value open and constructive debate on the key issues of public policy.

Nitin Desai,
Former Under Secretary General,
United Nations

Editor's Note

When I write this, there are many events which have happened in India and have stirred up our conscience. First, the winning of the Twenty-20 cricket world cup and the Asian hockey men's cup. More importantly the film: *Chak Dé* about the Indian women's hockey team which won the world cup. The film is now becoming a text book case study for management students, because it showed how hard work and team coordination can move any mountain. It showed how Indians can win anything if they can put aside their egos and biases and play as a team. As an activist I am an incorrigible optimist and believe this lesson can be used in any context and achieve the necessary changes. That's the spirit which is required in pursuing reforms and promoting economic democracy.

After setting a process of unshackling the economic governance structures in 1991, India has witnessed a continued growth. The growth rate reached nine per cent per annum last year. If a proper and effective regulatory framework is implemented, it can grow at 12 percent per annum at the least. This Report is an effort in this direction to educate the public and their masters on what the problems are and what are the solutions to resolve the same.

A few words about this Report and how it was done and why will this help the reader. This document has resulted from a series of trade and regulatory projects that CUTS has been engaged in since mid-1990s. This included examination of the competition regimes in India and elsewhere, as a natural progression in our quest for an orderly market, which can add to economic growth and create more jobs for our people.

Two catalysts for this report are worth highlighting: firstly, the analyses of the competition scenario in India through the 7Up project[1] (2000-02) which did a comparative study of competition law regimes in seven developing countries, supported by the DFID, UK. This gave us an insight into how the regime functions (or not) under a variety of political economy constraints. The 7Up model[2] is one which involves *all* stakeholders through a bottom up approach which enables them to appreciate the range and contours of

1 http://www.cuts-ccier.org/7Up1-overview.htm
2 http://www.cuts-ccier.org/7Up-model.htm

competition issues in a country, thus building up the latent or felt need for better economic regulation.

The understanding gained in the 7Up project matured further when we did a follow up project under the 7Up2 also supported by DFID, UK in 2002-04.. Under this we did a deeper analyses of the competition and regulation scenario in India, which resulted in a path breaking study: *"Towards a Functional Competition Policy for India"*. This study, which helped raise awareness of a large number of people in India, led to the idea of doing a regular report to assess the competition and regulatory situation on a periodic basis.

The second catalyst for this report is the present government's resolve to promote competition as a means of economic development, which was articulated in the National Common Minimum Programme and the President's address to the first sitting of the Parliament in 2004. It was for the first time in India that a government had put competition consciously on the live economic agenda. Inspired, one noted commentator named it as the Competition Minimum Programme.

We then formulated a proposal to do such status reports with a gap of one year, i.e the first one in 2007 and the second one in 2009. Armed with the proposal, we approached the British High Commission in New Delhi, which had a funding mandate to promote economic reforms in India through such research and advocacy projects. They agreed to support the project and we are grateful for that.

As a part of the report's structure, we commissioned few papers from external analysts and did some in house research, led by a team under Manish Agarwal, who is now doing his PhD in Australia. These papers looked at various aspects of competition: business welfare, consumer welfare, and sectoral and systemic issues. We also developed a Competition Perception Index, perhaps for the first time in India. The index exercise will be revisited in 2008-09 for the next cycle of the project to see what changes have happened. That will be extremely helpful to see what has transformed in the economic landscape, and how we are doing on competition and regulation in the economy.

In order to guide the project and discuss the work-in-progress, we created a National Reference Group under the chairmanship of Nitin Desai, who has captured his own experience of steering the project in the Preface to this report. We are very grateful to him for the time that he devoted to the project and chaired the meetings so ably.

The National Reference Group met four times in New Delhi and deliberated over the draft papers. This process was very pertinent for the project as well as raised awareness of the issues. Some of the papers, which were planned to be in this report, have been left out to be published as stand alone papers, while some new ones have been added to enrich the report and serve the purpose that has been set for bringing about the crucial change in the economic governance system of India. A list of participants in the NRGs is in the annexure to this Note.

The report as it stands now is a compilation of several papers written by different experts, and is thus not uniform. Readers will note this and therefore will bear with the different styles of each chapter. However, what matters is the substance and the discourse.

The writers who contributed to this report are: Manish Agarwal; Dr V V Singh; Nitya Nanda; Udai Mehta; Sunil Jain; Souvik Chatterji; and yours truly. Other than guiding us, T C A Srinivas Raghavan went through the drafts of each chapter carefully and offered us valuable insights to improve the Report. The editorial assistance was provided by Dipankar Dey Sarkar; Smita John and Madhuri Vasnani, while the layout has been done by Mukesh Tyagi. We are grateful to them also.

I am also very thankful to all who have commented on the report, whose names and remarks are carried at the back and inside pages of this document. In particular, to Kamal Nath, the Commerce and Industry Minister of India, because of what he candidly writes. All others are equally important, and in singling out Kamal Nath, we do not wish to underestimate others' views.

Finally, we owe deep gratitude to Dr C. Rangarajan, Chairman, Economic Advisory Council to the Prime Minister of India for writing the encouraging Foreword. This captures an essence of what the report covers and intends to do. His erudition and constant support to CUTS needs to be underlined. We will need his support as one of the top economic advisers to the Government to push the envelope, so that India continues to grow with equity.

Pradeep S Mehta
Secretary General
CUTS International
Jaipur

Annexure to Editor's Note

List of Participants in the NRG meetings

Aditya Bhattacharjea
Professor, Delhi School of Economics
aditya@econdse.org

Amirullah Khan
Fellow, India Development Foundation (IDF)
akhan@idfresearch.org

Amit Kapur
Partner, J. Sagar Associates Advocates and Solicitors
amit@jsalaw.com

Amitabh Kumar
Director General, Competition Commission of India
cci-amitabh@nic.in

Anish De
Associate Director, Transaction Advisory Services, Ernst & Young Pvt. Ltd.
anish.de@in.ey.com

Augustine Peter
Adviser (Economic), Competition Commission of India
paugustine@nic.in

Bibek Debroy
Secretary General, PHDCCI
bdebroy@gmail.com

G. C. Mathur
Convenor & Managing Trustee, BINTY
gcmbinty@yahoo.com

G. R. Bhatia
Luthra & Luthra Law Offices
gbhatia@luthra.com

Gautam Vohra
President, Development Research and Action Group (DRAG)
priyavari@sify.com

Manas Chaudhuri
Head, Competition Law & Policy, J. Sagar Associates
manas@jsalaw.com

Manish Agarwal
Director, KPMG
manishagarwal@kpmg.com

Manish Agarwal
Ph.D. Student
UniSA
manish.unisa@gmail.com

N. S. Mathur
Advocate, Supreme Court of India
mathur.ns@gmail.com

Nitin Desai
Former Under-Secretary General of UN, New Delhi
desaind@gmail.com

Nitya Nanda
Fellow
Centre for Global Agreements, Legislations, and Trade Resources and Global Security Division
The Energy and Resources Institute (TERI)
nitya@teri.res.in

Partha Mukhopadhyay
Senior Research Fellow
Centre for Policy Research
pmukhopadhyay@gmail.com

Pradeep S. Mehta
Secretary General, CUTS International
psm@cuts.org

Rajat Chaudhuri
Secretary, Southern Initiatives
rajat.chaudhuri@gmail.com

Rajat Kathuria
Professor of Economics, International Management Institute (IMI)
rajatkathuria@imi.edu

Reena George
Conflict Management Services
reenageorge@vsnl.com

S. Chakravarthy
Adviser/Consultant, Competition policy & law (former member of the MRTP Commission)
chakravarthy38@hotmail.com

S. Sundar
Distinguished Fellow, The Energy and Resources Institute (TERI)
ssundar@teri.res.in

Shrawan Nigam
Planning Commission
shrawan_n@hotmail.com

Shubhrata Bhattacharya
General Manager, Corporate Relations, Hindustan Lever Ltd.
Shubho.Bhattacharya@unilever.com

Subhashish Gupta
Professor of Economics & Social Science, Indian Institute of Management, Bangalore (IIMB)
sgupta@iimb.ernet.in

Subir Gokarn
Chief Economist, Credit Rating Information Services of India Ltd. (CRISIL)
sgokarn@crisil.com

Suman Bery
Director General, National Council of Applied Economic Research (NCAER)
SBery@ncaer.org

Surendra Kanstiya
Fellow, CUTS Centre for Competition, Investment & Economic Regulation (CUTS CCIER)
surendrakanstiya@hotmail.com

T. A. Bhavani
Professor of Economics, Institute of Economic Growth (IEG)
bhavani54@yahoo.co.uk

T. C. A. Anant
Member Secretary, Indian Council of Social Science Research (ICSSR)
tca.anant@gmail.com

T. C. A. Srinivas Raghavan
Senior Columnist, Business Standard
tca.tca@gmail.com

Udai S. Mehta
Assistant Policy Analyst
CUTS Centre for Competition, Investment & Economic Regulation
usm@cuts.org

Vijay Vir Singh
(Fellow, CUTS CCIER)
Assistant Professor
Department of Economics
University of Rajasthan, Jaipur
vijayvir@hotmail.com

Abbreviations

ACCC	:	Australian Competition & Consumer Commission
ACMA	:	Auto Components Manufacturers Association
AD	:	Anti-Dumping
ADC	:	Access Deficit Charges
AICTE	:	All India Council for Technical Education
AIOCD	:	All India Organisation of Chemists & Druggists
APIs	:	Application Programming Interfaces
APM	:	Administered Price Mechanism
BAI	:	Builders Association of India
BIM	:	Brazilian Institute of Metallurgy
BJP	:	Bharatiya Janata Party
BPL	:	Below Poverty Line
BSNL	:	*Bharat Sanchar Nigam Limited*
CA02	:	Competition Act 2002
CA07	:	Competition Act 2007
CAC	:	Carrier Access Code
CADE	:	Council for Economic Defence
CAT	:	Competition Appellate Tribunal
CBI	:	Central Bureau of Investigation
CCC	:	Consumer Coordination Council
CCI	:	Competition Commission of India
CCPC	:	Central Consumer Protection Council
CERC	:	Central Electricity Regulatory Commission
CIM	:	Commerce & Industry Ministry
CITI	:	Confederation of Indian Textile Industry
CLI	:	Calling Line Identification
CMA	:	Cement Manufacturers Association
CONCOR	:	Container Corporation of India's
COPRA	:	Consumer Protection Act
CSOs	:	Civil Society Organisations
DEOs	:	District Education Officers
DERA	:	Delhi Electricity Regulation Act
DfID	:	Department for International Development
DG	:	Director General
DoCA	:	Department of Consumer Affairs

DoJ	:	Department of Justice
DoT	:	Department of Telecommunications
DPCO	:	Drug Price Control Order
DTH	:	Direct to Home
DVB	:	Delhi Vidyut Board
EC	:	European Commission
EU	:	European Union
FASII	:	Federation of Association of Small Industries of India
FBI	:	Federal Bureau of Investigation
FDI	:	Foreign Direct Investment
FICCI	:	Federation of Indian Chambers of Commerce and Industry
FISME	:	Federation of Indian Small and Medium Enterprises
FTA	:	Free Trade Agreement
FTC	:	Fair Trade Commission
GDP	:	Gross Domestic Product
ICMF	:	Indian Cotton Mills Federation
IE	:	Internet Explorer
IIM	:	Indian Institute of Management
IPR	:	Intellectual Property Right
IRDA	:	Insurance Regulatory and Development Authority
ISPs	:	Independent Service Providers
IT	:	Information Technology
IUC	:	Interconnection Usage Charge
LPG	:	Liquefied Petroleum Gas
M&As	:	Mergers & Acquisitions
MoCA	:	Ministry of Corporate Affairs
MRP	:	Maximum Retail Price
MRTP	:	Monopolies and Restrictive Trade Practices
MSO	:	Multi System Operator
MTNL	:	*Mahanagar Telephone Nigam Limited*
NCERT	:	National Council of Education Research and Training
NCHE	:	National Council for Higher Education
NCMP	:	National Common Minimum Programme
NCP	:	National Competition Policy
NDA	:	National Democratic Alliance

NPPA	:	National Pharmaceutical Pricing Authority
NRG	:	National Reference Group
NRHM	:	National Rural Health Mission
NTBs	:	Non-tariff Barriers
PDS	:	Public Distribution System
PPPs	:	Public Private Partnerships
PSF	:	Polyester Staple Fibre
PSU	:	Public Sector Undertaking
PWD	:	Public Works Department
R&D	:	Research and Development
RBI	:	Reserve Bank of India
RTI	:	Right to Information
RTP	:	Restrictive Trade Practice
SCoRA	:	State Competition and Regulatory Agency
SDE	:	Secretarial for Economic Monitoring
SEBs	:	State Electricity Boards
SEM	:	Secretariat for Economic Monitoring
SERCs	:	State Electricity Regulatory Commissions
SPCB	:	State Pollution Control Board
SSI	:	Small Scale Industry
T&D	:	Transmission and distribution
TDSAT	:	Telecom Dispute Settlement & Appellate Tribunal
ToR	:	Terms of Reference
TNCs	:	Transnational Corporations
TRAI	:	Telecom Regulatory Authority of India
UGC	:	University Grants Commission
UNCTAD	:	United Nations Conference on Trade and Development
UNDP	:	The United Nations Development Programme
UPA	:	United Progressive Alliance
USAID	:	US Agency for International Development
USO	:	Universal Service Obligation
UTPs	:	Unfair Trade Practices
VPN	:	Virtual Private Network

CHAPTER 1

Prologue – An Overview

In his very first year as the Prime Minister of India in 2004, Dr Manmohan Singh wrote a signed frontpage editorial in *The Economic Times*. In it, he said, *"I do hope that in the New Year, we can all work together to build a more equitable, competitive and humane India"*. This Report prepared by CUTS *inter alia* takes stock of how we have moved forward since then in promoting growth and equity through regulatory reforms and better management, and what still needs to be done.

Dr Singh's exhortation has its roots in the first days of the new Government, which announced its intention of making competition policy a serious issue, drawing from the NCMP of May, 2004, which says the Government "will not support the emergence of any monopoly that only restricts competition. All regulatory institutions will be strengthened to ensure that competition is free and fair. These institutions will be run professionally". This was reinforced in the President's address to the Parliament on June 07, 2005:

> "Revival of industrial growth is of paramount importance. Incentives for boosting private investment will be introduced. Foreign Direct Investment (FDI) will continue to be encouraged. Indian industry will be given every support to become productive and competitive. *Competition, both domestic and external, will be deepened across industry with professionally run regulatory institutions in place to ensure that competition is free and fair.*
>
> "The Government will establish a National Manufacturing Competitiveness Council to provide a continuing forum for policy interactions to energise and sustain the growth of the manufacturing industry.
>
> "The Government is committed to a strong and effective public sector, whose social objectives are met by its commercial functioning. But for this, there is need for selectivity and a strategic focus. My Government will devolve full managerial and commercial autonomy to successful, profit-making companies operating in a competitive environment.

> My Government believes that privatisation should increase competition, not decrease it".

These statements provide the *raison d'être* for this Report, which examines what has been done – or not – on these commitments. In other words, it seeks to provide a status report on the state of competition and regulation in India.

The appropriate definition of competition is a situation which ensures that markets always remain open to potential new entrants and that enterprises operate fairly under the pressure of competition. Regulation, in this context, is defined as an instrument to tackle market failures in regulated sectors, particularly infrastructural areas like electric power, which due to their natural monopolies are not amenable to competition.

How will competition help us?

Broadly speaking, competition can help us, first, by ensuring that there are a large number of suppliers, so that there is healthy rivalry. Second, where there are natural monopolies, we require better regulation and price capping, so that consumers are not exploited. For example, there is huge competition in the telecoms sector, which is improving with new technologies available every day. Yet, the sector needs regulation. Rivals can collude, and thus negate the benefits of competition. Or, tariff plans can be devised and presented in such a way that consumers cannot decipher them. Thus, there is the Telecom Regulatory Authority of India (TRAI) at New Delhi, which governs the performance standards and commercial behaviour of the telecom sector.

TRAI is engaged in another area of regulation, which is also quite close to consumers, namely cable TV. In this sector, there are a large number of suppliers – the last mile operators – who are serving a large population of consumers. Yet there is no perfect competition. Here we are stuck with natural monopolies, because they divide the territories among themselves. They too charge exploitative prices. Consumers cannot even change their cable TV operator for fear of being left with no service at all. In 2003**,** CUTS carried out a nationwide survey on consumer satisfaction, the results of which showed a high level of dissatisfaction. The study highlighted that despite the existence of relatively strong consumer awareness in the country, the cable TV sector remains a seller's market. The consumer is no more than a puppet in the hands of the operators, without any say in the types of channels they want to watch or in choosing their cable operator. Consumers pay for channels they do not watch, and may pay and not receive channels they would like to watch. Natural monopolies reign in many other sectors, such as electricity to name only one.

In most cases, the capacity of regulators is either limited or non-existent. This is made worse by the fact that most regulatory agencies are run by retired bureaucrats (or judges), whose working lives have been spent under a command and control regime. Not surprisingly, their understanding of law and economics in the area of independent regulation is minimal. Some do learn on the job and perform well, but by the time they have learnt the ropes, it is time for them to go. In addition, the salary levels of staff are quite low, so the regulators do not attract good professionals. As a result the quality of regulation suffers. Clearly, we have miles to go.

What is fortunate is that the new Government at the Centre is very serious about improving competition in the market place, and reforming the regulatory structure. Currently, the Planning Commission is engaged in looking at the regulatory framework in infrastructure and considering how can we bring in the best international practices to improve it. Thus, there is intent – the challenge is to turn it into reality.

How to promote competitiveness through competition?

Competition policy has a significant role to play in promoting competitiveness and growth. The term 'competitiveness' appears to have aroused considerable controversy in the recent years. On the one hand, the word has become a kind of catch-all term for a wide-ranging set of policies. On the other hand, it evokes an analogy suggesting nations compete in the same way as firms. While nations may not always compete, they can – and should – help firms compete more effectively by following a set of macro policies that can create an enabling environment for competition. A simple example is length of time it takes to issue clearances to set up a business.

A study conducted by the World Bank[1] reveals that in India, it takes 35 days to set up a business. In 2006, however, it took 71 days to start a business in India. In a sample of 175 countries, India was placed 134th.

What is perhaps worse, is the difficulties faced by businesses *after* they have started – an unhelpful and obdurate bureaucracy, brought up with an attitude problem – is just one of many hurdles darkening our business landscape.

There are lessons for India in how other countries deal with similar problems. Faced with declining competitiveness, the European Union (EU) published a white paper in 1993[2], which highlighted four areas for priority action:

- promotion of investment in intangible assets;
- development of cooperation between firms;
- ensuring fair competition; and
- modernisation of public authorities.

Thus, we see that the EU white paper on competitiveness emphasises the need for ensuring fair competition in the market as an essential ingredient for enhancement and maintenance of competitiveness in the economy. These prescriptions apply to India as well. The Government has thus created the National Manufacturing Competitiveness Council, but its work has been uninspiring, marked by an inability to think out of the box, which is essential to change things.

Empirical evidence, though focusing mainly on the experience of developed countries, has confirmed that barriers to competition within an economy, whether due to governmental or private restraints, leads to loss in income and welfare. On the other hand, a well-designed and implemented competition policy promotes economic growth by ensuring better allocation of resources, as highlighted by the following examples:

> *A study carried out for the Australian economy estimates the expected benefits from a package of competition promoting and deregulatory reforms (including improvements in the competition rules) to lead to an annual gain in real gross domestic product (GDP) of about 5.5 percent, or A$23bn, where consumers would gain by almost A$9bn besides seeing increases in real wages, employment and government revenue.*[3]

> *A report released by the McKinsey Global Institute (MGI)*[4]*, based on research on the economies of 13 nations, argues that the key to reducing economic inequalities between rich and poor countries is productivity and it is linked to competition and consumption. MGI studied national economies from the ground up, and points out that global economic agencies underestimate the significance of a level playing field. Competition is more important than education or greater access to capital markets in lifting a country's GDP. To reduce barriers to competition, policy makers must stand up to special interests of business and focus more on the welfare of consumers.*

In the context of developing countries, including India, there is shortage in systematic analyses of the benefits of adopting a competition law regime. In India, there was never an effective law. However, a relevant study of the Peruvian competition agency, Indecopi, found that in the first seven years of its operation, the economic benefits due to the competition authority's operations amounted to US$120m against operating costs of US$20m, i.e. a six-fold 'profit'.[5] Similarly, a study by the Korean Fair Trade Commission (KFTC) in 2003 found that benefits (consumer welfare increase and income transfer effect) outweighed costs (the KFTC's budget) of competition law enforcement in 2000 and 2001 by 34 times[6].

Under the 7Up (the 1st in a series of similar projects which have carried out comparative studies of competition regimes in several developing countries) project[7], we found that the Indian Government in the 1980s and 1990s did not appear to be serious about the competition law regime, as the budgetary allocation to the Monopolies and Restrictive Trade Practices Commission (MRTPC) was just about 0.0009 percent of the total government budget in 2000, when the ideal allocation in other developing and developed countries was in the range of 0.0013 percent. Even a small poor country like Zambia had provided 0.005 percent of its total budget to its Competition Commission.

How does competition policy ensure pro-poor development?

An issue that is often raised in discussions about competition policy in the context of a developing country is the role of such a policy in the country's economic development. Arguably, the biggest challenge before the developing world today is to rid itself of the abject poverty that deprives a large section of its population, the opportunity to lead a dignified life. An important approach to poverty reduction is to empower the poor, provide them with productive employment and increase their access to land, capital and other productive resources. But this approach may not be successful unless the poor are linked to the markets and markets are made to work for the benefit of the poor.

The World Development Report 2000-01 says:

> *"Markets work for the poor because poor people rely on formal and informal markets to sell their labour and products, to finance investment, and to insure against risks. Well-functioning markets are important in generating growth and expanding opportunities for poor people".*

"Well-functioning" implies markets that work efficiently and without distortions. However, competition is often distorted by players, and it is essential that governments enact competition laws to regulate distortions. What is often ignored is the fact that the prevalence of anticompetitive practices in markets hurt the poor more than the rich. A rich person would not mind paying a rupee more for a product or service, but for people living with less than Rs 20 a day getting value for money – for every *paisa* they spend – is vital for survival. This is the 'consumption' side.

If we look at the 'ability to pay' angle or the 'income' side, a sector that immediately comes to mind is agriculture. Of the 1.2 billion people of the globe who live in extreme poverty, approximately 75 percent live and work in rural areas and about two-thirds of them draw their livelihood directly from agriculture[8].

The market in agricultural products is very often considered to be an example of a perfectly competitive market. However, there is a huge gap between the prices consumers pay and the prices farmers actually receive. This is because of the chain of intermediaries between consumers and farmers that do not always work in a competitive manner. These intermediaries abuse their monopolistic dominance in the market for the final products, while in the markets for primary products, they abuse their monopsonistic dominance. In a country like India, where two-thirds of the population draw their livelihood directly from agriculture, the linkage between market imperfections in agricultural goods and poverty is manifest.

Competition law is not a luxury of the developed world, but an indispensable tool for developing countries in their fight against poverty. Developing countries should not be dogmatic about withdrawing from the markets, as distortions and failures in markets are ubiquitous, necessitating state intervention to promote a fair and orderly market.

Competition policy maximises consumer welfare by ensuring that goods and services of the best possible quality are offered at the lowest prices and available in adequate quantities. Furthermore, competition policy also leads to business welfare, by ensuring, for instance, that intermediate goods and services consumed by businesses are available through a competitive process.

Promoting effective markets through competition

Competition, though seen as a means of attaining efficiency and fairness, may not necessarily promote these objectives. A perfectly competitive market with many small firms may achieve equality of opportunity (fairness) but may not achieve efficiency, as the existence of too many firms means that they may not be able to achieve economies of scale.

Obviously, competition policy must deal with trade-offs in its objectives and instruments. This concern has led to a shift from a structural to a behavioural approach in enforcing competition. After all, in a fiercely competitive market, even a duopoly can produce an outcome that a perfectly competitive market generates. Thus, it may not be necessary to have a highly-competitive market structure provided appropriate rules of the game can be designed and enforced so that the behaviour of the market players remains competitive.

This approach may, however, become ineffective when there are natural monopolies and competition cannot be ensured as such. Situations could also arise where there may be a number of players in the market but the market itself is so segmented that the individual players become monopolists. The only way to get 'competitive outcomes' in such markets is to put in place effective regulation. Thus, regulation in different sectors becomes an integral component of competition policy.

As is evident, competition policy is a complex issue. Unfortunately, there has not been much research on competition issues in India. Currently, DFID, UK, supports the Competition Commission of India (CCI) through the World Bank's Foreign Investment Advisory Service (FIAS) to undertake studies in various sectors, which can be accessed at *www.competitioncommission.gov.in*. The CCI project resulted mainly from a landmark study by CUTS, *Towards A Functional Competition Policy for India*, conducted in 2005, and supported by DFID. The study was a comprehensive one, which looked at both systemic issues and some sectoral issues.

As the country is poised to implement a new competition law, a lack of understanding of the nature and extent of prevalence of different types of anticompetitive practices in India will pose a major challenge. This Report is aimed at giving stakeholders a better understanding of the competition scenario in India. It will help:

- the Government to integrate a National Competition Policy;
- the competition and regulatory authorities to set priorities; and
- other stakeholders to understand the complexities and make appropriate interventions.

The Report

This Chapter, *The Prologue* gives an overview of competition and its relationship with various dimensions of economic governance. It also recalls our previous work in the area of competition and regulation in India since 2000. This Report is the fourth major research project undertaken by CUTS in India in this exciting and challenging field.

Perhaps for the first time in India, an effort has been made here to gauge the popular perception to competition and regulation by developing an Index. A carefully selected sample of about 660 respondents was achieved. Chapter 2, *How do People Perceive the Situation?*, carries the results of this exercise. The purpose was to assess the perceptions of stakeholders on the competition and regulation scenario along the following lines:

- Competition law or competition issues in competitive industries;
- Sector regulation or competition/regulation issues in regulated industries; and
- Government policy/measures/other legislation.

What comes out clearly in this exercise, is that although the need for a competition policy, competition law, and rules that encourage competition is clearly recognised, progress has been slow and haphazard. Evidence of anticompetitive behaviour is found in virtually every sector of the Indian economy.

The reforms of 1991 gave a fresh impetus to markets, which had been in a near-dormant state since the late 1960s. These reforms were undertaken to instil dynamism in the economy through competition. Competitive forces were expected to pull the Indian industry out of its state of inertia and place it on a dynamic growth path. In this context, it is generally believed that economic liberalisation and globalisation have succeeded in changing the market structure so as to allow more competitive free play. Market competition, is in turn, expected to have a positive influence on the performance of industry.

Industrial growth has improved the supply of various goods and services in the market. The availability of better and cheaper goods and services to consumers has certainly enlarged and is set to increase further with the rise in competition in the market. The availability of a larger basket of goods and services certainly enhances consumer welfare but it is limited only to those who have the necessary purchasing power. One of the basic objectives of competition in any economy is that the gains of competition be distributed equally among different segments of society. But the trickle-down effect of economic growth is not visible in the Indian market and the poor among the consumers do not have the opportunity to reap the benefits of competition. Obviously, to reap the benefits of competition, a person has to first become a part of the market, which means they must be given the opportunities to generate purchasing power.

Do all the consumers have the ability to pay, even if competition has increased the availability of goods and services in the market, and thus access? There are cases where, in spite of the availability of goods and services and paying capacity the market is characterised by a lack of access due to skewed and uneven distribution of goods and services in the market. These problems are often compounded by mal-governance. Growth has to be accompanied by reduced disparity, good governance and, even more importantly, dispersed benefits.

There has been substantial growth and expansion in various goods and services sectors with relaxation in control and new technologies. The telecoms sector, for instance, is a success story in terms of its widening access. With the rise in access to various goods and services and competition in the market, various anticompetitive practices are also expected to arise. As a result, while competition has increased, the task of regulating their conduct has not diminished – hence the need to develop a stated competition policy to promote efficiency and consumer welfare. Further, competition policy is needed to create a healthy business environment, which leads to efficient resource allocation, and to curb the abuse of market power.

In India, although the need for a competition policy and competition rules that encourage competition has been recognised, progress has been slow and haphazard. There has been a tendency, in spite of the commitment to reforms, to frame policies, laws and rules without acknowledging the market process; the approach has often not been consistent.

Many of the Government policies and practices have not been in line with market principles, not only because of lack of awareness, but also due to other reasons. These have been analysed in Chapter 3, *Policy Induced Anticompetitive Outcomes*. Even when the Government is committed to introducing competition based on market principles, the outcome is often the very opposite. Mostly, this happens because of futile and ignorant efforts to reconcile too many conflicting objectives. Too many good intentions often result in bad outcomes. But, increasingly, cronyism has also been responsible for such policies. For furthering competition as a fair process and as an impulse to shape equitable outcomes, it is important to ensure that the design and operation of policy instruments do not frustrate the market process.

However, a large overhang and backlog from the past persist in attitudes and laws, preventing the Government from both construing and constructing policies that are structured to work in sympathy with the market processes. The design and operation of several policies and practices of the Government are such that they distort the market process and competition – most often in the name of public interest, which invariably means some entrenched/ vested interests. Market distortions also exist at the state/local level. In a word, several policies and rules adopted by governments are obsolete in the present economic environment and are adversely affecting the competitive forces and competition culture in the country.

There is mounting concern that this state of affairs is affecting the welfare of both consumers and businesses. For example, the manner in which privatisation and deregulation policies have been introduced, in some cases they have simply transferred monopoly power from the public to the private sector.

The laws in India provide for regulatory mechanisms under several Acts. These have been discussed in some detail in this report. Regulation in the manufacture and trading of goods is governed by several laws, such as standards and food safety laws. To promote fair play alone, there is the Monopolies and Restrictive Trade Practices Act (MRTPA), the Consumer Protection Act (COPRA), 1986 and several Intellectual Property Right (IPR) laws. Then, there are the traditional laws such as the Contracts Act and the Sale of Goods Act – and an effective, though inefficient, judicial system to resolve disputes.

As far as specific infrastructural industries are concerned, there is, for example, the Electricity Act of 2003, which aims to create a liberal policy environment to facilitate the entry of new players into the business of electricity generation. The Act vests the power of determining tariffs to the appropriate regulator: Central and State Electricity Regulatory Commissions (SERCs) and not the generating company. The SERCs are expected to regulate prices that final consumers pay and to foster competition. However, political interference overshadows good regulation in the states. Telecom is a central subject, hence state-level interference is ruled out. The TRAI Act, amended in 2000, empowers the regulator of this sector but stops short of giving it teeth. It does have a lashing tongue though.

In order to enable healthy competition in the market place, there are set principles which the Government has to imbibe and incorporate in the policy rubric. The report has listed such principles in Chapter 4, *The Nine Principles of Competition Policy*. An important finding on a broad basis is that competitive neutrality is at a premium. This requires the separation of policymaking, ownership and regulation. For example, in the telecoms sector, the ministry of communication sets the policy; it owns and operates two large public sector companies – *Bharat Sanchar Nigam Limited* (BSNL) and *Mahanagar Telephone Nigam Limited* (MTNL) – and also oversees the regulator, TRAI. In such a scenario, can telecom regulation be really neutral? These and several other dimensions have been dealt with in the chapter.

Chapter 5, *Why Competition Policy & Law?* distinguishes between the terms competition policy; competition law and competitiveness, as many often confuse one with the other. It goes on to address some popular misconceptions through a Myth vs. Reality matrix. It examines and queries certain fundamental aspects of the issues at stake: for example, have we adopted a competition law under external pressure to enable market access for foreign multinationals? And do we need a competition law at all?

India does not have a comprehensive National Competition Policy (NCP). Interestingly, two arms of the Government have initiated the process after successful advocacy by CUTS[9] . The Department of Corporate Affairs (formerly Company Affairs) directed the CCI to form an Advisory Committee, headed by eminent economist, Dr Vijay Kelkar on January 17, 2006, for developing a consultation paper on a NCP. The Committee has met on several occasions, and will be presenting its assignment soon.

Overtaking the above process, the Planning Commission established a working group to develop a NCP on June 05, 2006, with V K Dhall, Member, Competition Commission of India (CCI), as its chair. The working group delivered its report in February 2007. The report is to be integrated into the 11th five-year Plan Document, which is expected to be ready by the end of

2007. The same has to be adopted by the National Development Council and then put into action. Our work will continue.

The main features of its recommendations include the establishment of a Competition Policy Council which will oversee the implementation of the policy, to broadly cover the following principles:

- effective control of anticompetitive practices;
- competitive neutrality, i.e. a level playing field;
- rule-bound procedures with transparency and non-discrimination;
- institutional separation between policy making, operations and regulation;
- third party access to essential facilities on fair terms; and
- deviations from policy on social or other grounds should be clearly defined, transparent, non-discriminatory and having the least anticompetitive effect.

Emanating from the first of the six principles mentioned above, Chapter 6, *India's Competition Law Regime: Past, Present and the Future*, takes the reader through the history of competition law in India – from the MRTPA of 1969 to the Competition Act of 2002 and an amended one in 2007. Work on the new law began in 1999, when the then Finance Minister, Yashwant Sinha, announced the Government's resolution to bring in a modern law. This came about for two cognate reasons: lobbying by the consumer movement led by CUTS[10] from the mid-1990s; and the Government's realisation that the archaic MRTPA, having worked more as a licensing law rather than a competition law, had outlived its utility. The whole approach was to turn the law on its head – while the MRTPA was a structural law, the Competition Act, 2002 would be a behavioural law. 'Big' was no longer to be considered bad, but if 'big' misbehaved it would invite punishment. The new law is yet to be notified and operationalised.

The delay of nearly eight years was due to several reasons. First, there was opposition from business, which is often the case in many developing countries. Businesses believe that such a law will suffocate their growth due to its very nature or prevent them from making profits, and that overzealous regulators will use a heavy hand. Another reason for the delay centred around the quality of regulators. Regulatory authorities are mostly headed by retired civil servants, who have been weaned in a command-and-control economy, and have little understanding of law and economics. The same happened in this case too, and it was challenged in the Supreme Court. The Court took umbrage on some other grounds, mainly that such quasi-judicial authorities with the power to impose fines or jail seutences can only be dealt with by judges, and not by civil servants under the doctrine of separation of powers between the executive and judiciary. There is more about this in the Report.

Box 1.1: Finding the Going Tough

Between July 2003 and September 2005, the upstream polyester producers, including Reliance and Indo Rama Synthetics, had increased the price of Polyester Staple Fibre (PSF) by approximately 26 percent. According to reports, PSF was available at Rs 71.5/kg in the domestic market. As against this, through imports, PSF was available at around US$1.2 (CIF) or Rs 56/kg. However, with 20 percent import duty on import price and 16 percent countervailing duty, the effective import duty on PSF came to around 39.2 percent. Thus, the cost of imported PSF for the domestic users worked out to Rs 77.8/kg. The domestic PSF producers have been pegging their prices to landed cost of imports, and taking advantage of the tariff protection.

With Reliance producing about 85 percent of the PSF, and Indo Rama producing the rest, this man-made fibre segment, like others, is known to be a highly concentrated sector. Over the years, the duo have conspired to ensure very limited competition by manipulating trade policy to maintain a high tariff barrier, and grown rather fat on profits from their exploitative pricing policy.

Consequently, the Indian Cotton Mills Federation (ICMF), now the Confederation of Indian Textile Industry (CITI) called for a lowering of customs duty on synthetic yarn to check exploitative pricing by domestic suppliers as it would check arbitrary pricing by the manufacturers. It demanded that import duties on all man-made fibres be reduced from 20 to 10 percent, while excise duty on domestic manufacture be cut down from 16 to 8 percent, if the textile sector was to become competitive.

The apex body of the textile industry had reportedly also threatened to call its affiliates to boycott polyester fabric and switch to cotton fabric if its concerns remained unresolved. CITI held that the country's synthetic yarn production had stagnated at 600,000 tonnes per annum since 1997 due to the duopoly of Reliance and Indo Rama. Various industry associations of the domestic mills sector had repeatedly pointed out that rather than squeezing more profits from the stagnating market, the polyester producers should look at their prices and try to expand the market.

(Source: The Economic Times, 20.09.04 & The Hindu Business Line, 22.12.04)

Predictable and effective regulatory regimes create confidence among businesses, and thus help to promote investment. If telecom and electricity rates come down it is not only consumers who benefit but also business as customers of the services. Similarly in the area of intermediates, it is business which gains from low cost inputs to become competitive. For example, in two synthetic chemical inputs the consumers – textile and garment manufacturers – suffer because of duopolies (see box 1.1). Again, where there are cartels, the immediate sufferer is businesses, as most cartels operate in the area of intermediates such as chemicals, cement and equipment, which are purchased by other businesses to produce goods and services. One of the most important benefits for business in a competition law is its ability to take action against entry barriers to setting up a business or supplying goods or service.

Both consumers and businesses urgently need a competition law, because of the existence of unchecked anticompetitive practices, such as cartels, across the country. Chapter 7, *Cartels: The Major Challenge*, traces the history of the pathology of cartels in India.

Cartels plague every sector in India. In one case to do with the contraceptive device, Copper-T, even a public sector undertaking (PSU), Hindustan Latex Ltd., has been named as a colluder[11]. The cartel was never investigated in spite of a complaint by CUTS to the MRTPC. In another case involving a well-known and widely-prosecuted international cartel in vitamins, the MRTPC dismissed our complaint summarily, without even a speaking order.

Cartels can operate without fear of prosecution because there is no competition law worth its name. The MRTPA, which can crack down on cartels, is toothless, as can be seen from a reading of cases handled by it since its inception. Further, the Commission has little resources. An additional problem centres around the lack of a definition for cartels. But this problem will hopefully be resolved under the new law – it not only lays down clear definitions, but also offers amnesty to whistleblowers, a tool that has been used successfully by competition authorities in advanced countries. As this chapter is being written, a cement cartel is in the news, often occupying the front and editorial pages of business newspapers.

Cement cartels highlight another type of anticompetitive practice – abuse of dominance. Cement companies are breathing down the necks of dealers to operate as exclusive distributors of their brands, and risk losing supplies if they sell another company's brand. In the parlance of competition law such type of behaviour is termed as 'exclusionary' abuse of dominance. This will be another crucial area of enforcement for the new competition authority. As already noted, the thrust of the new law is to regulate bad behaviour by big firms, rather than be inhibited by considerations of size. Besides that, the political economy of the country will enable big to become bigger over time, and thus regulating combinations (mergers, etc.) will involve striking a balance. Analyses of combination cases will also need a high level of skills and understanding, and will therefore take time to build up. Pay-scales offered by the authority are too low to attract skilled professionals, so there will be some limitations in capacity. This is not to suggest that regulation of combinations should be ignored but only to point out some practical difficulties.

Chapter 8, *The Contours of Abuse of Dominance in India*, takes the reader through the various definitions of the term. There are two types of abuses of dominance. One is exclusionary, which has been discussed above. The other is exploitative and its menu of abuses is longer than that of exclusionary. Mainly the conduct leads to a form of price gouging or rent extracting by a dominant business because either the customer has no choice or cannot access substitutes easily. One important contemporary case relates to an abuse of IPR. The ongoing case of price gouging by Monsanto Mahyco in its marketing strategy on Bt cotton seeds, over which the company has a global patent, is illustrated in the chapter.

The MRTPA did not specifically cover IPRs, but it did test some cases under the provision of monopolistic and restrictive practices. Under various court judgments, European courts have held that IPRs by themselves are not bad – it is their abuse which is bad. The Competition Act is rather weak in this respect, and hence any action against IPR-related abuse will have to be dealt with under this provision. This would also require strong capacity in the authority.

One problem that we have seen in the past with the MRTPA was that it could not really oversee the whole country because of constraints on resources, low capacity and the sheer size of the country. On the other hand, there are increasing numbers of anticompetitive and unfair competition practices which happen at the grassroots level without any recourse to justice. To give just one example from the CUTS dossier, a hosiery sale organiser, Bal Krishna Khurana,[12] used the media in 1984 to advertise the sale of cheap hosiery goods (claiming, for instance that a saree worth Rs 1,000 is available for Rs 150) necessitated by the factory closing down and/or ships sinking. In fact, the goods were of a poor quality, many customers could not find the particular good advertised, and there was no avenue to complain against bad goods, as these sales organisers had no regular office.

The sales were always held for three-five days in hired exhibition halls or hotels. This was and is a standard practice in all our cities. Khurana was thus carrying on business at Jaipur through both unfair trade practices (UTPs) and switch-and-bait. A complaint was filed against him at the MRTPC, which issued cease and desist orders. Copies of the orders were sent to the newspapers which were carrying these misleading ads. The practice stopped for many years and newspapers desisted from carrying these type of ads. Alas, the same practice has begun again and there is no action. Consumer courts are there to provide relief to unsatisfied consumers, but they hardly take any preventive action.

This is why we need competition and regulatory agencies at the local level. In a comparable large federal country like the US, there are state competition laws and agencies to deal with local problems. Chapter 9, *Competition Abuses: Local Problems Need Local Solutions*, argues the case for local-level authorities which can work in conjunction with central authorities. The telecoms regulator, which also oversees cable TV, is on record saying that while sitting in Delhi, it is unable to police the actions of a large number of cable operators, and that these should be handled at the local level.

In the area of telecoms, India has witnessed a stunning success in terms of creating huge competitive networks and offering the lowest tariffs in the world. However, one cannot be complacent about it. Chapter 10, *Telecommunications and Electricity* takes us through the situation of competition and regulation in both these crucial infrastructure sectors through case studies. While telecom has been a success, electricity has been a failure in terms of promoting competition. Common factors to both sectors include the establishment of universal supply obligations and a fund to assist companies to serve the poor and disadvantaged people/areas. It is operating in the telecom sector but not in the electricity sector as yet. On the same lines, private sector airline and petroleum retail companies are required to mandatorily service less profitable and remote areas. The telecom Universal Service Obligation (USO) Fund is currently being used to create a rural infrastructure.

In the electricity sector, there is very little private enterprise, as in many states the old electricity boards continue to function in their new avatars as generation, transmission and distribution companies. They continue to operate under a lethargic system and even the state electricity regulators have little control over them. Politicians often compete to deliver free power to rural consumers, rather than offer subsidy to the distribution company to do so. The Central Government has tried to stop these unhealthy practices and to offer incentives to states to improve their power situations, but the matter drags along. The electricity sector can be competitive by allowing private producers to sell power directly to consumers using the existing grid and distribution network, but apathy only prevents anything from happening in concrete terms. In the mobile telephony sector, one thing which is happening is separating infra from the ownership of operations. A similar approach will be required in the electricity sector to promote competition.

Finally, in terms of promoting growth, it is equally important to see how we deliver education and health care to our people. Both these areas are crucial for steady economic development too. Chapter 11, *Regulation in the Social Sector*, examines these two areas as case studies. Too much attention is being given to pharma prices in the country through the Drug Price Control Order (DPCO) and the National Pharmaceutical Pricing Authority (NPPA), while the issue of competition lies elsewhere.

Consumers do not decide which brand of drug to buy or which laboratory to go to for a diagnostic test – rather, it is their doctor or the hospital who decides. Many of the doctors prescribe under the influence of pharmaceutical companies and seek extra income from pharma retailers and diagnostic laboratories.

In the area of education, the quality of regulation is equally poor. Little attention is paid to the course curriculum or the pedagogy or even standards. On the other hand, the education regulators – the University Grants Commission (UGC) and the All India Council for Technical Education (AICTE) – set standards on the basis of the number of faculties or size of facility. These benchmarks cannot promote quality, while the National Knowledge Commission has argued for an education regulator in the area of higher education[13] which can promote quality.

Postscript

The record on infrastructural regulatory institutions is also poor, affecting both businesses and consumers. For business it affects investment decisions, while for consumers it means that things will be business as usual. We need over US$450bn during the 11th Plan period to create a strong infrastructure, so that we can maintain our growth rate at nine percent or even go higher, and to create more jobs and raise the living standards of the poor.

The Prime Minister announced in mid-2004 that the Planning Commission would prepare a policy paper on a sound regulatory architecture for India, taking into account best practices from around the world. He announced a deadline of six months. This was also an item in the agenda for the newly-established Committee on Infrastructure, which was headed by him. The paper is yet to be completed.

The first draft, on 'Approach to Infrastructure Regulation: Issues and Options', was prepared and placed on the Planning Commission's website on August 18, 2006, two years after the announcement. A Roundtable was organised on September 25, 2006 to discuss the draft paper, and participants were drawn from the government, regulatory agencies and consumer groups among others.

Expectedly, the discussions were contentious, because the paper had floated new ideas such as a framework law on regulatory regimes in order to promote cohesion among ministries in how each of them drafts laws for regulators in the sectors that they control. Another idea was to create truly independent regulators by making them directly accountable to the Parliament rather than line ministries. The draft paper suggested that regulators be pulled out of the control of ministries so that they could perform better and in an independent manner. An idea to create a department of regulation was also floated. But these suggestions met with severe resistance, as the line ministries would lose control.

Box 1.2: Regulatory Malfunction

The regulatory system for the efficient functioning of sector markets was meant to supplant a political system that is usually unable to take the required pricing decisions in various infrastructure sectors like electricity, or weighs in favour of special interest groups. However, as is common knowledge, the regulatory system has not worked perfectly, and some might argue in favour of rule-based contracts that do away with the need for periodic decisions by fallible regulators. But it should not be too much to ask that, so long as a regulatory system is in place, it works smoothly. That, unfortunately, is not the case.

The selection of the chairman of the Central Electricity Regulatory Commission (CERC), due since late last year, has once again been held up. The situation becomes worse with the Telecom Dispute Settlement and Appellate Tribunal (TDSAT) set to stop functioning for all practical purposes in three weeks' time because the posts of a second member (out of three) will have fallen vacant. The government has to make the appointments, and it is clear that people in the government are playing games. If the selection process is so politicised, it raises the question as to how independent the regulatory system is in practice.

In the case of the CERC, a selection panel short-listed two candidates, but one of them dropped out. Another name that was not in the original list was inserted and, even more extraordinarily, this Maharashtra-cadre IAS official was placed at the top of the list of two. In the case of the TDSAT, it gets worse. A candidate for one of the two posts was chosen by a panel, and the name approved by the Chief Justice of India. Then an unexplained problem was discovered, as a result of which the post was not filled. Later, the communications ministry decided to recommend the name of the outgoing chairman of the government-owned telecom firm, BSNL, which the Chief Justice rightly rejected on the grounds that

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90 per cent of the cases before the TDSAT are against BSNL. Undeterred, the ministry has sent the same name once again. The selection process for the second member has just begun.

Matters do not improve after appointments are made. In the case of the TRAI, it is well known that there was a difference of opinion between the TRAI Chairman and the telecom minister. So, for months the ministry refused to act on TRAI's recommendations – it did not help that the recommendations themselves were not well thought-out, and were changed in one critical case once TRAI had a new chief. None of this points to the regulatory system in the country functioning satisfactorily. A systemic review is in order.

Source: Business Standard, 27.08.07

At a second consultation on June 04, 2007, exclusively with consumer groups, the Deputy Chairman, Montek Singh Ahluwalia, observed that the final paper would be part of the 11th Plan Document to be debated at the National Development Council, before adoption. This may take another three-four months. However, for the recommendations to be accepted in full, it might take four-five years.

It is, however, also true that in some areas like telecom, civil aviation, insurance, railway container traffic and gas distribution, government monopolies have been curbed by allowing the private sector to enter. However, if one examines each sector in detail we find that principles of competitive neutrality (providing a level playing field) have been given short shrift. In the airline sector or oil exploration sector, the reverse has also been observed, where private players were given undue advantage over the public sector for obvious reasons – cronyism.

On goal setting, the Government's record is mixed. Reforms have led to growth, but competition in its true sense and equity are still missing. Critics within the ruling establishment allege that reforms are propelling growth that benefits big industry, leaving the vast majority of Indians and the small scale industry in a state of neglect and deprivation[14].

When we began writing this Report, the CA02 was under amendment, which did happen when we were completing the report, in 2007, thus the effective law arrived in the name of Competition Act, 2007. The amendment bill was debated in the Parliamentary Standing Committee on Finance, which submitted its report in December 2006. Among its recommendations is one which has agitated the business community – that of making it mandatory for all combinations (mergers etc) to be notified.

This is a classic case of the never-ending debate on industrial policy vs. competition policy. Many in India feel that we need large enterprises to be able to compete with big enterprises from abroad in both the domestic and overseas markets. Korea and Japan, through a protectionist regime, prospered in the 1960s/1970s because they did not have a bias against bigness. But thanks to many factors, all of which have driven countries to adopt highly-advanced competition laws, the situation today is very different from what it used to be even a decade ago. Today, both the Korean and Japanese competition laws have been strengthened to deal with abusive behaviour of big firms, who find their *laissez faire* freedoms curbed.

One way to promote competition against entrenched/dominant domestic businesses is to allow imports at low tariffs which would create a level playing field for imports. Thus, trade policy instruments are used to ease tariffs, that generally lead to increased choice for the consumer both in terms of price and quality. But, import competition can be thwarted (see chapter 7 on cartels) by the affected parties manipulating tariffs in such a way that the landed cost of a cheaper product is ultimately higher than the rent-seeking prices at which they are selling their own goods in India.

Similarly, for industry, policy measures such as delicensing, and removal of capacity expansion restrictions and protection (reservation of products) to small-scale industries would allow firms to expand strategically. This will facilitate economies of scale and scope, which can result in better prices and quality for consumers. Of course one will need to take care that products being manufactured by many small units does not result in the creation of a few large units in the sector, but many medium-size units which can be competitive.

Privatisation and disinvestment should seek to replace public sector monopolies with a thriving, competitive environment, while at the same time providing for efficient, well-structured regulatory bodies to govern them. The creation of effective regulation is surely beneficial to the market and the consumer.

As discussed in the Report, while a more appropriate umbrella competition legislation has been designed, its implementation will take some time, as the amended law is operationalised over time. The amendments have done away with regional benches which would mean fewer checks on anticompetitive practices at regional or local levels. Two better ways are for the CCI to meet regularly in regional centres and to establish regional offices to act as windows. There is not a formal mechanism for an interface between the competition authority and the consumer courts mechanism born out of COPRA (which often deal with grassroots competition abuses). This is essential if the two systems are to work in tandem for the protection of the consumer.

Also, as mentioned before, there is a need for wider civil society involvement in the issue of competition and consumer protection – something that the new economic governance framework will hopefully foster. The civil society movement needs to be resourced institutionally and their capacity built up to maintain a healthy demand side dimension to a healthy economy.

This chapter began with what the Prime Minister had to say and concludes by quoting him once again, on the crucial issue of economic democracy. Speaking at a function in New Delhi, on May 01, 2007, he observed:

> *"I was struck by a comment in the media that most of the billionaires among India's top business leaders operate in oligopolistic markets, and in sectors where the government has conferred special privileges on a few. This sounds like crony capitalism.*
>
> *Are we encouraging crony capitalism? Is this a necessary but transient phase in the development of modern capitalism in our country? Are we doing enough to protect consumers and small businesses from the consequences of crony capitalism? Whether we, in the name of protecting them (the big industry) have encouraged crony capitalism?*
>
> *Do we have a genuine level playing field for all businesses? What should be done to inject a greater degree of competitiveness in the industrial sector?"*

Endnotes

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9 Kirit Parikh, Member, Planning Commission's pronouncements at CUTS event on release of 'Towards a Functional Competition Policy for India', February 01, 2005.

10 Acknowledged by Yashwant Sinha in a personal communication to CUTS on June 29, 2007

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CHAPTER 2

How do People Perceive the Situation?

Introduction

In this Chapter, we introduce the **India Competition Perception Index** developed by CUTS to measure the state of play in competition and regulation in 2006 in India. We are hopeful that this Index – the first of its kind – will, over the years, become the standard gauge for assessing competition and regulation in India.

The Index has been developed in the backdrop of the changes taking place in the operating business and economic environment in the country. Changes are continuously being made in and to the economic governance system[1]. These include changing government policies/measures; amending existing legislations or enacting new ones such as the new competition law i.e. Competition Act 2007; establishment of sector regulatory bodies in utilities sector such as electricity, etc. All such measures are designed to ensure that markets function well in the new economic policy regime and yield the mandated results, i.e. promoting competition and fair play.

In the light of this, there is a need to assess the perceptions of stakeholders on the competition and regulation regime in the country. Therefore, the Index seeks to gauge the understanding of 'informed' stakeholders on the prevalent competition and regulation scenario. It is designed to tell us what the common consumer thinks of the state of competition and regulation in India.

Towards this end, we have identified five broad stakeholder groups for sampling for developing the Index. The objective was to get informed feedback from stakeholders who have a fair idea of the competition and regulation scenario in the country. These are:

1. **Policy-maker/Government official** (parliamentarians, central or state government officials, regulators)
2. **Business** (manufacturers, service providers, representative of business chambers, service providers' association)
3. **Civil Society Organisations** (consumer organisations, advocacy groups)

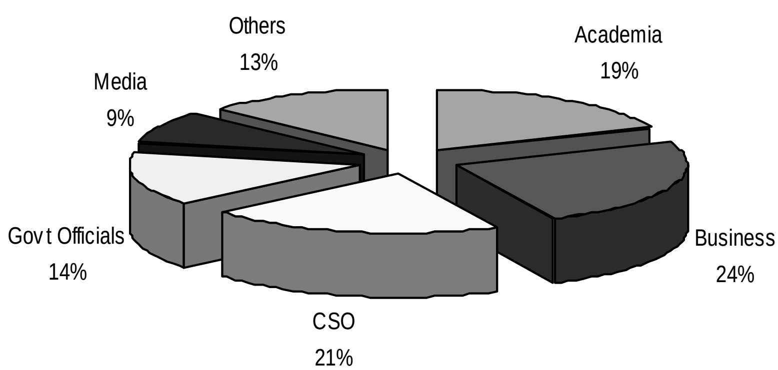
4. **Academia** (academic staff at universities/business schools, researchers, representative of research institutes)
5. **Media** (economic journalists, editors of newspapers and business magazines).

The questionnaire was circulated to assess stakeholder perceptions on:

- awareness and knowledge of regulatory and competition issues;
- level of competition and nature of practices prevailing in the market;
- impact of government policies/measures on competition; and
- effectiveness of competition and regulatory authorities.

The details of the sample are given below. The survey results are attached as Annexure to the chapter.

Respondents by Stakeholder Group



Stakeholder Group	Number	Percent of total
Academia	126	19
Business	160	24
CSO	137	21
Government officials	94	14
Media	59	9
Other experts/ practitioners	83	13
Total		**659**

The survey findings

The India Competition Perception Index is the simple average of normalised scores of all questions. This is calculated on the basis of the points that have been scored by each question out of a maximum possible 100 points. Following are the highlights of the survey results:

- **Overall competition:** The overall competition perception index of informed stakeholders returns a score of 54.67. As this score is based on the views expressed by informed stakeholders who are well aware of the markets, we can say that overall perception on competition in the country is above average, i.e. neither too good nor too bad, but fair. When the overall competition perception of well-informed stakeholders is fair, we can visualise the situation if we think of the common people who are also the part of market. Thus, it may be concluded on the basis of this score that even after one-and-a-half decades of reforms, the progress on competition and regulatory issues is slow and that the stakeholder-perception is that anticompetitive practices still prevail in the market at large.

- **Level of competition:** As already discussed, the stakeholders were asked to express their views on the level of competition in the market; the nature of market practices; awareness/knowledge of regulatory and competition issues; effectiveness of competition and regulatory authorities; and impact of Government policies/measures on competition. The Index indicates that stakeholders are more familiar with the level of competition prevailing in the market than they are with other parameters. The reason for this may be that the level of competition is visible in the market and people can 'feel' it while other parameters are neither that visible nor easy to understand. Competition can be felt in the market with enhanced access to the larger basket of goods and services, which, in turn, enhances consumer welfare. But to take full advantage of competition, consumers have to become familiar with various issues of competition as these might lead to anticompetitive practices in the market.

- **Nature of market practices/awareness:** The Index scores very low on parameters such as the nature of market practices (35.84) and awareness/knowledge of competition and regulatory issues (39.39), indicating a general lack of familiarity with these parameters. The reason may be that as the key provisions of the competition law have not been brought into force in India, so stakeholders may be ignorant about the nature of market practices and prevailing competition and regulatory issues. The Index also indicates that stakeholders are not aware of the prevailing anticompetitive practices in the market. This is of concern as it may lead to the exploitation of stakeholders as they are exposed to these practices unknowingly. Advocacy and effective regulation can play an important role and there is certainly room for improvement.

- **Effectiveness of authorities:** The score on perception of effectiveness of competition and regulatory authorities is also low (43.16), showing that these agencies have not been effective in controlling the anticompetitive practices. The survey reveals that in many cases, these agencies have not been effective even in enforcing their own orders at local levels. The effectiveness of these agencies is essential for fair competition to prevail in the market and for this the agencies should be granted independence, provided resources and a proper legal framework outlining their objectives and functioning.

- **Impact of Government policies/measures:** The impact of Government policies/measures on competition scores 47.43, which implies that policy initiatives to tackle market forces are not fair and that policies have not been very effective in creating fair competition, especially in providing a level playing field to public and private sectors.

  The survey also reveals that the feeling and understanding of all the 'informed' stakeholders on competition and regulatory issues do not vary much and are almost similar, irrespective of class and category. However, business category stakeholders are comparatively more knowledgeable about the nature of prevailing market practices and government officials feel that competition and regulatory authorities are fairly effective in ensuring fair competition. The perception of academia is that the government, to a certain extent, has been successful in ensuring fair markets.

Key Messages

- The overall perception on competition is neither very good nor too bad, but can be said to be fair.
- Stakeholders are more familiar with the level of competition in the market than other market practices.
- Awareness/knowledge of competition/regulatory issues and nature of market practices is not satisfactory. For example:
  - Only 26 percent (154 out of 586) respondents are aware that *UTPs have been omitted from the purview of the Competition Act* (Academia: 19 percent; Business: 32; CSO: 18; Government Officials: 27; Media: 34; and Others: 35 percent).

- Only 6 percent (33 out of 584) respondents are aware that *mergers above a certain threshold would come under the purview of the Competition Act, and that a pre-merger notification requirement is voluntary* (Academia: 11 percent; Business: 4; CSO: 17; Government Officials: 1; Media: 2; and Others: 7 percent).

- Competition and regulatory authorities have not been effective in controlling anticompetitive practices prevailing in the market. In many cases, these agencies have not been effective in enforcing even their own orders at local levels.
- Government policies have not been very effective in providing fair competition in the market.

Endnote

1 The economic governance system is a mix of policies, which include financial sector reforms; intellectual property rights protection; dispute settlement system/judicial system; removal of barriers on entry and exit of firms; corporate governance; transparency in governance; and control of corruption etc. Here, we focus on the competition regime.

Annexure to Chapter 2

The Survey Results

1. Respondents by Stakeholder Group

Stakeholder Group	Number	Percent of total
Academia	126	19
Business	160	24
CSO	137	21
Government officials	94	14
Media	59	9
Other experts/practitioners	83	13
Total		**659**

2. All Stakeholders Score

India Competition Perception Index	54.67
Perception about	
- Level of Competition in the Market	58.97
- Nature of Market Practices	35.84
- Awareness/Knowledge	39.39
- Effectiveness	43.16
- Government Policies/Measures	47.43

STAKEHOLDER SCORES BY BROAD PARAMETERS

1. Overall Competition Perception Index

Overall Score	54.67
Academia	52.05
Business	56.29
CSOs	51.78
Government Officials	51.95
Media	51.00
Others	58.91

2. Stakeholders' Perception on 'Level of Competition in the Market'

Overall Score	**58.97**
Academia	62.62
Business	60.30
CSOs	62.97
Government Officials	61.71
Media	62.25
Others	64.96

3. Stakeholders' Perception on 'Nature of Market Practices'

Overall Score	**35.84**
Academia	32.36
Business	39.38
CSOs	32.86
Government Officials	37.21
Media	33.59
Others	39.58

4. Stakeholders' Awareness/Knowledge

Overall Score	**39.39**
Academia	37.97
Business	41.42
CSOs	40.73
Government Officials	36.60
Media	37.58
Others	39.92

5. Stakeholders' Perception on Effectiveness

Overall Score	**43.16**
Academia	42.52
Business	46.32
CSOs	36.38
Government Officials	50.05
Media	48.63
Others	37.76

6. Stakeholders' Perception on Government Policies

Overall Score	**47.43**
Academia	50.44
Business	47.89
CSOs	47.90
Government Officials	47.90
Media	44.50
Others	44.36

SCORES BY STAKEHOLDER GROUP

1. Academia Perception Score

Competition Perception Index	**52.05**
Perception about	
- Level of Competition in the Market	62.62
- Nature of Market Practices	32.36
- Awareness/Knowledge	37.97
- Effectiveness	42.52
- Government Policies/Measures	50.44

2. Business Perception Score

Competition Perception Index	**56.29**
Perception about	
- Level of Competition in the Market	60.30
- Nature of Market Practices	39.38
- Awareness/Knowledge	41.42
- Effectiveness	46.32
- Government Policies/Measures	47.89

3. CSO Perception Score

Competition Perception Index	**51.78**
Perception about	
- Level of Competition in the Market	62.97
- Nature of Market Practices	32.86
- Awareness/Knowledge	40.73
- Effectiveness	36.38
- Government Policies/Measures	47.90

4. Gov.ernment Perception Score

Competition Perception Index	51.95
Perception about	
- Level of Competition in the Market	61.71
- Nature of Market Practices	37.21
- Awareness/Knowledge	36.60
- Effectiveness	50.05
- Government Policies/Measures	47.90

5. Media Perception Score

Competition Perception Index	51.00
Perception about	
- Level of Competition in the Market	62.25
- Nature of Market Practices	33.59
- Awareness/Knowledge	37.58
- Effectiveness	48.63
- Government Policies/Measures	44.50

6. Others' Perception Score

India Competition Perception Index	58.91
Perception about	
- Level of Competition in the Market	64.96
- Nature of Market Practices	39.58
- Awareness/Knowledge	39.92
- Effectiveness	37.76
- Government Policies/Measures	44.36

CHAPTER 3

Policy Induced Anticompetitive Outcomes

It is not generally accepted in India that anticompetitive outcomes often arise due to Government policies that are not in line with market principles. Even when the Government is committed to introduce competition based on market principles, the outcome is generally the opposite. Mostly, this happens because of futile and ignorant efforts to reconcile too many conflicting objectives. Too many good intentions often result in bad outcomes. But, increasingly, cronyism has also been responsible for such policies. This chapter speaks about such policy-induced outcomes at both the Central and the State levels.

The key to understanding the problem lies in recognising that many Government policies are oriented only towards effecting outcomes, without regard to the processes that lead to those outcomes. Thus, for government, 'competition' is a means to improving efficiency and productivity, technological dynamism, and increasing the size of the pie to be shared by all. Competition is thus seen by the Government as a means to achieve certain desired outcomes.

The Government also realises that competitiveness can be improved when enterprises have the freedom to swiftly respond to changing market requirements and are exposed to domestic and international competition. The 'process' of competition is inherent in the latter aspect, which acts as the catalyst or driver that makes firms respond to changes in the business environment. The way the Government works is that first 'outcome' is defined and then a 'process' is identified to achieve the outcome.

Thus, the basic philosophy behind and the common thread running through the various reform measures have been the resolve of the Government to liberate Indian industry from the shackles of its various 'controls'. The thrust of reforms has been to allow for more competition and for the Government to play the role of a facilitator rather than the controller of economic activity.

It is inevitable that the pursuit of fair outcomes generates a trade-off between furthering competition as a fair process and as an impulse to shape fair outcomes. It is important to analyse this trade-off by appreciating the link between the robust functioning of the market and government policies. It is critical that the outcomes being sought are pursued in a manner that minimises the trade-off. For this, it is important to ensure that design and operation of policy instruments do not frustrate the market process.

However, a large overhang and backlog from the past persist in both attitudes and laws. They prevent the Government from both construing and constructing policies that are structured to work in sympathy with market processes. The design and operation of several policies and practices of the Government are such that they distort the market process and competition – most often in the name of public interest, which invariably means some entrenched/vested interests.

Liberalisation has decreased the degree of control exercised by the Centre in many areas, leaving much greater scope than before for state-level initiatives. The states are competing among themselves and there are examples of state governments adopting anticompetitive rules and regulations. Market distortions are rampant at the state level even though the lack of healthy competition and fair-trading in the market tends to affect state finances and thereby the economy of the whole state.

In a word, the policies and rules adopted by governments are obsolete in the present economic environment and are affecting the competitive forces and competition culture in the country.

Central Government policies/practices that impede the market process

Given below are examples of some of the Central Government policies/ practices that impede the market process:

- ***Trade policy-related distortions***
  The last decade has seen significant relaxations in quantitative restrictions, reduction in tariffs and an easing of the exchange control regime. Despite this, the operation of key elements of the trade policy regime has severe anticompetitive dimensions, including policies in relation to the operation of anti-dumping (AD) measures, inverted duty structure[1], etc.

> ***Box 3.1: Inverted Duty Structures***
>
> *One of the anomalies in the tariff regime is the higher import duty on raw materials than on finished products (reverse tariff escalation), which leads to market distortions, adversely affecting domestic manufacturers.*
>
> *The few examples given below are from newspapers, which have been referred to in parantheses.*

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- *The tyre industry, where the import duty on natural rubber is 20 percent. However, the duty on imported finished tyres is only 10 percent. This has led to cheap unwarranted tyre imports, in particular from China. The profitability and market share of tyre manufacturers have taken a hit.*

  (Business Standard, 01.04.05)

- *The inverted duty structure is threatening to play spoilsport in the plans chalked out by the Indian auto components manufacturers, following the introduction of a zero-duty structure on six major auto components under the Indo-Thai Free Trade Agreement (FTA). The Auto Components Manufacturers Association (ACMA) has told the Commerce Ministry that since the duty on the import of these components is now zero, the duty on the raw materials should also be brought down to zero. The local industry is facing difficulty with the components permitted to be imported at zero duty, while raw materials attracted a 5-12.5 percent customs tariff. These raw materials include steel and aluminum alloys.*

  (The Hindu Business Line, 12.10.06)

- *The vegetable oil sector where crude palm oil, a raw material used to manufacture vanaspati attracts customs duty of 65 percent ad valorem; while import of vanaspati itself (the finished product) attracts much lower rate of duty at 30 percent. This is encouraging large vanaspati import and hurting the domestic industry.*

  (The Hindu Business Line 25.11.04)

- *In the petrochemical sector, suppliers of feed-stock like naphtha, natural gas (GAIL) and basic polymer (Reliance Industries), have a tariff protection advantage over producers of finished products like plastics and synthetic fibres.*

  (The Financial Express, 28.05.05)

The reduction of trade barriers has been accompanied by a proliferation of AD measures imposed by India. In several cases, the AD authority accepted an increase in the foreign firms' market share (which was only to be expected in a period of trade liberalisation) as evidence of injury, even though the Indian industry's sales and profits were increasing at the same time.

- ***Procurement-related distortions***

  The government is continuing with a discriminatory policy in favour of the public sector. Recent moves to extend the purchase preference policy for central public sector enterprises for another three years are a good example. Such preference to public units in the procurement of goods and services creates an uneven field for private sector players and distorts the market.

> ***Box 3.2: Distortions Prevalent in the Market***
>
> *The Finance Ministry has put an end to the practice of giving preference to public enterprises in air travel and telecom services. However, this has not gone down well with BSNL, the state-owned telecom operator, which has objected to this, under the garb of needing support to provide services in rural areas. On the other hand, private telecom operators have to provide access deficit charges to public sector operators precisely to neutralise this disadvantage.*

Quite often government procurement rules, which otherwise do not have any such preference clause, also result in anticompetitive outcomes because of the way in which they are implemented. In procuring 16mn broad gauge sleepers, the Railways awarded contracts to the existing 71 firms, and ignored the 24 new firms entirely. The Parliamentary Standing Committee on Railways (2004), while discussing the question of procurement of concrete sleepers, observed that:

...The procurement of concrete sleepers has become a very sensitive matter, because a lot of unscrupulous existing manufacturers have formed a cartel to secure orders by unfair means or tampering with procedure and simultaneously keeping the new competitors out of the race. The Committee is constrained to notice that there exists a regional imbalance in the setting up of concrete sleeper manufacturing units. They also express their unhappiness that new entrants are not encouraged, which ultimately strengthen[s] the cartel of old/existing manufacturers.

- ***Pricing-related distortions***

  Despite professing liberalisation and claiming to be the facilitator of economic activities, the Government continues to intervene in the pricing of several commodities that distorts the realisation of competitive outcomes. For example, the current system of pricing coal weakens the incentives for delivering better quality coal; the implementation of a minimum support price system distorts prices of foodgrains in the open market.

Box 3.3: Lack of Transparency in Pricing of Petroleum Products

The Administered Price Mechanism (APM) was formally dismantled with effect from April 01, 2002, after which the pricing of crude oil and petroleum products, except for kerosene and domestic Liquefied Petroleum Gas (LPG) sold through the public distribution system (PDS), was to be market determined. However, the factual position is that the public sector oil companies are collectively fixing prices of crude oil and petroleum products, and all price changes are approved by the government prior to implementation.

The current pricing policy includes several elements in the price build-up that are debatable. The pricing mechanism uses import parity pricing even for products in which India is the net exporter. This provides higher margins to the refiners.

As well, the government levies a cess on indigenously produced crude oil and natural gas. The Oil Industry Development Act, 1974, which allows for a cess to be charged, states that "the cess collected under this provision would be made available to the development of petroleum sector". However, only a small fraction of this amount has been used for the purpose it is imposed. The Parliamentary Standing Committee on Petroleum and Natural Gas observed, "there is no justification in levying the cess if the amount generated from it is not being utilised for the development of the oil sector".

- **_Distortions created by rules and regulations_**
  There are several rules and regulations framed by the Government agencies that distort the market process, including, for example, the clearances required for setting up a business and the time involved.

  A study conducted by the World Bank[2] reveals that in India, entrepreneurs go through 35 days on an average to set up business. A year ago, i.e. in the year 2006, 71 days were required to start a business in India. In a sample of 175 countries, India was placed at the 134th position in terms of the number of days it takes to get the procedural clearances.

  It is another story that businesses continue to face irrational hurdles due to a rent-seeking and/or lethargic bureaucracy in operating their businesses. No work has been done by the World Bank or other institutions to assess this malady, which cause huge delays in business operations.

For all those who champion the cause of small-scale units and demand more protection for them, there is a flip side too, which should be taken note of.

Box 3.4: Inspector Raj for Small Scale Industry (SSI)

Small-scale units are burdened by the phenomenon of repeated visits by multiple inspecting agencies, each of which has powers without sufficient transparency or control on how they are used.

A survey conducted by the Federation of Indian Chambers of Commerce and Industry (FICCI) in October 2004 revealed that, on an average, a factory/establishment is subject to 37 inspections a year, with some factories facing 67, the maximum number of visits being those of State Pollution Control Board (SPCB) officials and the Labour Officer. Some of the inspectors have wide-ranging powers: 20 of them have powers of imprisonment, 12 for sealing the unit and 21 for stopping operations. The wide powers vested in the inspectors, combined with the frequency of their visits, have made for a fertile ground for breeding corruption.

Many anticompetitive outcomes emanate from other rules and regulations of the government. For instance, the Essential Commodities Act, which applies to any commodity declared as 'essential' by the Central Government provides for instruments such as licences, permits, regulations and orders for price control, storage, movement of produce, distribution, compulsory purchase by the government and sale (levy) to the government. The Act vests much discretionary power with government officials and has led to excessive control and intervention in the functioning of the market.

Box 3.5: Deregulation of Anticompetitive Practices

The Jute Commissioner based in Kolkata announced a price ceiling on raw jute. The action was taken because prices of raw jute were skyrocketing and it meant that prices of jute bags would also be heading north. Raw jute is still treated as an essential commodity and the Jute Commissioner's office used its special powers under the essential commodity law to declare the price ceiling.

The Essential Commodities Act is an instrument to regulate market conduct to safeguard the interests of producers and consumers and to raise the standard of agricultural markets. However, this intervention of the Jute Commissioner was not designed to regulate any anticompetitive *behaviour but purely to benefit users of raw jute at the cost of producers. This intervention is against the principles of free market. Under normal circumstances, prices of commodities fluctuate depending on the demand and supply conditions and such interventions only bring back the spectre of control raj.*

(Business Line, 21.12.05)

Several existing policies, statutes and regulations of the Central Government restrict or undermine competition. A review of such policies, statutes and regulations from the competition perspective (this is referred to as 'competition audit' in several countries) should be undertaken with a view to remove or minimise their competition restricting effects. Proposed policies, statutes and regulations that have a impact on competition should be subject to a competition impact assessment through an internal mechanism. Regulatory impact analyses should be a pre-condition for imposing regulation in any sector. In the UK, any proposal for policy change requires an impact assessment to be done simultaneously. Any privatisation attempt should take into account the competition dimension[3].

Box 3.6: 'Need not Meddle with Market Forces'

According to the CCI, the banking sector will reap the full benefits of competition only if the Reserve Bank of India (RBI) restricts itself to framing prudential norms for banks and leaves all other issues to market forces. If the RBI has to take note of the CCI's suggestions, it will need to incorporate specific clauses in its regulations to prevent anticompetitive practices. Significantly, the CCI has suggested that public sector banks be not given any preference over private sector ones.

It has also pitched for greater operational freedom for private banks. There still are several entry barriers in branch licensing and ATM licensing besides locational restrictions, which were leading to distortions in the market, leaving just a few private players in the sector. These distortions have only grown because of heavy investments by banks in government securities, leading to 'lazy banking', directed credit and cross-subsidisation of public sector banks.

(The Financial Express, 10.08.07)

- ***State Government policies/practices that impede market process***
  State government policies too create anticompetitive outcomes. The overall policy environment and the quality of economic governance are important factors determining the growth potential of a state. The process of reforms is incomplete unless it permeates to the local level. The policies, rules and regulations adopted by state governments are obsolete in the present economic environment and adversely affect the competitive forces and competition culture in the country.

Box 3.7: Grant of Mining Rights Distorts Competition in Steel

Several states, where iron ore mines are located, (e.g. Orissa, Chhatisgarh, and Jharkhand) have decided to grant iron ore mining rights only if the steel plant is established in their respective states. This raises a serious competition issue. This policy has deprived steel makers, in the country but outside these states, the right to bid for mining leases and thereby makes the iron ore mining segment of the steel industry less competitive.

In a federal constitution, all citizens are equal irrespective of state of origin, and common mineral rights belong to all citizens, not merely to those of one state. Hence, tying a mine only to local state industries is discriminatory against citizens of other states, and unconstitutional.

(Source: Firoz, A.S., 'Competition Scenario in Indian Steel Industry' in 'Towards a Functional Competition Policy for India', CUTS and Academic Foundation, 2005; discussions at the FunComp e-group Forum)

- ***Distortions created by rules and regulations***
  In India's federal set-up, states vie for the largest slice of the industrial pie. There is competition between states to attract investment. In their pursuit, states offer packages for industrial promotion promising incentives such as sales tax holidays and electricity duty waiver. There are examples of state governments adopting licensing/auctioning terms and conditions that are anticompetitive in nature.

Box 3.8: Barbed-wire Association in Rajasthan

As per an earlier Rajasthan Government policy, a certain quota of barbed wire was to be procured from local manufacturers. This is supposed to have led to formation of a 'cartel' under the name of the Rajasthan Barbed-wire Manufacturers Association in the mid-80s. This Association hiked the prices, and with an implicit arrangement, allocated the total requirement of barbed wire amongst its members. Consequently, poor quality barbed wire was procured at a high price, with almost no quality checks at the government end. Local manufacturers depended solely on government patronage, making them uncompetitive. With a changed government procurement policy, local units closed down and the association broke up.

- ***Policy-related distortions***

  Several states have some orders or regulations in place giving preferential treatment in the matter of purchase to units situated within the state borders. Most often the policy is targeted to protect and support small-scale sector units, which are presumed to be less competitive than large- or medium-scale industries. In the context of the overall development policy of the state, such policy may be desirable. However, concern arises when the policy creates conditions for formation of cartels of local manufacturers that are solely dependent on government patronage. In such cases, the state government ends up paying a higher price for a product, which is often of poor quality. Moreover, with a captive market where there is no quality control and no threat of competition, the enterprises may become uncompetitive.

  Another area of Government procurement where there are cases of collusion are the construction contracts undertaken by the Government. The construction sector is scandalously infested with collusive bidding. The construction mafia appears to dominate in most such businesses and indulges in all types of anticompetitive practices in collusion with politicians.

Box 3.9: 'Crack Down on Pools'

In Chennai, a flyover scam rocked the state assembly in 2001, where contractors pooled up to share the contract for laying cables at a considerable cost to the taxpayer. But nothing much came of it.

Similarly, the Rajasthan Public Works Department (PWD) Minister announced in the assembly on July 20, 2004, that he would crack down on 'pools' (cartels), so that smaller contractors could bid for contracts. But, here too, it remains business as usual.

All state governments spend a huge amount of public money on civil works. All these works are awarded through a system of competitive bidding. However, in several cases contractors collude and there is a tender mafia at work. As a result of these distortions, competition is subverted and the bidding system fails to produce efficient results, even in cases where rules and procedures are followed properly. There is now a trend towards awarding works in much bigger packages, which effectively rules out small contractors from bidding, thus restricting competition and further facilitating collusion. Considering the mind-boggling amounts of money that are at stake, one can guess the impact it has on state finances.

- ***Competition assessment of state government policies and practices needed***
  Governments at the state level, most often, either themselves follow anticompetitive practices or by their policies encourage such practices. Market distortions are rampant at the state level, and lack of healthy competition and fair-trading in the marketplace affects the economy and state finances adversely. State governments would also require to carry out pro-competition reforms. They should review the existing policies, rules and regulations from the competition perspective.

  In the next chapter, we will discuss the nine principles of a competition policy, which *inter alia* can deal with such distortions.

Endnotes

1 These happened due to various regional trade agreements negotiated by the Government, which lacked coordination.

2 Doing Business in 2007: How to Reform, The World Bank

3 Forty-Fourth Report, Standing Committee on Finance (2006-07), *Lok Sabha* Secretariat.

CHAPTER 4

The 'Nine Principles' of Competition Policy

In Chapter 3, we discussed how some government policies, intentionally or otherwise, could create anticompetitive outcomes. In this Chapter, therefore, with a view to providing an aid to preventing such accidents, we list out the well-known 'Nine Principles of Competition Policy'. If observed in the right spirit, these can enhance the process of deregulation, liberalisation and competition necessary for sustaining innovation and growth.

Readers would have noticed how, thanks to several distortions in policies and practices, India is far from achieving the desired outcomes. We review the current state of these policies and practices from the perspective of the Nine Principles. They are:

1. Foster competitive neutrality between public and private sector enterprises
2. Ensure access to essential facilities
3. Facilitate easy movement of goods, services and capital
4. Separate policy making, regulation and operating functions
5. Ensure free and fair market process
6. Balancing competition and IPRs
7. Ensure transparent, predictable and participatory regulatory environment
8. Notify and publicly justify deviation from competition principles
9. Respect for international obligations

Foster competitive neutrality between public and private sector enterprises

In the past, many government business activities have been able to obtain certain advantages over their private sector rivals as a result of their public ownership. These advantages included exemption from taxes, lower costs of finance due to government guarantees and exemption from regulations affecting private sector activity. Such advantages gave an unfair advantage to government-owned businesses and encouraged resources to flow to them regardless of their efficiency.

According to this principle, a level playing field between government and private sector enterprises needs to be ensured. If government businesses compete with the private sector they should not be given any special advantages, such as preferences in government purchases. In India, this principle is violated both ways.

Box 4.1: Competitive Neutrality: Is it Fostered?

In favour of public enterprises

- *In the recent past, at Delhi and Mumbai airports, the state-owned Indian Airlines had a full terminal to itself, while the private sector competitors are all cramped in one. This is despite the fact that Jet Airways alone had a higher market share than Indian Airlines. Besides, private airlines were not allowed to establish hangars for major maintenance overhauls at airports and consequently had to outsource maintenance activity to high cost locations abroad. The scene has now changed after much lobbying by the private airlines.*

- *RajCOMP is a state agency established by the State Government of Rajasthan as a consultancy organisation in the field of information technology (IT). By virtue of its status, all state government departments, and state undertakings approach RajComp for their IT-related work. Therefore, the development of e-governance applications, MIS, procurement of computer hardware and other such work related to government departments are all farmed out to RajComp, which has acquired a monopoly in providing IT services to the State Government and its agencies. Government departments find it easier to procure through RajCOMP than invite competitive bids, thus raising their burden and costs.*

In favour of private enterprises

- *According to existing Central Government policy, shipping arrangements of all Public Sector Undertakings (PSUs) are centralised in the Chartering Wing of the Ministry of Shipping (popularly known by its telegraphic address, Transchart, in shipping circles). This policy, however, creates a disadvantage for PSUs as the private sector have the freedom to hire any ship. Some PSUs have asked for the removal of this clause. However, the ministry continues to follow the same chartering norms.*

- *Efforts by public sector airlines to procure new aircraft and expand their fleet have suffered because of bureaucratic delays in clearing their proposals. These delays have affected the efficiency of public carriers, resulting in foreign airlines utilising 70 percent of their* *entitlements, with Indian carriers utilising only 30 percent. For no fault of theirs, it has been suggested that the private airlines be allowed to use the bilateral traffic rights that are not utilised by the public sector carriers. Had the state-owned airlines been allowed to acquire more aircraft in the first place, there would have been no unused bilaterals. In pursuing such a policy, discrimination is also practised through the criterion that private airlines must have been in operation for at least five years – thus foreclosing the entry of new airlines – even if they can show a capacity to operate efficiently through their financial assets and capability.*

Ensure access to essential facilities

This principle governs the access of third parties to infrastructure facilities of national significance that cannot be duplicated in an economically viable way, but access to which is necessary to ensure effective competition in a downstream or upstream market.

Box 4.2: Is Access to Essential Facilities Ensured?

- *Interconnection in telecommunications, in particular to the BSNL network, is still unresolved. TRAI, the telecom regulator has issued an Interconnection Regulation to ensure efficient interconnection between service providers. However, BSNL, the state-owned incumbent challenged this regulation before the appellate body, which ruled against the regulator saying that it has limited powers to fix the terms and conditions of interconnectivity. Due to this ambiguity, interconnection has not kept pace with the exponential growth in telecom services, leading to an increase in inter-network congestion and poor quality of service to customers. In addition, BSNL does not allow reciprocal roaming on its networks by private operators, who otherwise have a mutual arrangement to allow roaming.*

- *In early 2005, the government announced it would allow private operators in the movement of container trains, signalling an end to the Container Corporation of India's (CONCOR) monopoly. However, an enabling policy framework to facilitate operation of other players is still absent. With the entry of other operators, access to railway tracks and to engines to pull the wagons need to be facilitated. But private container operators complain of a step-motherly treatment by the Indian Railways. There is a need for an access regime to ensure that the Railways do not squeeze out competition from other operators.*

Facilitate easy movement of goods, services and capital

While there is a general declaration in the Indian Constitution that trade and commerce should be free. While mandating free trade within the country, the Indian Constitution nevertheless provides that restrictions can be imposed by Parliament on internal trade (and similarly by state legislatures on trade within their territory) as may be required in "the public interest".

Distrustful of the market, restrictions have been imposed on trade and commerce in the country through regulations in various forms, often invoking "public interest". Complaints from Indian industry, especially the transport sector, relate to taxes (both Centre and state), regulation by states on the movement of goods, frequent stoppages and delays under administrative rules and inspection agencies. As a result of excessive taxation and delays, transportation and transaction costs increase, which further increase the final cost of the product, distorting competition in the domestic market. Most complaints concern the road sector, which is primarily in the private domain.

Separate policy-making, regulation and operation functions

In the changed circumstances, separation of the policy formulation function from regulation becomes imperative to offer a level-playing field to competing service providers. Unfortunately, the temptation to command and control still prevails within line-ministries, often leading to turf wars, reflecting the nascent state of the regulatory framework in India.

Box 4.3: Policy vs Regulation: Ambiguity and Turf War

- *The Government's role as licensor, policy-maker and service provider in the telecom sector creates serious conflicts of interest. For instance, the Department of Telecommunications (DoT) recently announced proposals for restructuring the tariff regime in telecommunications, considering these as policy issues. However, TRAI objected to these proposals. After TRAI's objection, the DoT contemplated exercising its powers under the Act to issue 'policy directives' to the regulator. Although the ministry finally refrained from doing so this event highlights the need to clearly demarcate policy and regulatory issues.*

- *Port Trusts that are both owners as well as service providers are called upon to introduce competition or put out some of their facilities for private handling and face competition. This, in fact, gives ports, as owners as well as service providers, an opportunity to discriminate against competing service providers.*

Ensure free and fair market process

The economic reform measures in India seek to promote free, fair and contestable markets. However, Government policies are often framed and implemented in a manner that protects some market players rather than promote competition.

Distortions to the market process arise in various ways, including:

- Government procurement rules that favour public sector enterprises or small-scale units;
- Certain elements of trade policy measures that are anticompetitive in nature (e.g., anti-dumping that favours domestic firms; inverted duty structure that favours producers of intermediates over manufacturers);
- Government intervention in pricing of certain commodities that distorts the market process (e.g., pricing of coal has weakened incentives for delivering better quality coal; there is lack of transparency in pricing of petroleum products); and
- Several rules and regulations that hinder the proper functioning of the market process (e.g., although pricing freedom has been given to coal-producing companies, the distribution of coal is still controlled by government agencies, and only they are allowed to sell coal directly to consumers).

Box 4.4: End of Cotton Monopoly Procurement – End of Distress for Farmers

The Maharashtra Cotton Monopoly Procurement Scheme was enacted in 1971. The scheme empowers the Government of Maharashtra to acquire all raw cotton produced in the state. The scheme was devised to support cotton farmers through assured prices for their produce; however, its effect on their welfare is debatable. The scheme affected the quality of cotton produced in the state. As there was monopoly procurement, no modernisation took place in ginning and pressing industry. The prices received by farmers were based on the discretion of graders who decided the quality of the cotton.

This power of the graders led to large-scale corruption and worked as a disincentive for farmers to produce quality cotton – because farmers, unlike private traders, had no interest in being judicious about quality.

As the prices fixed by the Government were higher than market prices, and the resource situation was poor, it became difficult for the government to pay the farmers. Under the increasing burden of losses the state government scrapped the monopoly nature of the scheme in 2002, and positive changes are now seen on the ground. New ginning and pressing units are being set up, and existing units are being modernised. Farmers are becoming quality conscious as they now also deal with private traders who pay as per the quality of cotton.

Balance competition and IPRs

The bundle of rights that are subsumed in IPR laws need to be preserved in the interests of creativity and intellectual/innovative power. However, the existence and exercise of IPRs may generate anticompetitive effects through the monopoly power granted to the holders of these rights.

What is called for is a balance between unjustified monopolies and protection of the property right holders' investment. In view of this, the Competition Act 2007 does not permit any unreasonable condition to form a part of protection of intellectual property rights. In several countries, IPR *per se* is not considered violative of the competition law, but its abuse is certainly covered. The WTO TRIPs Agreement also requires governments to enact suitable legislation to cover the abuse of IPRs.

However, in India, the Patent Act has over-riding powers over the Competition Act in matters relating to abuse of IPRs. The Patent (Amendment) Act 2005 provides for granting of licence to remedy an anticompetitive practice arising from the exercise of its right by a patent holder. The role of the Competition Commission of India (CCI) to examine such matters does not find any mention. Compulsory licensing and parallel importing are two key remedies of great importance and a competition authority cannot be kept out in this regard. Unfortunately, in India this is precisely the case.

Box 4.5: Enjoying Monopoly Position through IPR

In what is perceived to be a shot in the arm for those challenging the monopoly of Monsanto on its Bt cotton technology, a Government investigation panel has observed that Mahyco-Monsanto Biotech, India (MMB) enjoyed monopoly over the technology and that its moves amounted to restrictive trade practices.

The report suggested to the MRTPC that it might consider instituting an enquiry into the monopolistic and restrictive trade practice adopted by the respondent. This would help determine the reasonableness of the trait value to safeguard the interest of the farmers.

The investigation was initiated following a complaint made by Kolli Nageswara Rao, Vice-President of All-India Kisan Sabha, to the MRTPC, challenging the monopoly of the company and seeking a cap of Rs 250 on trait value.

After getting responses from the respondent and the complainant, the office of D-G pointed out that the reason for charging such an exorbitant

(Rs 1,250 on a 450-gm packet) trait fee appeared to be the monopolistic position enjoyed by the respondent in respect of the Bt cotton seeds.

Citing research and development efforts by other players, the report observed that the respondent was in a position to charge for this technology arbitrarily and unreasonably, as those bodies were not in a position to enter the market with an alternative.

The cost of production might vary for the seed companies for producing seeds. But the trait value charged by the MMB was uniform across the country.

"The trait fee of Rs 1,250 a packet of Bt cotton seeds, being exorbitant, plays an important role for the ultimate price to be paid by the farmers", it said. It pointed out that there was no justification for charging Rs 1,250, while the seed companies spent Rs 300 to Rs 500 on each packet.

"The trait fee being charged by the respondent not only imposes unjustified costs on the farmers by way of manipulation of prices but is also unreasonable in view of lack of competition", the report said.

(The Hindu Business Line, 15.04.06)

Ensure transparent, predictable and participatory regulatory environment

Over the years, several market-regulatory agencies, i.e. the competition authority and regulators, have been set-up in India. These agencies carry out several functions, including balancing conflicting interests, promoting competition, facilitating investment and ensuring overall development of the sector. In order to ensure success, it is important that the regulatory environment is transparent, predictable and participatory. However, most often the government interferes in the functioning of regulatory agencies in a manner that violates this principle.

Box 4.6: Regulating the Regulators

Regulation of regulators is the next big item on the UPA government's reforms agenda. The Government is working on a policy that will govern all regulatory organisations, such as Securities and Exchange Board of India (SEBI), TRAI and Insurance Regulatory and Development Authority (IRDA). The 'mother of all regulatory policies' would lay down the government's regulatory philosophy, apart from functions, structure and powers of various regulators.

➡

The policy will pave the way for the establishment of multi-sector regulators. The Planning Commission is drafting the details in consultation with other government departments. Unlike SEBI or IRDA, multi-sector regulators would cover more than one sector and this could result, for example, in the entire transport sector — roads, ports and airports — being governed by one regulatory agency.

All regulators, existing or proposed, would have to converge with the overall regulatory philosophy of the government once the new policy is formulated. As of now, various regulatory authorities are being set up with specific needs of the concerned sector in mind rather than a common philosophy. This piecemeal approach would give way to an universal foundation for regulators when the proposed policy takes shape.

The policy is being prepared to protect the interests of consumers. It is expected to strengthen all regulatory institutions. The policy would detail, among other things, the functions and powers of various regulatory commissions. It will also specify the terms and selection criteria of members and heads of various watchdogs.

Another important idea that has been put forward is the creation of multi-sector regulators. "The Planning Commission is of the view that it would be better to set up multi-sector regulators instead of allowing a proliferation of regulatory commissions", the source added.

(The Economic Times, 29.01.07)

The example given in Box no 4.6 is not an isolated one. In the brief history of independent regulation in India, on several occasions, the ministries concerned have tried to clip the wings of the so-called 'independent regulator'.

Notify and publicly justify deviation from competition principles

A perusal of the various examples given in this document gives the impression that most often, deviation from competition principles is undertaken to protect 'public interest' – which is open to interpretation – and that ultimately government policy ends up protecting some entrenched and/or vested interest.

True, for reasons of economic or social welfare, there may be a need to deviate from competition principles. For instance, providing access to essential services for citizens, especially the disadvantaged, cannot be achieved through competition and this might require cross-subsidisation. However, it is also important to publicly notify and justify such deviations and implement them in a transparent manner. Often certain policies that deviate from competition principles have laudable objectives, but the instruments used to achieve the objective leads to distortions.

> ***Box 4.7: Free Power to Farmers: Is It Desirable?***
>
> *This policy seeks to provide irrigation support to farmers. However, it has produced several undesirable outcomes, including misuse of electricity, poor recovery of user charges, and depletion of ground water. It has also distorted the cropping pattern towards water-guzzling crops. More than helping poor farmers, this policy serves the rich. The farm sector in India needs Government support, but the question is whether free electricity is an efficient way to extend Government support to targeted beneficiaries.*
>
> *The Government of Andhra Pradesh announced the policy of free power supply to farmers in 2004 soon after being elected but had to review the policy.*
>
> *According to the State's finance minister, "the Government wanted to review its policy of free power to farmers not due to monetary constraints but because it has led to many unexpected developments such as the increase in unauthorised power connections leading to overloading of the distribution system. The unexpected load on the system has resulted in increased failure of distribution transformers".*

Respect for international obligations

Adherence to a national policy should be subject to non-conflict with international obligations accepted by the country. However, India seems to go too far in respecting international obligations and does not use the flexibilities that are available to check market abuses. Consider the WTO TRIPs Agreement which empowers member-countries to take necessary actions if IPRs are abused giving rise to anticompetitive practices. However, the new competition law of India renders a weak treatment to IPR abuses. Instead, the Patents Act (amended in 2005 to ensure the domestic law complies with international obligations) overrides the competition law in matters of IPR abuses!

Adopt national competition policy as the mantra

The above assessment of the state of adherence to the 'nine principles' of competition policy does not bring out a rosy picture for India. Violation or non-adherence of these principles exists in several policies/practices adopted by the government both at the national and state levels. There is a lack of coherence in various government policies and practices. The guiding principles to frame government policies in the liberalised regime are missing, highlighting the state of 'policy vacuum'. It is, therefore, high time the government adopted a National Competition Policy (NCP) woven around the 'nine principles', as the mantra for implementing economic reforms in the country. In the next chapter we will expound further on a NCP.

CHAPTER 5

Why Competition Policy and Law?

Introduction

The need for competition law becomes paramount when a country adopts economic reforms aimed at converting a command-and-control economy into a market-oriented one, in which the private sector plays the leading role. India, which began reforming its economy in 1991, has moved in the right direction but at a slower pace than required. This has meant that markets are still not as vigorously competitive as they ought to be. This has had an adverse impact on the international competitiveness of Indian firms. Barring a few, the rest have tended to lag behind in indices of competitiveness.

Trade liberalisation is one of the most effective methods for ensuring competition in the marketplace and for curbing the abuse of market power. However, even this has its limits. Imported goods cannot reach consumers because entrenched players may control the distribution channels. This can significantly reduce or even nullify the gains from liberalised trade. Usually, what happens is that geographical segments of the national market are successfully monopolised or cartelised. It is to solve problems such as this that an increasing number of countries while liberalising their trade regimes, have also embraced competition laws. This is because in those countries the full benefits of economic reforms are felt to be better realised under conditions of fair competition, which stimulate consumer satisfaction, reward efficient firms and punish the inefficient.

Meanwhile, however, governments also have to tackle problems that may arise from market failure caused by market power and its abuse. This is what necessitates the introduction of an effective competition policy and law.

Box 5.1: The Difference between Competition Policy, Competition Law and Competitiveness!

Competition policy, competition law and competitiveness are three distinct concepts. Unfortunately, most of the policy community considers these terms synonymous and interchangeable, which is not the case. In India it is most often the government that indulges in or encourages anti-competitive practices. Though we have liberalised trade, some elements of the policy regime have severe anticompetitive dimensions, such as use of anti-dumping measures. Competition Law is but a subset of Competition Policy. Besides encompassing the law, Competition Policy tries to bring harmony in all government policies that affect competition and consumer welfare, such as trade policy or industrial policy. There are many policies of the government, which create anti-competitive outcomes.

Distortionary elements exist in industrial policy, labour policy, etc. Then, there are several policies/practices at the level of state governments that lead to anti-competitive outcomes. These cannot be checked under a competition law, but need policy responses.

It is therefore, there is a strong need to rationalise the role of the government, so that its intervention promotes functioning of markets, rather than impedes it. A 'Competition Assessment' of all new and old policies will help the government to promote competition.

Further, many policy makers and even economists also do not understand the distinction between competition and competitiveness, thus skewing the debate. Competition does lead to better competitiveness but it is not necessarily the other way. Competitiveness means promoting large number of strong players churning out goods and services at the best quality and prices. But their behavior can be anti-competitive through collusive practices and the like. Therefore, the country needs an effective competition policy and law to ensure that the market functions, and both consumers and the economy gains.

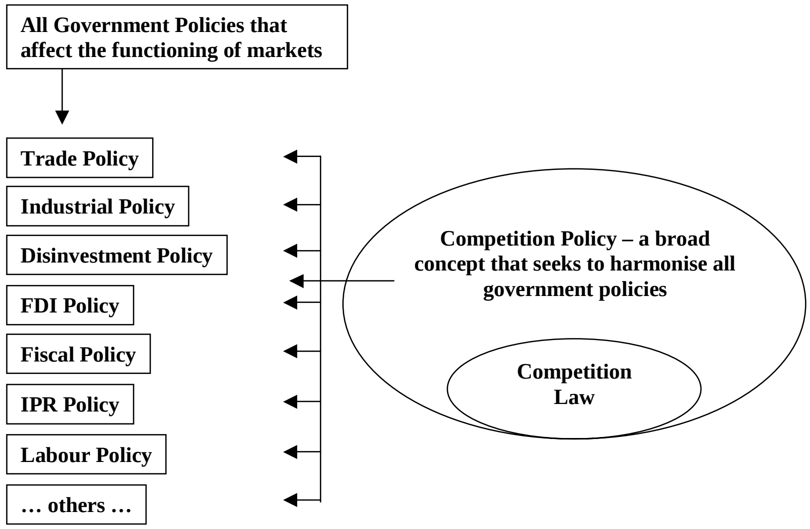
Competition law *vis-à-vis* competition policy

Competition policy and competition law are distinct concepts. Unfortunately, most of the policy community considers both terms as synonyms and interchangeable.

Competition law is but a subset of competition policy (see figure 5.1). Besides encompassing the law, competition policy includes sectoral regulatory laws and the various government policies that enhance competition and consumer welfare.

Competition law is, therefore, quite narrow in its scope, whereas competition policy is broad and comprehensive.

Figure 5.1: Competition Policy *vis-à-vis* Competition Law



Thus, competition policy and law complement each other (including competition law and sectoral regulatory laws) and are required to ensure that the market process helps accelerate progress towards achieving the various policy objectives. Competition law prohibits and penalises anticompetitive practices adopted by market players – i.e. it addresses market failures. Competition policy is needed to create a framework of policies and regulations that will facilitate competitive outcomes. Competition policy is also needed to promote efficiency and hence consumer/social welfare. Further, it is needed to create a business environment that leads to efficient resource allocation and curbs the abuse of market power.

In India, there has been a tendency, in spite of the commitment to reforms, to frame policies, laws and rules without acknowledging the market process. Often, the approach has not been consistent. This has led to concerns that both the consumer and the producer have been left worse off. For example, in introducing privatisation and deregulation policies monopoly power has simply been transferred from the public to the private sector. Therefore, there is a felt need for a rigorous competition policy and an adequate regulatory mechanism.

A competition policy is also needed to ensure and promote good governance in the corporate sector as well as in government, which could be achieved by limiting opportunities for rent-seeking behaviour and the corruption that often accompanies it. Competition law and regulatory tools usually take care of firms' behaviour and market failures. Governments often intervene when markets fail but in the absence of a clearly defined competition policy and regulatory mechanisms, these interventions can be arbitrary and end up serving vested interests rather than the consumers.

An effective competition policy and well-designed competition laws also help protect the economy from international anticompetitive practices. Evidence suggests the existence of international cartels of private firms that engage in restrictive practices designed to limit competition in international trade. These arrangements can be quite durable and detrimental to economic development (Levenstein and Suslow 2001). Cross-border M&As that lead to market dominance and the restrictive practices that some transnational corporations (TNCs) engage in further necessitate effective competition legislation.

Competition policy should, therefore, be an integral part of any economic policy. A competition law may be quite narrow in its scope, but a competition policy that is broad and comprehensive can fill in the cracks and harmonise all government policies, which in turn may encourage or impede competition and consumer welfare.

Broadly speaking, competition policy and law are needed to address:

- Anticompetitive practices designed to restrict the free play of competition in the market;
- Unfair means adopted by firms against consumers in order to extract the maximum possible consumers' and/or producers' surplus; and
- Maintenance and promotion of a competitive spirit in the market.

A competitive market also ensures efficiency, resulting in the best possible choice of quality, the lowest prices, and adequate supplies to consumers. This outcome emerges from the following three conditions:

1. **Competition**: There are a large number of producers supplying the same product, or close substitutes, and no single producer dominates the market.

   Competition is a process of economic rivalry between firms for a larger share of the market, which leads to internal efficiency and lower prices for the consumers. Competition is a process by which cost-effective production can be achieved in a structure where entry and exit are easy, and there is the existence of a reasonable number of players and close substitution between products of different players in a given industry.

2. **Full information**: All consumers are fully informed about the options that the market offers them.

   The existence of perfect information and its free flow among consumers is one of the basic requirement of perfect competition. Without information on the quality, quantity, potency, purity, standard and *price of goods and services, consumer would not be able to make the right choice. If consumers cannot make right decisions, then the process of competition itself gets subverted.*

3. **Low switching costs**: The costs a consumer faces in switching from one option to another are not high enough to deter this switch.

In the real world, markets rarely satisfy all of these conditions. In such situations, markets may not yield desirable outcomes. The factors responsible include situations where:

1. *Market players adopt unfair means to restrict competition and hurt other players and consumers;*
2. *Markets fail due to externalities, imperfect or asymmetric information, and economies of scale and scope; and*
3. *Government policy that paved the way for greater market-orientation in the first place might itself be inadequate in ensuring the proper functioning of markets.*

While the first two factors require some form of intervention in the market process, the third calls for fine-tuning of the government policy and its implementation to facilitate the working of markets.

These three factors are further elucidated below:

When market players adopt unfair means

When firms adopt restrictive or unfair practices to blunt competition, distortions in the market process take place. These relate to fixing prices in collusion with rivals, setting prices which are lower than cost in order to eliminate competition; taking advantage of a monopoly position and charging unreasonable prices; and refusing to buy or supply. There can be many more examples of such conduct. This suggests that a shift towards market-oriented economy does not always ensure that the 'invisible hand' will operate and allocate resources efficiently and produce competitive outcomes. The potential benefits of a market-oriented economy are often thwarted by market-distortionary practices.

Consider the example of the poor villager again, in a different setting. Let us assume there is only one shop in the village where villagers can buy dry cells and there is no alternative shop for several miles. Taking advantage of the situation, the shopkeeper (who is expected to sell the dry cells at Rs 2), might sell the dry cells at a price higher than Rs 2 (may even charge more than Rs 6, the original price) and pocket the extra money. The shopkeeper's unfair behaviour, would thus not allow benefits of trade liberalisation to pass on to the villagers. In order to ensure benefits flow to consumers, the behaviour of the shopkeeper needs to be checked.

In view of this, proper institutional arrangements need to be put in place to check such behaviour. That is why many countries have either enacted a competition law or scrapped their old laws to enact a new one. India, for instance, has framed the Competition Act 2007 (CA07), to replace the now outgoing MRTPA of 1969. But this is not enough. Just as ecological conditions determine the ability of a flower to bloom, so some preconditions affect the ability to apply a competition law effectively[1].

Market failures

Market failures have negative effects on the economy because an optimal allocation of resources is not attained. In other words, the social costs of producing the good or service (all of the opportunity costs of the input resources used in its creation) are not minimised, and this results in some resources being wasted. Thus, market failure occurs when markets do not bring about economic efficiency i.e. there is a Pareto sub-optimal allocation of resources in a market/industry.

Consider, for example, the electricity sector. There are three distinct activities in the industry: generation, transmission and distribution. Significant scale economies arise in these activities characterised by a high ratio of fixed to total cost, declining average and marginal costs with increasing volumes, and increasing returns to scale. In case of the distribution segment, for instance, this means that the entire market (say, a city) can be more cheaply supplied by a single electricity distributor. The problem is that consumers (domestic as well as industries) are locked into this single producer, now in a monopoly position. Therefore, potential benefits from low-cost scales of production can easily be wiped out in the absence of competition. In such circumstances, there is need to regulate the behaviour of the electricity distributor through, for instance, regulating electricity tariffs designed to prevent any monopolistic exploitation. Based on this premise, sectoral regulation is required to facilitate competitive outcomes.

The rationale for regulation differs from financial markets to utilities (e.g. electricity, telecommunications) to transportation. The regulation of utilities is mainly justified because of natural monopoly or locational monopoly for airports and seaports. In the case of financial markets, regulation is required because of information asymmetries, systemic problems and fiduciary responsibilities. In the case of public passenger transport the rationale for regulation is to prevent destructive competition.

An important factor that calls for regulatory intervention in sectors being opened up for other players is 'access to essential facilities'. For example:

- Telecommunications: access to telecom networks is one sector which cannot be left to market forces, and a regulator is needed to ensure non-discriminatory and reasonable interconnection arrangements;
- Electricity: access to a transmission and distribution network cannot be left to market forces, and a regulator is required to ensure proper arrangements for access;
- Oil & gas: access to transmission and distribution pipeline requires a regulator to ensure non-discriminatory and proper access; and
- Transport (seaports, civil aviation, railways): access to the network or an essential facility (e.g. railway tracks) needs regulatory intervention.

When distortions arise from government policies and practices

Distortions in the market process may also arise from the policies and practices of the Government. While the Government of India has undertaken market-oriented economic reforms with great fervour, distortions remain either in the policies themselves or in their implementation.

> ***Box 5.2: Distortions arise from Government Policies/ Practices***
>
> *Government-owned companies may soon lose the patronage that they get from favourable laws. Sectoral policies are set to be more consumer-friendly and tuned to promote competition in the market with the government considering a national competition policy that would ensure that all legislation pass the litmus test of competition principles. In other words, sectoral policies cannot be skewed to give unfair advantage to government departments, public sector companies and other government-owned entities competing with private sector players in the market. A national policy will also ensure that arbitrary economic regulation by regulators would not take place.* (The Economic Times, 11.08.07)

Therefore, while framing policies or implementing them, there is a need to anticipate the impediments these would create in the market process. These impediments need to be properly articulated and acknowledged, and measures taken to minimise their adverse effects on the functioning of markets. In order to do this, policies and practices need to be formulated and scrutinised on the touchstone of competition. This requires certain guiding principles to formulate policies and practices in a liberalised regime.

Competition policy

Appropriate competition principles and rules (competition law and sector regulatory laws) need to be framed and implemented, and supporting institutional infrastructure put in place for a market-oriented economy to deliver the goods. These measures come under the umbrella of 'competition policy', which seeks to check private- and government-imposed impediments to the proper functioning of markets and facilitates pro-active steps to create an environment in which markets function better and yield desirable outcomes. Thus, competition policy can be defined as those government measures that directly affect the behaviour of enterprises and the structure of industry.

This has two elements:

- A set of policies that enhances competition in local and national markets, including a liberal trade policy, relaxed foreign investment and ownership requirements, deregulation and privatisation.
- Legislation, i.e. competition law, designed to prevent anticompetitive business practices and unnecessary government intervention. It provides teeth and legal backing to the competition policy.

As can be inferred, competition policy has an interface with many other government policies. The important point here is that governments should maintain competition through either a stated comprehensive competition policy or by incorporating competition principles in other policies or, preferably, both.

'Competition policy' therefore involves:

1. Competition law prohibiting anticompetitive conduct by businesses;
2. Sectoral regulatory laws to check situations where markets fail;
3. Government policies that enhance competition in local and national markets (such as liberalised trade policy, relaxed foreign investment and ownership requirements, and regulatory reforms).

It is also crucial to remember that the implementation of competition policy requires the assessment of a wide range of policy instruments going beyond traditional legislative prohibitions. Thus, it is useful and necessary to list the different government policies that may encourage or affect competition and hence consumer welfare, particularly in the context of the present globalising environment. These include:

1. Trade policy;
2. Industrial policy;
3. Privatisation/Disinvestment policy;
4. FDI policy;
5. Fiscal policy;

6. Intellectual property policy;
7. Labour policy;
8. Consumer policy;
9. Small-scale sector policy;
10. Regional development policy; and
11. Environment policy.

Some policy instruments, such as competition law and sectoral regulatory laws have an obvious direct effect on competition, while the policies listed above affect the general economic environment and ultimately the general climate of competition in the country. This assessment needs to be done on the touchstone of the nine principles of competition policy (Chapter 4). They are:

- I. Foster competitive neutrality between public and private sector enterprises
- II. Ensure access to essential facilities
- III. Facilitate easy movement of goods, services and capital
- IV. Separate policy-making, regulation and operation functions
- V. Ensure free and fair market process
- VI. Balance competition and IPRs
- VII. Ensure transparent, predictable and participatory regulatory environment
- VIII. Notify and publicly justify deviation from competition principles
- IX. Respect for international obligations

Some Myths and Realities

Different stakeholders look upon competition policy and law differently. While policymakers consider it synonymous with competition law, business classes take it as threat to their existing business. Many in the civil society look at it as another market access push by western countries to open up our market. Here, we address a few of these myths and realities to get a better understanding of the situation.

Myth: Competition policy and law will allow foreign firms to come in and undermine domestic firms.

Reality: The effect of foreign entry into the market depends on the capabilities of domestic firms. If anything, competition law provides some protection to domestic firms from foreign firms that use anticompetitive practices to capture the national market.

There are instances and experiences from various countries where multinationals had to pay heavy fines for their engagement in anticompetitive activities. One of these is the vitamins cartel where several leading and sophisticated drug manufacturers were involved in a global conspiracy to fix the prices of bulk vitamins. Action was taken against the cartel in the US, EU, Canada and Australia, as a result of which a fine of over a billion dollars was levied on the perpetrators. Even Brazil, a developing country took action by getting cooperation from the US Justice Department.

However, India, could not take any action against the cartel. In fact, the MRTPC was unable to take any action against any of the international cartels that had attracted the attention of other competition authorities. It did, however, respond to complaints against groups of foreign companies who had been selling at low prices, but these orders were set aside by the Supreme Court, which held that the wording of the MRTPA did not give it any extra-territorial operation. By comparison, the new competition law CA07 has extraterritorial reach, being based on the *effects doctrine*. Thus, actions or practices taking place outside India but having an appreciable adverse effect on competition in the relevant market in India would come within the ambit of the CA07. Therefore, Indian industry can look forward to seeking protection under the CA07, when faced with any anticompetitive practice.

Myth: Competition policy and law are tools for the rich and urban societies.

Reality: In order to address this misconception, we recount the tale of a poor peasant widow, who used the law to get redressal against a moneylender.

Rukmini Devi, a poor, elderly and illiterate widow, lives in a village near Chittorgarh in Rajasthan. She had to sow her unirrigated 5-bigha farm in time, but did not have the resources to buy the seeds, fertiliser, etc. Fortunately, soft loans were available at the local cooperative bank at Rashmi, the sub-divisional headquarters under the government's Integrated Rural Development Scheme.

In view of the frauds which are ubiquitous, illiterate people are required to affix two passport-size photographs to the loan papers. Rukmini approached two local studios to get her photo taken but both were unhelpful, forcing her to go to a usurious money lender. Both the studios, it emerged, were in league with the moneylender.

Rukmini Devi took the help of a local consumer activist and complained to the local district forum under the COPRA against the RTP and cartelised activity that the two studios were engaged in. She won the case and collected damages from one studio – and the cartel was broken.

This real-life example shows how cartels can operate at all levels and sap the people and the economy. It also shows that the poor do benefit from action against competition abuses, if they can access justice.

Myth: Competition law and policy works for the rich and affluent sections only.

Reality: On one occasion, a poor villager applauded the fact that he could now get a good dry cell for Rs 2 each, which he had been purchasing for Rs 6. These cells were of Chinese make, and are now available in India because it has had to free imports of consumer goods. That was due to a trade policy measure that enabled prices to come down.

Likewise, an example of tied sales shows that competition law and policy works not only for the rich but also for the poorer sections of the society. For instance, a bright bureaucrat once thought of expanding the line of goods sold at ration shop dealers by adding razor blades, tea, etc[2]. The intention was good, but the prices of these non-short supply goods were higher than the market prices. When the poor consumers did not buy them, the shops started tied-sales, i.e., the consumer had to purchase a quantity of tea and razor blades if they had to pick up the required quota of wheat and/or kerosene. The practice was stopped when the consumer movement protested.

Competition policy and law could also benefit the poor by mitigating the adverse effects of a strong intellectual property regime. By using the compulsory licensing provision, for instance, an exploitative situation in life saving drugs can be curbed.

Myth: There is no public participation.

Reality: Sectoral regulatory policy/legislation in utilities is a good example of a competition policy measure meant to protect the interests of poor consumers. It does several things for the benefit of the poor, such as universal supply obligation, so as to ensure that firms supply services to the poor, even in far-flung areas. Such a policy ensures consistent supply at benchmarked quality and quantity and provides a window for public participation in policy formulation and tariff-setting. In turn, it reduces corruption and makes available an easy redressal system for the poor to resolve their grievances.

Myth: India already has a competition law; why then do we need a competition policy?

Reality: On the issue of adopting a competition policy, some policy makers and opinion leaders raise questions on the very need of such a policy – on the grounds that India now has a new competition law. However, they need to realise that:

- *First*, 'competition law' and 'competition policy' are two distinct concepts (see figure 5.1). Competition law is but a subset of competition policy. Besides encompassing the law, policy includes sectoral regulatory laws and the various government policies that enhance competition and consumer welfare. India has a competition law, but not a competition policy. And it needs one.

- *Second*, the market distortionary practices that emerge from any government policy or practice are beyond the scope of competition law.

In the absence of competition policy, the competition authority established under the Competition Act, for instance, cannot take any action against distortions arising, for example, from anti-dumping measures, government procurement policy and rules, state excise policy, etc. It also cannot carry out *ex-ante* assessment of government policies and practices.

At best, the competition authority, through its 'competition advocacy' function, suggest changes in Government policies and practices to facilitate the working of the market process. Under the Competition Act, the Government can seek the opinion of the CCI in framing any major public policy or reform. However, the effectiveness of this provision rests solely on the discretion of the government.

As argued above, we need a NCP, endowed with the political will, to deal with policy-induced anticompetitive outcomes in addition to the advocacy role of the CCI.

Although policy outcomes are sought to be generated, it is a persistent practice in India to do so without bearing in mind that policies need to be framed and implemented in sympathy with the market process, and not in a manner that would stall the process.

Instead, a strong policy advocacy is required to rationalise the role of the government so that interventions promote the functioning of markets rather than impede it. There is a need to take pro-active steps to promote competition, which requires a declared intent from the Government of its resolution to promote competition and fair practices in the market – something beyond the scope of law. Hence, there is a need for a NCP.

The need for such a policy was articulated in the mid-term appraisal of the 9th Five-Year Plan (1997-2002). Para 66 of Chapter 32, on the 'Direction of Reforms' states:

> *"There is an urgent need for articulating a National Competition Policy in India. The NCP should fully reflect the national resolve to accelerate economic growth, improve both the quality of life of the people of the country and the national image and self-respect…The competition policy should aim to bring about a spirit and culture of competition among enterprises and economic entities to maximise*

economic efficiency and to protect and promote consumers' interest and society's welfare and improve our international competitiveness".

The present coalition government too considers competition a serious policy issue. Its NCMP, *inter alia*, states:

"The United Progressive Alliance (UPA) Government believes that privatisation should increase competition, not decrease it. It will not support the emergence of any monopoly that only restricts competition. All regulatory institutions will be strengthened to ensure that competition is free and fair. These institutions will be run professionally".

Other countries with competition policies

Adoption of a NCP would not be unique to India. Several countries have adopted a competition policy, including:

- *Australia* (NCP adopted in 1995 by federal and provincial governments throughout Australia; consists of a set of policy reforms ensuring that the same competition principles and rules apply throughout the economy).
- *Hong Kong* (Comprehensive Competition Policy Framework adopted in 1997; Government bureaus state competition implications of major policy submissions and review existing regulations).
- *Mexico* (National Programme for Economic Competition 2001-06 adopted; Cooperation mechanisms established to facilitate coordination of competition policy with industrial, regulatory, trade and consumer protection policies).
- *Botswana* (Draft Competition Policy presented to Parliament in May 2005; seeks to ensure coherence between competition policy and other Government policies and laws).
- *Fiji, Malawi* and *Uzbekistan* are other countries that have adopted a competition policy, while *Mozambique* is in the course of adopting one before adopting a competition law.

Empirical evidence confirms that a well-designed and implemented competition policy promotes economic growth by ensuring better allocation of resources. A study carried out for the Australian economy[3] estimates the expected benefits from a package of competition promoting deregulatory reforms (including improvements in competition rules) to induce an annual gain in real GDP of about 5.5 percent, besides increases in real wages, employment and government revenue.

Following a presentation by CUTS before the Planning Commission on November 11, 2005, the government think tank established a working group to consider a NCP for the 11th Plan Document on June 05, 2006. The working group submitted a report to the Planning Commission in February 2007. Some of its recommendations are given below:

1. The NCP should be based on the following well-defined principles:
   - there should be effective control of anticompetitive conduct which undermines competition in markets;
   - there should be competitive neutrality among all players, whether these be private enterprises, public sector enterprises or government departments engaged in non-sovereign commercial activity;
   - the procedures should be rule bound, transparent, fair and non-discriminatory;
   - there should be institutional separation between policy-making, operations and regulation;
   - a separate regulatory arrangement should be consistent with the principles of competition;
   - third party access to essential facilities on fair terms should be provided; and
   - any deviation from the principles of competition should be made only for the purposes of meeting desirable social or other national objectives which are clearly defined, transparent, non-discriminatory, rule-bound and having the least anticompetitive effect.

The above principles of competition should be applicable across all the sectors of the economy.

2. The broad policy initiatives needed to achieve the objectives of NCP should extend to the levels of the Central Government, state governments and sub-state authorities.

3. Several existing policies, statutes and regulations of the Central Government restrict or undermine competition. A review of such policies, statutes and regulations from the competition perspective (this is referred to as 'competition audit' in several countries) should be undertaken with a view to removing or minimising their competition-restricting effects. Proposed policies, statutes, regulations that impact competition should be subject to a competition impact assessment through an internal mechanism. Regulatory impact analyses should be a pre-condition for imposing regulation in any sector. Any privatisation attempt should take into account the competition dimension.

4. Initiatives at the state government level would require undertaking pro-competition reforms keeping in mind the principles of the NCP. There are many economic areas of state legislation, regulations and policies that impact on or inhibit competition in the relevant markets. These restrictions also tend to fragment the national market and dent freedom

of trade. State governments should be encouraged to undertake a review of existing policies, law or regulations from the competition perspective and undertake a competition impact assessment of proposed policy, law and regulations before these are finalised.

5. Sub-state authorities include municipalities, housing boards, universities, professional institutes, and corporations that are created by statutes as extended arms of the state but are engaged in production, supply and distribution of goods or provision of services. Such authorities may be encouraged to consult the CCI on proposed changes in rules and procedures to ensure that competition is not undermined.

6. Once a comprehensive NCP has been adopted and announced by the Government, it should be incumbent upon the organs of the Government to abide by the principles of the policy. Similarly, at the state and sub-state levels, it is expected that the policy would be duly respected. However, given the wide canvas of the NCP, it would be necessary to set up an institutional arrangement for monitoring the progress of the implementation of the policy. The establishment of a Competition Policy Oversight Council, which would be autonomous in its functioning, has also been recommended. The Council would monitor progress in the implementation of the NCP, including reviews of laws and policies, and competition impact assessments of new laws and policies.

These recommendations will be included in the 11th Plan Policy Document, and thus provide a means to further the agenda.

Endnotes

1 Gal, Michal S, *The Ecology of Antitrust Preconditions for Competition Law Enforcement in Developing Countries*, New York University School of Law New York University Law and Economics Working Papers, 2004 Paper 10

2 The Times of India, March 25, 1985.

3 http://www.unctad.org/en/docs//c2em_d10.en.pdf

CHAPTER 6

India's Competition Law Regime: Past, Present and Future

Introduction and background

India's competition law, the MRTPA, ran from 1969 to 2002 before being replaced by the CA02. The new law was adopted after strenuous lobbying by the consumer movement which demanded an effective market regulatory system to deal with malpractices such as cartels, refusal to deal, anticompetitive M&As and acquisitions and abuse due to dominance. However, five years on, these malpractices still exist. Following some challenges in the Supreme Court, the law was revised and the Competition Act 2007 (CA07) has been adopted this year. This development is not unusual, having been witnessed in many developing countries. However, the reasons in other countries for the process of delays might not be similar that of India's.

There were three major triggers for the transition from the MRTPA to CA02 and CA07. First, it was due to a resolute campaign by the consumer movement. The movement in India has played an effective role in policy circles, much more than so than in many other developing countries. One major catalyst for the consumer movement in India was the Consumer Protection Act, 1986 (COPRA), which was adopted in spite of severe opposition by bureaucrats who tended to defend the public sector with a king-can-do-no-wrong mindset because it is part of the Government. The consumer movement forced the Government to amend the MRTPA in 1991 in order to bring the state sector in its ambit.

These important but incremental victories and radical changes came about due to several reasons.

First, is the growth of consumer movement in India. Before the enactment of COPRA there were about 35 consumer groups in the country, mainly based in the major cities. By 1990, the number had shot up to 3,000 with a large number situated in small towns. Of these, around 10-15 groups[1] command substantial resources and are fairly effective. Some of them, like

CUTS, have also professionalised and are thus covering a wide agenda. Many of them are still growing and expanding. All are engaged in competition-related work in their respective regions.

Second reason was the amendment in the MRTPA in 1984 which brought in consumer protection provisions under UTPs, specifically misleading advertising and deceptive claims. Many of the 30-odd medium to large consumer groups that were established around that time used the MRTPA to take action against businesses. Complaints by consumer groups have also covered RTPs – such as tied sales, and bait and switch – especially where consumers could become victims. The MRTPA also provided official recognition to many consumer groups, which included CUTS, thus empowering them.

Third, as an annual exercise the finance minister invites various interest groups to present their views on the budget proposals. Participants often raise important issues which go beyond the specificities of budgetary allocations. This interaction has raised the profile and importance of the consumer groups who are able to get their views across to one of the most influential and powerful members of the cabinet, the finance minister. (Sadly, consumer groups have not been consulted for the past few years). During the term of Yashwant Sinha of the BJP as the NDA's Finance & Company Affairs Minister, (i.e. from March 1998-July 2002), the consumer movement led by CUTS[2] advocated the adoption of a new competition law and the Government was convinced about the need for the one. Sinha, a former civil servant, was himself *au fait* and sympathetic[3] and thus the CUTS lobbying helped. On February 27, 1999, he made the following announcement in his budget speech:

> *"The Monopolies and Restrictive Trade Practices Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. Government has decided to appoint a Committee to examine this range of issues and propose a modern Competition Law suitable for our conditions".*

Among the various arguments, the one which convinced the Government most was that globalisation and liberalisation have fundamentally altered the economic landscape, and that the MRTPA was not adequate to deal with the job at hand. The finance minister shared our views and expressed them in his parliamentary speeches when responding to debates. The point was simple: the MRTPA was defective because it did not have any clear definitions about several malpractices and that the experience of consumer groups, who had filed hundreds of complaints, was that resolution of complaints took years. It had become dysfunctional and had to be repealed.

This happened in stages.

In 1991, as a result of the changed economic scenario, the merger provisions in MRTPA were scrapped, but this was like throwing the baby out with the bathwater because no alternative regulations were put in place. As a result, there were many cases which escaped the jurisdiction of the MRTP. One was the merger of TOMCO Ltd (a Tata company manufacturing soaps and detergents) with Hindustan Lever Ltd, a subsidiary of the Anglo-Dutch conglomerate, Unilever.

The HLL-TOMCO merger alarmed the consumer movement because it would have led to dominance in the large scale soaps and detergents sector, with no possible competition due to imports. Until 2001, India maintained a quantitative restrictions regime, which was scrapped after being challenged successfully by the US, among others, at the WTO. The case led to a better realisation in the consumer movement that anticompetitive mergers or takeovers could also lead to a decline in consumer welfare. Many consumer groups linked up to challenge the proposed merger before the MRTPC, but failed because the law no longer covered regulation of mergers. They then approached the company bench of the Bombay High Court, where the merger could be challenged under the Companies Act on grounds of public interest but lost there too. The movement also raised the issue before the CCPC under the DoCA, which is another body which provided legitimacy to consumer groups.

A second case concerned Coca Cola's takeover of Parle. There was no challenge to these M&As as they involved the sale of brands and because the fact was only made public after the deal was done. But it did cause concern as the takeover would lead to a duopoly in the market: Pepsi and Coca Cola. Another case which raised eyebrows was the takeover of Harbans Lal Malhotra & Sons, a shaving blade manufacturer by the US-based Gillette, because it would lead to dominance in the market.

Prices, quality, access and availability have been the main drivers of the consumer movement. There was a latent realisation, although it was never articulated as such, that better functioning markets can help the poor the most because they suffer the brunt of poor quality and high prices. Transparency and accountability, especially of the state sector was another important driver – after all, nearly all the services (power, transport, insurance, water, communications, etc) were mainly operated by the public sector and quite often unsympathetic to consumer interest.

Following the finance minister's statement in February 1999, the Government set up the High Level Committee on Competition Policy & Law chaired by S. V. S. Raghavan with eight other competent members, including a consumer representative, the chairperson of the apex body of consumers, the CCC.

Other stakeholders were not a part of the lobby, but the trade union movement was certainly supportive overtly. The reason for that were mainly: a) the fight on the HLL/TOMCO merger, which was also contested by both the company unions at the MRTPC and the Bombay High Court, and b) a general left, nationalistic and anti-foreign investment sentiment. Business groups did not wake up to the fact until Sinha spoke about it in one his pre-budget sessions with them. Even then they only took it seriously when a debate was kicked off by the Raghavan Committee and subsequently by the parliamentary process.

The Raghavan Committee heard various interest groups, including professional associations of company secretaries and chartered accountants and the MRTPA Bar Association. This limited group of professionals had been dealing with the MRTPA and had a vested interest. But to their credit, no one really opposed the law. Needless to say, the strongest proponents were again the consumer groups.

The debate in the Committee threw up some sharp differences of opinion and its report drew no less than four dissent/supplementary notes[4], i.e. from half the membership.

The strongest dissent from the right came from the late Sudhir Mulji, economist and businessman, who felt that India did not need a competition law at all. Rakesh Mohan, currently Deputy Governor in the RBI, in his supplementary note, which was not a dissent note, believed that India should proceed slowly so that various aspects could be debated vigorously before implementation. He suggested a cooling off period of 3-5 years during which the authority should conduct advocacy. The concept bill provided for advocacy during the first year, followed by anticompetitive practices in the 2nd year and regulation of combinations (mergers etc) in the 3rd year.

Former member of the MRTPC, Dr S. Chakravarthy, in his supplementary note, adopted a position to the left of the mainstream view, i.e. that India needed a strong competition law and in order to slowly ease in the liberalisation and globalisation of the economy. He believed that Indian industry was as yet too small and needed a level playing field and hence the law should be staggered in implementation. Mohan was concerned that an-all powerful authority sitting in judgment on mergers could come in the way of badly-needed consolidation in the industry.

Another member, a chartered accountant, P. M. Narielvala, also argued against the pre-merger notification along similar lines as Mohan. He said that since the thrust of the law was not on dominance but abuse of dominance, there was no need to bother with pre-merger notifications. Other than Mulji, the three other dissenters did have valid points that had very similar underpinnings.

This debate continued to reverberate in policy circles. John Burton, Senior Economic Adviser, DFID India, observed in a report[5] to his headquarters:

> *"Generally my impression is that the economic press has welcomed this as being 'reform'.*
>
> *[T]his was perceived as just another opportunity for government interference in the private sector, leading to more regulation and corruption. My previous assumption had been that this would be helpful because it would help Government of India overcome their fears of foreign multinationals acting in an anti-competitive way, to open up further to new competition in the domestic market.*
>
> *"An interesting point was made in the discussion that the business sector had not engaged on this agenda. The conclusion drawn was that the business sector does not take the law at all seriously, and thinks this is just another government process of meddling, which they will be able to manage".*[6]

As early as November, 2000, after the Concept Bill had been placed on the Government website, a heated debate had taken place in business circles. The main opposition to the new law was the need for preview of mergers, when a similar provision had been deleted from the MRTPA to enable Indian industry to grow without shackles and be competitive globally. Their fear was also based on the fact that the Authority would be run by retirees with a command-and-control mindset, who would be overzealous in using their powers.

This was dealt with by the Government by fixing a high threshold for mergers, so that only merging companies with assets of Rs 100mn and turnover of Rs 300mn would be scrutinised – that too, only if there were a voluntary notification. However under CA07, mandatory notification is required.

The Commerce & Industry Ministry (CIM) too opposed the bill because it felt that it would bring back the *Inspector Raj*. In an elaborate but inept submission[7] it had an adverse comment about everything possible, including extra-territorial jurisdiction (the effects doctrine). Due to some negative experiences in the MRTPA, the new law covers this issue explicitly. The CIM mandarins had not studied the draft bill well. The CIM also opined that this measure would give a wrong signal to the world that India was ready to accept negotiations on trade and competition at the WTO. (This matter is on the agenda of the WTO, but has been put on the backburner in the Doha Round. However, once the Doha Round is concluded, the issue will most likely be resurrected).

The MoCA responded that this law was needed to deal with problems arising out of globalisation at the WTO. The CIM even suggested that if at all the law had to be adopted then it would have to exclude national treatment of foreign companies, which too was rejected as something which would run against India's general non-discrimination commitments at the WTO.

The small-scale business association, too, had a strong view. The Federation of Small Industries Associations of India made a fervent but confused plea to the Raghavan Committee highlighting the problems faced by small industries in getting credit lines, in facing competition from overseas suppliers following the liberalisation of the import regime (due to the removal of the QRs on consumer goods) and about the UTPs of larger businesses. It pleaded for continued quotas or reservation for small scale units. But all this did not relate to the agenda of the Raghavan Committee. Instead, the Association could have demanded an exception from the full application of a competition law – something that exists in many countries, including rich ones.

Its woes in terms of larger units exploiting them was echoed by another small-scale body in an entirely different context, when it observed that a healthy competition regime would be advantageous to them to deal with malpractices of large enterprises. This view was stated by the Federation of Indian Small and Medium Enterprises (FISME)[8] when the country was opposing a multilateral agreement on trade and competition at the WTO, and the industry body was making a point that such a regime would actually help them.

The media, too, did some harm with law believing that the law would stunt the growth of Indian industry, while many professed that the law will actually help. The debate in the media was influenced by the views expressed both by members of the Raghavan Committee and economists/commentators outside it. The status quoists (including some in the CIM) found fault with everything in the law.

In sum, the Raghavan Committee did its job mainly on the back of submissions made by various interest groups, the opinions of its members and the hectic debate surrounding the process. It did not get research conducted on various aspects of the issue – including the crucial one of the failure of the MRTPC in busting cartels.[9] The time given was too short and perhaps it did not have resources at its command to commission research. As a result, the views of the articulate, rather than an actual evidence base, dominated the process, especially those from well-known economists.

Institutional issues in adoption of the new law

The Concept Bill was revised in many ways, and finally a draft Competition Bill was placed and adopted by the Parliament in 2003 but was named as CA02 after the year of introduction. One of the critical changes was on the coverage of IPRs. The committee had recognised that IPRs needed to be covered explicitly under the law, but when the bill was drafted, it made it less explicit, covering only unreasonable restrictions. The Law and Justice Ministry which drafted the final bill carried out these changes because it felt that if IPRs have been exempted entirely from the operation of the MRTPA, the CA02 should also not cover it. It is not clear if interested business parties had lobbied behind the scenes for the diluted version. In spite of our lobbying with the Parliament, the CA07 retained *status quo*. However, everything is not lost because of the fact that IPR abuses are dealt with under the 'abuse of dominance' provision in most competition law jurisdictions.

Nevertheless, there are two problems with this: a) the understanding of such a provision is almost totally absent in India as there has been no case which has been conclusively decided under this type of provision under any law, and b) where laws in India are not explicitly defined, their interpretation is left to the courts, which can be turned cleverly by smart and highly-paid lawyers.

On the whole, though, the CA02/07 has captured all the major issues in its design and coverage. Of course, the bite of many of the sections will evolve with case laws, as the law being new there is hardly any precedent to base its action upon. Case law from other jurisdictions can only be of persuasive value and much of the case law which develops in India will be a challenge. Fortunately, many sections were drafted carefully and capture the type of anticompetitive practices which India is witnessing.

One important change was in the coverage on extra-territorial jurisdiction (effects doctrine) which would allow the authority to check abuses occurring abroad with an effect in India. This too is a politically sensitive issue. For example the MRTPC had taken action against a US-based soda ash cartel and an Indonesian float glass cartel. Both cases failed to impress the Supreme Court because neither extra-territorial jurisdiction nor cartels was spelt out clearly in the MRTPA.

The CA02/07 has moved away from the structural (dominance) approach of the MRTPA and instead focused on behavioural aspects, i.e. abuse of dominance (Chapter 8). Big is no longer bad, but if the big do not behave well then they could be hauled up by the authority. This was quite an about-turn in India's approach to business. The MRTPA was more of a licensing law, and had acted as a millstone around the necks of business.

Noted commentator, Gurcharan Das wrote in his popular book[10]:

> *"The MRTPA turned out to be one of the most damaging in modern Indian history. Any group with combined assets of Rs 200mn was declared a monopoly and effectively debarred from expanding its business after 1969. A single company, with assets above Rs.10mn, puny by world standards, was similarly placed under 'anti-monopolistic supervision and control"*.

The MRTPA in one manner also covered the abuse of dominance in its coverage on monopolistic practices, but there is not much cogent case law. Besides the MRTPA did not have penalty provisions for any abuse, and in most cases it could order only 'cease and desist'. Compensation could be awarded to a complainant but only when there was a favourable order and the complainant moved the MRTPC for an award. The CA07 provides for deterrent penalties, which can be up to 10 percent of the annual turnover calculated as an average of the last three years.

The other major change in the CA02/07 from the Concept Bill was in the process of selection of chairman and members of the CCI, which has proved to be a central challenge for the implementation of CA02. The change has led to jockeying and rewards for favours done. The Concept Bill had recommended that the selection process should be through a permanent collegium comprising the Chief Justice of India, Speaker of the *Lok Sabha* (lower house of the Parliament), Governor of the RBI, Finance Minister and the minister in charge of company affairs. It had also proposed that the chairman need not be a judicial person but could be an expert.

The Bill as proposed in the Parliament did not carry this provision, and instead provided for a summary selection process to be decided by the government. There was a heated debate on this matter, and the Finance and Company Affairs Minister, Jaswant Singh, argued that such a committee will never be able to devote the time required or be able to meet frequently, and that a smaller selection committee was needed for the sake of efficiency and speed. Parliamentarians raised the spectre of retired civil servants wangling the chairs in a surreptitious manner but the minister assured the house that the Commission would not be allowed to become a parking place for retired bureaucrats[11]. That assurance has manifestly failed. Further, after the Bill had already been passed by the *Rajya Sabha*, the version which went to the Lok Sabha had some more changes, such as having a 'Member Administration' in addition to the chairman.

Another unprecedented step was the formation of a three-member selection committee with the then Minister for Commerce & Industry, Arun Jaitely, as Chairman, when he was not holding charge of the Department of Company

Affairs at that time. This was is in spite of a vague assurance given by the Minister, Jaswant Singh, on the floor of the *Lok Sabha* that the selection committee would not include any ministers[12]. The two other members were a well-known lawyer and a distinguished retired civil servant. The rules for the selection were framed by the MoCA and were found to be lacking propriety and vision. They selected the former Commerce Secretary and the former Company Affairs Secretary as Chairman and Member Administration respectively. Both were bureaucrats on the verge of retirement.

Two important factors helped their appointments: a) they were close to the chairman, having worked with him, and other key players, and b) transparency in the selection process had not been prescribed. Because of low salaries, the posts would not have attracted better or younger people from other sectors, and no effort was made at all to look for such candidates. That the bureaucrats can get into such positions was due to the age ceiling being set at a higher level in the law than the civil service age limit (60 years).

These two appointments led to a writ petition being filed in the Madras High Court alleging *mala fide* in the matter of the appointment of the Company Affairs Secretary (current incumbent Member of the CCI) on the grounds that he had been in a position to 'influence' the appointment. Another writ petition was filed in the Supreme Court challenging the appointment of the former Commerce Secretary as Chairman on the grounds that only a judge should be appointed, quoting the provision in the MRTPA, which this law would have replaced. The apex court was infuriated and the Chief Justice of India went to the extent of saying that if there had been a 'doctrine of suspect' in India as prevalent in the US, the law would have been struck down *in limine.* He felt that such appointments could one day lead to bureaucrats becoming High Court and Supreme Court judges!

The matter was settled after a long drawn-out battle in the court. Finally, the Government decided to split the authority into two: a) the CCI to work as a regulator to be headed by an expert, and b) the CAT to be headed by a retired judge of the Supreme Court or a retired chief justice of a high court.

The selection process has also been incorporated in CA07. It has been proposed to have a single selection committee, for appointments to both the CCI and the CAT, to be headed by a nominee of the Chief Justice of India along with the Secretaries of the Departments of Corporate Affairs and of Law and Justice. However, the procedure for selection has not been spelt out. In view of the earlier imbroglio over appointments and the fact that a Supreme Court judge will head the Selection Committee, it is expected that the process will be transparent and fair.

The amendment bill was moved in the Parliament sometime in 2006, and it was referred to the Parliamentary Standing Committee on Finance, which *inter alia* deals with subjects related to the MoCA. The standing committee heard all the usual suspects, including a representative from CUTS and the Company Affairs Department, and arrived at its conclusions in December 2006. Among many recommendations, its suggestions that notification of all mergers should be mandatory has been accepted and incorporated in the CA07. This may not be the best way forward, as chambers have already reacted against it. In many jurisdictions merger notification is voluntary. The debate is yet to be settled.

Institutional challenges ahead

The amendments in the Act have thrown up some important institutional challenges.

To start with there is the role of the CCI itself. In order to comply with the apex court's judgment, the Government has proposed that the word 'complaint' be replaced by 'information', the reason being that complaints can only be submitted before a judicial or quasi-judicial authority. This could mean many things, as pointed out by a leading advocate Pallavi Shroff, who had been a member of the Raghavan Committee. One is that 'information' cannot be a good substitute for complaint as all matters will be adversarial in nature[13]. This would involve presenting arguments, pleadings on defence and offence etc, and if the CCI acts only on information and disposes of the matter on its own without any formal hearing process, it would be opaque and against the principles of natural justice.

On the other hand, another former member of the Raghavan Committee and competition expert, Dr Chakravarthy pointed out that if all matters are to be decided by the appellate tribunal, it would become a lawyers' paradise, as no trial will be held during the first stage at CCI.

Another amendment was on a CA02 provision for the establishment of regional benches. The Government has decided to do away with regional benches entirely. We have argued that the CCI can have regional offices if not benches. Because, India is quite large and such offices can keep a watch on issues, which arise regionally, and also be an easy contact point for people in the regions. Such a system operates in Turkey, Macedonia and Venezuela and has proved to be effective. Secondly, in federal countries like the US and Australia there are local competition agencies operating under state laws, which work in tandem with federal agencies. (This aspect is covered extensively in Chapter 9).

One serious problem is that of capacity in the CCI. We have often argued that the CCI should attract talent from the market rather than rely upon government employees. The CCI had engaged the IIM, Bangalore to suggest the organisational structure among other things. It recommended that talent should be hired from the market with salaries which are higher than government scales. A similar system operates in the capital markets regulator, the SEBI.

The CA07 has empowered the CCI to hire and fire its staff. Since the amendment has been adopted this year, the CCI will need to have the staff in place very soon. Otherwise it will take another 6-12 months for the law to be actually operationalised. The CCI has also received financial support from USAID and the World Bank for capacity building, and both agencies have been quite frustrated with the delay as there are no recipients of such trainings.

At this point, it is necessary to refer to the USAID support, which is coming through the US Fair Trade Commission (FTC) and Department of Justice (DoJ), as it will pose another institutional challenge over time. The US competition or anti-trust regime has undergone a paradigmatic shift and is undergoing some rethink. Lately many of decisions in the US on M&As have not been acted upon as they are to be dealt with in the EU. This type of knowledge may not be really applicable for a young competition authority in India which will need to deal with such situations through a home-grown understanding. On the contrary, capacity building advice can be better obtained from other developing countries with experience, which will be more relevant.

Currently, the CCI is engaged in advocacy, which began about four years ago. In the beginning there was no speed or intensity that is required, given that this was their main task as enforcement provisions were not notified due to reasons stated above. Apparently the CCI personnel were cautious, if not apprehensive, that their advocacy activities may create some hostility. Some of this caution emanated from the fact that the whole law was being questioned by the Supreme Court, as also from the inherent character of the persons in charge of the project.[14] Nonetheless, since about one year, the CCI has raised the ante substantially. Its personnel are writing regular articles in the business press, interacting with various agencies to speak about competition, and also expressing its views on measures which may not be conducive to promoting competition.

Other than advocacy, what is also required is to build capacities of all stakeholders to appreciate and build a healthy competition culture. That too is a challenge and will need to be ratcheted up as the CCI comes into full bloom. Without public support or wider understanding the law will not be so effective nor a competition culture built up.

Administrative Challenges

Grants to the CCI in terms of money are provided by the Government of India as laid down in CA07. The Central Government also has the power to supersede the CCI on grounds of public interest. At the same time there are provisions which give autonomy to the CCI in certain matters. The Commission has its own procedure and is not bound by the Code of Civil Procedure, 1908, which stipulates the manner in which civil suits are to be decided in civil courts in India. At the same time it is expected that the Commission must be guided by the principles of natural justice under the provisions of the CA07[15]. In other words, the defendant should get an opportunity to defend himself with the right to be heard and the deciding authority should be free from bias and prejudice. And the CCI has powers to summon witnesses, require production of documents, receive evidence on affidavits and issue commissions for the examination of witnesses or documents.

In fact, even if the CCI personnel have to travel abroad for a conference or so, they need clearances from various branches of the Government. Often these approvals come at the last minute, thus discouraging the applicant from travelling. So taking into consideration all these factors the following recommendations are made:

1) *The discretion enjoyed by the Government in determining the budget of the CCI should be taken way. The parliament should approve the budget.*
2) *Travel abroad by CCI personnel should be left to their own discretion, and if only there appears to be any misuse should the government take* ex-post *action.*
3) *The power to supersede the Commission seriously curtails the autonomy of the CCI and should be removed.*
4) *The issue of policy directives by the Government should be qualified by including a provision for a wide consultation process. The Government should be expected to take into confidence the comments delivered by the CCI and other stakeholders, and justify the issue of directives with adequate reasons.*

Is the CCI accountable?

Under the Act, the Parliament has the general oversight over the rules and regulations made and in executing the provisions of the Act. The CCI is made accountable by requiring it to submit an annual report of its activities, which is placed before the parliament. At the same time, appeals against orders or decisions made by the CCI lie with the proposed CAT and the Supreme Court.

The general effectiveness of the CA07 will depend on the proper functioning of the CCI as it has the duty to eliminate practices having an adverse effect on competition, to promote and sustain competition, protect the interest of consumers and ensure freedom of trade carried on by other participants in the market. The CCI is the enforcing authority, so, the effectiveness of the Act will depend on the performance of its members.[16]

At the same time, in addition to the accountability of the CCI there should be review of the activities of the CCI in the light of the developments around the world, in the US, UK and in developing countries. There are the Daubert standards maintained for giving recognition to scientific testing standards in the US in relation to forensic sciences.[17] It says that forensic evidence provided in criminal cases are not admissible unless the testing process is updated, accepted worldwide, peer reviewed and having less standard of error. Similarly the enforcement measures of the CCI can be reviewed by inter-governmental organisations such as United Nations Conference on Trade and Development (UNCTAD) or Organisation for Economic Cooperation and Development (OECD), which has done several such reviews of country regimes, or by other more advanced competition authorities from the US or UK, or even other experienced developing countries.

So the following recommendations are made to make the CCI more accountable for the role it plays in order to successfully implement the CA07:

1) *The supervisory role of the parliament has to be enhanced and improved.*
2) *The CCI should be made accountable through independent reviews by external agencies.*
3) *There should be a peer review of the activities of the CCI by UNCTAD or OECD or competition authorities of other countries.*

Interface between the CCI and sectoral regulators

The provisions of the present Competition Act of India recognise the overlap between the functions of sectoral regulators and the CCI in matters of competition. Regulators tell the firms what they have to do. Competition rules on the other hand tell the firms what they should not do. The Act says that statutory regulators may refer competition matters to the competition authority, but to what extent the competition authority can influence the regulators in the absence of such requests is not clear.[18] According to the present provisions such a reference is voluntary and at the discretion of the sectoral regulator. Even where the competition authority's advice is sought, it is not compulsorily binding on the sectoral regulators.

According to the amendment Act, where any reference is made to the CCI, regulators have to give speaking orders. But by making the consultation process voluntary, the improvement introduced in the draft amendment bill would not be effective. Also keeping in mind the fact that regulators have to give speaking orders on a reference made to the CCI, they will have no incentives to refer the matter to the CCI in the first place considering the discretion they would have. Such inadequacies in the Act will create conflicts between the competition authority and the sectoral regulators and lead to inconsistent decisions and forum shopping.

The areas where competition rules interact with the industry specific rules are interconnection, monopoly-pricing, anti-competitive agreements and merger control.[19] In the US, competition rules and judicial precedents prevent the misuse of market position on interconnection. However as the specific sector-regulatory bodies are often responsible for defining entry conditions, their actions directly affect the nature of competition once the entry has been made. As such, conflicts between sectoral regulators and competition authorities could arise.

Similarly in respect of pricing issues, the sectoral regulator may find the competition rules on price fixing as vague and inadequate to address the sectoral concerns. In case the pricing rules do not coincide with the objectives of the sectoral regulator, the situation may result in a conflict between the two regulators.

In the UK important steps have been taken to make competition scrutiny of regulation more systematic.[20] First, the Enterprise Act has strengthened the powers of the Office of Fair Trading (OFT) and the Competition Commission (CC) to examine and make recommendations to the government on regulatory restrictions and distortions of competition. The OFT proposes to amend its guidance on market investigation references in order to increase further the potential role of the CC in this regard. Second, since 2002 competition scrutiny has been merged into the regulatory impact assessment of all new legislative proposals.

This assessment is primarily conducted by government departments. OFT provides guidance to government departments on when and how to carry out competition assessment and assists on cases as necessary. Third, an inter agency body, the Concurrency Party has been established to discuss the relationships between the competition agencies and sector regulator. It meets to decide which agency is best equipped to deal with a case. Finally, all appeals against the competition authorities and sector regulators lie at the CAT in UK, thus creating some convergence in approaches.

Keeping the above in mind the following recommendations are made to reduce the ambiguity between the CCI and the regulatory agency:

1) *There should be mandatory provision for consultation between sector regulators and competition authorities.*
2) *The CCI should proactively participate in discussions on competition-related issues before sectoral regulators.*
3) *The CCI should establish a concurrency party between the CCI and sectoral regulators, so that there is better coordination among them to ensure that competition concerns are addressed properly.*
4) *Considering the likely overlap between the CCI and various sectoral regulators, a Common Appellate Tribunal on the lines of the UK model should be established for the CCI and the sectoral regulators. This will ensure convergence in application of competition and regulatory laws on issues where there is overlap and discourage forum shopping. The jurisdiction of the common appellate tribunal should be restricted to issues of law.*

Weak IPR-related provisions

The Act recognises that the bundle of rights that are subsumed in IPRs should not be disturbed in the interests of creativity and intellectual/ innovative power of the human mind. As a result it exempts reasonable conditions from forming part of protection or exploitation of IPRs.

The Indian CA07, recognises the general importance of IPRs such as patents, copyrights, trademarks, geographical indications, industrial designs and integrated circuit designs. While the Act prohibits anticompetitive agreements, provisions of the Act say that this prohibition shall not restrict the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights enjoyed under the statutes relating to the above mentioned IPRs. By inference, unreasonable conditions imposed by an IPR holder while licensing his IPR would be prohibited under CA07. This provision is not very dissimilar to the laws in other countries. Thus, in case of unreasonable restrictive practices by the IPR holder, relief is available to the affected parties under the Act. The Commission can pass a variety of orders, including penalties up to 10 percent of turnover, cease and desist orders, direct modifications of the licence agreements, and any other orders it deems fit.

However, what is reasonable is not adequately mentioned in the Act. Secondly, there is no mention in the Act about remedies available if *unreasonable* conditions accompany IPR licences and limit competition. Compulsory licensing and parallel importing are two key remedies of great importance and a competition law cannot remain silent in this regard. However, in India the IPR laws such as the Patent Act, 1970 or Copyright Act, 1957 or Trade Marks Act, 1999 have overriding powers over the CA07 in matters related to IPR abuses. For instance, in cases where an anti-competitive outcome arises from the exercise of the rights by the patent holder, the Patent Amendment Act (2005) provides for issue of licences to stop such anticompetitive activity. However, the role of the CCI to examine such matters does not find any mention.

Competition law is best suited to decide whether there is a negative effect on competition from the use of IPRs.

1) *The Act should explicitly define what constitutes 'unreasonable' conditions. An indicative list of unreasonable conditions should be given, such as patent pooling; tie-in arrangements; prohibiting licensee to use competing technology; an agreement to continue paying royalty even after the patent has expired; fixing the prices at which licensee should sell, etc.*
2) *The Act should specify the remedies that are available in case of abuse of IPRs. In this context, competition law should override IPR laws.*

The criteria for defining 'exemptions' are totally subjective

The Act provides for exemptions to mergers and abuse of dominance on certain grounds, such as 'economic development' and 'public interest'. But, there are no definitions of these terms. In the absence of clear definitions/ criteria, relevant provisions will be open to varying interpretations, based on the subjective interpretation of 'economic development' and 'public interest'.

India can draw lessons from the South African Competition Act, 1998 where mergers are first evaluated on standard competition criteria and then the decision is weighed against the public interest criteria.[21] Furthermore, if the Government has a view, it has to file an intervention application in the case and appear before the Competition Tribunal as an interested party. The Government cannot issue any directives to the competition authority. The merger evaluation process is as follows:

1) It has to be established whether the merger is likely to substantially prevent or dampen competition;
2) If it has been decided that the merger would substantially prevent or lessen competition, then it must be established whether the merger will result in technological, efficiency or other pro-competitive gains that will outweigh the anticompetitive effects of the merger; and
3) Irrespective of the outcome of the evaluation of the competition impact of the merger, a public interest test has to be conducted.

Taking the above into consideration, the following recommendations are made:

1) *The Act should lay down the criteria under which such exemptions are granted.*
2) *Such exemptions must be publicly notified and discussed before being adopted.*

The idea of having a new competition law was accepted by the Government in February 1999. It has taken more than eight years to come this far. It might take another few years before the new law can begin fostering a competition culture. In doing this, we can well seek knowledge from around the world, especially from developing countries, where the conditions are similar.

Endnotes

1 CERC, Ahmedabad; VOICE, New Delhi; Mumbai *Grahak Panchayat*, Mumbai; Citizen, consumer and civic Action Group, Chennai; Federation of Consumer Organisations of Tamil Nadu, Chennai; Consumer Guidance Society of India, Mumbai, Federation of Consumer Associations of West Bengal, Kolkata *etc*.

2 Acknowledged by Yashwant Sinha in a personal communication to CUTS on June 29, 2007

3 *Confessions of a Swadeshi Reformer* by Yashwant Sinha, Penguin-Viking, 2007 (Pg-174).

4 Mohan T.T, *Competition policy dilemmas,* Economic & Political Weekly, July 15, 2000.

5 Copy of internal report dated February 23, 2001 available on file with CUTS.

6 Businesses were certainly a key stakeholders and they opposed the bill for both the right and wrong reasons. But as businesses did not participate in the above seminar, Burton's conclusions may not have been valid.

7 *Financial Express*, May 21, 2001.

8 *Globalisation and Competition* by Pradeep S Mehta in Economic Times, 30th March, 2004.

9 The CCI with the aid of DFID and FIAS of the World Bank is currently engaged in a series of research projects which are examining the market structure in various sectors. This research has been catalysed by an earlier research project done by CUTS: *Towards a Functional Competition Policy for India*. This project was also supported by DFID. The series of research projects of both CCI and CUTS in various sectors offers a good database of information on how various sectors function and the type of anticompetitive practices which prevail or are likely to occur. How to use the outputs in its advocacy and enforcement work will be a big challenge to the CCI.

10 *India Unbound* by Gurcharan Das, Penguin Books, 2002.

11 Synopsis of Debates, Rajya Sabha, December 20, 2002.

12 *Lok Sabha* Debates, December, 2002.

13 Verbatim Proceedings, Standing Committee on Finance, 18th September, 2006, submission of Ms. Pallavi Shroff, Partner, M/s Amarchand Mangaldas.

14 CUTS was invited to submit a proposal in 2005 to develop an advocacy package for the CCI but that project was never awarded to either CUTS or anyone else. In lieu of it the CCI has produced a few insipid small booklets.

15 Section 36 of the Indian CA02.

16 Supra n. 13.

17 Daubert V. Merrel Dow Pharmaceuticals, Inc., 509, US 579, 1993.

18 Competition Act, 2007, Reference by Statutory authority, section 21(1) – Where in the course of a proceeding before any statutory authority an issue is raised by any party that any decision, which such statutory authority has taken or proposes to take, is or would be, contrary to any of the provisions of this Act, then such authority may make a reference in respect of such issue to the Commission. http://www.cuts-ccier.org/pdf/CompetitionAct_2002.pdf

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CHAPTER 7

Cartels: the Major Challenge

Introduction

> *"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in conspiracy against the public, or in some contrivance to raise prices"*, Adam Smith in 'The Wealth of Nations', 1776.

This oft-quoted denouement by Smith in 18th century is but a realisation restated, and is one of the most popular contemporary quotes used when describing collusive behaviour of business. Collusion by traders to maximise their profits are as old a phenomenon as trade itself – since people began exchanging goods for cash. Cartels were recognised – and prohibited – in the days of the Eastern Roman Empire (Byzantium)[1]. The Constitution of Zeno in AD 483 punished price-fixing in clothes, fish, sea urchins, and other goods with perpetual exile, usually to Britain, then a Roman colony.

India recognised cartelising as a crime against the public in 400 BC. In a current analysis of Kautilya's *Arthashastra*[2], it is noted: "Kautilya appears to mistrust traders believing them to be thieves with a propensity to form cartels to fix prices and make excessive profits as also to deal in stolen property. He prescribed heavy fines to discourage such offences by traders and with a view to protect consumers". Further, the Law on Dealings among Private Merchants *inter alia* included regulation of traders "travelling together and pooling their goods".

Kautilya was Prime Minister in Chandragupta Maurya's empire in 400 BC, and wrote extensively on governance and administration. *Arthashastra* literally means 'science of wealth creation'. In his monumental treatise, which is also a road map for economic governance and statecraft, he prescribed the role of the Chief Controller of Private Trading to *inter alia* ensure:

- Fair trading in new and old articles;
- That profit margins of five percent on domestically produced goods, and 10 percent on imported goods were adhered to;
- That goods were sold at the prices fixed for them;

- That merchants did not indulge in collective purchase of commodities as long as goods of an earlier joint purchase remained unsold.

The last diktat above was perhaps given to prevent hoarding, rather than monopsony, but all possible abuses were covered by various other clauses, such as on setting profit and price ceilings, and prevention of unfair trading and price gouging. In any event, it recognised that traders are prone to cartelising and thus the government needs to regulate them.

In fact, it was cartel type purchasing behaviour of merchants in the farm good sectors in Canada and the US that led to the formulation of their first ever anti-trust/competition laws towards the end of the 19^{th} century. Big merchants formed 'trusts' which decided the purchase price, who will buy what and so on. This angered the smaller traders and farmers, which lobbied for competition laws, and succeeded. The merchants in the USA used to form 'trust' as a name for their associations, thus the competition law was named as anti-trust law.

Strictly speaking a cartel is a formal agreement between firms to act in concert on prices, production levels and territories**.** The elimination of rival firms that formerly competed is accomplished not by integration of production activities, as would happen in the case of a merger. Instead, the former rivals maintain separate firms but act jointly in fixing prices or dividing the market, or even both. Cartels can also construct private barriers to prevent entry, such as threat of retaliatory or predatory price wars and patent pooling. But the effect is the same.

"Our competitors are our friends, our customers are the enemy"

The statement cited above was actually made by a person sitting in a meeting of colluders in the US who had been involved in a famous cartel-busting case against big businesses in the animal feed additives business. The world heard it because undercover agents from the US Federal Bureau of Investigation (FBI) recorded it on audio and videotapes. The tapes exposed the cartel mentality, which was so contemptuous of its customers and antitrust laws, thus providing conclusive and incriminating evidence of conspiracy. What has made these tapes such an effective deterrent is not just the unnerving notion that the FBI might be watching, but the fact that high-level executives went to jail and their companies paid heavy fines as a result of their cartel activity. No wonder it has been said that cartels are 'the most egregious violations of competition law' – and they are ubiquitous.

The direct costs of a cartel to consumers are increases in the cost price of the product if the cartel is successful, fewer product choices (if the geographical markets are allocated among producers) and a slower rate of product innovation and technological change.[3] For producers, there are both potential costs and benefits deriving from the existence of an international cartel. However, in order to ensure that an international cartel survives, cartels may engage in activities that block or slow the entry by producers that are not members of the cartel. For example, cartel members may use tariff barriers and antidumping duties to prevent entry by developing country participants. International cartels may also use government-authorised non-tariff barriers (NTBs) to prevent entry, for example, through quotas.

Thus, many experts consider anti-cartel activity the most important function of a competition agency. They feel that because cartels cause the greatest harm to consumers, finding and prosecuting these agreements should be a top priority of competition officials. Prosecuting cartels may be the most difficult of the tasks assigned to competition authorities as cartels are conceived and carried out in secret. Cartel operators, knowing that their conduct is unlawful, do not willingly cooperate with competition officials in the course of investigations. Thus obtaining evidence to prove the existence of cartel agreements requires adequate legal provisions, special investigative tools and skills.

Quite often the cartels operate in the intermediate goods and services sector, so consumers do not feel the pain – they remain ignorant of the fact that such artificial price increases lead to a higher price of finished goods which they buy/consume. 90 years of the last century, in particular, saw a global resurgence of international cartels, which was evident thanks to the numerous efforts to uncover then by competition authorities. It is believed that the US and EU authorities have prosecuted about 100 international cartels[4] in the given time period. They have had effective competition regimes for many years, which have been refined over time.

This, in conjunction with the fact that some believe that as few as one in six or seven cartels are detected and prosecuted,[5] and that other cartels may have been discovered and prosecuted in places other than the US and EU, gives a rough indication of their high incidence. Both the US and EU are capitalist economies and firmly believe in the private sector as the most important component of its economy. Yet, they are very tough on collusive activities such as cartels because they sap the economy. The record, however, has been much poorer in the developing world – not because cartels are less common here but because the law enforcement agencies are less well equipped to deal with them.

Of the international trade flows identified in 1997 that best matched the products sold by 16 international cartels operating during the 1990s, developing countries' imports of these goods amounted to US$81.1bn, representing 6.7 percent of their imports and 1.2 percent of national incomes. With an estimated increase in prices of between 20 and 40 percent, one can then calculate a range of estimates for the overcharges paid by developing countries in 1997, had all 16 of these cartels been in operation during that year. These overcharges are in the range of US$16-32bn, which are equivalent to between one-third and two-thirds of the total annual multilateral and bilateral aid received by developing countries in the late 1990s.[6] Thus, there is a strong case for strengthening the enforcement activity of competition authorities in developing countries *vis-à-vis* cartels. This, however, continues to be hampered by inadequate legal frameworks or tools, information asymmetries, or worse, human resource handicaps. Such is the situation in countries like India.

The most common form of cartels is price-fixing, which is treated as a criminal act in the US and many other jurisdictions, including the EU, have started adopting the same treatment. Price fixing is a term that is generically applied to a wide variety of concerted actions taken by competitors having a direct effect on price. The simplest form is an agreement on the price or prices to be charged on some or all customers.

Next on the list are cartel agreements that divide markets by territory or by customers among competitors. If anything, such arrangements are even more restrictive than the most formal price-fixing agreement, since they leave no room for competition of any kind, and hence are often held illegal *per se* by competition laws around the world.

Under the third category of cartel behaviour is output restriction, when companies producing/supplying the same products/services agree to limit their supplies to a lower proportion of their previous sales. The ultimate objective of limiting supplies is to create scarcity in the market and subsequently raise prices of products/services.[7] The fourth type, bid rigging, involves coordinated actions by firms on tenders and auctions. Bid rigging, as all other cartel-type behaviour, can be difficult to detect and prosecute.

Cartelist behaviour is difficult to detect, and even when detected, might be countered by various defences. To make matters worse, cartels can occur in almost any industry and can involve goods or services at any level along the value chain. However, there are some sectors, such as cement, which are more prone to cartels than others because of the industry structure and the way in which firms operate.

The Indian scene

The Prime Minister of India, Manmohan Singh, during his speech at CII Annual Summit on May 24, 2007, called on corporate India to "desist from non-competitive behaviour". He added, "the operation of cartels by groups of companies to keep prices high must end. It is unacceptable to obstruct the forces of competition from having freer play".

Clearly, in India the scene is no different. But cartels here have never been prosecuted because our competition law is just not adequate to deal with them. Currently, we are witnessing cartel-type behaviour in cement prices with everyone in the Government, including the Prime Minister crying foul. All admit that we need a competition law, which can bite.

Cement enterprises are the favoured flavour of competition authorities around the world because they almost always collude as a cartel and fix prices, thus adversely affecting consumers and other businesses. Having failed to prosecute cement cartels in the past, the MRTPC has taken up a fresh case in 2007. It has not been able to succeed earlier and thus there is little hope that it will do so in future. Both then and now the Government has used import tariffs as the competition-promoting instrument. However, the cement industry is typical and imports may not always help.

Whether it is cement or other goods, colluding firms do not record their agreements, which are always oral, often facilitated by their trade associations. On the other hand, courts do not accept evidence of implicit cartels based on parallel price movements. The new law in India has amnesty provisions, which allow a colluder to spill the beans, which may be the best way for competition authorities to uncover evidence and prosecute cartels.

Large firms may decide independently to behave as though they had a cartel arrangement without a formal meeting; that is, each one can cut its output and hope that the others will do the same. Inevitably, in markets with an oligopolistic structure, firms take their rivals' actions into account. When firms in an oligopolistic market coordinate their actions despite the lack of an explicit cartel agreement, the resulting coordination is sometimes referred to as tacit collusion or conscious parallelism, which is not actionable under most competition laws.[8] In almost every country with a competition law the existence of an agreement must be proved. In other word, the sole existence of parallel prices is not sufficient to convict firms in a cartel case. Unfortunately parallelism is often used as an effective defence tool, beating the competition authorities with less investigative power or experience. (see Box 7.1).

Box 7.1: Price Parallelism in Brazil[9]

In a leading case in Brazil, the Administrative Council for Economic Defence (CADE) adopted a "parallelism plus doctrine" to prove a collusion amongst the three biggest Brazilian steel companies in order to raise plain steel prices to the same level at the same time. CSN readjusted its prices on August 01, 1996 (3.63 percent for hot plated steel sheets and 4.34 percent for cold plated steel sheets), while Cosipa readjusted its *prices on August 05, 1996 (3.59 percent for hot plated steel sheets and 4.31 percent for cold plated steel sheets), and Usiminas readjusted its prices on August 08, 1996 (4.09 percent for hot plated steel sheets and 4.48 percent for cold plated steel sheets).*

The new prices were preceded by communiqués sent to buyers on July 17, 1996 (CSN) and July 22, 1996 (Cosipa and Usiminas). Besides, a meeting was held in the Ministry of Finance's Secretariat for Economic Monitoring (SDE) on July 30, 1996. Representatives of the three companies and one of the steel producers' association (IBS – Brazilian Institute of Metallurgy) informed the government body that they would raise their prices. The Secretary replied that the practice would be eligible for cartel.

This case was decided under the ***parallelism plus theory****. The plus factors found as sufficient to conclude that there was a collusion were: the fact that the first company to raise the price was the company with the lowest market share; there was not an increase in costs that could explain the joint rise of prices; the companies used the same methodology and timing to communicate the price rise; and the joint meeting at SDE. Defendants suited an injury against the condemnation. The Federal Court Decision of First Degree, however, found that the CADE´s decision was correct. The judge highlighted that the conduct for conscious parallelism without rational economic explanation could be used to condemn a cartel.*

In India too, cartels have been alleged in various sectors, including cement (Box 7.2), steel, tyre, trucking, and family planning devices (Copper T). India is also believed to be a victim of overseas cartels in soda ash, bulk vitamins (see Box 7.2) and petrol. All these tend to raise the price or reduce the choice for consumers/customers. Several of these products are key intermediates. In fact South Central Railways regularly mention in their tender notices that if a cartel is found in the tendering process the firms will be disqualified. Therefore, most often, it is the businesses, whether in the private sector or public, those are affected by cartels as the cost of procuring inputs is enhanced or choice is restricted, affecting profitability.

Box 7.2: Bulk Vitamins Cartel and the Lackadaisical Indian Approach

US anti-trust authorities exposed a global conspiracy by leading chemical manufacturers in the bulk vitamins market to fix prices, allocate markets, supply contracts and sales volume and engage in bid-rigging. The cartel controlled the most popular vitamins, including vitamins A, C and Betacarotene, over a nine-year period from 1990 to 1999.

The conspiracy led to artificial increases in prices for hundreds of food, beverage and medicine makers, which were using these bulk vitamins as additives, and inflated the profits of these companies. Investigations by US authorities revealed that the colluding companies acted as if they were working for a single corporation, dubbed 'Vitamin Inc' and reaped huge profits from the high prices.

The chemical companies were also subjected to private civil suits for damages suffered by their customers, mainly food and drug businesses. Under an out-of-court settlement reached in November 1999, seven firms involved in the price-fixing of vitamins agreed to pay US$1.05bn to companies they supplied to. The costs of the conspiracy were passed on to consumers via producers of bread, milk, cereals and juices all of which use bulk vitamins. Consumers are being compensated by the cartel indirectly through a US$107mn contribution to charity. Another US$107mn will go to wholesalers and distributors, and state governments in the US will recover US$30mn as reimbursement for the extra cost of foods they purchased for hospitals, prisons and other institutions.

Despite the international exposure of the cartel, no action had been taken in India.

CUTS had launched a campaign for the investigation of the cartel in India. Letters were written to the subsidiaries of these companies in India or their head offices abroad, requesting information. They were asked whether they have been selling these bulk vitamins in India, either through direct sales or by way of exports. If yes, they were asked to provide figures on the extent of overcharging and sales levels. It was clearly stated in the letter that if the companies opined that they had not indulged in a similar activity in India, they should furnish a written undertaking to this effect. Despite numerous letters and reminders, the response was disappointing.

Rather than filing a case, CUTS sent a complaint letter to the MRTPC, with copies of correspondence with the companies and the US judgments, to launch a case. The Commission did not react and disposed of the case without giving any reason whatsoever. A question raised in the parliament too was disposed of with a one-line answer.

Cartels under the competition law in India

The new CA07, has strong provisions to combat cartels. These provisions are based upon best international practices. But how the new law will operate depends upon how the provisions are used by the new competition authority.

If one takes the cement case, it is quite interesting to see how even cheaper imports from Pakistan are being prevented on the grounds that their factories are not certified by the Bureau of Indian Standards. On the other hand, in all WTO negotiations, India has been asking for equivalence or mutual recognition of standards, because they are harming Indian exports. The question then arises as to why India has not done so proactively at least with its neighbours in South Asia.

India enacted the CA02 to replace the MRTPA 1969. Subsequently, the CCI was established in October 2003 under the CA02. CA02 and its successor: CA07 has provisions to take action against anticompetitive agreements, including cartels, which are presumed to have an appreciable adverse effect on competition.

Taking some lessons from the successful regimes to enable it to bust cartels, there are provisions in the CA07 to encourage whistle blowing and leniency. This is because cartel 'agreements' are always oral and not documented, which makes it very difficult for an agency to prosecute them even if the circumstantial evidence is corroborative. The lysine case was busted in the US by a sting operation, but mostly a colluding party blows the whistle on its partners-in-crime, thus offering incontrovertible evidence to the competition authority to prosecute the others. However, as stated above, the new law is yet to come into effect and whether similar confessions can be obtained in India has to be seen. This provision is similar to the criminal jurisprudence where a person turns an approver and blows the whistle on his cohorts, thus attracting lighter or no prosecution.

In India as well as elsewhere, cartels are also found to be most common in markets for intermediate products – vitamins, cement, chemicals, copper tubes, etc. – that are processed and form input costs along several stages of the supply chain, with fairly sophisticated customers.

The passing-on of costs makes it difficult for even the most vigilant competition watchdogs to follow and work out the price increase, price spread and profit margin in such markets/industries. Any possible claimant would be required to go through expensive accounting and competition analysis to determine the extent of the overcharge, and to examine and defend counter-claims that they partially or fully passed on the overcharge to their customers.

The users of the end products, of course, would not have a clue about why the price is so high. The difficulties in detection embolden cartelists.

A cartel, under the MRTPA, can be categorised as a restrictive trade practice, which, as defined, means "a trade practice which has or may have the effect of preventing, distorting or restricting competition". Under the MRTPA, the only power vested with the MRTPC with respect to restrictive trade practices is to issue a "cease and desist" order or to permit the parties to a collusive agreement to modify the agreement so that it is no longer prejudicial to the public interest. In this manner, a party, until summoned before the Commission, can continue to indulge in RTP without suffering any consequences. At the most, when action is taken against a party and a restrictive trade practice is established, it may be directed to discontinue the practice and only if it indulges in it that can it be prosecuted.

Due to the above-mentioned defects, the MRTPC, in its history of 30-odd years, has take action against very few cartels in the domestic market, let alone in the global market[10]. One of the important cases is one involving a cement cartel in India in 2000-2001. However, no significant result has been achieved (see Box 7.3). Ultimately, consumers are the ones who have to bear the brunt of the delays caused by the fight between the builders and the cement producers.

Box 7.3: Builders' Boycott to Break the Cartel

It has been a long-standing allegation that cement prices in India are not determined by market forces, but by collusive price-fixing of the manufacturers. In 2001, the cement cartel, after showing signs of weakness for a few months, once again became active. The cartel had stopped despatches all over India from November 27, 2000 to December 03, 2000. Despatches resumed on December 04, but with a uniform price hike all over the country. The price hike was about Rs 50 per bag, a rise of almost 50 percent.

This was too much to take for the major construction companies, who accounted for about 60 percent of the total cement consumption in the country. These companies, under the banner of the Builders Association of India (BAI) urged the Cement Manufacturers Association (CMA) to roll back the prices. However, the CMA turned down their demand. The BAI decided to stop purchasing cement from January 15, 2001, and their construction activities came to a grinding halt in many projects, even though they had strict deadlines. After a few days, the builders realised that civil work could not be stalled indefinitely, as they were also losing over Rs 50mn daily.

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The BAI thus decided to change its strategy. Instead of boycotting all the manufacturers, they targeted two major companies, Grasim and GACL, who were also believed to be leading the cartel. The idea was to create an incentive problem amongst the players, which could lead to a rift among them.

Meanwhile, the BAI also lobbied the government for a 10 percent reduction in basic customs duty from the then existing 38 percent, as well as for the removal of the surcharge of 10 percent, anti-dumping duty of Rs 10 per metric tonne, and the countervailing duty of Rs 350 per metric tonne. The BAI even allied itself with the then Chief Minister of Maharashtra, Vilasrao Deshmukh, who had a series of meetings with the Union Finance Minister, Yashwant Sinha. In the 2001-02 budget, the Government reduced the import duty and removed the surcharge as well.

Taking full advantage of this, the BAI arranged to import 800,000 bags of cement from the Far East at a landed cost of around Rs 140 per bag at a time when the ruling prices in Mumbai were at around Rs 185 per bag. Consequently, cement prices started falling. It is not known if good sense prevailed upon the cement majors; if Lafarge triggered disunity by refusing to play ball with the domestic players, especially in the eastern market where it is the biggest player; or if it was because of the actions of the BAI and the government. The dealers felt that the prices were falling because of renewed competition among the manufacturers.

Source: Towards a Functional Competition Policy for India, CUTS, 2006

An anonymous complaint was received by MRTPC alleging that some of the leading chemical firms in northern India have formed a cartel for hiking the prices of their products. The prices of chlorine gas and hydrochloric acid witnessed an increase of 277 and 200 percent within six and four months respectively in 1992. This was contended to be the result of an agreement amongst the parties to create artificial scarcity in order to raise prices. Since the prices of raw materials – sodium chloride and electricity – had more or less remained the same, it was stated to be a fictitious crisis created to take advantage of the market and increase the prices of their products.

Keeping in mind the definition of cartels and the necessary elements, the MRTPC was of the view that, except for the use of the expression ‘cartel’, there was no material evidence to suggest parity of prices or a meeting of minds. The Commission was of the view that the investigation lacked relevant and necessary information in regard to the parties forming a cartel leading to distortion and restriction of competition in the market. Without evidence of these essential factors, the Commission agreed with the respondents that *prima facie* there was no case of a cartel.

Cartels were not defined under the MRTPA but the CA07 clearly defines a cartel and lays down the following criteria to prove the same:[11]

- Agreement which includes arrangement or understanding;
- Agreement is amongst producers, sellers, distributors, traders or service providers, i.e. parties are engaged in identical or similar trade of goods or provision of service; and
- Agreement aims to limit, control or attempt to control the production, distribution, and sale or price of, or, trade in goods or provision of services.

According to the CA07, it is presumed that such agreements cause appreciable adverse effects on competition. Thus the burden of proof in any cartel case is on the defendant to prove that the presumption is wrong. A specific goal of the CA07 is to prevent economic agents from distorting the competitive process either through agreements with other companies or through unilateral actions designed to exclude actual or potential competitors. The CCI is required to regulate agreements among competing enterprises on prices or other important aspects of their competitive interaction. Likewise, agreements between firms at different levels of the manufacturing or distribution processes, which are likely to harm competition, need to be addressed.

Eliminating competition by fixing freight rates is common to the trucking industry. The MRTPC has passed 'cease and desist' orders against various truck operators unions for having formed a cartel. But due to the absence of penalty provisions, it could not impose them. However, on the other hand, as per the CA07, CCI has the power to grant interim relief, award compensation, impose penalty and to grant any other appropriate relief. The CCI also has the power to levy penalty for contravention of its orders, making of false statements or omission to furnish material information.

In another case, which came before the MRTPC, a joint venture of six US soda ash producers attempted to ship a consignment of soda ash to India. However, the major Indian soda ash producers complained to the MRTPC and asked it to take action against the producers for cartelised exports to India.

The Commission confirmed that the producers have formed a cartel and passed 'cease and desist' orders against them. The defendants, however, appealed to the Supreme Court of India, on the following grounds:

- Under the MRTPA, the MRTPC had no power to stop imports
- The MRTPA did not confer extra-territorial jurisdiction to the MRTPC

- Action could be taken only if an anti-competitive agreement involving an Indian party could be proved and that too only after the goods had been imported into India. In this case, the shipment had not actually taken place.

The Supreme Court did not go into the allegation of cartelisation, but instead held that the wording of the MRTPA did not give the MRTPC any extra-territorial jurisdiction. The MRTPC therefore could not take action against foreign cartels or the pricing of exports to India, nor could it restrict imports. Action could be taken only if an anti-competitive agreement involving an Indian party could be proved, and that too only after the goods had been imported into India.[12] The Supreme Court overturned the order of the MRTPC.

Bearing that in mind, the CA07 empowers the CCI with extra-territorial jurisdiction to cover any agreement, which has been entered into outside India; and any party to such agreement who is outside India, if the agreement has an effect in Indian markets. This is known as the "effects doctrine" and is widely used in many competition laws of the world. For example, the German competition authority could stop the merger between Gilettte and Wilkinson, the two shaving product giants, even though neither of them was manufacturing in Germany but sold their products there.

Dawn raid and leniency provisions

One most effective tool available to the cartel prosecutor – the "dawn raid", or unannounced visit to the offices of suspected cartel operators for the purpose of seizing documentary or electronic evidence of a cartel agreement. Dawn raids are not too difficult to undertake, and can generally bring good results, especially in the case the alleged companies refuse to cooperate. It is probably safe to say that an anti-cartel programme cannot be truly effective without the use of this evidence-gathering tool.

The CA07 does away with the explicit search and seizure powers, i.e. dawn raids as were granted to MRTPC. This is undesirable because it is only through such powers that the competition authority can conduct surprise raids on homes of executives and offices of suspected companies, and gather incriminating evidence. Be that as it may, the CA07 has leniency provisions, which could be designed and implemented in a manner to make it an effective tool for detecting cartelisation.

The party desirous to take shelter under the leniency provision has to proceed carefully as the conditions listed to avail of the concessions are:

- full and true disclosure is made before initiation of investigation/ enquiry;

- disclosure is vital in busting the cartel; and
- benefit can be rescinded if there is non-compliance of conditions subject to which lesser penalty was imposed.

The CA07, states that all the parties who wish to cooperate with an inquiry can do so right until the time the Director General (DG) submits his report to the CCI. Thus leniency shall not be limited to only the first party. Moreover, allowing leniency during investigations is considered to be an effective way to encourage other cartel members to come forward and cooperate with the investigations.[13]

The CA07 of India was examined by the Parliamentary Standing Committee on Finance, which has observed that leniency provision should be structured in such a way that each cartelist should be in a hurry to come forward with the necessary evidence before others do so. The Committee has accordingly recommended that complete amnesty should be granted to the first firm that gives enough evidence to commence an investigation and reduced penalties for those giving useful evidence subsequently, provided they continue to collaborate in the investigations against the remaining colluders.

Conclusion

With the availability of a definition of cartels, incorporation of a leniency programme, powers to impose fines against cartel members, explicit provisions to exercise jurisdiction in respect of actions taken place outside India, with an effect in India, and with provisions to enter into co-operation agreement with overseas competition agencies, the CCI has been much better empowered to tackle cartel cases than its predecessor.

However, much capacity building has to be done to hone the CCI's investigative methodology, providing infrastructural support to the investigators, assured protection to be provided to the whistleblower, etc. In order to achieve these, there are lessons to be learnt from competition authorities in developed countries that are better equipped to prevent or crack hard-core cartels. Success requires the following:

- proactive role on the part of the competition authority;
- empowering CCI with power to conduct dawn raids;
- high level of fines;
- criminal liability (for individuals);
- protection for whistleblowers;
- leniency programmes for firms that are willing to cooperate in the proceedings; and
- co-operation among countries (and probably an international watchdog) in case of global cartels.

Endnotes

1 Wish, R. 'Control of cartels' in *Competition Law Today*, Vinod K Dhall (Ed), Oxford University Press (2007).

2 'Kautilya's Arthashastra – Its Contemporary Relevance' Indian Merchants Chamber and Hinduja Foundation, Mumbai, (2005).

3 Levenstein. M, and Suslow, V. (2003-2004), 'Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy', *Antitrust Law Journal* 819.

4 Connor, J. (2003), 'Private International Cartels: Effectiveness, Welfare and Anti-Cartel Enforcement', *Purdue Agricultural Economics* Working Paper No. 03-12, available at <http://agecon.lib.umn.edu/cgibin/pdf_view.pl?paperid=11506&ftype=.pdf>

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6 Levenstein, M. and Suslow, V. (2001), 'Private International Cartels and Their Effects on Developing Countries', Background paper for the World Bank's *World Development Report 200*1. World Bank, Washington.

7 CUTS (2001), 'Competition Policy and Law Made Easy', pg.8

8 The determination whether cartels unreasonably restrain trade depends on the nature of agreement and on the surrounding circumstances that give rise to an inference that the parties are involved in some pernicious activity. There has to be an *explicit* agreement to purchase or sell the goods only at price or on terms or conditions agreed upon between the sellers or purchasers on which the goods are to be sold. Existence of an agreement (oral or written) is one of the essential conditions to be fulfilled to establish a cartel.

9 Pfeiffer, R. 'Recent aspects of hard core cartel prosecution in Brazil', Report to section I of the third meeting of the Latin American Competition Forum: fighting hard-core cartels in Latin America and The Caribbean.

10 In a few cases, the MRTPC did try to prosecute cartels from abroad for their activities in India, (see pg-97) but did not succeed in the end because the Supreme Court upheld the appeals on the grounds that the MRTPA did not have a provision on extra-territoriality. This has now been rectified and stated explicitly in the Competition Act 2002.

11 Section 2(c) of the Competition Act 2002

12 *Haridas Exports vs All India Float Glass Manufacturers' Association*, (2002) 6 SCC 600. A detailed discussion on the wider implications of this judgment, and Indian competition policy in relation to international trade, can be found in Bhattacharjea (2003).

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CHAPTER 8

The Contours of Abuse of Dominance in India

The thrust of the new CA07 of India is not so much on dominance but its abuse. It seeks to check the behavioural issues of market practices, rather than the structural ones because 'bigness' or scales are no longer as important as they used to be. This is what makes it different from the MRTPA 1969 whose thrust was on dominance. This is one reason that the new law, in its treatment of combinations (M&As and the like) has kept a high threshold for regulation. Another critical departure from the old competition law is the way abuses resulting from IPRs, another form of dominance, are treated. The MRTPA was barred from exercising its jurisdiction over any practices sanctioned under an IPR law, while the new competition law can examine any 'unreasonable exercise' of any IPRs if they cause an adverse effect on competition. Thus any anticompetitive practice under the cover of IPRs would have to be tried under the provision of 'abuse of dominance' under the new law.

The CA02 had voluntary notification for combinations (mergers) above a certain threshold, but the CA07 has made notification mandatory for all combinations. Alas, the law does not consider market shares at all. In a globalising economy, the size of the markets can be quite large, while at the same time it can be quite small also depending upon the access. For example, if two enterprises operating in a small town merge than it can lead to dominance and possible abuse. On the other hand, in a market, which is subject to easy import competition, even just two large enterprises functioning in the whole country can merge and not be dominant. Besides that, product market definition also includes substitutes.

The MRTPA dealt with abuse of dominance in various cases under the windows of 'monopolistic practice' and 'restrictive trade practice', but there was no clear definition on 'abuse of dominance'[1]. Neither was there a clear definition of 'cartels'. Cartels, as a collusive action by several parties, can also lead to abuse of dominance but it is a stand-alone competition abuse.

In this chapter we examine some of the leading cases of 'abuse of dominance' under the MRTPA, with some insights into similar contemporary practices, to see what impact they will have on how the new competition authority will deal with them.

Types of abuse of dominance

According to the provisions of the CA07 passed by the Indian Parliament in September 2007, it is the duty of the CCI to eliminate practices having an adverse effect on competition, protect the interest of consumers and ensure freedom of trade carried on by other participants in markets in India. According to the Act, the CCI is supposed to take action against abuse of dominant position like predatory pricing, etc. It is a *per se* a violation under the new law.

Dominance by an enterprise is to be judged by its power to operate independently of competitive forces or to disadvantage its competitors or consumers in its favour. Abuse of dominance can also be collective, such as a cartel not allowing new entrants into the market. It is not necessary that a single firm possess a high market share to abuse its dominance. However, consequences for competition can be severe if the firm is dominant.

Abuse of dominance is broadly of two types: Exploitative and Exclusionary abuse

1. *Exploitative abuse* means exploiting customers by ignoring the needs of customers and competitors. For example, a hike in cable charges despite the TRAI's tariff orders is no surprise to cable TV subscribers across India. Cable operators have the discretion to abuse their monopoly because all the operating areas are neatly divided among them. Efforts by competing operators usually witness dirty rivalry, such as cutting cables or physical threats. Thus, consumers do not have the choice to use the services of another cable operator but to accept the rates and service as provided in their area.

   The various ways in which exploitative abuse could be exercised are:

   - refusal to deal, such as denial of essential facilities;
   - tying, bundling, forced line selling;
   - predatory pricing;
   - non-price predation;
   - price discrimination;
   - IPR abuses; and
   - excessive pricing or price gouging.

2. *Exclusionary abuse* involves exclusion of competitors. For example, in some states in India, truck operators are not allowed to load and unload goods within the route unless they become part of the truck association. The truck association charges tariffs almost 35-40 percent higher than the prevailing market rates to the non-members truck owners. It happened in Makrana in Rajasthan where the marble sawing plants had to shut down and move to Kishangarh.

   The way in which exclusionary abuse could be exercised is given below:

   - Exclusive dealing arrangements (distributors cannot sell another supplier's goods or services)

For determining whether a specific undertaking is dominant the geographical and product market is to be understood.[2] Geographical dimension includes the geographical area within which the competition takes place. Product market includes all such substitutes that the consumer would shift to, if the price of the relevant product were to increase. For example, if Coca Cola, together with its rival cola drink Pepsi, in a parallel price movement and not necessarily through collusion, decide to increase their prices unreasonably, consumers can shift to other cheaper soft drinks. The only argument here would be about consumers who want only a cola drink for reasons of taste or peer pressure, and then may find it difficult to shift to another soft drink.

Both the cola giants are engaged in aggressive competitive behaviour, and in capturing a bigger market share than what the other has. There is nothing wrong in that. But there is a fine distinction between defending one's market position or market share, which is perfectly legal and legitimate and may involve aggressive competitive behaviour, and exclusionary and anticompetitive behaviour, which is prohibited under the new law. Abuse of dominance includes exclusionary and anticompetitive behaviour by charging unfair prices, and restricting quantities, markets and technical development, as opposed to defending one's market by aggressive competitive behaviour.

The next step is to analyse the dominant position in the market, by way of looking at the market share of companies. However, market share is not a correct indicator of dominant position for at least three reasons. First, the standard market definition test essentially asks whether a hypothetical monopoly supplier of a particular product/service in a particular area would find it profitable to increase prices by a small but significant non-transitory amount, i.e. 5 to 10 percent. However, in abuse cases, this may lead to errors, which are commonly referred to as the "Cellophane Fallacy" (after the 1956 US Du Pont case in which this issue arose). If the relevant product market was 'all flexible packaging material', then Du Pont's share was only 20 percent. But if instead the relevant product market was just cellophane, Du Pont had 75 percent of the market. Second, small market shares may be consistent with market power. Indeed, this would be the case when several small firms collude to control a market. For example, 10 firms with 10 percent of the market each may collude to charge monopolistic prices. Obviously, there is a limit to this, given the free-rider problem when the number of firms increases in a collusive agreement, as in any other co-operative agreement[3].

Third, large market shares may be consistent with low market power. Indeed, potential entry may significantly reduce incumbent firms' market share as underlined by the Contestability Theory. For firms with a large market share, the presence and nature of barriers to entry is a much more useful guide to policy than the market shares themselves[4].

Thus, crucial to the proper implementation of an anti-monopoly law (in particular assessment of dominance) is a thorough analysis of entry barriers since a firm may not exercise significant market power over time in the absence of barriers to new entrants in the relevant market[5]. However, all too often the issue of entry barriers is undermined in competition laws. For instance, the common practice in US and EU competition laws suggests that while most efforts have been devoted to determining the relevant market and assessing market power (usually in terms of market share), little (or at least not enough) attention has been paid to entry barriers.

Competition law – as any other government policy – should include efficiency considerations. If competition law on abuse of dominant position tends to focus on firms' market share rather than on strategic barriers to entry, then efficient firms may be penalised. This will give the wrong incentives to firms, which will try not to become too large (in terms of market share) rather than to try to produce more efficiently.

Exploitative abuse

Refusal to deal

Here firms that are at different levels of the same production-supply chain enter into an agreement (vertical agreement), where they agree among themselves not to sell to or buy from certain customers, as seen in Box 8.2. In other words, they agree to refuse to deal with a third party, normally a

Box 8.1: The Case of Bata

Bata has a dominant presence in the footwear market in India. It is engaged in the manufacture of leather and rubber canvas footwear. It entered into agreements with small-scale manufacturers for purchase of footwear to be sold by it under its own brand. The small-scale manufacturers comprised mostly poor cobblers and leather workmen.

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The agreements prohibited the small manufacturers from purchasing raw material and components from parties other than those approved by Bata.

The agreements also stipulated that they use only those moulds that were sold or supplied by Bata for manufacturing footwear for Bata's requirement. The agreements came up for review by the MRTPC, having been challenged as a RTP under the MRTPA, 1969. The Commission, after due enquiry, ruled that the conditions imposed by Bata constituted a RTP and were prejudicial to public interest. The Commission observed that the small manufacturers were by and large impecunious and depended and survived on leather footwear manufacture for their livelihood and that the restrictive conditions contravened the provisions of the MRTPA relating to RTPs (MRTPC, 1975).

competitor of one of them. Although this may be fair marketing strategy for optimising profits, sometimes such practices may reduce competition in the market and, consequently, could be restrictive in nature.

From the point of view of competition law and policy, vertical agreements are most likely to be harmful when at least one of the transacting parties is dominant in either upstream or downstream market. However, even restrictive vertical agreements that involve dominant firms can result in efficiency gains. Thus, whether or not such practices are anticompetitive depends on the specific case, as shown below.

VHP, an Australian steel manufacturer that controlled 97 percent of the market, was manufacturing 'Y' bars used as fence posts, among other things. VHP used to sell this product only to its subsidiaries for retail selling. Another company, Queensland Wire (QW), manufacturer and seller of barbed wire, tried to purchase 'Y' bars from VHP but could only get it at a higher price. At the same time, QW rival AWC, a subsidiary of VHP, sold barbed wires together with 'Y' bars supplied by VHP at a lower price. Although VHP did not actually refuse to supply QW, the point to be noted here is that there was no substitute product for the 'Y' bar. A judgement by the Australian Competition & Consumer Commission (ACCC) went in favour of QW as the costlier supply was found to have an anticompetitive effect.[6]

The European Commission (EC) fined Volkswagen AG, Europe's biggest carmaker, for barring its Italian distributor from selling cars to consumers in Germany and Austria. Volkswagen, saying its Audi unit and their distributor had, over a decade, "systematically" rejected orders from foreign customers seeking to take advantage of lower Italian car prices. Under the

EU rules, carmakers are allowed to sell through dealers, which offer only one manufacturer's products, but cannot prevent dealers selling to individuals or companies acting on their behalf who want to take advantage of cheaper prices.

The Commission said it had found "written evidence", during 1995 raids on Volkswagen and Audi and their distributor Autogerma, based in the northern Italian town of Verona, of pressure exerted on dealers to refuse cross-border orders. Its investigation concluded that a dozen dealers had their contracts terminated for not respecting Volkswagen's instructions and a total of 50 had been warned of the risk they would take if they sold outside.[7]

There have been instances of concentration arising from governments establishing monopolies for various public policy reasons. These PSUs or enterprises excel in abuse of their dominance for various reasons. Contracts and terms & conditions are drawn up in an opaque and unilateral manner, leaving no choice for the consumer to demand a fairer deal. Often this leads to arbitrary behaviour tantamount to abuse. There are numerous cases of this nature.

In a very recent case, the MRTPC issued notices to the Haryana Urban Development Authority for taking "undue advantage" of the common man's helplessness in housing allotment schemes[8]. It was alleged that that housing schemes were heavily tilted in favour of the agency and that it was indulging in UTPs, ignoring its social responsibility. It had retained deposits for over six months but did not pay interest to unsuccessful depositors.

India's electricity sector has vertically integrated monopoly utilities, mostly owned and operated by the public sector. In many instances unbundling has taken place, but all the new bodies remain under government control and/or ownership. The Electricity Act, 2000, has provided for promotion of competition as one of its objects. The existence of dominant utilities typically raises concerns on abuse of dominant position – many of their practices are arbitrary and result from their dominance, as consumers do not have a choice. The new electricity law has created independent regulators, but these are unable to perform their roles independently, as they are under the control of the Power Ministries (for more, see Chapter-10).

Tying, bundling, forced line selling

Here the supplier sells a product, which is dependent on the purchase of some other product, usually a slow-moving product (tied product), as seen in Box 8.2. This tie-in arrangement is such that even if the customer does not want to buy the tied product, he has to buy it in order to get the desired product. A good example of this kind of agreement is "full line forcing," requiring downstream firms to purchase a particular product.

Box 8.2: Tie-up Sales of Gas Stoves with Supply of Gas Connection

As in any other command and control economy, some goods and services were always in short supply in India, which led to political patronage and exploitation. Businesses exploited the situation through restrictive practices like tie-up sales. One such case, which came before the MRTPC in 1984, was that of Shyam Gas Company, the sole distributor to Bharat Petroleum Corporation Ltd, of cooking gas cylinders at Hathras (Uttar Pradesh), which was allegedly engaged in the following restrictive practices:

- *giving gas connections to customers only when they purchased a gas stove or hot plate from the company or its sister enterprise, Shyam Jyoti Enterprise; and*
- *charging customers for the supply of fittings and appliances at twice the market price.*

The MRTPC held that the company was indulging in an RTP that was prejudicial to public interest. When charged, Shyam Gas Co. agreed to stop the RTP and the MRTPC directed the company to abide by the undertaking.

The company was also asked to display, on its notice board, that consumers were free to purchase gas stoves and hot plates from anywhere they liked, and that the release of the gas connection would not be denied or delayed if the stove or hot plate was not purchased from the company or its sister company. This order formed the basis of asking all Liquefied Petroleum Gas (LPG) dealers to put up a similar notice on their premises.

Source: Monopolies Trade Regulation & Consumer Protection, D P S Verma, 1985.

However, such behaviour should not be considered abusive if the firm does not have market power in the tied goods. In general, a tie-in cannot be motivated by abuse if the two products are used in fixed proportions (as in the case of industrial goods) or if the tied goods are vertically related i.e., one good is used as an input for the production of the other good.

In Costa Rica, six companies own liquefied gas retail business. Competition is limited, because the final price is fixed by a Government regulator. Because each retailer works with different types of containers, and each of them requires a different filling valve. This binds the consumer to a single retailer[9].

The most significant case on abuse of dominance is the *United States v. Microsoft Corporation* case, which has universal application because Microsoft operates all over the world[10]. The plaintiffs alleged that Microsoft Corporation abused its monopoly power in its handling of operating system sales and web browser sales. The issue central to the case was whether Microsoft was allowed to bundle its flagship Internet Explorer (IE) web browser software with its Microsoft Windows operating system. It was further alleged that this unfairly restricted the market for competing web browsers (such as Netscape Navigator or Opera) that were slow to download over a modem or had to be purchased at a store.

Underlying these disputes were questions over whether Microsoft altered or manipulated its application programming interfaces (APIs) to favour Internet Explorer over third party web browsers; over Microsoft's conduct in forming restrictive licensing agreements with OEM computer manufacturers; and Microsoft's intent in its course of conduct. On April 02, 2000, the judge issued a two-part ruling: his conclusions were that Microsoft had committed monopolisation, attempted monopolisation, and tying (commerce) in violation of Sections 1 and 2 of the Sherman Act. The proposed remedy was that Microsoft must be broken into two separate units – one to produce the operating system, and the other to produce other software components.

However, recently the Microsoft lost its appeal this week against an abuse of dominance case brought by the European Commission (EC) in 1998. Microsoft was fined €497mn three years ago. The Court's presiding judge, Bo Vesterdof stated: "The (European) Commission did not err in assessing the gravity and duration of the infringement and did not err in setting the amount of the fine. Since the abuse of a dominant position is confirmed by the court, the amount of the fine remains unchanged". A number of commentators have indicated that the Commission clearly won the case.

Furthermore, the Court reiterated the EC's findings that Microsoft had abused its dominant position by refusing to supply interoperability information and by tying its Windows Media Player. The US Department of Justice has, however, expressed its concerns with the European Court of First Instance's decision to block Microsoft's antitrust appeal. Reigniting the debate about the correct approach to dominant form conduct, Thomas Barnett, head of the department's antitrust division, says the court's ruling "may have the unfortunate consequence of harming consumers by chilling innovation and discouraging competition", rather than helping consumers[11].

This view reflects the changing paradigm in the US on approaching competition abuse cases. The MRTPC too had tried to deal with this problem but did not succeed.

In October, 1997, the Competition Council in Finland imposed a fine of FIM5mn (US$1.12mn) on the Finnish dairy products company Valio Oy for an abuse of dominant position in the liquid dairy product markets. According to the rebate table applied by Valio, retailers were granted discounts on the prices of liquid dairy products on the basis of the average value of all the products (liquid daily products, cheese, fats, ice-cream, snacks and juice) obtained from Valio. In order to get a full discount, retailers had to make all their purchases of liquid dairy products from Valio, which had the effect of tying customers and excluding competitors from the markets.

Predatory pricing

Predatory pricing is the practice of offering goods or services at exceptionally low prices, even at a loss, in order to drive out competitors or deter the entry of new players in the market. Once a predator has acquired or successfully maintained market power, it raises its price above the competition level to recoup the losses it sustained during the predatory period and make profits thereafter. Such profits are called supra-competitive profits. Even though the consumers would benefit from low prices in the short run, they can suffer in the long run due to loss of competition in the market.

A company would resort to predatory pricing only when it enjoys significant market power. In a market with many competitors, the exclusion of some players would not lead to sufficient weakening of competition, so as to allow the company to reap the benefits of anticompetitive practices. In order for predation to be successful, the exclusion of competition in the market should be instrumental in maintaining or creating the predator's dominant position, thereby allowing the predator to charge high prices later on.

A predatory pricing strategy usually means that the predator:

- must be pricing exceptionally low or below cost;
- has an intent to eliminate specific competitors;
- has market power or dominance to eliminate competitors; and
- is able to sustain future market power to recoup earlier losses.

In the landmark *Brooke Group v. Brown & Williamson* case, the US Supreme Court in 1993 held that predatory pricing must meet two tests: the price must be below an appropriate measure of cost; and there must be a dangerous probability that the alleged predator will be able to recoup its losses through monopoly prices once its rivals emerge.

The French Competition Council issued its first ever fine for predatory prices. The Council fined the pharmaceutical company GlaxoSmithKline €10mn for predatory pricing on drug sales in 1999 and 2000. The Council found that Glaxo sold Zinnat, an injectable antibiotic, at a price below costs so as to deter other drug makers from entering the hospital market.[12]

The All India Float Glass Manufacturers' Association filed a complaint and an application seeking temporary injunction from the MRTPC against three Indonesian float glass companies, alleging they were selling their products at predatory prices in India, and were therefore guilty of restrictive and unfair trade practices under the terms of the MRTPA 1969. The Association complained that float glass at the landed price of US$155 to US$180 had been shipped to India between December 1997 and June 1998.

The Indian manufacturers claimed that these prices were lower than not only the cost of production in Indonesia but also the variable cost of production. The complainant also furnished figures indicating the estimated cost of float glass internationally as well as the cost of production in India claiming Indian manufacturers would not be able to compete with the price at which the Indonesian manufacturers were selling or intending to sell to Indian consumers. The MRTPC instituted an enquiry on the complaint and granted interim injunction restraining the Indonesian companies from exporting their float glass to India at predatory price.

The case has also a dimension of dumping, and instead of being handled by the MRTPC it could have been referred to the Anti-dumping Directorate in the Ministry of Commerce. However, there is a thin line between dumping and predatory pricing. Dumping refers to a foreign firm selling a product at a price below cost or at a price below that at which the firm sells the same product in its home market. The price must cause injury to the domestic industry. However, predatory pricing is the intentional selling of a product *at a loss* in order to drive competitors out of business. Thus the element of loss is very important when analysing cases related to dumping and predatory pricing.

Predatory pricing is a serious threat to competition and consumer welfare that requires serious action from competition agencies and courts across the globe. However, vigorous price competition is often mistaken for predatory pricing. Competition agencies need to be careful while analysing predatory pricing cases that they do not end up discouraging welfare-enhancing competitive behaviour by their actions.

Non-price predation or predatory behaviour

Distinguishing predatory behaviour from legitimate competition is difficult. The distinction between low prices, which result from predatory behaviour, and low prices that result from legitimate competitive behaviour, is often very thin and not easily discernible.

Indeed, it is sometimes argued that predatory behaviour is a necessary concomitant of competition. To quote Professor Jagdish Bhagwati from his book: 'A Stream of Windows'[13]:

> *"Clyde Prestowitz, former US trade negotiator and an ally of Mr. Fallows in the angst over Japan is doubly wrong when he asserts that 'Japan plays a different game' and that therefore the United*

States cannot have a beneficial trade with it under a rules-based multilateral trading regime...

What then about the view, often ascribed to Chalmers Johnson, professor at the University of California at San Diego, that Japanese Companies believe in "predatory" competition?"

"The notion that American Companies, by contrast, compete in a benign fashion is faintly romantic and fully foolish. What the Cambridge economist Joan Robinson used to call the 'animal spirits' of capitalist entrepreneurs surely are manifest in both countries. The successful always appear more predatory. This was exactly the stereotype of British entrepreneurs during the nineteenth century and of the ugly American in the 1950s and 1960s. With success, one gets one's share of envy and resentment".

In 1984, a case came up before the MRTPC after the Retail and Dispensing Chemists Association in Mumbai directed all wholesalers and retailers to boycott a Nestle product until the company met its demands. The Commission observed that the impact of the boycott could by no stretch of the imagination be considered negligible. It represented an attempt to deny consumers certain products that they were used to and, therefore, the hardship to such consumers was indisputable. The Commission accordingly passed a 'cease and desist' order[14].

In 1982, the All India Organisation of Chemists & Druggists (AIOCD) had to face a similar stricture in a similar case[15]. The AIOCD was brought before the Commission in 1983 after it issued a circular to pharmaceutical companies, warning that they would face a boycott by its members if they dealt with state cooperative organisations and appointed them as stockists, granting them sale rights. The case was decided in 1993, when the Commission observed this to be the restrictive trade practice of refusal to deal.

The case of *Director General (I&R) vs. Alfa Laval Agri (India) Ltd*[16] shows how predatory behaviour has been dealt with by the MRTPC. Following an advertisement by the Dairy Department of the State of Punjab for procuring a milking parlour and a milk-cooling tank for installation in a village, a company named Westfalia Separator India Pvt. Ltd. approached the government with the intention of procuring the purchase order. A second company, Alfa Ltd., also approached the government but the order went to Westfalia. Later, Alfa informed the government that it would like to donate the milking parlour free of cost, following which the government cancelled the Westfalia purchase order.

Westfalia then approached the MRTPC on the grounds that Alfa's donation of equipment had led to the distortion/impairment/elimination of competition in the market. Alfa's act, it alleged, was clearly a predatory tactic and thus it should be restrained from undertaking such practices. The Commission discharged the complaint, holding that while it had no doubt that the Alfa move had reduced competition between traders, the grant had also lowered the cost of the project, which would ultimately benefit the consumers in particular and the public in general. In addition to that, the MRTPC held, Westfalia had not been able to prove that Alfa's actions had in any way lead to the restriction of competition in the market. There was also no evidence to prove that the steps taken by Alfa Ltd had gained them a predominant position in the market.

Wal-Mart Store, Inc. v. American Drugs (1995) explains predatory behaviour among other conducts by a firm. Wal-Mart is a leading US super market chain which also sells pharmaceuticals. In order to beat the prices charged by rival pharmacies, the headquarters of Wal-Mart sent out instructions to its Pharmacy Managers to resort to price reductions on some of the items. The key words in Wal-Mart's subsequent advertisements were "meet or beat the competition without regard to cost". In this backdrop, three local pharmacies in Faulkner County filed a complaint against Wal-Mart for violating the UTPs Act of Arkansas State.

For the purposes of proving predatory behaviour on the part of Wal-Mart, the following questions were asked: did Wal-Mart have market power? Was the price below the cost? Was the measure aimed at driving out competitors? And was there an entry barrier? (i.e. unless entry barrier is very high competitors would re-enter the market). Considering all the facts, the court concluded that there is no predatory behaviour on the part of Wal-Mart.[17]

Price discrimination

It is quite often seen that a person travelling by air, land or sea is charged a different price for the journey than some other people travelling along with him. A rail journey, for instance, is cheaper in the middle of the day than in rush hour. If we travel by air the price of the ticket probably varies hugely between types of travellers. These variations occur not just for different airlines and different flight times – people travelling on the same flight have bought tickets for very different prices. Some will have paid no money at all if they have collected enough 'air miles'.

Differential pricing is not confined to the transport industry. The rates charged at hotels vary between customers for the same quality of room on the same night. Doctors in the private sector charge different fees to different patients for the treatment of the same condition. In the travel sector, although such behaviour has been around for a long time, people are becoming more aware of it, perhaps as a result of the arrival in recent years of the low-cost airlines such as GoAir and Deccan Airways in India, and Easyjet and Ryanair in Europe.

Interestingly, women's haircuts are often more expensive than men's, something that in the past could be put down to women generally having longer hairstyles. Nowadays men and women's styles are more varied but the price discrimination continues. Some saloons have modified their pricing to reflect 'long hair' versus 'short hair' or style instead of gender. Charging different prices to different customers for the same goods or services is known as price discrimination and it can also be legitimate, as discussed in Box 8.3.

Box 8.3: 'Price Discrimination Recognised by Law'

Pharmaceutical companies may charge customers living in wealthier countries (such as the US) a much higher price for identical drugs than those living in poorer nations, as is the case with the sale of anti-retroviral drugs in Africa. Since the purchasing power of African consumers is much lower, sales would be extremely limited without price discrimination. The ability of pharmaceutical companies to maintain price differences between countries is often reinforced by national drug laws and regulations.

While pricing a patented drug, companies usually take into consideration the consumers' paying capacity in the market. However, in developing countries, there would possibly not be substantial adherence to this practice of taking into account the purchasing ability, because to make medicines available to a large segment of the population, pharma companies would have to drastically lower their prices, which they may find difficult to do.

Their unwillingness would conceivably stem from primarily three reasons:

- *Given their profit-oriented strategies, this standard of reduction in prices would not be acceptable to them.*
- *If they did adopt such a policy, the price differences would be so glaring that they would conspicuously reveal the extent of profits involved, leading to pressure to reduce prices in developed countries as well.*
- *Pharma manufacturers have also expressed apprehensions that the same drug sold at a lower price in a poor country may travel back to the rich country through legitimate or illegitimate channels, thus affecting their sales in the rich world.*

Wal-Mart is currently the largest retailer in the world. With more than 4,500 stores, it generated US$240bn in sales in 2002, which accounted for nearly 2.5 percent of the US GDP[18]. Wal-Mart's success, however, is not universally admired. In fact, it is often accused of engaging in anticompetitive business practices.

Many smaller retailers and some consumer advocates allege, for instance, that Wal-Mart intentionally and unfairly quashes competition through extremely low prices. Because of Wal-Mart's size, the argument goes, it can afford to offer extremely low prices until smaller businesses are forced to close their doors, leaving Wal-Mart as the only retailer in town. This practice too is referred to as predatory pricing.

To convict a company of predatory pricing, it must be shown that the company prices its products below its costs. But a highly efficient distribution system and retailing expertise give Wal-Mart a cost advantage that enables it to price its products below the competition and still make a profit. In the view of the competition/antitrust law, this is healthy, rather than unfair, competition.

In another case the South African competition watchdog handed a local firm, Nationwide Poles, a big victory over the international oil company Sasol. The tribunal found Sasol – a Johannesburg-based MNC, which converts coal into liquid fuel, such as gasoline, diesel and heating oil – guilty of unlawful price discrimination following a complaint by Nationwide Poles.

Nationwide had originally complained to the CC. Following an investigation, the Commission concluded that there was no evidence of illegal price discrimination. Nationwide then complained to the tribunal. Nationwide buys creosote, a wood-treatment chemical, from Sasol. It had complained that Sasol discriminated against small businesses, claiming that it was entitled to the full discount offered to Sasol's bigger customers, such as its rival Woodline.

Sasol claimed that it was not a dominant group and that creosote substitutes were freely available. The tribunal disagreed, ruling that Sasol had violated the competition law.[19]

IPR abuses and excessive pricing

All forms of intellectual property have the potential to raise competition law problems. Intellectual property provides exclusive rights to the holders to perform a productive or commercial activity, but this does not include the right to exert restrictive or monopoly power in a market or society. Undoubtedly, it is desirable that in the interest of encouraging and rewarding human creativity, IPR needs to be protected. This right enables the holder (creator) to prevent others from using his/her inventions, designs or other creations. But at the same time, there is a need to curb and prevent anti-competition behaviour that may surface in the exercise of the IPR.

There is, in some cases, a dichotomy between IPRs and competition law. There is a need to appreciate the distinction between the existence of a right and its exercise. During the exercise of a right, if any anticompetitive trade practice or conduct is visible to the detriment of consumer interest or public interest, it ought to be assailed under the competition law.

Competition concerns may arise in three categories: the acquisition of IPR, transfer of technology through licensing arrangements, and cooperative arrangements among innovating firms. These practices raise such concerns when they constitute attempts to extend market power by excluding entry into a market, suppressing innovation, etc.

The most recent notable example of abuse of dominance in relation to an IPR in India was the *Mahyco-Monsanto* case. Mahyco-Monsanto was found guilty of price gouging in a Bt cotton case filed by the Andhra Pradesh Government and some civil society organisations before the MRTPC[20]. Mahyco–Monsanto was charging an excessively high royalty fee for its Bt gene, which made the seed too expensive for the farmers, leading to losses. As there was no competition due to their IPR on Bt cottonseeds, Mahyco-Monsanto had a monopoly and had acted arbitrarily.

The MRTPC passed an order on May 11, 2006, granting temporary injunction and directed Mahyco-Monsanto not to charge the trait value of Rs 900 for a packet of 450 grams for Bt cottonseed during the pendency of the case, and to charge reasonable trait value considering what was charged by the parent company in neighbouring countries like China.[21] The case is still pending following an appeal by Mahyco-Monsanto before the Supreme Court. In the interlude, they tried to arrive at an out-of-court settlement, but the Andhra Pradesh government refused to deal without taking other interested state governments (Punjab, Maharashtra, Tamil Nadu, etc) into the picture. The other state governments were not in favour of a settlement until the company had paid compensation to all the affected farmers.

In the field of intellectual property there are other instances of abuse of dominance. Abuse of intellectual property means illegitimate use of intellectual property. An IPR is an intangible right, according to Black's Law Dictionary, protecting commercially valuable products of the human intellect comprising patents, copyrights, trademarks and similar rights. The WTO TRIPs Agreement uses the term 'abuse' only to determine the connecting factor for a member country's regulatory power. It means that the use of stake must be illegitimate, i.e. contrary to the basis and objectives of IPR protection. So it is the consistency requirement, which defines the limits within which members may determine both the basis and the objectives of domestic IPR protection and the abusive character of its use.

The conflict between competition law and IPR is also reflected in the following case. In *Vallal Peruman and another v. Godfrey Philips (India) limited*

(MRTPC, 1994), the Commission observed as follows. "Applying the above principles to the controversy at hand, it seems, that a certificate of registration held by an individual or an undertaking invests in him/it, an undoubted right to use trade mark/name etc. so long as the certificate of registration is in operation and more importantly, so long as the trade mark is used strictly in conformity with the terms and conditions subject to which it was granted. If however, while presenting the goods and merchandise for sale in the market or for promotion thereof, the holder of the certificate misuses the same by manipulation, distortion, contrivances and embellishments etc. so as to mislead or confuse the consumers, he would be exposing himself to an action of indulging in unfair trade practices. It will, thus, be seen that the provisions of the MRTPA would be attracted only when there is an abuse in exercise of the right protected".

The judgment in this case reflects the approach even by the MRTPC that abuse of an IPR perhaps can be actioned under the MRTPA on the grounds of unfair trade practice i.e. misleading statement or deceptive practice, but not on those of restrictive or monopolistic practices. However, this had not been tested in any other case.

The level of competition in the pharmaceuticals market is indispensably linked to a range of issues relating to IPRs. The crux of the matter is that patents confer monopoly status to pharmaceutical companies as patents, by their very definition, grant the patent-holder exclusive rights to make, use or sell a product for a specified period. Often such monopoly rights are misused to the detriment of consumers, with companies abusing their dominant position by pricing their patented products at monopolistic profit-maximising levels, thereby severely limiting access to affordable medicine.

In India, with the process patent regime in place, the above-mentioned abuse of monopoly power was easily avoided. Now, however, since India has made the transition to the product patent regime from 2005, a monopolist can market any patented product entering the market. As a result of this, abuse of dominance – almost non-existent earlier – may be frequently invoked in the new patent regime.

The provisions regarding the procedural part enshrined in the CA07, in case abuse of dominance occurs, are worth mentioning here. There are provisions in the Act, which mention the procedural aspect of enquiry into the dominant position of an enterprise.[22] The Act mentions the orders, which can be passed by the CCI after inquiry into the practice of abuse of dominant position. Other provisions talk about division of enterprise enjoying a dominant position. In the field of intellectual property unreasonable conditions imposed by an IPR holder while licensing his IPR would be prohibited under the CA07. Thus, in case of unreasonable restrictive practices by the IPR holder, relief is available to the affected parties under the competition law. The

Commission can pass a variety of orders, including penalties up to 10 percent of turnover, cease and desist orders, direct modifications of the licence agreements, and any other orders as it deems fit.

However, what is reasonable is not properly defined in the Act. This should have been clearly defined rather than being left to courts and the court-craft of clever lawyers.

There is no mention in the Act of remedies available if *unreasonable* conditions accompany IPR licences and limit competition. Compulsory licensing and parallel importing are two key remedies of great importance and a competition law cannot remain silent in this regard. However, in India, the IPR laws such as the Patent Act, 1970 or Copyright Act, 1957 or Trade Marks Act, 1999 have overriding powers over the CA07 in matters related to IPR abuse. For instance, in cases where an anticompetitive outcome arises from the exercise of the rights by the patent holder, the Patent Amendment Act, 2005, provides for issue of compulsory licences to cope with such anti-competitive activity. However, the role of the CCI in examining such matters does not find any mention.

Exclusionary abuse

Exclusive dealing agreements

Such an agreement is between the supplier and the distributor, where the former dictates to the latter on his/her market, as described in Box 8.4. That means that whether or not the distributor will sell to any particular region or to a particular class of customers is to be decided by the supplier. Again these are marketing strategies, generally followed by firms, which sometimes pose competition concerns.

It is frequently argued that exclusive dealing agreements help firms to organise their distribution more efficiently. In such cases, where these agreements result in cost reduction or some other efficiency dividend, there may not be any competition problems associated with them – or only minimal ones.[23]

On the other hand, such agreements tend to have an adverse effect on competition, since they may restrict the access of upstream rivals to distributors. Rivals may be foreclosed from the market altogether or, more commonly, forced to use higher cost or less effective methods to bring their products to market. In either case, competition can be reduced through either reducing the number of manufacturers serving the market or by artificially raising the costs of some manufacturers.[24]

Box 8.4: Cement Dealers in a Bind

The race for market leadership in the cement sector has grown more intense with the Aditya Birla Group (comprising UltraTech and Grasim) and Holcim (ACC) asking dealers in Mumbai to exclusively sell their cement bags for a commission or face a halt in supplies, according to prominent dealers. "We have been told we would get about Rs 2.25 extra per bag if we exclusively sold products of both these cement majors", one Mumbai-based dealer revealed.

According to industry sources, about 35-40 percent of the dealers in Mumbai and surrounding areas (Dahanu and Mira belts, Thane, Raigad and Panvel) have agreed to sell either Aditya Birla Group or Holcim cement bags. "We have been informed by a cement major at a stockists' meeting that if we did not accept exclusive dealership, the supply of cement bags would be stopped. We have been given until the end of this month to decide", the dealer added.

However, when contacted, an Aditya Birla Group spokesperson said, "Around 60 percent of our dealers are exclusive, and it's completely voluntary". A spokesperson for ACC Ltd. declined to comment. More than 80 percent of ACC's dealers have an exclusive arrangement with the company, it is learnt. Says Shailendra Choksi, director, JK Laxmi Cement, "We cannot bind dealers to become exclusive sellers of our commodity. Of late, this practice may have started because of short supply, but this is not the best practice".

Source: 'Cement dealers in a bind', The Financial Express, August 04, 2007

JCB, one of the UK's biggest manufacturers of construction equipment was restricting sales by its distributors outside their allotted areas in the UK, France, Italy and Ireland. The EC fined JCB US$36mn for this act. The restrictions had been used for over 10 years to 1998, to indirectly stop customers from buying machines at lower prices in other countries. The Commissioner justifying the fine said, "it is shocking that important companies present in all member states still jeopardise the most fundamental principles of the internal market to the loss of distributors and, ultimately, consumers".[25] In a similar case in automobile distribution, the EC applied an identical remedy.

McDowell & Co. Ltd., in India, imposed territorial restriction on its franchise holder's manufacturers/bottlers, to the effect that they were to confine their selling operations to areas allocated to them and prohibited them from selling their products at any place outside the respective areas. The MRTPC held this practice to be a restrictive one. The Commission observed that in view of the relatively small share of McDowell in the soft drinks industry and relatively large areas allocated to each bottler, the territorial restriction was not substantial and did not restrict or discourage competition. But the possibility of these restrictions inhibiting competition at a later stage could not be ruled out if and when the market share of McDowell increased significantly.

In another case, the Bangalore Jute Factory entered into an exclusive dealing arrangement with its distributor with the clause, "you shall not, without our consent in writing, deal in any product manufactured by any other party local or foreign, which is similar to the product covered by this agreement". The MRTPC held it to be restrictive.[26]

The way ahead

Competition law is a useful device to keep a check on anticompetitive practices such as licensing agreements that prevent or restrain marketing and product development. Accordingly, the CCI should be able to deal with the cases of abuse of IPRs. In some countries like Zimbabwe, the competition law has very clear provisions to deal with IPR issues. It is therefore recommended as follows:

1) *There should be an elaborate chapter in the Competition Law on IPR issues. It will be important to check the transgressing activities of the firms and to exploit the flexibility provided under the agreement on TRIPs of the WTO.*
2) *The Act should explicitly define what constitutes 'unreasonable' conditions. An indicative list of unreasonable conditions should be given, such as, patent pooling; tie-in arrangements; prohibiting licensee to use competing technology; an agreement to continue paying royalty even after the patent has expired, fixing the prices at which licensee should sell, etc.*
3) *The Act should specify the remedies that are available in case of abuse of IPRs. In this context, competition law should override IPR laws.*

India can create more specific definitions of each and every type of abuse of dominance, which can give the CCI a yardstick to measure abuse of dominance. For instance, the amount of fine that can be imposed by the CCI is restricted to 10 percent of average turnover of the enterprise for the last three years before the abuse of dominance is proved.[27] The fine can be increased because for big enterprises deterrence can be created only by huge monetary implications, so the higher the limit of penalty that can be imposed by the CCI in case of abuse of dominance, the more the possibility of having a fair competition regime in India.

Endnotes

1 This was not the only definitional issue under the MRTPA, which led to the realisation that India needs a new competition law, where definitions are clear and unequivocal.

2 'Competition Act, 2002: The Approach' by Dr S. Chakravarthy in 'Towards a Functional Competition Policy for India', Pradeep S. Mehta (Ed.), published by Academic Foundation and CUTS International, 2006, page 59.

3 Olson, 1965.

4 Kuhn *et al.*, 1992.

5 Barriers to entry can be of three types: artificial (introduced by government regulation or trade associations), natural (linked to production technology, scale and scope economies) and strategic (set up by firms to deter entrants through over-investment or loyalty bonuses, for example).

6 Report of the UNCTAD-CUTS Asia-Pacific Regional Workshop on Competition Law, Jaipur, India, April 16-17, 2000.

7 Financial Times, September 23, 2001.

8 The Economic Times, August 06, 2007.

9 COMPAL Programme: 'Strengthening Institutions and Capacities in the area of Competition and Consumer Protection Policies in Latin America,' UNCTAD, 2005.

10 87. F. Supp. 2D 30 (DDC 2000).

11 http://www.wwb.co.za/wwb/view/wwb/en

12 *Global Competition Review*, March 16, 2007.

13 The MIT Press, 1998 and the Oxford University Press, India, 1999

14 RTP Enquiry No. 37/1983, decided on June 06, 1993.

15 RTP Enquiry No. 14/1982, order dated 25-9-1984

16 2003 CTJ 265 (MRTP)

17 Supra No. 4

18 Bureau of Economic Analysis, US Department of Commerce Website, and Fortune, February 18, 2003

19 http: //www.globalcompetitionreview.com/news/news_item.cfm?item_id=2513.

20 http: //www.genecampaign.org/Publication/Pressrelease/civil_society_demands.htm.

21 http://indlawnews.com

22 http://competition-commission-india.nic.in/speeches_articles_presentations/Abuse

23 Asker. J (2004), 'Measuring Cost Advantages from Exclusive Dealing – An Empirical Study of Beer Distribution', Harvard University.

24 *ibid*.

25 *Financial Times*, December 22, 2000.

26 CUTS International, 'Competition Policy and Law – Made Easy' *Monographs on Investment and Competition Policy*. 2005.

27 Section 27(b) of the CA07
http://competition-commission-india.nic.in/speeches_articles_presentations/Abuse

Chapter 9

Competition Abuses: Local Problems need Local Solutions

Competition matters not only at the national or the regional level but also at the local level where, sadly, there is a lack of healthy competition in India. Unfair trading is the rule rather than the exception. Usually most of these practices can be categorised under the provisions on 'abuse of dominance' in the CA07. While the CA07 is empowered to deal with conduct issues, this chapter argues that in a large and federal country like India, the ability of Delhi-based agencies and authorities to deal with abuses at the local level is inadequate.

In other large and federal countries like the US or Australia each province has a state law and agency to deal with local problems, quite often in conjunction with the federal agency. In this chapter, we have illustrated some of the case laws from the US.

This problem cropped up under the MRTPA, 1969 – hardly any local unfair competition cases could be brought before it, let alone be prosecuted.

In a manner, local unfair competition issues are covered under the Consumer Protection Act of 1986, which has an extensive network for dispute resolution throughout the country. But its thrust is on redressing grievances through remedies, and it is not really a law designed to deal with such problems through a preventive action, which the CA07 is. Besides, the consumer courts do not have an investigating agency like under the CA07, and mainly acts as an adversarial body.

In terms of service sector regulation, regulators and an appellate tribunal for electricity exist both at the central and the state level, while a telecom regulator and an appellate and disputes tribunal exist at the central level. But past experience shows that central legislation/agencies have failed to contain abusive practices at the local level, especially in the services sector which is to a very large extent unregulated or inadequately regulated. Cartelising, abuse of dominance, tied sales, etc. are rampant at the local level. We give several examples below.

Box 9.1. Diagnostic Clinic case

This case is about an eight-year-old girl (living below the poverty line) from Sri Ganganagar, Rajasthan, who was suffering from cough and fever. Her doctor referred her to a private diagnostic clinic, which diagnosed her with throat cancer and started her on chemotherapy.

On account of the treatment, she lost her hair, became very weak and suffered from other side-effects. Following this, her father got her checked again in Delhi. This time the diagnosis ruled out cancer – but she had already suffered irreparable physical damage because of which she could not lead a normal life and is bed-ridden. Her father wrote to the ***local*** *Chief Medical and Health Officer of the district to take suitable action against the guilty diagnostic clinic by canceling its registration. The official replied that the clinic was not registered and in any case there was no such criterion for canceling registration. Hence the question of canceling the registration did not arise.*

It is evident that there is neither a requirement of registration nor any standards set for setting up of laboratories, leading to a complete failure to regulate such clinics and highlighting the need for appropriate regulatory mechanisms at the state level.

Competition abuses at consumers' end

Consumers come into contact with providers of goods and services at millions of places spread over the length and breadth of the country. While there may be adequate competition at the level of manufacturers, this may not be true of the distribution networks through which the goods pass to reach the consumers. Hence, monitoring and maintaining competition or ensuring competitive outcomes in such sectors becomes difficult and competition abuses are rampant at the local level, as shown below:

> *A dog bites Munna Lal. He gets a prescription from his doctor for anti-rabies shots and a tonic. The patient leaves and the doctor takes out his little black book and makes a mark in it – one more bottle sold, more commission earned. Several doctors have turned into drug-peddlers of sorts. They push the chosen brands and receive handsome commissions in return. But what is particularly worrying is that no one knows how legitimate these pharma firms are.*

One such competition abuse is informal collusion at local level. For example, printing of maximum retail price (MRP) is mandatory under the Standards of Weights and Measures (Packaged Commodities) Rules, 1997. MRP includes sales tax, octroi duty etc. and its rate varies across states. Hence, MRP is calculated by considering the highest tax rate charged by any state government. Furthermore, MRP is not necessarily the actual selling price and retailers are expected to sell at prices lower than MRP. However, in practice, retailers do not compete and MRP becomes the reference price for them to collude informally. In many places in the country, retailers' associations in fact publish their own price lists, which in many cases exceed the printed price.

There are several such competition abuses in the delivery of services at the consumers' end. For example:

- Tied sales by schools where students are made to buy books, uniform and stationery from the school or other designated shops at exorbitant prices;
- Local cable operators abuse their monopoly by increasing subscription rates at will, as seen in Box.9.2.

Box 9.2: Monopoly of Bhaskar in Jaipur

There is a natural monopoly of cable TV at the Multi System Operator (MSO) and local cable operator levels in Jaipur, which is symptomatic of larger cities. Taking advantage of this, the MSO 'Bhaskar' charges arbitrary rates on an incremental basis with poor standards. They periodically increase their subscription charges, in clear violation of TRAI's Telecommunication (Broadcasting and Cable) Services Tariff Order 2004. There is no redressal forum at the local level to redress grievances of cable TV consumers who are suffering from such a monopoly.

Because of this, the consumers do not even have the option of changing their local operator, as all of them have divided their areas. CUTS, being a consumer organisation, receives regular complaints against the MSO and local operators. It is a seller's market, where consumers have no choice.

In 2004, CUTS had written to TRAI, drawing its attention towards the practices of Bhaskar and other operators. It got back asking us what could be done. This shows how helpless and inefficient central legislation and agencies are in dealing with such local problems.

However, Pradip Baijal, the then Chairman of TRAI did admit in a public statement that cable TV regulation had to be dealt with at the local level, because TRAI could not police the entire country.[1]

- In most towns, taxi and auto drivers demand lump sum payments, even those equipped with fare meters. The charges vary depending on location and sometimes with the category of consumers. The case of Delhi is interesting in this context. A similar situation prevailed in Delhi with respect to auto drivers, who charged lump sum amounts. But now auto drivers in Delhi use meters. The reason for this sudden change: the state government has given clear instructions to the traffic police to cancel the driving licences of auto drivers found not using meters.
- Service sectors such as barber shops; *paan-biri* shops, etc. form unions and dictate selling prices, which are often higher than the actual price. For instance, in Mumbai, the Pan Merchants Association decides on and circulates a price list, which mandates members to sell at prices that are higher than those printed. This is a violation of the Weights and Measures (Packaged Commodities) Rules, but one cannot expect the weights and measures inspector to go around prosecuting every paan shop. Such types of practices need to be dealt with systemically by the state government, but no one bothers!

The basic problem is of poor enforcement, which in turn is due to lack of staff, corruption and political will. Moreover, in many cases, non-compliance costs are lower than compliance costs, as the penalties fixed are unrelated to the extent of violations. By taking care of these factors, situations can change in favour of a healthy market and consumers.

Most often service providers at the local level resort to these practices because of the need to grease the pockets of enforcement agents. For instance, India Gate in New Delhi, a popular recreation spot, is full of ice cream vendors who charge more than the price printed on the package. Their explanation is that they have to pay a weekly bribe – a *hafta* – to the policemen on duty in order to sell at India Gate, where the business is brisk. Selling at more than what is marked on the package violates the Weights and Measures (Packaged Commodities) Rules, but the Department of Legal Metrology does not haul them up and they continue to overcharge consumers. One wonders why the same police force is not used to enforce rules that favour the consumers. Their power can be used in a positive way to protect rather than harm consumers.

Given below are some sector-specific issues:

Professional services

There exists no limit on the fee charged by the lawyers, doctors, architects, placement consultants and several other professionals. Incidences of consumers being cheated and harassed are growing in the country.

These service sectors largely remain either unregulated or poorly regulated. A general survey of various placement consultants has shown that no common rule is being followed in the sector with regard to fees. Some of them charge nothing at all from a candidate while others charge registration fees ranging from Rs 100 to 300. On successfully placing the candidate, some charge 50 per cent of the first month's salary while others charge the same percentage for 2 months. Yet others charge nothing. This amount is in addition to what they are paid by the employers. A set of regulations needs to be framed and enforced.

Though self-regulatory bodies exist in some of the service sectors, e.g. Medical Councils and Bar Councils, the track record of these bodies do not give much cause for hope. Hardly any member of these self-regulatory bodies have been punished for misconduct or deficiency in services provided to consumers. As the members of these bodies are drawn from the same profession, they are quite partisan in their approach and support their fraternity. Moreover, these bodies are not looking into the issues that affect the consumers most, such as absence of standards for performance and price regulation.

Cable TV Systems

The cable TV sector in India has developed in an unregulated manner. The distribution chain in the cable TV industry consists of broadcasters, Multi System Operators (MSO) and their franchisees, and independent local cable operators. The market is marked by monopolies in the delivery of service, including an increasing presence of large vertical monopolies of broadcasters, MSOs and cable operators. This has resulted in, for example, an uneven quality of services and steep hikes in fees charged by pay-channels.

Consumers in the cable TV sector have very limited choice with respect to the service provider. A consumer's only choice is to subscribe or not to subscribe to the service being offered by the local cable operator. Furthermore, cable operators also use strong-arm methods to thwart the efforts of anyone who can affect their monopoly. However, with the advent of wireless Direct to Home (DTH) broadcast services, the situation has improved somewhat. But even here, there can be some distortions by maintaining exclusivity of programmes (see Box 9.2). Secondly, many low- to middle-income consumers cannot afford the DTH services, and are hence dependent upon the cable service.

In most cases, problems in the cable TV sector are of a local nature. Given the nature of the problem, effective implementation of the regulations can only be carried out through decentralised enforcement machinery. In other countries, such as the US (see Box 9.3), local authorities regulate the cable industry. Thus local agencies are required to tackle various issues in the cable TV industry to make it a truly consumer-friendly cable TV system.

Box 9.3: State of New York, et al. v. Primestar Partners, et al., [1993-2 Trade Case. (CCH) Para. 70, 403 (S.D.N.Y. (1993)]

Cable monopolists were sued with the allegation that they had conspired to affect competition from direct broadcast satellites, an emerging technology that was then beginning to offer an alternative to the incumbent cable system operators. The specific allegation against the Cable Operators was that they were engaging in such type of agreements, which involved conspiracy to restrain competition in multichannel subscription TV service by forming Primestar to block other firms from entering the market. Reports show the State's efforts to assure direct broadcast technology a fair opportunity to compete with traditional cable.

Source: http://www.techlawjournal.com/courts/bristol/81005.htm

Education

Education is one of the sectors that is controlled by the government at the central, state as well as district levels. At the district level, we have District Education Officers (DEOs) who are responsible for ensuring quality of education in government and government-aided schools. However, in practice, the DEOs have to carry the burden of administrative work and are, therefore, unable to devote the time and energy needed to ensure quality of education.

The University Grants Commission (UGC) is responsible for monitoring higher education. Although the UGC rates universities for their standards, but expecting the UGC to conduct similar rating exercise for large member of colleges affiliated to various university is impractical and unrealistic. Thus there is a need to have a regulatory at the state or local level.

Tied Sales

1. School education: tied selling of books, uniform and stationery

There have been instances where school authorities compel parents to buy books, uniform, stationery, etc. from a particular shop, as the school authorities get a commission on the sales. They resort to such practices as a profit motive; however, some parents are of the opinion that the schools do this to provide good quality services or to make these items easily available to parents.

Parents are forced to buy these goods from a particular shop, which restricts their choice of buying other brands or buying from other shops that might be selling the same product at a lower price. Thus, the action of such school authorities is unethical and unjust and needs to be checked. Interestingly, it has been seen that people with higher income have relatively few problems with such practices from ethical point of view.

2. Health Services

Health service malpractices are common to rural as well as urban areas, with many doctors colluding with pharmaceutical retailers and diagnostic laboratories. There is a clear nexus between these three players and there is a need to check such practices. The problem arises because such tie-ups are not evident on the face of it. There is an urgent need for state-level agencies for close monitoring.

Tied selling is a genuine concern in both education and health services. Concerns of school authorities over maintenance of quality and uniformity cannot be ignored. But schools should refrain from forcing students to buy goods that are standardised and easily available in the market.

However, the issue is far more serious and complex in the health services sector. Reliability of testing services is a serious issue. Although there is a regulatory framework to ensure genuine medicines in the market, there is significant scope for improvement in its enforcement. In the area of diagnostic testing, the Cabinet has recently given its approval of the Clinical Establishments (Registration and Regulation) Bill, 2007, which hopes to provide a legislative framework for registration and regulation of clinical establishments, including diagnostic centres. The Bill, yet to be moved in the parliament, would also bring in a national registry of such establishments.

Competition abuses affecting business

Similarly, there are services provided at the local-level and used by businesses that are anti-competitive in nature.

For instance, in the goods transportation sector, most of the trucks plying on Indian roads are under single ownership, with very few large-fleet operators. Although there appears to be competition here, the fact is that about 5000 cargo operators handle the entire cargo in India. These operators cartelise and decide the freight, and there is no competition at their level.

Truck Operations

Sometimes, truck operators at the district level or around major production centres form a cartel, which then leads to increases in freight charges (for more, see Chapter 7). In most cases, trucks that come in with goods are not allowed to carry freight from the production centre. In most cases, these cartels have local- or even state-level political patronage. There are innumerable numbers of such examples and some of these were also referred to the MRTPC.

Truck operators' cartels result in higher transport costs because trucks that do not belong to a cartel and are bringing in goods charge a two-way fare – not being members of a cartel they are not being able to carry a return load. It is estimated that transportation costs on outgoing goods are about 35-40 percent more than what should be paid. For instance, in case of Baddi in Himachal Pradesh, the *Baddi* Nalagarh Truck Operator Cooperative Transport Society has monopolised the movement of goods from the state. Controlled by the local MLA (legislator), the truck union charges 30 percent higher prices on the *Baddi*-Delhi route and 15-20 percent higher on the *Baddi*-Mumbai route. Trucks coming in with supplies return empty because they are not allowed to pick up freight, which only adds to the cost.

There is an excise waiver for companies in this industrial area and large numbers of consumer goods and pharmaceutical companies have set up manufacturing units in *Baddi*. By controlling the commercial traffic in *Baddi* the transport union has reduced the cost advantage the units would otherwise enjoy. Often, large companies find that the cost advantage due to excise-waiver is higher than the component of higher transportation costs and are willing to yield to the blackmail of local transporters, but small companies face problems.

As per information collected by media, Godrej Industries tried to bypass the truck union in *Baddi*, but this move did not last long. Godrej, which has a manufacturing unit in *Baddi*, established a depot in Chandigarh. They used the *Baddi* truck union's trucks to transport goods from *Baddi* to Chandigarh but used other operator's vehicles for the rest of the journey. However, this arrangement lasted for only a few days as once the Baddi truck union learnt of the arrangement, it refused to provide trucks to Godrej Industries, and Godrej had to give in to their demands.

In Orissa, transport cartels are formed with official backing. For example, the Angul Truck-owners Association, a government registered body operating at the National Aluminum Co. Ltd's factory, charges as much as 200 percent more for transportation of ingots under the obliging eyes of the authorities. A complaint was once lodged with the district authorities against the association, but to no avail. Such official cartels also exist in other parts of Orissa also such as Sukinda Mines, Paradeep Port and Balasore.

In a tragic case in Makrana, Rajasthan, the absence of any action by the district administration and the stubbornness of the truck operators' union resulted in the demise of the marble business in this one-time capital of the marble trade.

The famous Taj Mahal was built with marble from Makrana – more recently it had become a '*mandi*' or market, where blocks of marble brought in from all parts of Rajasthan were processed. Here a truck operators union sprang up around the trade and began exploiting the traders, charging a tariff almost 35-40 percent higher than the prevailing market rates. This led to an increase in transportation costs, alongside the predictable harassment of dealing with a monopolistic union. The harassment grew to such proportions that several marble-cutting plants shifted to Kishangarh on the Jaipur-Ajmer National Highway No. 8. Others followed, and gradually the entire marble business moved base to Kishangarh. As against 100 trucks, which used to come to Makrana daily, these days hardly 35-40 turn up. Kishangarh has become a rival *mandi*, while Makrana, having lost its advantage, is now losing its prosperity!

The upshot is that any aberration at the local level can and ought to be tackled at the level of district and local administration. This requires willingness on the part of the administration to resolve the problem, taking a balanced view after hearing all the parties concerned.

Additionally, companies can follow practices that rule out the formation of cartels. For instance, the Birla Cement factory in Chittorgarh uses the Internet to invite bids for transport of goods, giving out information on the number of trucks required, the period of operation and the destinations where the cement has to reach. This helps the factory get competitive rates, and the reach of cartels is thus curtailed to a large extent. This will however not prevent cartels from colluding in the bidding, but being transparent and widely publiciaed, the chances of collusion are much lesser.

Tourism

The Department of Tourism rates only government-run hotels. But there is need to rate *all* hotels, and not only on the basis of the services that they provide, but also the quality of services. It should also cover restaurants and the ratings should be made available to the public. One problem is that hotels do not follow any norms on the basis of which they charge tariff. Therefore it is necessary to lay down standards at the local level and ensure that they are complied with.

Government procurement and bid rigging

There are inconsistencies in the state government policy on reservations or quotas for small-scale firms. Closely linked with it are state government procurement policies, under which both the price and purchase preference are awarded to both small-scale and other units in the state. The policies are designed to favour one class of enterprise over others, and distort competition between units producing the same product. However, concerns arise when the policy creates conditions for the formation of cartels of local manufacturers that are solely dependent on government patronage. In such cases, the government ends up paying a higher price for a product, which is often of poor quality, as shown in Box 9.4.

Box 9.4: Barbed-wire Association in Rajasthan

As per an erstwhile Rajasthan Government policy, a certain quota of barbed wire was to be procured from local manufacturers. But this led to the formation of a cartel under the name of the Rajasthan Barbed-wire Manufacturers Association in mid-80s. This association hiked the prices, and with an implicit arrangement allocated the total requirement of barbed wire amongst its members. Consequently, poor-quality barbed wire was procured at a high price, with almost no quality checks by the government. Local manufacturers depended solely on Government's patronage rendering them uncompetitive. With a changed Government procurement policy, local units closed down and the association broke up.

Source: Manish Agarwal and Prabhat Dayal, 'State Government Policies and Competition', Towards a Functional Competition Policy for India, Pradeep S Mehta (Ed), CUTS International and Academic Foundation, 2005.

Another area of government procurement where there are cases of collusive bidding is construction contracts undertaken by the government. On the surface, the system of competitive bidding is sound. Notices inviting tenders for a particular work are published in local newspapers. Depending on the quantum and complexity of the project, bids are received in a single or double envelope. Bids are opened in front of the bidders, and the lowest bidder is determined through a transparent system. But even here, there are cases where the contractors collude and set up a '*tender-mafia*'. As a result, competition is disturbed and the bidding system fails to produce the desired results.[2]

There is a need to crack down on such anti-competitive practices, as shown in the Box 9.5, but it would require putting in place appropriate institutional mechanisms at the local level.

Box 9.5: George C. Miller Brick Co., Inc. v. Stark Ceramic, Inc., Pineledge Holding Co.Inc, John H. Black Co., Supreme Court, State of New York

The plaintiff, George C. Miller Brick Co., Inc., alleged, that Stark Ceramics, Inc., Pineledge Holding Co, Inc, and John H. Black Co. had violated the New York General Business Law, the Donnelly Act and were involved in bid rigging and price fixing.

Plaintiff alleged that through a letter produced by the defendants and several phone conversations, the defendants, actually constructed a bid

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rigging and price fixing scheme, after which the State of New York solicited bids from general contractors. As the letter just spoke about territorial allotments relating to distributors, the evidence was not strong enough to prove bid rigging and price fixing. So the motion for summary judgment on the part of the plaintiff was dismissed.

Source: http://www.courts.state.ny.us/comdiv/Law%20Report%20Files/January%202000/millerbrick.html

Why a state-level agency?

- *Sectoral context*: The constitutional framework allows the state government to regulate certain trade practices, but this is being done either in an *ad hoc* and unscientific basis or not at all.
- *Closer to local conditions*: Central regulators or even the traditional departmental administrators cannot ensure fair-trading at the local level.
- *More direct political accountability*: Central regulators are not accountable to local legislatures or state governments.
- *Effective monitoring of regulated entities*: Once again, regulated entities are so many and often small that a central body is unable to police the situation.
- *Greater involvement of affected population*: Local problems need local solutions, which will ensure a better outcome for larger affected populations.

Establishment of State Competition & Regulatory Authority (SCoRA)

In a big country like India, it is not possible for regulatory actions to be taken up *only* in the national capital and therefore state governments should establish their own state regulatory agencies to regulate the service sector in the state. They should cover a variety of services under an omnibus/ hybrid law and regulatory agency. The constitutional framework allows the state to regulate certain trade practices, which are being done either on an *ad hoc* basis or not at all, and in case without any scientific approach. The agency will look at sectors that are a part of the state or under the concurrent list in the Constitution of India. For services, which are exclusively within the jurisdiction of the centre, the state agencies would work as intermediaries between the centre and the states.

Central regulators or even the traditional departmental administrators cannot ensure fair-trading in local cities. Central regulators are not accountable to local legislatures or state governments in practice. And talk of establishing any other highly resourceful central agency that can deal effectively with local issues is merely utopian. Regulated entities are so many, but often so small in size, that a central body is unable to police them.

Under these circumstances, a state-level competition and regulatory authority is strongly required to check local-level competition abuses. The proposed authority should also take up advocacy with existing agencies and departments at the state-level to highlight their market-distortionary policies and practices.

SCoRA would do an ex-ante monitoring of service providers, which is a pro-active approach. It would also strengthen the existing Consumer Protection Act.

In a nutshell, SCoRA could concentrate on providing the following areas:

- Setting standards for services;
- Rating, based on the quality of services;
- Ensure compliance with standards; and
- Strengthen existing laws/institutions

Conclusion

Anticompetitive practices are rampant at the local level and there is a clear need for state-level competition agencies, backed by appropriate laws, to check them. In fact, by promoting competition and effective regulation, state governments can protect consumer interest as well as increase their own revenues. In other federal countries, like the US (see Box 9.6) and Australia, many provinces have their own state competition laws[3] and agencies.

Box 9.6: Fisherman's Wharf Bay Cruise Corporation v. Blue and Gold Fleet, Inc, 114 Cal. App. 4th 309, 7 Cal. Rptr. 3d 628

In this case, the California Court of Appeal, First District, held that a sightseeing cruise operator could sue a competitor under California's antitrust law for predatory pricing and price discrimination. The plaintiff made allegations against Blue and Gold Fleet saying that they had tried to drive it out of business by selling tickets below cost to wholesale purchasers of sightseeing cruises, paying secret rebates to wholesalers, and entering into tying arrangements for Alcatraz tickets, among other practices.

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The court held that the plaintiff stated a claim under Californian law even if Blue and Gold Fleet had offered only some tickets below cost, and had offered secret rebates on only some tickets, but that California's prohibition of tying applied only to commodities and not to services. The case has been appealed to the California Supreme Court.

Source: http://www.zsrlaw.com/publications/articles/jac_04-01-04.htm

Such practices need to be dealt with systemically by state governments, but no one bothers. The lack of healthy competition and fair-trading in the marketplace adversely affects the economy and consumer interests. Thus there is a need for a local-level competition regime such as SCoRA to facilitate orderly markets and add to economic growth.

Endnotes

1 Recommendations of TRAI, October 01, 2004

2 Manish Agarwal and Prabhat Dayal, 'State Government Policies and Competition', Towards a Functional Competition Policy for India, Pradeep S Mehta (Ed), CUTS International and Academic Foundation, 2005.

3 For an example of a state agency taking action, please see Chapter-8 which recounts how the Arkansas Unfair Trade Practices Act in the US was used to take action on a case of predatory pricing: *Wal-Mart Store, Inc. v. American Drugs (1995)*.

CHAPTER 10

Telecommunications and Electricity

In this Chapter, we discuss two important infrastructure industries – telecommunications and electricity. The purpose is to compare and evaluate the success or otherwise of the state of competition and regulation in these two sectors. Despite successes on the supply side, what one finds is a mixed picture suggesting that good regulation is still some distance away? On one hand, the telecom sector is marked by the presence of many players and is highly competitive in most segments, while on the other the electricity sector lacks competition to the state-owned suppliers. The quality of regulation is uneven across the two sectors; with electricity the worse of the two because of excessive political interference, which arises due to the prevalent view that electricity is a public good.

Telecommunications sector in India

Introduction

India has over 232.87 million telecom connections – 192.89 million wireless and 39.89 million wired. This amounts to a tele-density of nearly 20, which was just around 4 percent in 1996. The Government estimate that seven percent of Indians would own (as opposed to the earlier 'have access to', usually through a PCO) a phone by 2005 was achieved in March 2004. The new target is that teledensity will rise to 22.5 by the end of 2008 – we were at 19.3 in May 2007. Indeed, India's achievements in telecom in the last few years have been higher than they were in the first 50 years of the country's independence. Clearly, the last 10 years have seen an enormous progress on the supply side.

As can be seen from the table, much of this has been achieved by the private sector. Over 80 percent of mobile phones in the country are provided by private sector firms, while over 90 percent of fixed lines belong to the two public sector firms, MTNL and BSNL.

Table 10.1: Total Wireless Net-additions Analysis (in percent of net addition)

Operators	Q305	Q405	Q106	Q206	Q306	Q406	Q107	2007 Apr
Bharti	22	18	22	26	23	26	37	34
BSNL	22	24	19	14	16	12	33	6
MTNL	2	2	3	2	0	1	3	-5
Hutch	62	15	16	10	14	16	22	25
Reliance	18	17	23	19	20	21	-27	15
Idea	4	5	6	10	10	11	10	11
TATA	14	17	7	15	12	9	11	4
Aircel/Dishnet, Spice, HFCL & Shyam	-43	3	4	5	4	5	10	10
TOTAL WIRELESS net additions	5,934,448	8,581,221	10,201,144	9,151,533	11,964,453	13,109,947	9,102,178	5,138,374

In most telecom circles, there are five-six players offering competing services. As a direct result of increased supply and competition, telecom rates have also seen very significant reductions, both for long distance as well as for short distance (local) calls. That said, the question remains: is the industry regulated properly? Has the regulator ensured enough competition? Or are incumbents behaving like their counterparts the world over, trying their best to ensure new competitors don't have access to their customers by denying them interconnection rights?

India, as is often the case, presents a curious paradox. Certainly there is enough competition, and many argue the industry is too fragmented to survive in its current form. When compared with regulation in other industries, however, India's telecom regulatory regime stands out. Apart from the obvious longer tenure (the telecom regulatory history is more than a decade old), the telecom regulatory regime (with more than a little prodding from the country's courts) has introduced competition in most areas of telecom (some notable exceptions remain) while the electricity power regulatory regime, for instance, struggles to do this.

But it is equally true that most of what are advertised, as instances of regulatory successes have been the result of long-drawn court battles that have been initiated by the operators. Consumer groups have largely been silent spectators because they do not have the resources or the capacity. The evidence suggests that the battle for a better regulatory regime has been fought long and hard, and is still not over. There have been some victories but it has not been fully won. The TRAI has oscillated between being too brash and independent (Justice Sodhi's TRAI, the very first one, was actually dissolved by the Government) to being virtually a handmaiden of the Government.

Relations between the government and the TRAI have been a roller-coaster ride. Thus when the NDA was in power, the TRAI's recommendations were accepted immediately. But when the UPA came in power, the communications minister announced a major change in policy on long distance and Internet telephony without even seeking the mandatory TRAI recommendation. The TRAI's recommendations on 3G policy have been kept hanging for over a year. The government has not been able to provide spectrum as promised by the TRAI and assumed in its major recommendations. Thus, governments of the day have not believed that a TRAI recommendation has to be automatically accepted.

Growth of industry

The telecom industry is one of the fastest growing in the country, with around 5-6 million new customers adding to the mobile users club every month – up from around 3 million a month just a year ago. In contrast, growth in the number of fixed line users has been much slower, with the number of fixed line phones actually declining, from 41.3 million in May 2006 to 40.3 million in May 2007. While still small in number, broadband growth appears to be picking up at last, with the total broadband connections in the country finally reaching the 2.5 million mark. In March 2006, there were 1.4 million broadband connections in the country. The total number of Internet users, including dial ups, is around 8 million.

Despite the large growth, market shares have been relatively stable, the only change in recent times being Hutch (now Vodaphone) replacing the public sector BSNL at the second slot. The latter facing a severe capacity crunch with a tender for 45.5 million lines (half of which would be 3G ones) being put on hold for over six months now and prospects of an indefinite delay.

Despite all the handicaps that come with government ownership, BSNL has managed to hold its own, and retained the number two slot in the cellular mobile section of the business. This is a tribute to how it has managed to re-focus itself to take on the competition and to the regulator's inability to force the company to open up – BSNL does not allow others to roam on its network, necessitating expensive rollouts by private firms if they wish to remain connected in the smaller cities and towns.

The TRAI has taken credit for the phenomenal growth by bringing in new players because until 2001, there were only two mobile phone licensees in most circles. Growth has been the result of lower telecom rates – which happened not just as a result of increased competition, but also because of a May 2001 rule called Calling Party Pays. This allowed mobile phone companies to make incoming calls free, which was in a sense a halving of tariffs.

But rural tele-density remains a problem – against the 2010 target of four, the current level is around two. While the initial plan was to make it mandatory for private phone firms to lay a certain number of rural lines as part of their licence conditions, this was observed more in the breach. In fact, the Government has now removed the obligation. A USO Fund was set up, with a part of the licence fees going straight into this Fund so that anyone could use it to subsidise rural phones. But this did not really take off either and, at one point, the Fund disbursed just around a third of the money it collected.

The TRAI has proposed two radical changes, which could jumpstart rural telephony. First, it has decided that since mobile phone costs were coming down faster than fixed line costs, it would be a better idea to allow the USO Fund to subsidise mobile phone operations in rural areas. Second, it has decided that instead of calling for subsidy bids on each line (the firm wanting the lowest subsidy won), it would subsidise mobile phone towers instead. This policy to allow the sharing of towers, and the near saturation in large cities and towns should ensure that rural telephony would get a boost.

The regulatory regime

The regulatory regime has had some great successes and some equally stunning failures. The biggest success, also the first and very often the most difficult, has been to fashion interconnection rules and regulations. When the private sector was allowed into the telecom sector in 1994, public sector telecom firms provided all the telephony in the country. Getting them to fall in line was critical. If BSNL had decided, for instance, that it would not allow Airtel cell phone users to either call BSNL subscribers, or the other way around, the telecom revolution would have died prematurely. Similarly, if BSNL had decided that it would charge very high interconnection fees from a mobile services supplier each time a mobile subscriber wanted to talk to someone on the BSNL network, the result would have been the same. However, BSNL adopted certain practices to scuttle the private sector also.

The first few years saw many battles. But by 1999 the principle of automatic interconnection was established and enforced, and in January 2003 an Interconnection Usage Charge (IUC) order laid down just how this pricing was to be done, including the cost of carriage of calls over various distances. Thus, thanks to regulatory intervention, tariffs on leased lines also crashed, which has made long distance telephony cheaper.

1. **Incumbents take all, mostly**
   India's top private telecom firms would not be here if the government had insisted that only incumbents would be allowed to expand networks and bid for new services. Yet, this is precisely what is happening in major areas. Here is why:

i. The TRAI has not been able to force BSNL to allow private operators to roam on its network. So, if you are an Airtel user, and want to travel to an area where only BSNL has a network, your phone will not work. In contrast, if an Airtel customer travels to a place where there is, say, only a Hutch (now Vodaphone) network, chances are that the two companies will have an agreement, which allows roaming. It can be argued that such arrangements are commercial ones, and the regulator has no say in them. Yet it is equally true that the lack of such arrangements pushes up the cost of telephony in the country and acts as a barrier to access.

   Indeed, some years ago, the most important reason for the poor quality of services offered by private operators was also due to BSNL because private operators were not allowed to exchange signals directly, say from Idea to Spice, but had to route them through BSNL. In July 2005, the TRAI's Quality of Service monitoring showed that there were 86 Points of Interconnection (a PoI is the junction where, for instance, a Hutch phone connects to a BSNL one) where the congestion levels were as high as 10 percent, a figure that is 20 times as poor as the benchmark ideal. This, however, rose to 122 POIs the very next month. The TRAI had cited 918 cases of pending demands by private operators and of these 367 had been pending for more than a year. The TRAI had ordered that such interconnection, which is the lifeblood of the telecom industry, be provided within 90 days. But BSNL challenged the TRAI's jurisdiction at the TDSAT, which ruled in BSNL's favour.

ii. The country's Independent Service Providers (ISPs) policy, similarly, has been held hostage to the rights of the incumbent wireline players, chiefly BSNL and MTNL. In most countries, and even in India initially, ISPs paid nothing to register, and began services immediately after registration. The latest ISP policy, however, asks ISPs to pay Rs 10 lakh to begin services; to lower FDI limits from 100 percent immediately to 74 percent; to disallow provision of IP TV; and for revenue shares to be raised to 6 percent. ISPs are still not allowed to offer two-way telephony even though this will boost business and lower costs for the consumers. Also, while the TRAI was spectacularly unsuccessful in forcing the incumbents who have copper wire going into 40 million homes to make these available for a fee to ISPs, the ISP business still survived. ISPs managed to somehow negotiate leased lines from wireline players and then offered superior Virtual Private Network (VPN) services on them. So, while BSNL decided to stop offering leased lines to anyone who dealt with private firms, the government declared that VPN services were not part of the original ISP licences.

iii. 3G spectrum rules were first recommended by the TRAI in 2005. But they are yet to be notified by the Government. While valuable 3G spectrum which allows wireless operators to offer much better quality and value-added services than the current 2G one – by allowing much higher data transmission speeds which are equivalent to the broadband quality offered by wireline service providers today – it is unlikely to be handed out free as the TRAI had first recommended. So entry will be restricted to the existing licensed players. Since the number of players who can be given spectrum is more than the spectrum that is available, no new player will be allowed to bid for the spectrum. This has two impacts. One, it ensures that the valuation of existing players increases. If Vodafone could have bid for 3G spectrum, it would have perhaps paid a different price for acquiring Hutch. What complicates matters further is that some players have been granted 2G licences even though there is no spectrum available for them – so, in effect, these players are now eligible to bid for 3G spectrum! Others that did not apply for, or get, a licence on the grounds that there was no 2G spectrum, will now not be allowed to bid for 3G spectrum.

iv. A few years ago several firms wanted to set up domestic and international long distance operations. But the TRAI came out with rules that effectively barred the entry of new players by insisting on very high entry fees – Rs 107 crore in Year 1, going down to Rs 30 lakh in Year 5, thus effectively providing a few years of extra protection. But the minister overruled the TRAI and slashed entry fees while also removing rollout obligations for all players. Many new players have now firmed up plans to enter the market.

2. **BSNL on dole**

BSNL, the public sector incumbent giant, has been the recipient of what amounts to a private sector dole. The argument is that the money provided via the Access Deficit Charges (ADC) has been spent by BSNL to set up uneconomic village lines. But it is useful to put this in perspective. In 2006, BSNL was slated to receive Rs 3,000 crore via the ADC, and this went straight into its bottom line. Had this injection of funds not been there, BSNL would have needed to increase top line by around Rs 14,000 crore, or 40 percent of its turnover at that point. Its top line in that period grew by around 6-7 percent.

It should also be pointed out that the process of estimating the amount of ADC subsidy was and is completely unscientific. This is best seen from the fact that in May 2003, TRAI ordered that BSNL be paid Rs 13,000 crore by levying an ADC on all phone calls so that it could meet the cost of operating rural phones. Private firms argued that BSNL did not need Rs 13,000 crore. A few months later BSNL reduced the figure to half. A year later, the TRAI came up with a range of ADC payments depending upon what rentals BSNL charged its customers – if the rental was Rs 200 per month, the ADC had to be Rs 1,402 crore and this would go up to Rs 3,436 crore if the rentals was Rs 156. In January 2005, however, the TRAI went back to the earlier figure of Rs 5,300 crore. Till August 2007, the TRAI had not conducted a test to see if BSNL really needs the money.

3. **The roaming rip-off**

   Despite the large number of players in the industry, the TRAI said in its January 24, 2007 tariff order that "there appears to be a coordinated arrangement in pricing of roaming services among the private GSM service operators". Clearly, even though the Government reduced carriage costs, which form an important part of total costs, the wireless firms did not pass this reduction on to customers. Nor did they pass on the sharp reduction in licence fees when the government reduced its revenue share takeaway from 15 to 6 percent.

   Instead of insisting on a proper pass-through, the TRAI gave the operators a huge cushion while determining tariffs. It ruled that the cost of a call ranged between 7 paise to Rs 1.09 per minute, and decided to use 75 paise per minute in its calculations – even though only two of the 17 firms it got data from had costs above 75 paise. The TRAI then arrived at a total cost of Rs 2.05 a minute but allowed the firms to charge a minimum of Rs 2.40. The TRAI said firms incurred no extra costs when subscribers sent SMS while roaming, yet it allowed firms to charge Rs 3.45 for an outgoing SMS, a figure that's higher than even the cost of a phone call while roaming.

4. **Calling party pays**

   This was introduced in May 2003, and single-handedly changed the fortunes of the cellular mobile industry as it allowed incoming calls to become free and almost halved mobile costs for subscribers. Until then, when a mobile phone user called up someone on a BSNL/MTNL network, the wireless phone firm would have to pay a charge to BSNL. But when the reverse happened, BSNL/MTNL did not pay the wireless phone company. The cellular industry had been asking for this since 1994, but it was only in 1999 that the TRAI first put out a consultation paper. Yet, nothing happened and things got worse when WLL mobile phone firms got paid when a cellular phone customer called them (since WLL were essentially wireline players) but the reverse did not hold true. This allowed the WLL firms to allow free incoming calls to their subscribers and gave them an advantage over the cellular wireless players.

   Since neither the Government nor the regulator did anything about it, the cellular firms took the law into their own hands and cut off all connections to/from WLL firms. A crisis sorts of took place; the then

Communications Minister, Pramod Mahajan gave the firms an earful, but they retorted with full-page ads showing favouritism to WLL firms like Reliance. Within a few weeks of this, the TRAI ushered in Calling Party Pays for the cellular firms as well.

5. **Spectrum goof up**

Spectrum issues have become a serious bottleneck. The current spectrum shortage is a creation of the government/regulator and it is being used as an excuse for not opening up the 3G auction to new players. The logic given is absurd: since existing players have a spectrum shortage, and 3G spectrums will help alleviate this, only they should be allowed to bid for 3G spectrums.

When the TRAI regularised WLL-mobile phone firms, the cellular firms argued against it, citing a spectrum shortage. At that point, the TRAI argued that there was enough spectrum to go around, and used this to bring in new players. Later, however, the TRAI turned around and said there was a huge spectrum shortage. This was the genesis of its recommendation – which was later changed again after TRAI got a new chief – that 3G spectrum be treated as an extension of 2G and be given to existing players as and when they exhausted their allocation of spectrum. Indeed, having brought in the WLL-mobile players on the basis of their so-called spectral efficiency – on the dubious claim that they used the scarce spectrum resources five times as efficiently as the cellular players – TRAI then did another *volte face* and said equal spectrum should be granted to both technologies. The Government has accepted neither recommendation.

6. **Policy changes**

As part of the political economy of the country, the Telecom Policy has been changed at least twice to accommodate a big business house. This is not unique to telecom, but can be seen across the spectrum of policy making, wherever the private sector indulges in rent seeking by exploiting or bending rules. In the case of the telecom policy, even TRAI's recommendations have been given the short shrift. There are too many murky details for this report to delve into, because many of them cannot be substantiated by evidence. In any event, the purpose of this report is to review the status of competition and regulation in the country as it stands, rather than to explore the depths of good governance. Albeit, one of the implicit goals of competition policy is to promote good governance, and that does happen.

Discrimination in prosecution has also been reported. For example, small operators running an illegal callback facility would be hauled over the coals. On the other hand towards the end of 2004, a very large telecom operator was caught changing the Calling Line Identification (CLI) on international calls received by its network, and replacing these with local numbers. This helped in avoiding paying the ADC of Rs 4.25 per minute on every international call either received or made from its network. Apart from helping the company save at least Rs 1,000 crore, it allowed it to get more business since its ILD calls were cheaper than those offered by the competition which paid ADC on each call.

The road ahead

The good news is that most of the harder regulatory issues have been settled and, thanks to the appellate process, the system has become a lot more robust. Companies routinely challenge decisions and this has served both the industry and consumers well. The real challenge now lies in getting more telephones in rural areas, to stimulate Internet telephony and to sort out the spectrum problem. With the TRAI having a good solution in place for sharing infrastructure like towers, and the USO fund willing to be more flexible, things look a lot better as far as rural telephony is concerned.

The present ADC structure is set to expire next year and will be given a decent burial. Getting internet availability to grow rapidly will require the TRAI/government to take on existing wireline companies and getting them to allow ISPs to access their last mile networks. The government will also have to come up with an ISP-friendly Internet policy instead of one that really favours big wireline companies setting up Internet facilities. This would include allowing ISPs to offer IP TV and two-way telephony.

On spectrum, which is currently a hot issue, eventually the TRAI/Government will have to come up with a solution that involves equitable availability to all existing and potential operators, and associated commercial issues. Then, as in other parts of the world, wannabe wireless firms would just register with the government, but would be able to start operations only after they bought/hired spectrum.

Finally, in order to further stimulate competition, the TRAI/government has to implement Carrier Access Code (CAC). So, for instance, you have 'X' company's connection, but you find that company 'Y' is offering a lower-cost long distance call from Delhi to Mumbai. If you had CAC, and company Y's CAC was 9876, all you would need to do would be to dial 9876 from your 'X' phone, get on to the 'Y' network, and then dial the Mumbai STD code and phone number.

At present, consumers just have to accept the rates offered by their service provider, which is why long distance tariffs are so high. So far, this has been kept in abeyance but once done it will really usher in competition in the long distance business. Number portability, which allows subscribers to move to different wireless providers while retaining their original telephone number, is another area, which will stimulate competition. Both have been kept in abeyance thanks to the lobbying by existing operators.

In many countries of the world, one has retail suppliers who offer cheap value-added services, such as long-distance dialing, after buying wholesale services from the main providers. That is yet to happen in India.

Finally, in many countries of the world like the UK, Pakistan and Egypt, mobile phones operate all over the country without the burden of roaming charges. That, coupled with number portability, will boost competition in the sector. It would mean that a consumer living in Rajasthan could have a Vodaphone connection (even if it is not operating here) on his Airtel number (on moving his number to the Vodaphone network), and pay the same rate as a Vodaphone customer would pay in circles where it is operating. Most importantly, it will help to promote a national system, and thus put an end to the debate on capping the number of operators in each circle.

Box 10.1: "No need to cap number of Telco's"

At a time when the TRAI is busy contemplating whether to recommend a cap on the number of mobile service providers in a telecom circle, the CCI is keen that the issue should be left to the market forces. According to the CCI, limiting the number of players is akin to thwarting competition.

The CCI also feels that the 2G spectrum pricing policy of the government should be changed to encourage more optimal utilisation. At present, operators pay an entry fee for 2G spectrum followed by a revenue share. The DoT has sought the views of the TRAI on the matter purely on the basis of scarcity of spectrum arguing that more operators mean fewer spectrums for each one of them, which leads to poor quality of service.

However, the CCI feels that realistic pricing would keep out non-serious players and lead to effective and efficient utilisation of the spectrum, where the demand is more than the existing availability.

Source: The Indian Express, 02.08.07

Electricity sector in India

Introduction

Electricity is most versatile and convenient form of energy. It is an essential commodity that human existence revolves around. Besides that, it is a crucial component of infrastructure on which the socio-economic development of the country depends.

"A laggard power sector may trip the economy's joyride", said Manmohan Singh, Prime Minister, which reflects the grim situation in the power sector. Supply of electricity at affordable rate to rural as well as agriculture sector is essential for its overall development. Equally important is availability of reliable and quality power at competitive rates to industries in India in order to make them globally competitive and to enable them to exploit the tremendous potential of employment generation. The services sector has made significant contribution to the growth of our economy and at this juncture, availability of quality supply of electricity is very crucial to the sustained growth of this segment of the economy.

Electricity has unique properties that do not allow it to be stored or routed. Unlike oil or gas in a pipeline, electricity must be generated and delivered at the precise moment when it is needed. However, the generation and distribution of electricity are complex processes, which are dependent upon a host of inter-related factors, including economic conditions, fuel availability, the transmission and distribution network and environmental factors. Another unique feature of electricity is the need for dedicated transportation infrastructure. To reach consumers, electricity must travel through miles of transmission and distribution lines until it reaches its final destination.

The growth of the power sector in India since its Independence has been noteworthy. However, the demand for power has been outstripping the growth of availability. Substantial peak and energy shortages prevail in the country. This is due to inadequacies in generation, transmission and distribution, as well as inefficient use of electricity. Very high level of technical and commercial losses and lack of a commercial approach in the management of utilities have led to unsustainable financial operations. Inadequacies in distribution networks have been one of the major reasons for the poor quality of supply.

Overview of the electricity sector

The economic reforms that began in the 1990s saw, amongst other things, deep changes in governance patterns in the economy. The most important of these perhaps was the shift from direct regulation by the state to independent, para-statal regulation.

In the first phase of reform that started in 1991, it was decided to open power generation – but not transmission and distribution – to private producers. Regulatory agencies, like the Central Electricity Regulatory Commission (CERC), were established. State-level regulatory bodies soon followed.

However, the impact of regulation and the development of competition have been patchy. The main reason for this has been the steadfast refusal by the political class to view electricity as a private good and therefore empower the regulators properly. The very concept of independent regulation has still not been fully accepted. In that sense, given the importance of the Government in the market for electricity, it is not easy to identify the impact of the regulators. So what we get at best is a fragmented view.

The fact that electricity is viewed as a quasi-public good is indicative of the importance that the political class attaches to access. The Government has striven hard to improve access, as can be seen from the large number of schemes and programmes. In a peculiar omission, the reforms programme did make explicit provisions for enhancing electricity access for the poor. As has been pointed out by experts there has never been an explicit mention of USOs in connection with electricity.

The Electricity Act, 2003 has tried to make amends by seeking stand-alone systems for rural areas and non-conventional energy systems, and a national policy on electrification and local distribution in rural areas. The Act has further increased the challenges. Changes in the Act have been sought to be made in pricing and tariffs, unbundling has been made mandatory for all utilities, separation of transmission and systems, etc., such that the past electricity monopolies can be replaced with more competitive framework.

The politicisation of electricity started in 1982 when a regional political party promised free electricity to farmers, and the sector is still characterised by subsidies and under-pricing – both are seen as anti-poverty measures. This has left the State Electricity Boards (SEBs) in severe financial distress. Orissa, on the advice of the World Bank, tried to withdraw subsidies from its citizens on the assumption that this would enable it to start earning profits. But the experiment ended up in a fiasco. The main factors responsible for such failure were doubts raised over sustainability of private sector achievements in the sector as net profit for transmission and distribution (T&D) sector as a whole had been negative for every year since the privatisation was introduced, financially weak sector, lack of tariff reforms and natural factors like cyclone. After privatisation of electricity sector in Orissa failed, many had raised question over viability of competition through privatisation of the sector in which demand always exceeds supply (i.e. shortage).

Experience in many countries has demonstrated that inadequacies in market design and improper sequencing of reforms can expose market participants and stakeholders to enormous uncertainties and risks. Therefore, without proper market design and proper sequencing of reforms any efforts of promoting competition through privatisation would only add up to similar experience as already been experienced in Orissa case.

In 2003, a new Electricity Act was enacted. It says that the price of power should reflect the cost of supply with a view to reducing and eliminating subsidies within a period to be specified by the regulatory commissions. It also calls upon the state governments to pay up the subsidy in advance. This has led to most states doing away with free power for farmers and imposing a nominal charge. But thanks to the extremely competitive politics at the state level, many state governments have reverted to providing free power. In such a situation, it is probably a little premature to talk of effective regulation and empowerment of regulators.

That said, the key element has to remain market contestability. Here reform has been almost nil, even when private producers have been allowed into power generation. Where customers – both domestic and industrial – are concerned, there has been virtually no change either in the level or the nature of competition. The need is to progress from wholesale to retail markets but there seem to be no signs of such a move despite the Electricity Act creating an enabling environment. The amount of electricity traded is only about three percent of the total power sold. India needs to move from a single-buyer to a multi-buyer multi-seller model. Only then will a genuinely competitive market emerge. At present, the wholesale power market is mainly for long-term bilateral contracts.

Box 10.2: Court Order Proves Bungling in Power Privatisation

The Leader of the Opposition in the Delhi Assembly highlighted a recent High Court order stating that policy directives issued by the Delhi government for privatisation of power in the state were illegal. Holding the government responsible for violating the powers given to it under the Delhi Electricity Regulation Act (DERA) had put a stamp of approval on the allegations leveled against the privatisation of the erstwhile Delhi Vidyut Board (DVB).

The Court order also reflected the findings of the Comptroller and Auditor General of India and the Public Accounts Committee of the Delhi Legislative Assembly on irregularities in the process of privatisation of power distribution. These irregularities relate to the appointment of consultants, valuation of assets of the erstwhile DVB and the negotiations between the Delhi government and private distribution companies on the privatisation of the DVB.

Source: The Hindu, 10.07.07

Key issues in electricity

Open access

Open access is the mechanism that has been adopted to facilitate the introduction of competition into the electricity sector. The object of reforms in the electricity sector has been to improve consumer choice and increase efficiency. In order to fully appreciate the issues involved in the implementation of open access, it is important to understand the drivers behind the introduction of open access to transmission and distribution lines.

Open access to the T&D systems is necessary in order to achieve a model where access to networks does not become an impediment to the development of a competitive power market. It is also important that access to transmission and distribution is regulated and pricing policies are compatible, transparent and efficient.

Thus, open access would provide a platform for the introduction of competition into the sector, which in turn would help bring down the cost of supply. However, there are certain costs that are implicit in the implementation of open access, such as increased complexity in the development of transmission systems. This complexity in development results from the fact that open access to transmission and distribution lines means that demand for transmission and distribution capacity may vary over a period of time. Therefore, the risks involved in planning and implementing the expansion of a transmission or distribution network becomes greater.

Financing power sector programmes including private sector participation

To meet the objectives of rapid economic growth and 'power for all', including household electrification, it is estimated that an investment of Rs 9,00,000 crores would be required to finance generation, transmission, distribution and rural electrification projects. Power being the most crucial infrastructure, public sector investments, both at the central and state governments, will have to be stepped up. Considering the magnitude of the task at hand, a sizeable part of the investments would also be needed from the private sector. The Act creates a conducive environment for investments in all segments of the industry, both for public and private sectors, by removing barriers to entry in different segments.

The public sector should be able to raise internal resources so as to at least meet the equity requirement of investments even after suitable gross budgetary support from the governments at the Centre and in the states in order to complete their on-going projects in a time-bound manner. Expansion of public sector investments would be dependent on the financial viability of the proposed projects. It would, therefore, be imperative that an appropriate surplus is generated through return on investments and, at the same time, a depreciation reserve created so as to fully meet the debt service obligation. This will not only enable financial closure but also the financial viability of the project would be improved for expansion programmes, with central and state level public sector organisations and private sector projects being in a position to fulfill their obligations toward equity funding and debt repayments.

It will be necessary for all power generating companies, transmission licensees and distribution licensees to receive due payments for effective discharge of their operational obligations and for enabling them to make fresh investments for expansion programmes. Financial viability of operations and businesses would, therefore, be essential for growth and development of the sector. Concerted efforts would be required for restoring the financial health of the sector. For this purpose, tariff rationalisation would need to be ensured by the SERCs. This would also include differential pricing for base, intermediate and peak power supply.

Steps should also be taken to address the need for regulatory certainty based on independence of the regulatory commissions and transparency in their functioning to generate investor's confidence.

The role of private participation in generation, transmission and distribution would become increasingly critical in view of the rapidly growing investment needs of the sector. The central and state governments need to develop workable and successful models for PPP. This would also enable leveraging of private investment with public sector finances. Mechanisms for continuous dialogue with industry for streamlining procedures for encouraging private participation in the power sector need to be put in place.

Transmission and distribution losses

It would have to be clearly recognised that the power sector would remain unviable until T&D losses are brought down significantly and rapidly. A large number of states have been reporting losses of over 40 percent in recent years. By any standards, these are unsustainable and imply a steady decline of power sector operations. Continuing losses at the present level would not only pose a threat to power sector operations but also jeopardise the growth prospects of the economy as a whole. No reforms can succeed in the midst of such large pilferages on a continuing basis.

Electricity theft

Almost all SEBs in India are facing a huge financial crisis and continue to be plagued by energy shortages and poor quality of supply. One of the main reasons for this situation is the high level of T&D losses. Pilferage or theft is a significant contributor to this and causes a financial loss of approximately

Rs 200 billion a year to the nation. Studies have shown that theft is not restricted to slums, unauthorised colonies, etc., but also occurs in posh localities and in large commercial and industrial establishments. Using hooks, open wires, and other ingenious means many carry out thefts. Unfortunately, officials in almost every state turn a blind eye to power thefts by ordinary people not because there is no machinery to take action, but because politicians in power eager to maintain vote-banks, allow the thefts to happen. In the case of commercial subscribers, it is often due to corruption or even threats.

Ongoing reform programmes are laying an emphasis on curbing theft through technical controls as well as legal and legislative measures. The anti-theft legislation of West Bengal that became operational on July 15, 2002 lays down stringent penalties in the form of fines of between Rs 5,000 and Rs 50,000, or imprisonment for 3 months to 5 years, or both.

Strict enforcement of the initiatives mentioned above, together with better governance of the distribution business, holds the key to the turnaround of the power sector. The onus for designing and implementing anti-theft measures rests with the utilities and the government. Private entities and non-governmental organisations (NGOs) could also assist in the process.

Box 10.3: Power Theft: A Non-bailable Offence

The Electricity (Amendment) Act, 2007 makes power theft a cognisable offence. This means that the police can book any person who is stealing power and send them to jail. This critical amendment is expected to substantially improve financial health of distribution companies by curbing power theft. Average power theft levels in the country are as high as 30-35 percent of the total power generated.

The amendment will for the first time empower electricity companies to book consumers who tap power illegally. Distribution companies, who have not been able to do much to control theft so far, will be in a position to get help from the police to book the guilty. (Many states have already started successful theft detection programmes with a focused approach).

There are provisions for imprisonment for six months to five years if theft of power is detected second time and theft was being committed with a connected load above 10KW.

Source: Gazette Notification, GoI dated 29.05.07

Governance issues: dominance of retired bureaucrats

An important aspect of regulation is the independence and capacity of the regulators. The complexity of the electricity sector requires the regulator to be a person with specialised knowledge and experience of the sector, who should be independent and impartial. Thus the qualification, experience and independence of the regulator is of vital importance and it should make no difference if the regulator is selected from public or private sector as long as they have the required qualifications and experience.

Unfortunately, in our country regulatory commissions are being used to extend patronage to retired bureaucrats and judges. In addition to that, there are norms that bar regulators from taking further employment with the government and from taking commercial employment for a period of two years. These act as a hindrance in getting young blood in this sector, which is important to bring in fresh perspectives.

Effective regulation is crucial for creating an enabling environment for increasing efficiency in the sector. Therefore, the choice of qualified regulators is important for better governance in the electricity sector.

Regulatory independence[1]

Independence and autonomy of regulatory bodies is an essential prerequisite for ensuring confidence among the players and customers. Regulators maintaining an arm's length from political parties means autonomy. The necessary attributes are provided for in the enabling legislation that includes a transparent selection process, criteria of qualification and disqualification, prescribed tenures, criteria for removal, clear delineation of the powers, etc.

An important aspect of regulatory independence is financial independence. Dependence on uncertain budgetary allocations weakens regulatory capacity and increases the influence of politicians. Therefore, there is need for alternative funding arrangements for self-financing through fees or a cess.

Way forward

As is clear from the above discussion, the problem is not that India does not know what needs to be done or in which direction it should proceed. Indeed, it is generally conceded on all hands that although private power accounts for just around 5 percent, in about 15 years its share is expected to increase to 30 percent and in 30 years to more than 50 percent. In other words, the bulk of additions to power capacity will come from the private sector.

This necessarily envisages that potential markets for electricity will come into existence. It further means that in order for these markets to be efficient they will have to be competitive and well regulated. But the necessary condition for that to happen is the removal of the dead hand of politics from the sector. Only when the businesses begin to be viewed from the perspective not merely of access but of competitive efficiency, there will be progress. It is instructive, in this context, to find that even the Planning Commission has recognised political interference to be a major problem. This is what the approach paper to the 11th Plan has to say, "AT&C losses have to be brought down from the current level of around 40 percent to at least 15 percent by the end of the 11th Plan. This can be done if managements of SEBs are professionalised and given autonomy of operation without political interference. But in the very next line it says "Half the country's population is today without electricity", which appears as an invitation to politicians to interfere. Nevertheless, it proposes the following measures:

(i) Ensure competition in each sub-segment of the energy sector and *remove all entry barriers* so as to realise optimal fuel and technology choices for extraction, conversion, transportation and end use of energy.
(ii) Ensure energy pricing that leads to efficient choice of fuel, inter-fuel substitution, and technology so that resource allocation takes place based on market forces operating under a *credible regulatory regime*.
(iii) Incentivise rational use of energy across all sectors, including agriculture, industry, commerce, domestic, personal transport, public transport and haulage.
(iv) Ensure an institutional framework that provides *a level playing field to public sector and private sector players* and provides comparable incentives to power producers across all energy sectors.
(v) Ensure a consistent tax and regulatory structure across all energy sub-sectors. There is no reason why energy resources should be taxed much more than others unless there are some externalities involved.

Towards these ends, it is worth recapping that the Electricity Act 2003 is in place, and the National Electricity and Tariff policies envisaged in the Act have been notified. Regulators are in place in the states and have issued a series of regulatory orders, which are beginning to reduce the wide dispersion in electricity tariffs that have existed traditionally, and to contain tariffs charged for industries. Many states have unbundled their SEBs into generation, transmission and distribution companies for better transparency and accountability.

P.S. Common issue: independent infrastructure

While SEBs have been unbundled, it is not sufficient to generate competition in the electricity sector because the unbundling has not resulted in separate ownership of each arm. One problem, which the consumer will face in accessing a different supplier of electricity, is that the distribution line belongs to the same dominant group of companies (belonging to the state), which is generating, transmitting and distributing electric power to the end-consumer. While providing access to essential facility is provided for in the Electricity Act, 2003, in practice it is difficult to ensure the same. Cases have come up where independent power producers (in many cases captive power generators belonging to an industrial unit) cannot sell power directly to the consumer. Instead, it has to wheel the same through the existing network, and receive the wholesale buyer rates, which are non-negotiable.

One suggestion in order to promote competition is to create independent infrastructure companies, which own the networks and sell their services to any generator. And in turn transfer power to any consumer directly. The infra company does not own the generating set up, but only the transmission and distribution networks. Marketing directly to consumers and assessing the consumption through meters is the generators' domain. Thus we can have many generators, infra companies owning the transmission and distribution networks, and thus promote competition.

This is already happening in the telecom sector. For telecom firms to penetrate the rural areas/hinterland, sharing infra has gained paramount importance, and makes more money.[2]

Box 10.4: Tower Business Rising, 9 New Players Waiting

The passive telecom infrastructure industry is witnessing big action, with at least 9 tower companies waiting to enter the segment. According to market sources, the telecom infrastructure business is expected to post exponential growth similar to that being recorded in the cellular industry. The growth of telecom connections at 7.3 million users per month would require installation of 330,000 towers within the next couple of years and here lies the opportunity.

Moreover, the opportunity is also due to the fact that mobile operators are hiving off towers into separate business to concentrate on their core competencies. At present among all the operators there are around 110,000 towers in the country. US-based American Tower Corporation and Crown Castle International are among others looking at entering the country, while Israel-based Tower Vision has already commenced operations for Spice Telecom.

Market analysts say the tower sharing business is very lucrative, especially when there are 6-7 operators present in each service area. While the tower business benefits telecom by reducing the capex and opex, it generates significant back-ended cash flows by front-ending capex.
(Business Standard, 03.08.07)

Manoj Tirodkar, CMD of GTL Ltd., says: "In India's vast geographic area, low and falling margins and an intensely competitive market place, sharing of passive cell-site infrastructure is almost a necessity. As per TRAI, 240,000 additional towers would be needed to support another 300mn subscribers by December 2010. As per an estimate, an average tenancy of '2x' per tower can save conservatively US$3-4bn in capex for the whole industry. This could translate to a saving of US$500mn for each of the major players over the next three to four years. Additionally, huge pre-operation costs, O&M costs and Management Bandwidth would be freed through this process.

"According to COAI estimates, by 2010 the industry will require 300,000 plus towers. To add to this, the advent of data application technologies like 3G and WiMAX, the Minutes of Usage per subscriber would increase manifold. Considering the limited spectrum availability, even after sharing the company estimates the need for 125,000 towers on a conservative basis".

Estimates always get into some kind of debate, but the point being made here is that independent infrastructure needs to be in truly independent companies, such as American Tower (see box 10.4), and not as subsidiaries of telecom companies, so that there is clear division of interests. This part of creating independent infra companies has been highlighted in the context of mobile telephony, but the same approach could be adopted for fixed-line services too, and to create an independent infra network for the electric power supply system.

Nevertheless, there is a nexus between telecom and electricity on one issue of infra – the availability of 24-hour electric power to the towers for operation of the sophisticated equipment to be lodged there, particularly the air conditioning required for climate control. Electric power is in short supply, and the situation is worse in remote areas, where supply is more erratic. Many of the towers will need to be installed in remote areas, which would be done through the Universal Supply Obligation Fund, otherwise our rural consumers will not get smooth access to telecom facilities. Nearly 30-40 percent of the operating cost of a tower is on power supply. Diesel generators are being used to meet the shortage, but it is much more expensive. Companies are already exploring ways to meet this shortage through alternative sources such as biodiesel, wind or solar energy or a combination of them. This also augurs well for sustainable development and in the reduction of carbon emissions.

Endnotes

1 'Energy Sector Reforms in the SAARC Countries', South Asia Energy Dialogue, New Delhi, March 05, 2007.

2 *Financial Express*, April 07, 2007.

CHAPTER 11

Regulation in the Social Sector

Introduction

One of the basic objectives of competition policy and law in any economy is that the gains of competition should be equally distributed among various sections of the society. But the benefits hardly ever trickle down. To reap the benefits of competition, poor consumers have to first become a part of the market, i.e. be given the opportunities to generate purchasing power.

The question of availability and affordability emerges in case of basic needs, such as food, clothing, healthcare, education, water and sanitation, housing, energy and transportation, which are essential for survival. On the one hand, while competition has increased the availability of goods and services in the market and thus access, the moot question is whether all consumers have the ability to pay. On the other hand, there are cases when goods and services are available and people have the ability to pay, but they do not have access due to skewed and uneven distribution of goods and services in the market. Therefore, growth has to be accompanied with reduced disparity and more dispersed benefits.

With the relaxation in control and advent of new technologies, certain essential services have expanded. There has been substantial growth and development of various services like health, education, banking, transportation, housing, etc. With the increase in access to these services and with rising competition in the market for these services, various anticompetitive practices have also increased, thereby necessitating regulation.

Through its effect on standards, competition can have a positive influence on the quality of services. However, this may not always be the case, as standards may be rigged at an artificially low level by a group of companies to prevent new entrants with better standards from entering the market and competing. Also, producers would be interested to improve the safety and other quality attributes of their products only when consumers are conscious of the same. Sadly, in our country, quality awareness still remains quite low as compared to price awareness. In fact, this extra attention to price on the part of the consumers may tend to have a negative impact on the quality of products sold in the market. In India, price-competition seems to take precedence over quality competition. However, it could be expected that as markets mature and consumers become more aware and conscious, the situation would change. As a matter of fact, what is needed ideally is a fine balance between quality and price that reflects the diverse needs of Indian consumers.

As health care and education come under the ambit of basic services, and they are critical soft infrastructural issues for economic growth, these have been considered for deeper examination in this chapter, without intending to reduce the importance of other sectors where competition and regulation is equally vital.

Healthcare delivery system

Access and structure

It is undeniable that access to healthcare is one of the most basic needs, an inviolable right of every human being. Healthcare is an intrinsic component of the development process. Limitations in healthcare may be immediately associated with a lack of adequate public or private health facilities or the inability to afford what is available, but the real impact lies in the lack of freedom to live healthy lives, freedom from preventable ailments, and untimely death.

India is not the only country facing the problem of access to healthcare. It is being experienced across the world and has a presence at the global level.

More than one-third of the population lacks access to basic healthcare services. The direct impact is the price paid in terms of poor health conditions and increasing mortality.

It is generally believed that healthcare for the poor is inexpensive due to the existence of government hospitals and other institutions set up by welfare-driven governments. But, as a matter of fact, it is the poor who are often compelled to avail of more expensive private healthcare services due to a host of other factors such as inefficient government hospitals.

India has a wide variety of healthcare services available for its population. On the one extreme end, there are the high-technology hospitals and diagnostic centres (both private and public) in metropolitan cities, and on the other, one has village health guides, folk healers, faith healers and quacks in remote villages. Between these two extremes, there are district general hospitals (civil hospitals), private hospitals, 'trust' hospitals, consulting and general private practice dispensaries and clinics (allopathic, ayurvedic, and homeopathic), rural/cottage hospitals, primary health centres and sub-centres. But are there enough healthcare providers in India to meet the needs of its population? This is a difficult question to answer. If one looks at official/published data, then the aggregate ratios that emerge (doctor: population, bed: population, etc.) reveal that there is a large shortfall when one considers any adequate minimum standard.

Two events in the history of the health delivery system in India are of particular significance:

- During the mid-1980s, the government formally recognised private healthcare as an industry and offered several incentives to private players such as land allocation at subsidised rates for new hospital projects and reducing import duties on medical equipment.
- The health insurance market was opened up to private competition in April 2000. Both general and life insurance companies can now offer health insurance.

Here, the health delivery system is being considered to comprise just four components: doctors, hospitals, pharmacists and diagnostic laboratories. These have been chosen not only since these are the vital elements of the system, but also because competition and regulation concerns are comparatively more prevalent in their domain. The following table gives an estimate of the infrastructure in the health delivery system in India:

Table 11.1: Trends in Healthcare Infrastructure

	1951	**1991**	**2005 (Period/Source)**
SC/PHC/CHC	725	57353	171608*
Dispensaries and Hospitals (all)	9209	23555	27770 **
Beds (Private & Public)	117198	569495	914543 (all types)**
Nursing Personnel	18054	143887	865135 ***
Doctors (Modern System)	61800	268700	656111 ***

* RHS: Rural Health Statistics, 2006.
** Health Information of India, 2004.
*** National Health Profile, 2005.
Source: Economic Survey 2007, Government of India

How far has India succeeded in widening the access and ensuring quality to healthcare delivery? Are there any competition and regulation concerns in the structures and practices prevalent in the system? This chapter tries to address these questions.

It has been observed that the health delivery system in India is heavily inclined in favour of urban and semi-urban areas. On the other hand, the rural areas are marked by a poor quality of services provided by a large number of unqualified personnel. In a bid to improve this grave situation, the government, through the National Rural Health Mission (NRHM), has been trying hard to provide primary healthcare facilities, especially to the poor and vulnerable sections of society, but access to health delivery continues to remain very poor in these areas and is a major concern. Even doctors are not available in these areas, as they are unwilling to stay and practice due to the unprofitable nature of practice in these areas. Lucrative private practice is the place where doctors are available.

However, to improve the availability of doctors in rural areas, different state governments have been planning to introduce a separate cadre (a Rural Health Service) for a long time, but nothing concrete has been done so far. The basic idea to create such an exclusive cadre is that health personnel selected for the cadre will only serve rural areas and thus ensure availability of proper healthcare services. Of late, the Government is also reported to be working on legislation making it mandatory for all government doctors to undergo a year's rural posting before they get permanent posting. In a scenario where 30 to 40 percent of the doctors posted at rural primary level health centres do not report to work, such legislation favouring compulsory postings of doctors would ensure better health facilities for those living in the rural areas.

Even if such a scheme is formulated, enforcement/implementation will remain a problem. Suitable incentive/disincentive provisions can ameliorate the problem to an extent.

Various data reveal that proper healthcare facilities are accessible to a very small percentage of the Indian population. This could be largely attributed to the fact that growth and expansion of the healthcare industry has been mainly confined to the private sector. While the private sector has experienced the development of all the big hospitals and urban healthcare facilities, accessed mostly by the elite, the public sector has, by and large, remained at a distance from growth and expansion. It can be said that the private sector has flourished in sharp contrast to the highly inadequate and inefficient public sector. The public sector has, thus, remained unequipped to handle the mammoth task of providing efficient healthcare to millions of Indian citizens.

At present, there is not even an indication of improvement as the governments both at the Centre and states are mandated only to set up hospitals for welfare purposes. They are least concerned about whether setting up of hospitals alone is enough to ensure efficient healthcare delivery to the masses.

While setting up huge infrastructures, the initial sunk cost (and other costs) is never recovered; nor is it intended to be recovered from the beneficiaries of the hospitals. Thus, over a period of time, the public sector hospitals set up by the welfare-driven government become an uneconomical venture leading to deterioration of all facilities, including minimum basic facilities.

Besides, even the selection criteria of medical and para-medical staff of a government hospital play an important role in the healthcare institutions being inefficient. The selection criteria are often very tough and stringent with several political and local conditions required to be complied with. As a result, selected staff often fail to live up to the post-selection performance criteria. Further, poor pay structures also add to the existing dilapidated conditions. A major concern with regard to the healthcare delivery system in India is that, on the one hand, the private sector is continuously growing, on the other hand, the public sector has become stagnant. This may end up in an overall increase of prices of healthcare services in the country. Further, the diversion of budget allocation may make it more difficult for the public sector to remain efficient. Thus, access to healthcare is made even more difficult for the common man.

Present status of competition and regulation

Competition concerns are prevalent in all the four components, i.e. doctors, pharmacists, hospitals, and diagnostic laboratories, of the health delivery system in India. Let us now take a look at the market dynamics of the sector.

Market Dynamics

Doctors

The most significant unethical practice engaged in by doctors is that they are the one who make the decision on behalf of the patient as to which drug a person has to buy and where best to send the patient for diagnostic tests or further treatment. Doctors usually prescribe expensive drugs, motivated by kickbacks from pharmaceutical companies. Another practice, which is rather prevalent among doctors, is accepting commission for referrals. Doctors are sometimes paid commission for referring the patient for further treatment or for suggesting a particular diagnostic centre, pharmacist or hospital. The dependence of patients on the doctor does render the health delivery system vulnerable to misuse by players in the system. Profit considerations in the process of treatment would obviously influence decisions taken by doctors and impinge on free and fair competition.

Box 11.1: Bristol-Myers Pays US$515mn to Settle Fraud Charges

Bristol-Myers Squibb Co has agreed to pay more than US$515mn to settle fraud allegations involving kickbacks to doctors and inflated drug prices, the US Department of Justice said. Michael Sullivan, the US Attorney in Boston, said Bristol agreed to settle charges that the drugmaker illegally compensated doctors to induce them to prescribe Bristol drugs, ostensibly for their participation in various programmes, which included trips to luxurious resorts.

Other allegations include that Bristol unit Apothecon paid retailers and wholesalers to stock its drugs, and that it promoted the sale and use of the schizophrenia drug Abilify for use in children for dementia-related psychosis. "Kickbacks are especially nefarious when they are used as part of a marketing effort to convince physicians to prescribe drugs for uses that the FDA has not determined to be safe and effective", Sullivan said.

Sullivan's office also had accused Bristol and Apothecon of setting and maintaining 'fraudulent and inflated prices' – for an array of drug products while being aware that federal health-care programmes set their reimbursement rates based on those prices.

As part of the settlement, Bristol-Myers said that it entered into a five-year "corporate integrity agreement" with the Office of the Inspector General of the US Department of Health and Human Services. The agreement provides for, among other obligations, "the continued development and maintenance of the company's compliance programmes relating to the company's US pharmaceuticals business", Bristol-Myers said.

The Hindu Business Line, 29.09.07

Pharmacists/pharmaceutical industry

The anticompetitive practices most prominently engaged in by pharmacists are reflective of collusive behaviour. Pharmacy owners may be considered to have banded together to form a huge cartel in the guise of a trade association. The AIOCD is known to have launched boycotts against drug companies to grab higher profit margins.

Pharmacist associations have been known to demand that drug companies obtain a 'no-objection letter' from each state trade association, before a new drug could be sold there. Otherwise, it would be excluded from the pharmacists' stock lists. For each new drug, the trade groups usually solicit a cash donation. AIOCD has also forced some drug companies to agree to increase the profit margins of pharmacies.

Box 11.2: Rent-seeking by Pharmacists: Some Cases

Strong-arm tactics by pharmacists' associations (at state as well as national level) are nothing new. In 1984, a case came up before the MRTPC after the Retail and Dispensing Chemists Association, Bombay, directed all wholesalers and retailers to boycott a Nestle product until the company met its demands.

The Commission observed that the impact of the chemists' boycott could, by no stretch of the imagination, be considered negligible. The boycott represents an attempt to deny consumers certain products that they were used to and, therefore, the hardship to such consumers was indisputable. The Commission accordingly passed a 'cease and desist' order. (RTP Enquiry No. 10/1984).

Even before that, in 1982, the AIOCD had to face a similar stricture in a similar case. (RTP Enquiry No. 14/1982, order dated 25.09.1984).

The AIOCD was brought before the Commission, once again, in 1983. It issued a circular to various pharmaceutical companies, threatening that if they dealt with state cooperative organisations and appointed them as stockists, granting them sale rights, it would expose the companies to a boycott by its members. The case was decided in 1993, and the Commission observed it to be the restrictive trade practice (RTP) of refusal to deal. (RTP Enquiry No. 37/1983, decided on 25-06-1993).

Undeterred, the AIOCD decided to boycott the Septran range of products, manufactured by Burroughs Wellcome (India) Ltd. When the case came up before the Commission, the AIOCD pleaded that it did not issue any circular to dealers, threatening to boycott the products. However, the Commission observed that a boycott could also be conducted by way of an understanding among those enforcing it, or by word of mouth among them. The mere absence of a circular calling for a boycott did not mean there was no boycott. (1996, 21 CLA 322).

In 1999, the MRTPC again issued a cease and desist order against a boycott. In this case, the material published in the bulletin of Retail and Dispensing Chemists Association read in one part as, "it is necessary that all retailers suspend dealing in Wander (pharmaceutical company) and ensure no retailer sells even the other products of Wander Ltd…". The Commission held that a boycott of such nature might go against public interest by not making available an essential commodity. [1999 CTJ 436 (MRTP)].

The Patents Act in its amended form, which is an element of the regime, guarantees significant economic exclusiveness to producers of new products and processes but with in-built mechanisms to check extreme causes of competition restriction. These, in combination with the Drug and Pharmaceutical Policy and Drug Price Control Orders (DPCOs), which have gradually liberalised price controls, constitute a lethal cocktail. While competitive elements are, apparently, introduced by the abolition of licences (with certain exceptions) and decontrol of prices, end-users would not benefit from such competition[1].

There is legitimate concern that the product patents regime will create monopolies in particular medicines and lead to market concentration. Here, it needs to be noted that the CA07 has weak provisions to deal with IPR abuses and only covers unreasonable restrictions (that too is not defined explicitly) imposed by IP owners.

While industry has been pushing for decontrol, the logic that market forces and competition are best suited to stabilise drug prices is suspect. Market forces do tend to be a leveller when it comes to prices in other industries, but given the high concentration in different therapeutic segments and the low elasticity of demand in the pharmaceutical sector, market forces are usually ineffective in controlling prices[2]. As such, price decontrol has led to greater trade margins for pharmacists. It just may well be that benefits of the price decontrol of several drugs are going disproportionately to pharmacists, as compared to manufacturers. This, in itself, defeats the very purpose of the deregulation that is meant to provide manufacturers with the ability to spend more on research and development (R&D). By giving extra profits to the pharmacist, instead of reducing the retail price, manufacturers are keeping medicine prices higher than necessary for Indian patients[3].

Gradually doing away with price controls is dangerous, especially against the backdrop of the product-patent regime coming into force, though some argue that high prices of patented drugs may help fuel innovation. The DPCOs are, however, not of much use in controlling prices of patented drugs because the drugs listed as essential are mostly not patentable. What is needed, along with the use of compulsory licensing, is a pro-active regulatory mechanism[4]. This concerns itself with preventing a crisis through effectively implementing provisions relating to pre-grant opposition, limiting the scope of patentable subject matter, expediting the grant of compulsory licences, including exceptions such as Bolar provisions, and defining ambiguities in the law – for example, the Indian Patents Amendment Act, 2005 – in favour of public health.

One estimate for India suggests that household costs, associated with higher prices[5] for medicines, will increase by some US$670mn, almost double the current spending on all antibacterial medicines. In fact, the pharmaceutical industry too feels that the prices of certain drugs will increase with the kicking in of the new patent regime, another recent survey has revealed.

The fact is that a high trade margin is not only due to the bargaining power of pharmacists but also due to the manufacturers' strategy to capture greater market shares through the provision of incentives to doctors and pharmacists. Informal collusion by pharmacists involves anti-competitive practices at the local level. For example, when we buy a drug, pharmacists look at the MRP and sell the drug at that price. However, the MRP is not the retail price determinant; it is only a maximum recommended price by all the pharmacists, so there is absolutely no competition for any drug.

Hospitals

Hospitals are an important part of the health delivery system. However, although not much is known about their practices, there have been cases of agreements entered into by hospitals with drug manufacturers to exploit consumers. Such hidden costs, an issue in many hospitals, are also a competition concern, as the consumer pays more than warranted.

Tied selling

Furthermore, tied selling is a common anticompetitive practice in all the four components of the health delivery system. One form of anticompetitive practice is for medical professionals to suggest more tests than necessary, which may be indicative of a profit arrangement between doctors and diagnostic centres. The tied selling of diagnostic testing is prevalent in hospitals as well.

Private healthcare

More than six percent of the GDP in India is spent on healthcare. More than three-quarters of this expenditure constitutes private 'out-of-pocket expenses'. Almost all of this private spending is on curative care: consultations, diagnostics, and in-patient. Despite such a high share of expenditure by individuals, the provision of adequate health care (both in quality and access) is becoming more and more difficult. Currently, there is no law to regulate or monitor the functioning of private hospitals, nursing homes and other medical care establishments in the country.

In a real sense, the competition is not really between government hospitals and the big-ticket nursing homes. On the one hand, we have a welfare-driven entity, while on the other, there is a professional business house. However, the private health sector will continue to be a major player in providing health services. Given that private sector health care is predominant in India, and that it is likely to grow under the competition regime, there is an urgent need for recognition of its far-reaching impact on people's lives. Clearly, there is an urgent need for regulating private health providers.

Information asymmetry

Lack of information is one of the most serious problems in the health delivery system. People by and large depend on private health facilities for their healthcare needs. Yet, no systematic information is available about the quality and type of services, as well as prices charged by different private hospitals. Improper information channels serve as the only source of such information, which often leads to exploitation. Thus, what is essential to promote competition in the health services sector is to make public all necessary information on the types of services provided by different hospitals and other medical establishments (including government establishments) and their quality as well as prices. Private hospitals and nursing homes should consider organising well-articulated public awareness campaigns so as to ensure that the common patient (the consumer) is not cheated or duped. Similarly, touts working in government hospitals are a reflection of administrative corruption and need to be removed by administrative methods.

Regulating health delivery system

A number of legal and policy options are available, which could be utilised to deal with anticompetitive practices in the health delivery system. Utilisation of these options should be considered in order to facilitate access to medicines and healthcare by the poor. Apart from competition law, patent law and drug price control are also crucial for efficacious elimination of competition violations in the health sector.

CA07 can best serve to redress violations of competition law committed by doctors, hospitals and pharmacists. Apart from the competition law, there is no other concrete regulatory mechanism that could address anticompetitive conduct in the health delivery system. Some states have legal frameworks in place for mandatory registration and technical standards of clinical establishments, including hospitals, nursing homes and diagnostic centres. The Clinical Establishment (Registration and Regulation) Bill 2007 is under consideration in the Parliament and expected to provide a legislative framework for the registration and regulation of clinical establishments. However, mere existence of legal frameworks is not enough; implementation is equally important. With the hospital industry growing at its current pace, this void between the provision and implementation needs to be effectively filled in.

Regulating physicians

The only other regulation, apart from competition law, which may be resorted to as recourse to anticompetitive conduct is the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002. It is widely believed that making generic prescriptions mandatory can help do away with corruption among physicians who prescribe branded drugs in exchange of kickbacks from pharmaceutical companies. The regulation says that every physician should, as far as possible, prescribe drugs with generic names and that they should ensure that there is rational prescription and use of drugs. Further, there is an explicit mention in the regulation that drugs prescribed by a physician or bought from the market for a patient should explicitly state the proprietary formulae as well as the generic name of the drug. This regulation strongly emphasises the duties of medical professionals and states the primary objective of the medical profession is to render service to humanity, with reward or financial gain a subordinate consideration. Therefore, accepting incentives to promote particular brands would be against the code of ethics.

The regulation further stresses the fact that practices mentioned as unethical or misconduct under its provisions are not exhaustive and that the Council would consider any other practice which may be construed as professional misconduct. Therefore, anticompetitive practices, such as tied selling, which are not expressly mentioned by the regulation, may still be redressed by the Medical Council.

Box 11.3: Rajasthan Model of Medicare Relief Societies

In Rajasthan, Medicare Relief Societies have been set up in all government hospitals at State, Divisional, District and sub-division level for the purpose of:

- *better maintenance and upkeep of the hospitals;*
- *providing cheaper medicines to the common man through outlets known as life line fluid stores opened within the hospital premises; and*
- *providing medicines free of cost to below poverty line (BPL) families.*

These Medicare Societies mainly comprise of the doctors in the hospitals. Their source of income is primarily the user charges levied by them for the services provided in the hospitals. Through these medicare societies several critical medicines, injections, antibiotics, IV Fluids etc. are purchased in bulk through open tender from the manufacturers and sold through the lifeline fluid stores in the hospital premises.

As a result, the prices are reduced considerably and some of the medicines are sold at prices as low as or even lower than 50 percent of the prevailing market rates. An example is the Intravenous (IV) fluid, a bottle of which is being sold to patients between Rs 10 to Rs 11 as against its ceiling price of Rs 17. Running of the stores is contracted out and these are generally open round the clock.

But does self-regulation have the same weight as legislation? What would be the punishment meted out to a guilty practitioner? The Council may award "such punishment as deemed necessary" or remove the practitioner from the register. Deletion from the register is widely publicised in the local press as well as in publications of various Medical Associations.

But, the regulation has little effect in practice. From the existing practices in the sector, it is quite evident that the provisions of the regulation are not implemented. Doctors tend to mention the brand names of drugs in prescriptions, rather than their generic names. Doctors, of course, are not always motivated by incentives offered by drug manufacturers, and it is very difficult to identify doctors who prescribe on the basis of bribes or other sweeteners, such as funded foreign jaunts offered by drug companies. Difficulties in implementation are set to continue in all probability, as the decision-making authority under the regulation is the Medical Council, which usually chooses to protect the medical fraternity.

Regulatory frameworks for prescribing practices do exist around the world. The prescription audit is one way to make a post-facto analysis, which encourages the doctor to be careful. More stringent regulation of physicians' conduct is essential to effectively control anticompetitive practices in the health delivery system.

Box 11.4: Regulating Physicians in the US

The types of conduct within the health care professions that have been deemed anticompetitive over the years include agreements on price and price-related terms, agreements to obstruct the entry of innovative forms of health care financing and delivery, and restraints on advertising and other forms of solicitation. Since the 1970s, the Federal Trade Commission has had an active law enforcement programme targeting anti-competitive practices among physicians and other health care professionals.

Since 2002, the FTC has entered into 17 consent agreements with physicians, their organisations, or their non-physician consultants and agents, settling charges that the respondents have engaged in unfair methods of competition – primarily different forms of price-fixing.

Source: Improving Healthcare: A Dose of Competition, A Report by the Federal Trade Commission and the Bureau of Justice, 2004

Regulating pharmacists

Apart from the competition law, there is little governance of pharmacists in the health delivery system. As discussed above, the most common anticompetitive practice of pharmacists is collusive behaviour and arm-twisting of drug companies to wrest higher margins. As per the provisions of the new CA07, only trade unions are allowed to engage in collective bargaining. Hence, the activities of the pharmacists' association to extract higher margins are illegal.

There is legislation pertaining specifically to pharmacies, the Pharmacy Act, 1948, to check misconduct by pharmacists. But this is not a useful legal option in controlling anti-competitive practices. The Pharmacy Council of India under the Pharmacy Act 1948 simply prescribes the minimum qualifications for a practicing pharmacist[6].

The MRTPC, however, has been quite active in controlling anticompetitive practices engaged in by pharmacists.

Box 11.5: The Effect of the MRTP Commission

In one case, a pharmaceutical company alleged that a pharmacists' association had issued oral instructions to its members not to deal with the complainants and to buy or sell medicines to them. In reply the association not only denied the allegations, but also issued a circular to its members mentioning that an allegation had been made that there exists a boycott against the company in question, but that the allegation was untrue and that members were free to deal with the company and the company with them. Upon this, the Commission saw no ground to continue proceedings.

It may very well be that this was exactly what had happened. On the other hand, an orally instructed boycott may have been in place and the complaint served the purpose of ending it. [2002 CTJ 124 (MRTP)]

In another case, upon initiation of an enquiry by the Commission into a circular issued by the Utkal Chemists and Druggists Association calling for a boycott of products manufactured by Lupin Laboratories, the Chemists and Druggists Association informed the Commission that they had resolved the matter with the company and would not repeat such an action in the future. [(1997) 5 CTJ 350 (MRTPC)]

At the global level, most countries have separated the roles of physicians and pharmacists to ensure that physicians do not have a financial interest in the drugs they prescribe. For example, Korea is currently in the process of separating the roles of physicians and pharmacists. In some countries, pharmacists do have some degree of control over the drugs actually consumed. In India or perhaps many countries (see Box 11.1), the pharmacist-doctor nexus continues to remain very strong, and thus it is in the interest of the consumer that their relationship is monitored.

Regulating hospitals

Hospitals often engage in a range of anticompetitive practices. But, it is not possible to tackle them simply by a competition law. Yet, there is no appropriate law to regulate or monitor the functioning of private hospitals, nursing homes and other medical care establishments in the country.

There are state-level laws in this regard only in a few states like West Bengal, Maharashtra, Tamil Nadu, Andhra Pradesh, and Puducherry, while some states like Kerala and Jammu & Kashmir are considering such a law. The Central Government is also considering legislation. in consultation with the state governments with the objective of regulating the establishment of private hospitals/clinics and prescribing uniform minimum standards. The Clinical Establishment (Registration and Regulation) Bill 2007 has been introduced in Parliament and as of now, however, in most states, any person can open a nursing home or a hospital or a diagnostic laboratory just by obtaining a trade or municipal licence.[7] The most damaging aspect of the situation is that very little is known about these establishments and people are routinely cheated.[8]

Even in states where such a law exists, the provisions are quite rudimentary and implementation is poor. Moreover, these laws deal with technical regulations only. As for economic regulation, some laws specify only free treatment to a certain percentage of patients. However, there is no effective mechanism to monitor such provisions. Nonetheless, hospitals in the public sector operate under the regulatory mechanism as specified by the central or state governments. In practice, however, several hospitals and health centres are run by governments which do not conform to their own standards.

The education sector

Structure of higher education

At present, there is a rapid expansion being witnessed in higher education with student enrolment scoring an annual 10 percent growth. Yet, the gross enrolment ratio of Indians in institutions of higher education is around 7.5 percent of the age group (eligible for higher education) – lower than the Asian average of 11 percent and much lower than the countries of the OECD. However, the ratio is expected to double over the next decade. As such, this sector needs thousands of crores of rupees in investment from every possible source, be it public, private, charitable or foreign. So vast is the enormity of the challenge that all kinds of initiatives can be accommodated. The public sector would have a leading role to play, but the core problem remains the mismatch of supply and demand – there are too few institutions and fewer of quality. If quality education is not of abundant supply and does not come from multiple sources, consumer choice is limited.

Over the last 50 years, the Government of India has provided full policy support and substantial public funds to create one of the world's largest systems of higher education. But barring a few notable exceptions, institutions have been unable to maintain a high standard of education or keep pace with developments, especially in knowledge and technology. Over time, with exploding enrolments public funds are proving to be insufficient to support higher education. Topping it all is an overall structure of myriad controls with a rigid bureaucracy that has stifled development. In terms of higher education in science and technology, India has, nonetheless, built up one of the largest pool of scientists, engineers, and technicians.

Higher education in India has expanded rapidly over the past two decades. This growth has been mainly driven by private sector initiatives. There are genuine concerns about many institutions being substandard and exploitative. Due to Government ambivalence over the role of the private sector in higher education, this growth has been chaotic and unplanned. The regulatory system has failed to maintain standards or check exploitation. Instead, it has erected formidable entry barriers that have generated undesirable rents. Apparently, voluntary accreditation has no takers from among private providers and by appearance, serves little purpose for any of its stakeholders. Despite impressive growth, higher education in India has only a clutch of quality institutions at the top. Poor and declining standards constitute the majority. Also, there are large numbers of small and non-viable institutions. Entry into elite institutions is very competitive and consequently gives rise to high-stake entrance tests and a flourishing private tuition industry. So high are the stakes that quota-based reservation of seats in the name of affirmative action has occupied centrestage in electoral politics. Subsequent outcome has been the fragmentation of merit space, intensified by competition for limited seats in quality institutions.

Further deterioration in academic standards came about with the steady reduction (in real terms) in public funding while enrolment was growing. The institutions were forced to raise their tuition fees to sustain themselves. Emergence of private providers and increased tuition fees in public institutions have put higher education beyond the reach of the poor.

On the other hand, because of peer effects and prestige, rather than the price-determining behaviour of the institutions, higher education has become sharply hierarchical and has impacted the market clearing process. Higher education is highly stratified at the top-end in that the institutions attract many times the number of students they can accommodate, thus leading to high selectivity, which goes hand in hand with high reputation.

Thus, with price elasticity being low, highly reputed institutions could, in all probability charge heavy tuition fees. This, however, is not done in all cases, since they pursue prestige maximisation rather than profit maximisation.

Not surprisingly, prices fail to balance demand and supply. Non-availability of credible consumer information results in market failure due to information asymmetry. Information asymmetry can arise from student immaturity, with the provider furnishing misleading information or both provider and students having imperfect information about the true quality of the academic programmes.

Thus, the changing structure and delivery of higher education is creating a competitive market for higher education, but total reliance on market forces alone is not the feasible solution. There are certain factors, such as rising inequities, increasing exploitation of young and uninformed students, deteriorating standards and skewed growth, which necessitate government intervention. To overcome the abuse of market forces in higher education there is a need to develop a regulatory system.

Present status of competition and regulation

Main players

The Indian education system is tightly controlled in that the government regulates who you can teach, and what you can charge. The system also has huge regulatory bottlenecks. There are considerable entry barriers wherein universities can be set up only through legislation, approval procedures for starting new courses are cumbersome, and syllabi revision is slow. Concurrently, there is no evaluation of teachers and accreditation systems are extremely weak and arbitrary. The regulators permit relatively little autonomy for institutions and variation, which leads to shortage of quality institutions. To enhance access to higher education, heavy public investment is essential but this will not yield much if the regulatory regime remains rigid. Following are the main players in the higher education system in India:

- The UGC, set up under the UGC Act 1956, is responsible for the coordination, determination and maintenance of standards and release of grants to universities and research organisations.
- Professional Councils are responsible for recognition of courses, promotion of professional institutions and provision of grants to undergraduate programmes.
- Quite a few Research Councils have been set up under the Central Government.

In all, higher education institutions and regulatory bodies are maintained and funded by the Central Government and key appointments are also undertaken by the same. This enables the Central Government, which discharges its responsibilities primarily through the Ministry of HRD, to have the last word on major issues. In addition, there are at least fifteen other ministries/departments in the Government of India that either establish, finance or regulate higher education institutions. There are, nonetheless, significant differences in the mandate, powers and functions of the different regulatory and statutory bodies. The councils have rules and regulations of their own and there is significant overlapping of functions with that of the UGC, other professional councils and even of universities in some cases. Further, there are overlaps in the functions of national and state councils. This has resulted in fragmentation of the higher education system in the country. To ensure co-ordination, the idea of a National Council for Higher Education (NCHE) was mooted. But for some reason it has not materialised so far.[9]

Likewise, state governments also have a major role in higher education funding and are a vital link in the entire higher education chain. The powers in the states are concentrated in the governments' higher education departments. However, as per a Supreme Court judgment, the permission of the state government is essential to start an educational institution within its boundaries. The judgment reiterates that if there are more colleges in a particular area the state would not be justified in granting permission to one more college in that locality.

There may be good reasons to involve state governments in granting permission, but, many times over, this argument is premised on faulty logic. Why is the judiciary assuming that competition will not be good for the locality, both in terms of price and quality? What will be the effect of granting quasi-monopoly rights to the existing college? Is not the agglomeration of institutions in a locality often a good thing for education? Why should the state exclude more colleges from coming up in a locality if there is no government money involved, except for the usual zoning consideration? This ruling is symptomatic of the rather odd character of the regulations[10].

Affiliation

Affiliation of colleges to the university is a major governance and regulation problem. In India, more than 85 percent of all enrolment is in affiliated colleges. Affiliated colleges function under the academic governance of a university, which makes higher education in India highly dispersed. Large numbers of affiliated colleges are non-viable and under-enrolled, thus posing serious problems of governance and regulation. An affiliating university has a defined geographical service area and all colleges located in the area are entitled to be affiliated to that university.

The concept of jurisdiction to affiliated colleges limits competition and creates a monopolistic situation for the affiliating university and further corrupts the state system, because universities often sell these affiliations. If, however, the intent of the affiliation has been to regulate and standardise quality, the intent has failed, and the system has been responsible for the declining reputation of the affiliating university.

Unfortunately, conveners and members of academic bodies' are determined on the basis of majority in the election process and thus weak colleges tend to determine the policy of the university with regard to course content, examinations, etc. Colleges that have the competence and capacity to raise educational standards are without choice, as they have to follow the examination pattern and syllabi of the affiliating university.

Initially, in the process of affiliation, temporary affiliation is granted on condition that permanent affiliation would follow upon meeting certain minimum standards in infrastructure. Even after decades, it is estimated that sixty percent of colleges continue with temporary affiliation for want of minimum infrastructure and facilities. Such colleges are not eligible for recognition by the UGC under Section 2(f) of the UGC Act. Hence, though study degrees of these colleges are awarded by the affiliating university and recognised (because the universities are recognised), the colleges are not recognised by the UGC. More than two-thirds of all colleges in the country (12036 out of 17625) are not recognised by the UGC (UGC, 2005b). This defeats the whole process of recognition by the UGC[11].

Fees

The fees charged by higher educational institutions is also an important issue. The government wants to regulate fees, because it wants to ensure that higher education is affordable. By itself, pricing is not essential in clearing demand and supply in higher education. The demand for seats in the prestigious higher education sector is relatively inelastic and can command high prices. But, instead of helping the poor, fees caps reduce the supply of education. However, average prices would come down with an increase in supply. The entry of foreign universities into the market can be a good source of increasing supply of education but all kind of forces conspire to block the entry of such universities. However, the problem of students not being able to afford education can be addressed by directly empowering students, not by curbing the autonomy of institutions.

Private participation

Private education ventures in India has not been the consequence of changing ideological commitments of the key actors – it has ensued from a breakdown of the higher education system of the State as it was unable to meet the rising demand in terms of number and quality of institutions. However, private ventures continue to suffer from weak ideological and institutional underpinnings.

While private investment in higher education has become inevitable in the current environment, the nature of private participation is so poorly or ambiguously spelt out that pseudo-educational ventures have come to dominate our educational system. Whereas legitimate return on private investment is justifiable, the greed of private providers that could result in the exploitation of gullible masses needs to be checked. The problem is the ambivalent status of these private institutions, which are permitted to operate under the cloak of "charitable" status.

These so-called charitable institutions are being 'privatised', as donors are more likely to retain effective control over the resources they donate and charity is being conflated with creating not-for-profit, but financially sustainable institutions. Should institutions of higher education that derive almost 100 percent of their revenue from charges of goods and services to students be classed as charitable? Should the large number of private colleges be treated as surrogate businesses or genuinely philanthropic?

Box 11.6: Regulating Private Higher Education in South Korea

Private higher education in S Korea grew in an environment marked by very tight regulations. Until 1995, S Korea not only had strict guidelines on how to establish and operate a higher education institution, but also controlled the number of students in each department of each school, as well as student selection methods. In most cases, student quotas and school licences were rationed to those institutions that could demonstrate to the government their capabilities of providing quality education.

Naturally, the strict regulations created substantial rent-seeking activity, while leaving little room for individual educational initiatives among institutions.

Recognising various problems arising from heavy regulation, in 1995 the government started to loosen controls. Among other things, private universities were allowed to regulate the number of students as well as the distribution of students within the institution. The rules to establish a new institution were liberalised. The government also gave small incentive grants to reward performance.

In short, the government introduced competition among universities and colleges by making them more autonomous and more competitive.

Source : Kim Sunwoong (2005), Political economy of massification of higher education in South Korea: Public policy choice on elitism versus accessibility and private-public mix.

In order to claim the status of charitable enterprises, they should explicitly demonstrate the educational commitment and social responsibility and should be willing to be allowed to be prescribed in social and academic audits.

Furthermore they should explicitly demonstrate the educational commitment and social responsibility and should be willing to be allowed to be prescribed in the social and academic audit. Perhaps, now is the time to face realities and to rectify the systemic anomalies and mistaken notions about private higher education in India. Many of these corrections will have to be made in adopting a more pragmatic (rather than an idealistic) approach in the formulation of public policies and interpretation of the Constitution by the various courts. All efforts to burden the overloaded regulatory bodies to maintain quality standards and ethical practices would amount to wasted exercises if these anomalies are not removed. The need of the hour is a coherent policy framework that recognises the complementarities of public and private systems of higher education and ensures the healthy development of both.[12]

Quality standards

The pressure for maintaining quality standards has to come from various sources. Single centralised agencies like the UGC and AICTE have failed to maintain quality due to inadequate capacity and a too formulaic an approach.

Important attributes of quality include the provision of good teachers and good reading material. In the present system, there is neither a quality evaluation of teachers nor any incentives for good teaching. Promotion of teachers depends upon research and bears no weight on teaching. There is, perhaps, availability of good reading material but, at the same time, abysmally inferior and substandard reading material has flooded the market. 'Pass books' are being supplied as text books in most small towns and students are attaining degrees by reading them.

We have concentrated all our energies on regulating institutions by interfering in everything from their admission policies to the amount of land they can possess, but not done the obvious thing, which is to have stringent licensing requirements in these professions, by testing individuals on the output side. It will be far easier to devise and monitor very high quality tests for professionals before licences are granted. Such a process will be fairer as well. It will test individuals, which given the wide variations within institutions, is really important. It will enable professionals to set better standards for their own professions and it ensures that the entire burden of quality control does not fall on an accreditation process. Obviously, strict tests for licensing individual professional will not do away with all imperatives to monitor institutions. But they will tackle the core objective of regulation better by shifting the focus from, say, the number of rooms an institution has to the quality of its output[13].

However, regulating quality of higher education is a very nebulous task. How do we ensure quality? So far the focus of affiliation, licensing and accreditation bodies has been on input monitoring. However, monitoring these inputs itself is a big challenge and even if it is done; does it matter? It is very difficult to establish the correlation between the output (quality) and the input because educational achievement is a complex product and it is not easy to pin down to presence or absence of few variables in learning environment. However, in professional institutions, the employers are a better judge of the quality than the regulators. Prospective students look at the market based signals such as placement and reputation in choosing the institutions rather than regulator's stamp. Private schools in our country are example of this as they deliver better quality not because of inspection by government officials but because they want to compete with other schools.

Status of competition and regulation in school education

The concerns related to quality standards, fees and privatisation in school education are similar to those in higher education but, additionally, the school education system involves various other competition and regulation issues.

Unlike in higher education, there are unfair market practices related to the purchase of school uniform and books. Recently, with the frequent syllabi revision by the National Council of Education Research and Training (NCERT), the supply of books by the monopolist NCERT has seen a huge time lag. At the same time, books with the revised syllabi are supplied by private publishers on time, and students are forced to purchase these books at a much higher price because of pressure from schools. But once the NCERT publishes its books, students have to also purchase these because they are compulsory! The delay is difficult to fathom because the NCERT is aware of the demand for its books nearly a year in advance of publication.

Another important issue is the rampant growth of coaching institutions for the entrance examinations to various degree courses. Such coaching institutes divert students from regular schools and exploit parents in the name of ensuring admission to prestigious colleges. As such, coaching institutes are real examples of asymmetric information.

As in higher education, the demand for school education is increasing from fee-paying students – a demand to which the private sector naturally responds. According to the NCAER, since the early 1990s, the percentage of 6-14 year-old students attending private schools has increased from less than one-tenth to a quarter of all school-goers. This percentage may be higher as a large number of private schools are not officially recognised.

Private schools are good business. The real problem is that since there is a profit motive to run these schools, the students are from well-off families and not from the poorer sections of society. The poor have no choice but to send their children to government schools. This system places a limit on parents' free choice on schools. Since government schools are no longer able to meet the educational demands of society, there is a need to restructure educational policies and redefine stakeholders' roles in the delivery of education. Education vouchers can be a viable solution to enhance this choice.

Box 11.7: Education Vouchers Becoming Popular

Education vouchers in the US were introduced by the Reagan administration in the 1980s. So far the voucher programmes have been implemented only in six states and most of the education vouchers are offered to particular students who belong to low-income families and to schools that are not performing well.

The popularity of the scheme is on the rise with the state of Milwaukee leading the way. Nearly 15,000 students are using vouchers and approximately US$100mn is paid in vouchers. About 26 percent of students are receiving public funding to attend schools of their choice outside the state system. However, Milwaukee residents are paying more in taxes for voucher students than for those attending state schools. Political support for vouchers has been mixed in the US, but it is increasing.

Education vouchers

The main purpose of education vouchers is to increase parental freedom to choose schools for their children. To allow enhanced access to private schools, the primary focus should be on low-income families. One of the desirable consequences of vouchers is the initiation of competition among public schools as well as between public and private schools. Such a free market for education services lowers costs and at the same time, improves accountability. However, there is still much debate about the advantages and disadvantages of voucher schemes.

The Government can provide subsidy to goods and services by subsidising either producers or consumers. Economic theory suggests that subsidising consumers is more efficient and enhances consumer welfare. The present system of government schools is a producer subsidy, while an education voucher would be a consumer subsidy and would result in enhanced consumer welfare. Vouchers would foster competition and allow consumers to purchase better quality education.

Experience all over the world clearly suggests that it is not so much the size of the government education budget but how the budget is spent that determines the efficacy of the education system. By way of reference, the

State of Kerala stands witness to the significance of choice and competition in education. Political will is very important to implement this programme. However, the design depends on how policy makers value the outcomes of the endorsed vouchers. One has to ensure, through proper regulation, that 'voucher schools' would be academically and economically effective so that there is a sufficient number of autonomous schools offering their services.

Conclusion

Anticompetitive practices plague healthcare provision. Such practices, mostly, are local level abuses affecting, inadvertently, both access and quality. Such abuses need local solutions by way of local regulatory agencies supported by vigilant consumer activism. Strict regulation is the need of the hour, applying to all hospitals, nursing homes and medical practitioners. Fee structures at private facilities should be formalised and monitored. For the major part, the result of such an initiative would be to put the brakes on the exploitation of patients. It would also facilitate the establishment of appropriate health insurance schemes for specified procedures. Contrary to the scenario in healthcare services, the Indian education system is one of the most tightly controlled in the world.

The National Knowledge Commission[14] has highlighted the extreme barriers to entry that exist in the field of universities. This is resulting in an increase in the size and deterioration in the quality of existing universities as there is no competition among universities. Another important drawback in the present system is that it does not promote autonomy and accountability. Almost all regulatory functions are carried out by the UGC, which seeks to regulate almost every aspect of an institution. This overburdens the UGC and it is neither equipped nor capable of doing so. It is essential to reduce the UGC workload by creating an independent regulator that can ensure the proper supply of good institutions and foster accountability. But it is to be ensured that the new regulator deteriorate to the same level of UGC in the coming years.

For school education, there is a need to regulate coaching institutes and the supply of books. Education vouchers can ensure proper choice in schooling. Thus, there is a need to develop a roadmap for streamlining of the education sector, overall, through decentralisation of central/state regulation and development of institutional mechanisms for effective market co-ordination. This sector requires two transformations: the state must invest heavily to increase access to education and should respect the autonomy of higher educational institutions, so that a diversity of experiments find expression. Institutions should be allowed to have the flexibility so that talent can be retained in the country and can respond quickly to growing demand. The education sector in India requires a paradigm shift in regulation and the debate has only just begun.

Endnotes

1 See *Director General (I&R) versus Stangen Pharmaceutical Ltd. [2005 CTJ 82 (MRTP)]* and also *Director General (I & R) v. Jagson Pal Pharma Ltd. [2002 CTJ 151 (MRTP)]* for MRTPC's judgment on drug-pricing and competition. The Commission's position in these cases has been that increasing prices of drugs *per se* is not an anticompetitive practice. This position is maintained in the Competition Act. For a critique of this position see Mehta, Pradeep, *Competition Policy and Consumer Welfare* in *Towards a Functional Competition Policy for India,* edited by Pradeep S. Mehta, Academic Foundation and CUTS, 2006.

2 See *Options For Using Competition Law/Policy Tools In Dealing With Anticompetitive Practices In The Pharmaceutical Industry And The Health Delivery System*, a report prepared for the WHO and Ministry of Health and Family Welfare, Government of India by CUTS, 2006.

3 CUTS C-CIER: Report on Options For using Competition Law/Policy T00ls in Dealing with Anticompetitive Practices in The Pharmaceutical Industry and The Health Delivery system, P- 53.

4 See Chun Biak Lun, Pooja Garg, Ramya Raghuram & Sujata Kukreja, *Reconciling TRIPs with Human Rights, An Indian Case Study* in Southern Initiatives Journal of Sustainable Development (Vol I/IV), Southern Initiatives, Calcutta, 2006.

5 In the new product-patent regime. Data source, HDR, 2005, UNDP.

6 http://video.disc.iisc.ernet.in/vigyan/pharm.html

7 Parliament of India, *126th Report on the Petition Seeking Legislative Measures Inter Alia to Provide a Regulatory Mechanism for Private Nursing Homes/Clinics and Stringent Penal Provisions For Production/Distribution, etc. of Spurious Medicines*, Committee on Petitions, Rajya Sabha Secretariat, New Delhi, December 2005.

8 K V Narayana, 'Changing Health Care System', *Economic and Political Weekly*, March 22-29, 2003, p. 1230-1241

9 Pawan Agarwal, 'Higher Education in India: The Need for Change'. Working Paper No. 180, the Indian Council For Research on International Economic Relations. June 2006.

10 Pratap Bhanu Mehta, 'Critiquing the Regulatory Regime', *The Indian Express*, July 15, 2005.

11 Pawan Agrawal, 'Higher Education in India: The Need for Change: Working Paper No. 180', the Indian Council For Research on International Economic Relations, June 2006.

12 Pawan Agrawal, 'Higher Education in India: The Need for Change: Working Paper No. 180'. The Indian Council For Research on International Economic Relations. June 2006.

13 Pratap Bhanu Mehta, 'How to Build Quality Institutions', *The Indian Express*, July 16, 2005.

14 National Knowledge Commission Report, 2006.

CHAPTER 12

Epilogue: The Way Forward

This Report has tried to cover status of the competition and regulation scenario in India as until 2006-07, by looking at the contours, problems and their possible solutions. It cannot be comprehensive, but has been drafted to stimulate a debate in the country on how to make the implementation of competition and regulation regime more effective, so that the regulators can discharge their functions independently and effectively. There are lacunae in the laws and policies and will need corrections as we move ahead in creating a sound economic regulatory regime, which can deliver higher growth, create more employment and ensure distributional justice to all. Progress will be incremental – achieved through a marathon rather than a sprint.

The dynamics of India's coalition politics will have to be borne in mind as that will certainly be the norm in the future as well. For instance, if regulatory reforms suggest that to ensure independence, all sectoral and competition agencies be taken out from the oversight of the line ministry and be made accountable directly to the Parliament – as has been suggested by the Planning Commission – Will it be an easy task? No, it will not be. However, incremental efforts over time can make this happen in the next three-five years.

Our own conviction is that the nation can grow faster and develop if competition reforms are introduced and implemented scientifically over time. This becomes an imperative if we are to achieve economic development to attract infrastructure investments of US$450bn or more over the Eleventh Five-Year Plan. Some raise questions on the links between competition policy and economic development, which have been explained in the Report, particularly in the Prologue. So long as we recognise that growth is an essential prerequisite for development, we cannot fail to see this as an important link.

However, it is important to note that these links can be gainfully exploited only when competition policy is effective and soundly coordinated with other closely related policies such as industrial policy, trade policy and other policies which affect the markets. This case too has been argued in the Prologue.

The future agenda

There are mainly five issues for a forward looking agenda:

1. Adopt and implement a National Competition Policy;
2. Implement regulatory reforms;
3. Implement competition rules;
4. Address systemic issues coherently; and
5. Develop capacity building solutions.

1. Adopt and implement a National Competition Policy

A competition policy is desirable for several reasons, the most important of which is to promote economic development and inclusive growth, as has been argued in the Prologue. Such a Policy is the motherboard for designing good policies and practices on economic governance, and is thus an imperative. To underline, the economic reforms undertaken by the Government have been generally on a sector-by-sector basis and progress across sectors has not been uniform[1]. The sector-by-sector approach also carries the risk of inconsistency between sectoral policies. A broad-based, overarching NCP will promote coherence in the reforms and establish uniform competition principles across sectors. It will also avoid policies that are anachronistic in the new economic regime.

To strengthen the forces of competition in the market, both competition policy and market regulatory laws are required. They complement each other.

> ***Box 12.1: The Difference between Competition and Regulation***
>
> *Competition is a process of economic rivalry between firms for larger share of the market, which leads to internal efficiency and lower prices for the consumers. Competition is a process by which cost-effective production can be achieved in a structure where entry and exit are easy, and there is the existence of a reasonable number of players and close substitution between products of different players in a given industry.*
>
> *Regulation is a set of transparent, consistent, and non-discriminatory rules that creates a competitive and dynamic environment in which market players can thrive. In its absence, anticompetitive practices and regulatory failures may not allow the market process to yield desirable outcomes.*
>
> *However, while competition tools are always applicable, regulatory tools are needed only when competition is not well developed. In natural monopolies, such as in electricity or water, where competition is not feasible, regulation mimics competitive outcomes. The objective of both competition and regulation is to promote fairplay and economic democracy, thus benefiting all stakeholders.*

A regulatory law promotes healthy competition in the regulated sector through various structural and behavioural measures, mimics competition in natural monopolies and ensures competition where the market fails. A competition law prohibits and penalises anticompetitive practices by enterprises functioning in the market; that is, it addresses market failures. The aim of competition policy is to create a framework of policies and regulations that will facilitate competitive outcomes in the market and to ensure that economic measures are designed and adopted with competition principles at their core.

The objectives of the NCP should, therefore, be:

- promotion of a strong competition culture within the country;
- bringing about convergence and coherence in policies, law and procedures at all levels of governance;
- ensuring synergy between the competition agency and sectoral regulators;
- striving for integration of a national market;
- making national firms globally competitive; and
- harmonising the national economy with the global economy.

The Planning Commission has drafted the outlines of a Competition Policy[2]. The *prima facie* agenda for the purpose of this Report has been spelt out in seven initial steps. It will be a formidable task, and will have to deal with *status quoism* and entrenched vested interests. But it can be done.

Once the Competition Policy is implemented many other pieces in the jigsaw puzzle will fall into place, and hence it is the first priority.

The *Prima Facie* Agenda Towards Economic Freedom

i. Adopt a National Competition Policy by March 2008

Planning Commission's Eleventh Five-Year Plan Document containing an outline of the NCP is to be adopted by the National Development Council.

ii. Establish a Competition Policy Council by June 2008

- Small 15-20 member body comprising two-third non-officials, but headed by an eminent non-government person, with a mandate to appoint expert or working groups on topics/subjects requiring deeper discussions, which can co-opt experts.
- The Committee to meet at least once in a quarter, while expert/ working groups to meet as often as required.
- Ex-officio members to include Secretaries/heads of Deptt of Economic Affairs; Corporate Affairs; Industrial Policy & Promotion; Commerce;

Consumer Affairs; Law & Justice; CAG; CCI, TRAI and CERC and similar bodies by rotation if too many in number.

- Ex-officio members can nominate alternates to attend meetings, but they should not be below the level of Joint Secretary.
- Non-officials to include two business newspaper editors; two academics each from economics and law background; two representatives each of business chambers and NGOs, and two distinguished experts from the field of law, economics or accountancy. *Adequate remuneration, and not just standard scale sitting fees, should be provided to engage the non-official members' undivided attention and commitment to the cause and the goals.*

iii. Operationalising the Council by July 2008

Foundational meeting held and methodology adopted.

iv. Create a National Working Group on Competition Assessment by August 2008

NWG to have membership from Council Members and select state governments to deliberate on the agenda.

v. Launch the project on Competition Assessment of all government policies, laws and practices on identified benchmarks described in the Policy by August 2008

As the first step to prepare and circulate a Discussion Paper on Competition Assessment to all branches of the government at centre and states; call a seminar, educate the stakeholders through media, and launch the project with a deadline of six months. The process of assessments will also create public awareness on the contours of the NCP.

vi. Specific assessment studies launched by February 2009

Prepare Terms of Reference (ToR) for carrying out sector specific assessments.

- At least six specific sector assessment studies to be prioritised and launched for an early harvest within 3-6 months.
- Engage reputed consultants to do it, with a suitable budget from the government.
- Results to be delivered to the government and parliament for taking action.
- Finance Minister to highlight the Policy in his budget speech, so as to garner wider support.

vii. Implementation of Assessment results by Monsoon session of Parliament, 2009

Implementation of assessment recommendations in some sectors to begin through a cabinet decision/GOM and National Development Council, and completed by June, 2009 through legislative proposals wherever required or through administrative measures wherever possible.

2. Implement regulatory reforms

The above section has proposed action on some important fundamental issues for deepening the competition agenda. This section speaks about the specific area of regulatory reforms in order to encourage the government to adopt the best practices in the regulatory architecture in the country, so that we can attract a high order of investment in infrastructure and promote consumer satisfaction to the best extent possible. Predictability of the regulatory framework is an essential pre-requisite to attract investment.

Separation of the policy formulation function from regulation became imperative to offer a level-playing field to competing service providers. Consequently, the concept of (so-called) independent regulation gained popularity. Nevertheless, given that regulatory institutions have been created to achieve predetermined policy objectives, an absolute divorce between the two is not desirable. In fact, regulatory objectives have to be derived from the policy objectives. Sufficient provisions are required to ensure that the regulator's domain is not encroached upon by the government in the name of achieving policy objectives. This calls for creating a clear distinction between policy and regulation, which is often missing.

To cite an ongoing case, the Department of Telecommunications (DoT) announced certain proposals (on Access Deficit Charges, one India call rate, inter-connection usage charges) to restructure the tariff regime in telecommunications, considering these to be policy issues. However, the TRAI, the sector regulator, objected to these proposals. After the objection, the DoT contemplated exercising its powers under the TRAI Act to issue 'policy directives' to the regulator. Although the ministry finally refrained from doing so, this episode highlights the need to clearly demarcate policy and regulatory issues.

Box 12.2: 'We Need to Work on This'

In infrastructure financing, if you could provide sufficient assurance of returns to investors and not make them keep thinking about unexpected changes in the rules of engagement in the future, I think they would be very happy to invest in infrastructure. We need to work on this.

Dr. Raghuram G. Rajan, Chairman, Committee on Financial Sector Reform in Business Line, *Wednesday, August 29, 2007.*

Maintaining an arm's-length distance between the regulators and the line-ministry is desirable to ensure that the latter does not influence the former unduly. It needs to be appreciated that the line-ministry is responsible for the overall development of the sector, and the regulator is instrumental in attaining this objective. In fact, both the regulator and the line ministry share common responsibilities – ensuring orderly and sustained growth of the sector, attracting private investment, enhancing consumer protection and so on.

Currently, in some cases, the line minister is made answerable to the legislature even for functions that have been transferred to the regulator. This makes the line ministry continue to want to perform the same functions and interfere in the domain of regulator, which impairs regulatory functioning and, consequently, its efficacy.

Hence, a mechanism needs to be developed to make the regulators directly accountable to the legislature. Furthermore, having appropriate processes in place to facilitate consultations between the line ministry and the regulator is required to avoid a possible compromise on regulatory autonomy. The manner of consultations between the RBI and the ministry of finance is a good model: the RBI holds consultations with the ministry of finance on a regular basis, at formal and informal levels, without compromising its autonomy.

Recommendations[3]

1. *Underlying legislation need to be reviewed and modernised as per the changed circumstances, clearly spelling out the objectives and scope of regulation and the powers of the regulator in the enabling legislation.*
2. *Provide a clear distinction between 'policy' and 'non-policy' issues;*
3. *Make regulatory agencies autonomous by legislation so that undue interference by the line ministry is avoided. However, the line ministry should defend the regulator's decisions before the legislature whenever required;*
4. *There should be regular consultation between the line ministry and the regulator; the RBI-ministry of finance interface model could be applied wherever feasible;*
5. *Establish a Parliamentary Committee on regulation and competition as the reporting authority for all regulatory agencies. The Committee's domain should be confined to systemic issues only and not the individual decisions and orders of regulators. In case of operational matters, the regulator is in any case accountable to the Appellate Tribunal and the Judiciary (High Courts and the Supreme Court); and*
6. *Constitute multi-sectoral regulators, such as one for energy and another for transport to reduce the possibility of regulatory capture by the regulated sector and line ministry, and for efficiency.*

3. Implement competition rules

Much of the regulation in the infrastructure area is a part of the competition rubric. One of the principles of a national competition policy is to proactively promote competition rules through the competition and regulatory laws, and by removing the repugnant anticompetitive provisions which have a direct and negative bearing on the functioning of a healthy market. The case has been argued in depth throughout the Report.

Implementation of the national competition policy described above will be something new in India and hence, a pragmatic timeline has been suggested. In contrast, the implementation of competition rules is an ongoing exercise. However, there are few areas – both macro/cross-cutting and some micro – which are relevant to the new CCI. These are being described below under two sections: enforcement agenda and non-enforcement agenda, but without timelines.

3.1 Enforcement agenda

There are three major types of anticompetitive practices which are prevalent in India and, for that matter, in most countries. These are:

1. Combinations, which may result in dominance, with a propensity to abuse;
2. Abuse of dominance, including IPRs, natural monopolies (such as in the electricity sector); and
3. Cartels, which include collective abuse.

If one were to prioritise the entire enforcement agenda, the CCI needs to first take up winning cases to build up a public buy-in. If it gets into complex cases, which are subject to deep analyses and political pressure, setbacks can result in loss of public confidence and, more importantly, erode the morale of its staff.

Although the competition law is new, the Indian public have been exposed to action on anticompetitive practices by the MRTPC since it came into being in the 1970s. Alas, cases filed under the MRTPA have often been unsuccessful – and where there was success it was small and insignificant. Thus the first thing which the CCI should do is to study the case history of the MRTPC to understand the reasons for the failure. Some reasons are obvious – flaws in the design of the law is one – but some other reasons can shed a light on the taxonomy and pathology of abuses in the Indian context. Such learning can be home-grown and cannot be acquired from the praxis of any other jurisdiction.

The MRTPC has featured in the media and continues to do so today, even when it issues notices of enquiry, which by itself raises awareness of the issues. The MRTPC featured more strongly in the media on UTP cases:

misleading advertising, deceptive claims, etc. which created a good public buy-in. In fact, the same can be seen in any country where the competition authority deals with UTPs. The Australian Competition & Consumer Commission (ACCC) is referred to in the local media as the 'consumer watchdog'. Whatever it does as a competition regulator, it has high credibility.

In inheriting the mantle of the MRTPC, CA07 has dropped UTPs from its purview which will henceforth be handled by the consumer disputes redressal agencies established under the COPRA, 1986. Besides that, the MRTPC will continue to work for another two years to wind up all pending cases. If it cannot do that, the competition cases will be transferred to the CCI, and the UTP cases to the consumer disputes redressal agencies.

The other issue is related to the regulation of combinations (mergers, acquisitions, amalgamations etc), which is again a complex issue for several reasons stated above. To begin with, this area is not appealing enough for the public to appreciate, and hence the CCI cannot build up the same level of public awareness as in competition abuse cases. Combination cases will be covered by the pink press and business pages of dailies, but will not be on the television unless there are controversies. The only kinds of combination cases which can hit the headlines are those of a foreign company taking over an Indian one, or those relating to companies manufacturing consumer goods. The first is because of a remnance of xenophobia about anything foreign (this has diminished over time but still exists), and the second because a consumer goods case usually raises the hackles of the consumer movement.

The issue of combinations regulation was the main reason for opposition to the Competition Act from business lobbies in India (See Chapter 6). In fact, the original Act of 2002 had it as a voluntary notification with high thresholds, but now it has been made mandatory. Around the world both systems are followed, and the debate on which is better is yet to be settled. Nonetheless, any attempt by the CCI to examine a combination will not only need skilled human resources to analyse them, but will also face political economy constraints in cases involving large companies. There is an added dimension to this issue – combinations over a certain threshold will only come under the competition lens, which is inadequate in our opinion. For example, two small enterprises (below the threshold levels) can merge in a geographical area where there is no other competitor and imports are not an option. This can lead to anticompetitive outcomes. Ideally, the combination regulation should have included a hybrid criterion of size and market shares in order to be effective.

The original act prioritises the implementation of the CA02 by recommending the implementation of the first phase over a year to focus on advocacy activities; the second phase to deal with anticompetitive practices and the third year to begin work on combination regulation. Since the 2002 Act was notified in October, 2003 the CCI has been engaged in advocacy activities and conducting research, which has been quite effective. In addition, CUTS too has been engaged in research and advocacy activities intensively and extensively. Thus in hindsight, the long period of advocacy has been fairly productive. However, advocacy on its own does not produce the necessary level of awareness unless it is accompanied by illustrations and actions. That time has come for the CA07 – passed by the Parliament in September 2007 – to be fully operational sometime in 2008.

That said, there is much hue and cry on palpable anticompetitive practices in the country, such as abuse of dominance and cartels. For example a case pending before the Supreme Court on price gouging by Monsanto on supply of Bt cotton seeds due to its IPRs is a typical case of abuse of dominance (see Chapter 8) and it has attracted much publicity. Not only that, many state governments have taken up the case at the MRTPC egged on by its farmer lobbies. The MRTPC's orders have been challenged at the Supreme Court, but the case is yet to be decided.

In the interlude, Monsanto has tried to settle the matter out of court but the principal complainant, the State of Andhra Pradesh, far from succumbing to it, has demanded that all the other state governments who joined in as parties should be involved in any settlement. This case, which has exposed state governments on anticompetitive practices, highlights the power of farmers' lobbies. In fact, both the Canadian and US competition laws came about in the late 19th century as a result of farmers' lobbies, who were being exploited by businesses. Thus, this case can be a good entry point for the CCI to engage with states in establishing contact points to bring forward issues to them. The Act provides for any state government to bring forth complaints.

Similarly, there is abundance of conduct cases in India under the window of abuse of dominance, such as in the utility sector. These require to be studied on a continuing basis and taken action upon.

The second major issue is that of cartels (see Chapter 7). The cement cartel is again a current hot topic and offers a good base for the CCI to initiate action through existing provisions of the Competition Act 2007, which provides for amnesty. There are scores of other cartels, including duopolies and collective abuse cases, which need to be explored and attacked on a winning priority basis. Some innovative approaches need to be tried out by the CCI to start with, so that it can bust cartels and create a good public buy-in and a fear among cartelisers.

The innovation will require the CCI to engage with the CAG, which audits all government budgets, and can check any cartel-type behavior or pattern in bulk purchases. To begin with cement purchases by government agencies can be the first priority for investigation through the CAG. Similarly other big government agencies like the Railways can be roped in for a systematic evaluation of bulk purchases.

Another central agency which can be roped in is the Central Bureau of Investigation (CBI) on the lines of the use of FBI in the US, which has often helped expose collusive action by businesses. The only minor problem with the CBI *vis-a-vis* the FBI is that, while the latter has a remit all over the US, the CBI's remit is limited to matters which concern the central government and it needs permission of state governments for attacking any crime being conducted in the state. However, with the cooperation of state governments, such a problem can be overcome.

The consumer goods sector should be first priority in attacking competition abuses to raise public acceptability and awareness. For example, when the Peruvian competition authority was launched in early 1990s, two important cases were actioned by them – in the poultry and bakery markets, which have a direct interface with the public. This brought down the prices and raised public confidence in the regime.

In taking up either type of cases, the CCI should also build up a 'friends of competition' army in the media and the consumer movement, who can bring in information for further investigation and action.

3.2 Non-enforcement agenda

Policy advocacy: The first priority for the CCI is to continue to *suo moto* engage in policy advocacy on legislative bills and other measures. It has raised the ante in several cases, for example with a retrogressive bill which aims at creating a monopoly for the Post Office in postal articles below 500gms. The weight benchmark came down to 350gms and then to 150gms due to stiff opposition from many, including the Planning Commission and the Prime Minister's Office. However, we have not heard the last of this bill, which is still being debated. Our view is that express articles should be allowed to be sent by the courier industry at double the rates of ordinary postal articles. However, the Post Office can continue to compete with the courier industry in both express and ordinary articles, just as it does currently. This is the case with industries such as telecom and airlines. If the Post Office is granted a monopoly, it will be a retrogressive step.

Another critical area for CCI's intervention is in the matter of disinvestment/ privatisation. Often public sector units are sold or disinvested to private parties, and we witness the phenomenon of being taken out of the pan to be thrown into the fire. Public monopolies become private monopolies and turn rapacious.

The CA07 directs the Government, at the centre and states, to ask for the views of the CCI on policies which may impact competition, but it is not mandatory. Additionally, even when views are sought from the CCI there is no provision to force the government to accept them. There is no transparency in this process and the public may not be aware of what has transpired. Whenever asked for an opinion, the CCI should follow strict principles of transparency and put it on their website. Such a strategy will also build up public support. A provision on transparency does not exist in the Competition Act, but does exist in other regulatory laws such as TRAI Act – and in the general governance principles expounded by the Government. Furthermore, the Right to Information (RTI) Act empowers citizens to seek such information on any such matter from any government department or undertaking.

Much of what follows is on the subject of awareness generation, which leads to building capacity among stakeholders. Thus there is an overlap. However, capacity building on its own is being treated separately in this Report under both Systemic Issues and Sectoral Approaches.

Awareness generation

a) *Media*: One good way to create public awareness is through media interaction, advertising and publicity. Besides, publication and distribution of literature through various targeted means are also desirable.

b) *Public meetings*: Well-designed and -implemented public meetings along with the distribution of accessible literature can be very effective in raising basic awareness. Such meetings can be organised under the banner of social organisations such as Rotary Club and Lions Club, university and college teachers associations, etc.

c) *Compliance education:* The simultaneous practice of compliance education of business executives through structured programmes will need to be carried out by the CCI to raise awareness and prevent anticompetitive practices by businesses. There are various good models available in other countries such as Australia, which can be tailored to suit to the Indian conditions and socio-economic-cultural context. Money should be invested in this and if possible the Department of Corporate Affairs can – through professional associations or directly – make it mandatory for business executives to undergo a minimum period of time of training as a stand-alone process or as a part of the Corporate Governance Compliances.

d) *Specialised courses:* There is very little understanding of competition issues among professionals, economists and lawyers. For example, the course for company secretaries in India requires a study of only Indian competition law, but there is hardly any company secretary who has to deal with it. They are more interested and engaged in the administration and compliance with company law. Moreover, none of the undergraduate courses in economics and law require a detailed study of competition issues.

These lacunae can be overcome by offering both long- and short-term training courses by open and regular universities and colleges. Business chambers, NGOs and development research and training institutions can also be encouraged to offer such courses[4].

e) ***Seminars and handbooks:*** The focus here should be on enforcement of the law, targeted at members and staff of competition and regulatory agencies. A small panel of experienced enforcement officials from developed and developing countries should be drafted into such programmes, as is being done by the OECD secretariat. Case study seminars and handbooks will need to be designed to include various types of competition abuses in one category, with examples brought in from several jurisdictions to train competition officials and other stakeholders.

A good way to create awareness on competition and regulation issues is to organise well-designed and -structured international seminars where staff and members of the competition agencies are exposed to good and bad practices or successes and failures from other countries.

Advocacy on strengthening the CA07: The next and most important item for the CCI's non-enforcement agenda is advocacy on infirmities in the CA07. The wearer knows where the shoe pinches, and hence the CCI has to carry out this function in a scientific manner. Broadly speaking there are two major infirmities: independence and overlap with sector regulators. There are a few others too, but in this Report, we deal with the big ones which can create problems in the efficient and fearless application of the CA07.

i) Independence and autonomy

There are four major weaknesses in the CA07, which will prevent truly independent functioning of the CCI. These are:

a) *Provision of grants,* etc. It is the Parliament which should provide for grants to the CCI on a charge basis, rather than through the Department of Corporate Affairs. Often this defeats the purpose of the authority in discharging its functions efficiently and acts like a road bump in cases of disagreement with the government. Further, the CCI should be allowed to retain the fines and penalties it levies as part of the Competition Fund to run its operations.
b) *Exemptions* from the ambit of the law is currently with the government, and is often the target of lobbying by entrenched interests to get out of the clutches of the law. It should be used parsimoniously by the government and in prior and transparent

consultation with the CCI, so that the interested public also knows and can participate in the debate.

c) *Policy directives* can be issued by the government to the CCI, but there is no provision for transparency or consultation with the CCI. In Canada, all such directives, if issued at all, are issued through a transparent process.

d) *Supersession of the CCI* can also be effected by the government but this would only weaken the CCI. If such a thing is at all required then the due process should be followed and an eminent persons' group should decide if supersession is really the first best solution.

ii) Overlap with sector regulators.

This is a contentious area and needs to be clarified in the law. There are many good practices around the world, which can be borrowed to amend the CA07 over time. While behavioural issues should be dealt with by the CCI, structural issues should be dealt with by the sector regulator. Secondly, there should be mandatory consultation between the two, which is provided for in their enabling legislations. This is followed in EU countries and is a good model. In the UK, there is a concurrence party, a membership body comprising the two competition agencies and sector regulators, which decides on which regulator should handle a particular case. Besides that, in order to bring in convergence a common CAT is empowered to deal with all appeals from the competition agency orders and those of the sector regulators too.

4. Address systemic issues coherently

4.1 Personnel matters: The first cross-cutting issue is the quality of personnel, both members and staff, in the regulatory authorities. Quality of regulation is directly linked to the quality of personnel. The Government's resolve is to have professionally-run institutions, stated in the NCMP of May, 2004 and reinforced in the President's Parliamentary Address of June, 2005 (see Prologue for details).

A common (rhetorical) refrain that is often heard is how one can get Members/ Chairmen at a peon's salary. Thus, only retired civil servants or judges are available at such low salaries. Many successful lawyers do not join the bench, a common practice in the judiciary. 60 percent of judges are appointed from among the lawyers' community and 40 percent from the state judicial service.

At a Finance Ministry/World Bank seminar on Public Private Partnerships (PPPs) in New Delhi, on February 05-06, 2007, a senior executive of Mahindra and Mahindra, Arun Nanda, publicly stated that he is available to work in a regulatory authority at the prevalent scales, provided he is properly empowered[5]. He defended his position stating that there are many like him who would be willing to do so at an advanced stage of their private sector careers, as they have made enough money by then. This view is borne out by the fact that many High Court and Supreme Court judges are successful former lawyers who are attracted to the job because of the independence that they enjoy in discharging their adjudicatory functions, and the prestige of the job.

In the case of private sector executives, one common view is that their functioning may be compromised by their past associations. That is another silly excuse. Judges who may have a relation with a lawyer or a client are required to recuse themselves from a case where there is the slightest doubt of conflict of interest. Similarly a regulator, too, can exercise discretion or caution in dealing with matters where any nexus is suspected to exist *vis-a-vis* their past association. Distortions can happen as in any system, but they will be more in the nature of exceptions rather than the norm.

4.2 Selection and appointment of regulators: This is one of the most crucial aspects that need to be addressed upfront. There has been a tendency in recent years to appoint retired bureaucrats and judges as heads of regulatory bodies without ascertaining their suitability. This is an unhealthy practice and needs to be curbed.

Indeed, attracting young talent is key to making these institutions work in a desirable manner. This would not happen until the selection process is made transparent and attractive compensation is offered. Attracting professionals from diverse backgrounds would go a long way to attain regulatory efficacy.

Recommendations

1. *A standing committee of eminent people should be constituted to select regulators for various regulatory agencies at the central level and a similar model should be followed in the states;*
2. *Proper manpower planning should be carried out to ensure that a regulator is selected in advance of a position falling vacant; applications should be invited against pre-determined selection criteria;*
3. *Regulators should be given a fixed tenure of five years with a maximum age limit of 60 years for appointment, with the reasons for any exceptions recorded in writing;*
4. *Those provisions in regulatory laws that deter people from business/non-government sector to move to regulatory bodies should be removed;*
5. *The prevailing practice of sinecure needs to be discouraged. The bottom line must be to encourage experts and young professionals to join such positions; and offer attractive compensation to draw young professionals to join regulatory bodies;*
6. *The government's Department of Personnel should be designated as the administrative ministry for regulatory bodies, responsible for release of appointment letter and other administrative matters; and*

7. *Regulators and their staff should be provided with short-term training prior to induction.*

4.3 Removal: Providing protection against possible discretionary dismissal, unlike supersession, would go a long way to ensure functional autonomy to regulators. Such provisions would help regulators to work towards attaining the stated objectives without undue interference and prove an effective deterrent against possible capture by the line-ministry.

For instance, in 2000 the Government amended the TRAI Act and, in the process, reconstituted the TRAI, which is considered a rather weak institution. This example demonstrates the vulnerability that 'independent' regulatory institutions face in India.

Recommendations

Protection of regulators against arbitrary removal by the Government is necessary. A member of a regulatory agency should be removed only in case of proven guilt or inability established by due process.

4.4 Appellate Tribunals: Presently appellate tribunals have been proliferating along with regulatory agencies, though most do not have much work. This is an unnecessary burden on the exchequer and aggravates the undesirable practice of retired bureaucrats and judges wrangling sinecure positions.

Secondly, there is often an overlap between the functions performed by various regulatory agencies – between the competition authority and sectoral regulators, between electricity regulators and the proposed petroleum regulator and so on. Setting up an appellate body for each regulatory institution can lead to forum shopping and inconsistent decisions at the appellate level. A common appellate tribunal for related regulatory agencies will ensure convergence in the application of regulatory laws on issues where there is an overlap, and set healthy conventions to ensure harmonious application of regulatory laws. There is one piece of good news here: the Electricity Appellate Tribunal is also the appeals body for orders of the Petroleum and Natural Gas Regulatory Board.

Recommendations

1. *Establish a common appellate tribunal with benches for a broad set of regulators, for instance one for the infrastructure sector and another for the financial sector;*
2. *The law should provide for appeal against a regulator's decision before the Common Appellate Tribunal first and then to the Supreme Court. The appeal should be made on points of law only; and*

3. *The power to deal with disputes should be with the regulator, not the Tribunal.*

4.5 Accountability: It goes hand-in-hand with autonomy. The current provision of regulators submitting annual reports to the legislature is not sufficient to hold them accountable in an effective manner. Having appropriate provisions to ensure accountability on an *ex-ante* basis is also important.

Recommendations

1. *Make the Parliamentary Committee on Regulation & Competition the reporting authority for regulatory agencies. The Committee should have its own staff with suitable experience and must not depend on other agencies;*
2. *The proposed Committee can should be able to call regulators for an explanation only in case of systemic issues;*
3. *Create a Consumer Advocacy Fund to build the capacity of consumer/ civil society groups to raise consumer concerns more effectively and to facilitate review of the regulator's performance by an important stakeholder group;*
4. *Provide for evaluation of regulator's performance through a peer/external review system against the given mandate; and*
5. *Political parties and the Government should give their feedback as stakeholders to the regulator whenever it is sought. Besides, they should participate in the open discussions/hearings conducted by the regulator; and*
6. *The process should be transparent – by making hearings open to the media and television broadcast, for instance. This is tied in very strongly to parliamentary committee hearings in the UK for instance. In India, there is a system of parliamentary committee hearings, but those are held in camera. However, reports are tabled in the Parliament.*

4.6 Financial Autonomy: The regulator's dependence on the line-ministry to get its budget approved is not desirable for the reason that such a provision might limit regulatory autonomy indirectly. The number and nature of staff, appointing consultants and market investigation are activities that can be controlled through budget allocations.

At present, there is an absence of common practice across the sectors. While the IRDA and the SEBI have been allowed to raise resources on their own, other regulatory agencies do not have this freedom. It is another story that they have not been allowed to expend according to their own wishes. Recently, the government turned down the TRAI's request to allow it to raise resources by imposing a cess on revenue generated by service providers, in spite of the fact that legislation provides for it.

Recommendations

1. *Regulatory agencies should be allowed to generate resources on their own through a fee, cess, etc. wherever possible, and be allowed to spend it;*
2. *The financial requirements proposed by the regulator should be linked with their work plan for a certain time period (say, 3 years) and approved by the parliament; the regulators budget should be a charged expenditure on the Consolidated Fund; and*
3. *Regulators should be given the liberty to hire required staff on contract and appoint consultants in a transparent manner.*

4.7 Other suggestions include the following:

1. *There should be state level competition and regulatory agencies, particularly for the service sector; already there is an electricity regulator at the state level, while a few states are in the process of establishing water regulators;*
2. *All regulators and competition agencies should set up well-functioning consumer representation and redressal mechanisms (which will take the pressure off consumer courts);*
3. *Sectoral regulators should put more pressure on service providers/operators to meet quality objectives (like QoS, Standards of Performance, etc) while setting benchmarks and conducting regular performance evaluations;*
4. *Consumer impact assessment of all policies and laws, particularly regulatory policies, should be done periodically; and*
5. *Consumer advocacy groups need to be made effective by providing them resources through a sustained funding mechanism and capacity building.*

5. Develop capacity building solutions

The United Nations Development Programme (UNDP) defines 'capacity building' as the creation of an enabling environment with appropriate policy and legal frameworks, institutional development, including community participation (of women in particular), human resources development and strengthening of managerial systems. The UNDP recognises that capacity building is a long-term and continuing process, in which all stakeholders participate (including ministries, local authorities, NGOs and user groups, professional associations, academics and others[6]).

The achievement of a healthy competition culture will thus promote an orderly growth and economic democracy, enhance economic development and enable proper resource allocation, which is a necessary condition for growth and poverty reduction. The objective of this section is to lay out a road map for capacity building. This section has been drawn mainly from a CUTS publication, Friends of Competition.[7]

5.1 Types of capacities

1. Perspective: The critical component of capacity is related to the perspective, which drives the intellectual and conceptual analysis of the regulatory structure in the national policy space. The perspective includes values, ethics and the political ground, which create the foundation of market regulatory institutions.

2. Institution building: Another critical component in capacity is related to institution building. It involves the internal and external relationships and linkages. Each institution operates in a locally specific context through a network of relationships with other actors, which not only provides the basis for its pursuit of purposes and mission but also provides the basis for its legitimacy (Tandon, 2002). Therefore, the ability of institutions to nurture, cajole, coax, influence and confront these relationships and actors is a primary arena of capacity.

3. Resource mobilisation and utilisation: Experience suggests that material resource base is an increasingly important element of capacity as far as regulatory institutions are concerned. This includes the physical infrastructure and assets and resources. It is this capacity which, in fact, provides a strong ground for taking an autonomous and independent position on the issues of market distortions without being subject to political interference and regulatory capture.

5.2 Principles of capacity building

It is argued that capacity building should underpin the following desirable principles:

1. Continuous and ongoing process: The ongoing nature of capacity building encourages the acknowledgement of its dynamic and processual nature as opposed to mere events and structure;

2. Self-reflecting and evolutionary learning process: A lot of learning is evolutionary, continuous and does not depend on external inducements. Capacity building through an external intervention can only be a facilitative process, which builds new or additional capacity on top of the capacity that already exists within the body;

3. Synergistic total: The focus of capacity building should be a combination of skill up-gradation and enhancement of potentials. Growth of individuals is key to any meaning of capacity. The relevance of the organisation to its changing context is the measure of its effectiveness. As a regulator, building relationships with other actors – locally, nationally, regionally as well as globally – becomes important for effective functioning and sustainable impact;

4. National context: It is essential to build capacities related to a locally-based, articulated and originating capacity for critical reflection, learning, documentation and dissemination. It is essential to initiate a dialogue with the community with whom they work on the need for specific laws, structures and programmes;

5. *Futuristic in approach:* Capacity building has to be in relation to a search for relevance, identity, and clarity of roles and perspective building. It is important to look at the regulatory sector's future needs and consider how best one can use different methodologies to enhance existing capacities as a whole; and

6. A systemic approach: The task of capacity building should be looked at from a systemic approach. There is a growing realisation that institutions are only one component of the set of actors involved in promoting an orderly marketplace. There are other sets of actors whose capacities have to be enhanced to strike a balance. Operationally, this would mean building effective linkages, coalitions and alliances between the range of regulators and other economic and development actors. This would also require promoting, engaging and sustaining dialogues across all sets of actors.

A capacity building programme needs to take all the above and other specific factors into account, and devise methods and coping strategies to ensure effective implementation of the competition regime within a given environment.

5.3 Capacity building in various infrastructure sectors[8]

In order to identify the capacity building needs in the various infrastructure sectors, the key sectors[9] have been analysed, with a focus on emerging regulatory and competition related issues. In general, the capacity-building needs in each sector can be categorised into four categories: i) government officials involved in policy formulation and implementation – particularly in the states, ii) regulatory bodies (Commissioners & staff), iii) utilities and generators (leadership and management, operating staff and customer-facing staff), and iv) customers and civil society organisations (CSOs).

1. Power sector: In spite of the significant developments in the sector on the legislative and policy fronts, adequate understanding and capacity does not exist in the central and state governments to meet the significant challenges the sector faces. State-owned utilities have voiced great concern at the lack of internal capacity in the senior management (at the Director and Chief Engineer levels). In particular the lack of capabilities on contracts development, negotiation and management has been identified as a key area of concern.

2. Water supply and sanitation: While there is a great degree of commonality of issues between the water supply & sanitation and urban infrastructure, there are also significant differences in terms of regulatory arrangements. Also, rural water supply and irrigation are of considerable significance. Hence, one needs to impart greater precision to the identification of capacity building needs.

The criticality of water, the policy and regulatory initiatives and the changing priorities in the sector have spawned a wide range of research-based capacity building needs around policy and regulatory issues. The largest need is at the local body level, where there is an urgent need to build, expand and enhance cadres of qualified professionals and managers with experience in water planning, management, service delivery and pricing. Progressive emergence of independent regulatory framework in the country will also require skills within the regulatory bodies and among the utilities to address the regulatory issues. There is also significant need at the policy level within the states since water essentially remains a state subject.

In particular, there is a clear need to educate the stakeholders on the features of the prevalent policies and legislation and the impact of the same.

Significant capacity building is required around issues like price signaling and tariff determination in the water sector. It is evident that the prices charged as compared to other countries are very low, leading to inefficient consumption on the one hand and shortages on the other, which particularly affect the poor).

3. Urban infrastructure: Capacity building in the Government sector has long suffered from being under-funded and supply-led, with a weak institutional base and inadequate arrangements for outreach and follow-up. At present, there is no performance management culture in government departments.

Capacity building should be carried out to ensure basic skill sets for the delivery of existing and future responsibilities and to meet the emerging requirements of stakeholders so as to encourage best practice and innovative thinking.

It will need to be targeted at government officials involved in policy formulation and implementation, particularly in the states; municipal corporations, municipalities and village *Panchayats* and CSOs.

4. Oil & Gas: Although capacity building needs here are not likely to be as extensive as in power, it is still expected to be reasonably large. Unlike telecommunications, where technology has introduced a high degree of competition between services and between operators, the oil & gas sector (particularly gas) is likely to witness less competition. In the initial phase competition will be focused on acquiring the market (e.g. obtaining authorisations) and not within the market, and to that extent there is similarity with power. Experience from developed jurisdictions also demonstrates that market development in gas is a continuous process of evolution that will affect consumer interests. Capacity building solutions will need to be targeted at regulatory bodies, utilities and consumers.

5. Telecommunication: Recognising the need to ensure that policies keep pace with the developments in the telecommunication sector, capacity building needs should be to be assessed for efficient functioning of the system. Capacity building should be targetted at:

- **Government officials involved in policy formulation and implementation:** in the areas of understanding of public policy, economics, law, competition, finance and commercial aspects;
- **Regulatory bodies:** in the areas of understanding of public policy, economics, law, competition, finance and commercial aspects for businesses, regulatory principles and practices, quality monitoring, governance arrangements, and performance reporting;
- **Service providers and professionals:** in the areas of understanding of industrial and regulatory economics, law, competition, finance and commercial aspects for meeting the needs of the policy and regulatory framework, regulatory (and competition) information requirements, performance management and reporting; and
- **Consumers and civil society groups:** in the areas of consumer rights and obligations, sector regulation, policy and governance arrangements, tariff structures and implications, and quality reporting and data interpretation.

5.4 Competition law regime

The regulatory and competition authorities in India are constrained by a lack of resources – not only fiscal resources but also qualified and experienced staff. In India, where competition law and policy are relatively new areas, it is difficult for the authorities to find staff that is trained in the economic and legal aspects of competition policy and law. There is also the problem of attracting good professionals on the salaries that are offered. Therefore, it is necessary that the best possible staff is attracted by non-monetary incentives and decent living wages with liberal perquisites; and for them to be trained externally with another similar authority or institution.

The strategic approach to a capacity building programme will need to take care of:

- strengthening the capacity of the institutions dealing with competition issues;

- creating a market for competition rules; and
- providing the backbone/infrastructure for effective implementation.

Following are a few ideas through which such capacity building programmes can be undertaken to build an effective competition law regime in India:

Exchange of officials: Exchange of officials and experts would be useful for the competition officials of new or inadequately developed competition authorities to see how the competition authorities in other countries handle cases, particularly those in similar countries. Such exchanges could include short-term internships for Indians and visits by experienced staff from foreign competition authorities. We found this style operating quite well in South Africa, which too has a similar competition agency structure to India's.

***Secondment of private sector officials*:** In order to orient relevant people on enforcement of the competition law, the authority could invite officials from the private sector, law firms and consumer groups on short-term secondments. That will provide valuable cross-fertilisation opportunities and ensure that neither an anti-business nor anti-consumer mentality infects the authority.

Case research: Case research under the competition law is extremely crucial for investigation and prosecution. Often cases can be defeated for want of adequate or even sufficient information and analyses. It has been seen frequently that either there is a paucity of background material or competition agencies cannot undertake proper analysis of cases because of which the prosecution fails or cannot deliver results.

Ideally, research needs to be conducted by suitable in-house staff. For this purpose, sufficient budget and freedom needs to be provided to the competition authority, and this is already happening.

***Friends of competition*:** In many developing countries, including India, despite the existence of a competition law, there is not as yet a healthy competition culture. As a result, many people are unable to perceive the deleterious effects of anticompetitive practices. Often consumers consider a business practice quite normal even though it has an adverse effect on competition. One way to overcome this is to build a 'friends of competition' brigade. This can be done by resourcing and strengthening the capacity of consumer organisations and similar NGOs to conduct research and bring forward complaints before the competition authority.

International cooperation: International cooperation is an essential element of any capacity building programme to provide resources for coping with financial problems, fulfilling training needs and confronting cross-border competition issues.

India has now adopted a new law, which will be in line with the changed economic scenario. The Government has also expressed the need for capacity building on implementing the new law. The CCI has some funding commitments from the World Bank and USAID, which should be used effectively, bearing in mind our own needs, rather than be directed by external agencies.

Conclusion

Clearly, one strong need to promote a culture of competition in India – and economic reforms generally – is to enable the consumer movement through resourcing and capacity building. Strengthening the consumer movement will go a long way in promoting effective markets and good governance in India at substantially lower costs than similar efforts put into governmental or quasi-governmental initiatives.

Indeed one will need to tailor the programmes according to the resource availability and priorities in India. But the imperative is to provide tailor-made capacity-building programmes.

The challenge before us is to reach out to the political elite in India to see the benefits of an effective competition law and policy.

When the WTO came into being in 1995 only about 35 countries had competition laws. Today, nearly 100 countries have one, with more in the queue.

Some people think that a competition law is a 'First World luxury'. They are mistaken. It is as applicable in a poor country as it in a rich one, but it will need to be adapted to the local scenario, and innovative ways will have to be evolved to design and implement an effective and appropriate competition law.

However, the regulatory and competition regime in India may not turn out to be quite effective. For this, we will need a committed polity, dedicated consumer movement and an honest bureaucracy to effectively implement the laws. The laws needs to be implemented, and the recommendations of this Report are aimed at organising the whole system and galvanising and facilitating this entire process.

Endnotes

1 'Working Group on National Competition policy', Planning Commission, Eleventh Five-Year Plan, February, 2007.

2 See Chapter 5: Why Competition Policy & Law? of this Report

3 Policy Brief 'Better Regulatory Framework for Economic Development – How?' CUTS C-CIER, 1/2005.

4 In order to fill this vacuum, CUTS has established a specialised CUTS Institution for Regulation and Competition offering training courses in India and other countries in the developing world. The institution will also offer research services and consultancies to governments and competition authorities.

5 'Where in the world are the watchdogs? Jobs of such critical public concern should be thrown open to all', by Pradeep S Mehta, *Financial Express*, March 17, 2007.

6 *Source: http://encyclopedia.thefreedictionary.com/Capacity+Building*

7 *Source: http://www.cuts-international.org/FOC.pdf*

8 This section is based on the report *Development of 'Strategic Business Plan'* for Capacity Building in Infrastructure Regulation and Competition for the CUTS Institute for Regulation and Competition prepared by Ernst & Young.

9 Power sector, Water supply & sanitation, Urban Infrastructure, Transport Infrastructure, Roads, Ports, Airports, Oil & Gas and Telecommunications.

Selected Publications on Competition, Investment and Economic Regulation

EVENT REPORTS

1. The UN Code of Conduct for TNCs: Why it collapsed...The Way Ahead
It contains evidence submitted at the Permanent Peoples' Tribunal, London, in November 1994. It includes a statement with supporting enclosures that include several original documents. An extremely good resource material for anyone interested in the issues of regulation of global business.
pp 121, #9401, Rs.30/US$15

2. Investments: Consumers, Development and the Environment
This is a report of the CI-CUTS International Seminar on Multilateral Frameworks for Investment, in Geneva, on October 18-19, 1996. It contains 10 papers from eminent experts of different viewpoints. The report covers issues concerning investment liberalisation and its impact on consumer, development and environment.
pp 93, #9602, Rs.50/US$15, ISBN: 81-87222-03-4

3. Liberalised Trade & Fair Competition
This is a report of the IOCU-CUTS International Conference on Competition Policy in the Context of Liberalisation, New Delhi, 20-21, January, 1995, containing 19 papers from eminent competition practitioners and economists from all over the world. The recommendations include calling upon the WTO and UNCTAD to develop work programme on trade and competition and governments to involve public interests groups in policy-making. *pp 144, #9501, Rs.100/US$25*

4. Too Big for Rules
This is a report of the IOCU-CUTS International Conference on Fairplay in Global Business, February 14-15, 1994, New Delhi, which contains several documents relating to trade and Trans-national Corporations (TNCs). It is a comparative statement of the draft UN Guidelines for Transnational Investment, the International Chamber of Commerce's (ICC) Guidelines for Investment and the OECD Declaration for Multinational Enterprises. It also contains the Delhi Declaration adopted in the conference. *pp 105, #9409, Rs.50/US$25*

5. Challenges in implementing a Competition Policy and Law: An Agenda for Action

This report is an outcome of the symposium held in Geneva on "Competition Policy and Consumer Interest in the Global Economy" on 12-13 October 2001. The one-and-a-half-day event was organised by CUTS and supported by the International Development Research Centre (IDRC), Canada. This publication will assist people in understanding the domestic as well as international challenges in respect of competition law and policy.

pp 48, #0202, Rs.100/US$25, ISBN: 81-87222-54-9

6. Competition Policy and Pro-poor Development - A report of the Symposium on Competition Policy & Pro-poor Development

This document covers the deliberations at a one-day symposium looking at how competition policy and law relate to pro-poor development. This report carries the papers, which were produced and presented at the three sessions, by young researchers associated with the project. The proceedings carry the rich debates, involving many of the experienced and highly recognised experts from all over the world, which were held around the three presentations.

pp 72, #0319, Rs. 250 for India/US$20 for OECD countries/US$15 for others, ISBN: 81-8722-93-X

7. Regulatory Framework for Infrastructure in India

This is a report of the proceedings of the seminar, "Regulatory Framework for Infrastructure in India", organised by CUTS, in collaboration with the Planning Commission of India in January 2005. The aim of the seminar was to facilitate brainstorming amongst stakeholders and contribute to the Planning Commission's ongoing work on developing a regulatory framework for the infrastructure sector in India.

pp 68, #0507, Rs.100/US$25, ISBN: 81-8257-056-5

RESEARCH REPORTS

1. Analyses of the Interaction between Trade and Competition Policy

This study not only provides information about the views of different countries on various issues being discussed at the working group on competition, but also informs them about the views of experts on competition concerns being discussed on the WTO platform and the possible direction these discussions would take in the near future.

pp 150, #9913, Rs.100/US$30,ISBN: 81-87222-33-6

2. Putting our Fears on the Table
Analyses of the Proposals on Investment and Competition Agreements at the WTO

It provides analyses of the proposals on investment and competition agreements at the WTO, especially in the areas taken up and/or proposed

at Doha for possible future negotiations. This volume is a product of comprehensive research and dialogue by leading international experts, practitioners and other stakeholders and will provide valuable inputs to negotiators and all other stakeholders who play a role in evolving negotiating positions of countries.
pp 112, #0312, Rs.300 for India/US$25 for OECD Countries/US$15 for other, ISBN 81-87222-84-0

3. Towards a Functional Competition Policy For India – An Overview
Edited by Pradeep S Mehta, this report comprises of 22 chapters, which highlight various systematic and sectoral issues dealing in competition in the country. The report is being published in two separate volumes. This overview version presents a brief account of competition regime in the country for busy readers. *pp 248, Rs 495/US$32.95, ISBN: 817188449-0*

4. Multilateral Competition Framework: In Need of a Fresh Approach
The paper identifies the relevant competition problems and suggests a way forward for international cooperation to deal with them. It suggests that a brand new organisation, dedicated solely to competition issues under the auspices of the UN, will be most suitable.
pp 68, #0506, Rs.100/US$25, ISBN: 81-8257-055-7

5. Consumer-friendly Cable TV System
The report looks at all the various issues of concern in the cable TV sector and analyses them in the light of the several surveys conducted by CUTS, to assess the structure of cable TV market in four metros, gauge the level of influence cable operators have on consumers and to find out the consumers' perception of CAS. It finally makes certain recommendations towards ensuring a consumer-friendly cable TV system.
pp 130, #0509, Rs 100/US$15, ISBN: 81-8257-059-X

6. Competition Regimes in the World – A Civil Society Report
This report is a compilation that maps out competition regimes around the world from the civil society perspective. It covers about 120 countries, including the European Union (EU), which is a supra-national jurisdiction. The publication is primarily based on voluntary contributions of various International Network of Civil Society Organisations on Competition (INCSOC) members and other experts and practitioners. The country papers in this huge compilation provide a glimpse of the competition scenario in the selected countries.
pp 670, #0607, Rs 3000/US$150, ISBN: 81-8257-064-6

7. Institutional Independence in India
In this discussion paper, a comprehensive analysis of institutional independence in India is carried out, which would help facilitate cross-

disciplinary learning and identification of good and bad practices. Further, the functioning of various independent institutions – Tier one and Tier two – has been examined in detail.
pp 42, #0617, Rs 100/US$25, ISBN: 81-8257-080-8

8. Politics Trumps Economics – Lessons and experiences on competition and regulatory regimes from developing countries
Co-authored with Manish Agarwal and V V Singh, this monograph suggests that mere adoption of regulatory laws is a necessary but not a sufficient condition to be part of the market reform agenda. Implementation is equally important. Most developing countries have adopted market-oriented reforms as part of the globalisation and liberalisation process but due to various reasons, distortions arise in the working of the market process.
pp 56, #0709, Rs 50/US$10, ISBN: 978-81-8257-087-0

MONOGRAPHS

1. Regulation: Why and How?
From a consumer's viewpoint, markets and regulators are complementary instruments. The role of the latter is to compensate in some way the failings of the former. The goal of this paper is to provide a general picture of the why's of regulation in a market economy.
pp 34, #9814, Rs 50/US$10, ISBN: 81-87222-17-4

2. Role of Competition Policy in Economic Development and the Indian Experience
Competition and efficiency are the guiding principles of the liberal economic order. Any healthy competition must have rules that the players should follow. This monograph examines the role of an effective competition policy in economic development from an Indian perspective.
pp 32, # 9908, Rs.50/US$10, ISBN: 81-87222-25-5

3. FDI, mega-mergers and strategic alliances: Is global competition accelerating development or heading towards world monopolies?
Foreign Direct Investment, mergers, amalgamations and strategic alliances are the rules of the present day global economy. The monograph sheds light on the main contours of the global competition and its implication for consumers. *pp 24, #9909, Rs.50/US$10, ISBN: 81-87222-26-3*

4. Competition Regimes around the World
In this monograph, an attempt has been made to compile briefly, the current state of Competition Law in some select countries, on which information is readily available. The paper steers clear of any value judgements on the design and implementation of the Competition Law in the countries covered therein.
pp 40, #2002, Rs.50/US$10, ISBN: 81-87222-31-X

5. Globalisation, Competition Policy and International Trade Negotiations

This monograph maps out the issues concerning multilateral competition policy from the southern perspective. It concludes that there is a need for a realistic assessment of the extent to which developing countries would be able to control Transnational Corporations under the discipline of competition law.

pp 38, #2003, Rs.50/US$10, ISBN: 81-87222-32-8

6. Trade, Competition & Multilateral Competition Policy

This monograph clarifies the areas of interaction between trade and competition through case studies and shows that such interactions are on the rise. It also highlights efforts being made for a multilateral competition policy after the Second World War, in the form of Havana Charter, till the present happenings at the WTO. Most importantly, the paper brings forward the debate *vis-à-vis* multilateral competition policy that is currently taking place at various fora.

pp 36, #0005, Rs.50/US$10, ISBN: 81-87222-35-2

7. All About Competition Policy & Law

This monograph, meant for advance learners, deals with various elements of competition law and policy in a comprehensive manner. It describes the various restrictive business practices (RBPs) in the market place. It further highlights linkages between competition policy, economic development, poverty and foreign investment.

pp 70, #0006, Rs.50/US$10, ISBN: 81-87222-37-9

8. All About International Investment Agreements

This briefing kit for the general reader provides an overview of recent trends in the proliferating number of bilateral and regional investment agreements. The kit highlights the key issues in these agreements and considers past initiatives and prospects at the multilateral level.

pp 64, #0102, Rs.50/US$10, ISBN: 81-87222-39-5

9. Competition Policy & Law Made Easy

This publication meant for the activists, aims at generating fair amount of awareness on competition law and policy. It could be helpful for a common person to identify anticompetitive practices in the market place and take action to rectify the same.

pp 36, #0109, Rs.50/US$10, ISBN: 81-87222-48-4

10. Making Investment Work for Developing Countries

This publication is another one in our series of monographs on investment and competition policy, intended to introduce related topics to a wide audience. This monograph also serves as a reference point for those interested in the

complex and, sometimes, controversial relationship between foreign direct investment and development.
pp 38, #0110, Rs.50/US$10, ISBN: 81-87222-49-2

11. Foreign Direct Investment in Developing Countries: What Economists (Don't) Know and What Policymakers Should (Not) Do!
This monograph discusses the global FDI trends and determinants, and tries to highlight some of the arguments on the link between FDI and growth. We are extremely grateful to Peter Nunnenkamp of Kiel Institute of World Economics, Germany for allowing us to publish this.
pp 30, #0216, Rs.50/US$10, ISBN: 81-87222-70-0

12. Market Practices in Zambia: Where do the Consumers Stand?
The study delves deep into competition – and consumer-related issues in different sectors of the Zambian economy. Especially, it outlines what types of anticompetitive behaviours are observable in present day Zambia and what actions the state and consumer groups, like the Zambia Consumers' Association, have taken in response.
pp 28, #0310, Rs.100/US$5, ISBN: 81-87222-81-6

13. Competition and Consumer Protection Scenario in Uganda
The study delves deep into competition – and consumer-related issues in different sectors of the Ugandan economy. Especially, it outlines what types of anticompetitive behaviours are observable in present day Uganda and what action the state has taken in response.
pp 40, #0313, INR100/US$5, ISBN: 81-87222-85-9

14. Why is a Competition Law Necessary in Malawi?
This monograph aims at giving an overview of Malawi's regulatory regime (including competition regime); some of the common anticompetitive practices in Malawi; and review the prevalence of each practice and efforts taken/not taken to arrest the problem.
pp 42, #0302, MWK150/INR100/US$5, ISBN: 81-87222-73-5

15. FDI as a Source of Finance for Development
This monograph presents two broad policy challenges for developing countries, which, if met, could contribute to the fulfillment of development goals: first, making the domestic environment attractive to FDI, and second, ensuring that beneficial effects of FDI are reaped. The monograph gives a balanced assessment of the role of FDI and thus makes an interesting read!
pp 27, #0308, Rs. 50/$10, ISBN: 81-87222-80-8

16. Home Country Measures and FDI: Implications for Host Country Development

This monograph, which highlights various measures adopted by home countries to influence outbound FDI and draws attention to issues and implications for developing host countries, provides some food for thought and makes worthwhile contribution in this direction.

pp 31, #0316, Rs. 50/$10, ISBN: 81-87222-90-5

17. Restrictive and Unfair Trade Practices – Where Stands the Consumer?

A healthy competition in market can be hampered by a monopoly, restrictive business practices or unfair trade practices . This handbook, in its simple question-answer format, tries to outline the nature of restrictive trade practices, unfair trade practices and unethical conducts, and the response of law to them in different countries.

pp 42, #0318, Rs. 50/US$10, ISBN: 81-87222-94-8

18. Incentives-based Policy Competition for FDI

This case study seeks to address the incentive-based policy competition for FDI among sub-national jurisdictions in three developing countries — Brazil, China and India. In essence, the study calls for better design, implementation, administration and evaluation of incentives-based policy for attracting FDI.

pp 64, #0331, Rs.50/US$10, ISBN: 81-8257-006-9

19. Investment Policies in Select Large Emerging Markets – Performance and Perceptions Perspective on India, Brazil and South Africa

This report attempts to compare and contrast the national regulatory regimes and policy issues relevant to FDI in three large emerging economies – Brazil, India and South Africa – with a view to build capacity and awareness in investment issues and draw out the lacunae of the present system.

pp 44, #0335, Rs.50/US$10, ISBN: 81-8257-004-2

20. Investment Policy in Select Least Developed Countries — Performance and Perceptions

The report studies the investment regimes of select Least Developed Countries (LDCs): Bangladesh, Tanzania and Zambia. It compares the performance of the countries in attracting FDI and the civil society's views on FDI in the three countries.

pp 56, #0337 INR50/US$10, ISBN: 81-8257-010-7

21. Synergising Investment with Development

Part of a seven-country two-year project "Investment for Development", this report brings out common and country-specific findings on sectors that are or could be important for facilitating and maximising benefits from FDI.

This paper looks at some of the key sectors that contribute significantly towards the Kenyan economy and finds out whether competition really exists.
pp 53, #0343, Rs.50/US$10, ISBN: 81-8257-016-6

22. Strategising Investment for Development
The paper highlights the global and regional trends and policies in the project countries and in FDI, and the effectiveness of national policies. The paper also contains the summarised results of a survey on the civil society perceptions of FDI.
pp 60, #0342, Rs. 50/US$10, ISBN: 81-8257-015-8

23. Investment Policy in India – An Agenda for Action
This booklet is an attempt to analyse India's FDI trends and policies, and suggest action points for governments, civil society and inter-governmental organisations. It also summarises discussions of national seminars and results of a survey of civil society perceptions of FDI in India, conducted under the IFD project.
pp 30, #0322, Rs.50/US$10, ISBN: 81-87222-97-2

24. Investment Policy in Zambia – An Agenda for Action
This report recommends action points for policy makers, inter-governmental agencies and the civil society organisations (CSOs).
pp36, #0333, Rs.50/US$10, ISBN 81-8257-008-5

25. Investment Policy in Brazil – An Agenda for Action
This report discusses briefly Brazil's investment policy, its performance, perceptions and stakeholders' views on FDI. The report has come out with policy recommendations for the government, civil society and inter-governmental organisations.
pp 32, #0329, Rs.50/US$10, ISBN: 81-8257-002-6

26. Investment Policy in Tanzania – An agenda for action
The aim of this booklet is to advocate better approaches for enhancing the benefits of FDI in Tanzania. It is also a useful tool for other developing and transitional economies facing similar constraints in their effort to enhance the role of FDI in their countries.
pp 32, #0323, Rs.50/US$10, ISBN: 81-87222-98-0

27. Investment Policy in Bangladesh – An Agenda for Action
FDI provides substantial economic benefits to developing countries not only by supplementing domestic investment and decreasing aid flows, but also in terms of employment creation, transfer of technology and making domestic industry and services more competitive. This report suggests a number of recommendations to attract FDI to Bangladesh.
pp 44, #0334, Rs.50/US$10, ISBN: 81-8257-003-4

28. Investment Policy in Hungary – An Agenda for Action

The basis of the long-term competitiveness of the country is dependent on an improved supply of qualified labour and quality infrastructure. This paper discusses these and other issues of current and long-term capital attraction capacity of Hungary.

pp 32, #0340, Rs.50/US$10, ISBN: 81-8257-014-X

29. Investment Policy in South Africa – An Agenda for Action

Part of a comparative study of seven developing countries' investment regimes, this report attempts a diagnosis of South Africa's investment climate and regime in the context of its economic environment and policy framework.

pp 40, #0330, Rs.50/US$10, ISBN: 81-8257-001-8

30. FDI's Role in Development –

Analysis of Investment Policy Regimes in Bangladesh, India, Hungary, Zambia, South Africa, Tanzania and Brazil

The report 'FDI's Role in Development' is in two parts and presents two of the publications under the project. Part I, which is the synthesis report of the project, brings out common and country specific findings, from case studies on each of the seven countries. Part II presents the CUTS advocacy policy document prepared as a part of the project.

pp 114, #0411, Rs.50/US$10, ISBN: 81-8257-029-8

31. Experiences from a Project an FDI policy practices & perceptions in Bangladesh, Brazil, Hungary, India, South Africa, Tanzania and Zambia OR, How to Implement a Multi-Country Project

This paper is the final process report of the project: "Investment for Development", the aim of which is not only to document and share the process of implementing the project, but also to facilitate readers to get a bird's eye view of the nuts and bolts in implementing such projects, particularly in developing countries across the world.

pp 54, #0418, Rs.50/US$10, ISBN: 81-8257-034-4

32. Competition and Consumer Protection in Kenya

Competition and consumer protection in Kenya is still inadequate. This report looks at some of the key sectors that contribute significantly towards the Kenyan economy and finds out whether competition really exists.

pp 37, #0409, Rs. 100/US$10, ISBN: 81-8257-024-7

33. Abuse of Dominance in Developing Economies: A Focus on the Issues in Cambodia, Laos and Vietnam

This monograph provides a general overview of issues relating to abuses of dominant positions with an emphasis on issues cropping up in developing economies. It also reviews specific issues related to Cambodia, Laos and Vietnam and identify some guidelines that may assist developing economies

in implementing their competition regimes and controlling abuse of market power.
pp 34, #0604, Rs.50/US$10, ISBN: 81-8257-071-9

34. Why India Adopted A New Competition Law?
This monograph is yet another research work project (an endeavour similar to the recently released research report entitled 'Why do Countries Adopt new Competition Laws' – www.competitionregimes.com) that aims to study 20 countries, which have enacted a new competition law, after scrapping the old one. It will certainly add value to the debate as to 'Why countries adopt a competition law'? The India chapter contributed by Dr S Chakravarthy, former Member of the Monopolies and Restrictive Trade Practices (MRTP) Commission and Fellow at CUTS Centre for Competition, Investment & Economic Regulation (C-CIER) has been is presented in the form of this stand-alone booklet, which throws light on the developments in the Indian of competition regime in the country, since its inception.
This monograph can be viewed at: *http://www.cuts-international.org/pdf/wiancl.pdf*

DISCUSSION PAPER

1. Multilateralisation of Sovereignty: Proposals for Multilateral Frameworks for Investment
This paper analyses the past, present and future of investment liberalisation and regulation. It also contains an alternative draft International Agreement on Investment.
pp 148, # 9807, Rs.100/US$25, ISBN: 81-87222-14-X

2. Capacity Building on Infrastructure Regulatory Issues (I and II edition)
This document is intended to kick-start a debate among the stakeholders – the Government, regulatory bodies and civil society – to catalyse an appropriate regulatory environment in India.
pp 28, #0404, Rs.100/US$50, ISBN 81-8257-020-4

3. Investment Policy in Zambia – Performance and Perceptions
The report addresses these questions through a review of Zambian investment policies and their performance, and aims to create awareness about the investment policymaking process by a study of data and the perceptions of stakeholders. *pp 48, #0338, Rs.100/US$25, ISBN: 81-8257-011-5*

4. Investment Policy in Brazil – Performance and Perceptions
This report highlights the important issues in policy reform, investment trends and the civil society view on the contribution of foreign investment to Brazil's economy. It is a valuable contribution to the understanding of

FDI trends and their impact in the past decade.
pp 46, #0320, Rs.100/US$25, ISBN: 81-87222-95-6

5. Investment Policy in Tanzania – Performance and Perceptions
The report captures the perceptions of the Tanzanian civil society of the contribution and benefits of FDI to Tanzania's social and economic development and its potential in attracting FDI. While development partners and the private sector have a role to play in enhancing FDI inflows, the brunt of making FDI work for the development of Tanzania lies within the remit of the government, says the study.
pp 68, #0336, Rs.100/US$25, ISBN: 81-8257-009-3

6. Investment Policy in India – Performance and Perceptions
Foreign investment may have begun coming in after India launched its liberalisation programme in 1991, but India's performance in attracting FDI has not been very encouraging. This report attempts to study the investment regime and the actual performance of India, with a view to build capacity and awareness of investment issues and draw out the lacunae of the present system.
pp 52, #0332, Rs.100/US$25, ISBN: 8257-007-7

7. Investment Policy in South Africa – Performance and Perceptions
This report reviews key policy issues related to investment in South Africa, and the performance and perceptions of investment with a specific focus on FDI. Containing a systematic overview of related policy areas, it provides an understanding of the interface between economic performance and domestic and foreign investments.
pp 67, #0341, Rs.100/US$25, ISBN: 81-8257-013-01

8. Investment Policy in Bangladesh – Performance and Perceptions
Despite a favourable investment regime on paper, Bangladesh has not been receiving FDI in greater quantity, particularly in recent times. The study makes a good attempt at understanding the investment regime and the actual performance of multiple actors in the field of FDI in Bangladesh, in the global and national context.
pp 62, #0339, Rs.100/US$25, ISBN: 81-8257-012-3

9. Investment Policy in Hungary – Performance and Perceptions
The transformation process in Hungary had some experiences with FDI even before 1990. It is therefore possible to regard Hungary as an example of FDI-led economic reconstruction and development model. The following analysis tries to sum up both the gains and pitfalls of this FDI-led economic development model.
pp 43, #0405, Rs.100/US$25, ISBN: 81-8257-020-4

10. Restrictive Business Practices in Nepal

This paper attempts to study the restrictive business practices (RBPs) prevalent in the Nepalese market. The main recommendation of the study is that the bureaucrats and policy makers have to be educated about the need to promote competition in the marketplace. The study introduces the reader to the Nepalese history and the process of industrialisation and economic reforms, and throws light on the RBPs experienced at the local level.

7Up COUNTRY REPORTS

1. Towards a New Competition Law in Sri Lanka

This is the Sri Lanka country report, which will feed into the first phase of the Comparative Study of the Competition Law Regimes of select developing countries of the Commonwealth also known as 'the 7-Up Project', undertaken by CUTS, supported by the Department for International Development (DFID), UK. The research project aims to identify measures that would assist developing countries in strengthening their competition laws and introducing such laws where they are absent.

pp 51, #0206, Lankan Rupee (LKR) Rs. 150/Indian Rupees (INR) Rs.100/ US$10, ISBN: 81-87222-65-4

2. Competition Law & Policy – A Tool for Development in Tanzania

The report makes a critical assessment and review of the competition regime in Tanzania based on the Fair Trade Practices Act of 1994 and the subsequently created institutions. In this report, economic and law based researchers carefully explore the competition regime in Tanzania, bringing to fore the different facets of competition policy in the country, including the socio-economic and public policy context.

pp 49, #0207, Tanzanian Shilling (TSH) 1000SH/ INR Rs.100/US$10 ISBN: 81-87222-66-2

3. Promoting Competitiveness & Efficiency in Kenya – The Role of Competition Policy & Law

This report examines the scope and context of competition policy and competition law in Kenya, the socio-economic development of the country, an assessment of Kenya's competition law, administrative aspects of the law and capacity and needs of the MPC.

pp 54, #0208, Kenyan Shilling (KSH) 100/ INR Rs.100/US$10, ISBN: 81-87222-62-X

4. Competition Policy & Law in South Africa – A Key Component in New Economic Governance

The report assesses the competition framework in South Africa, with a view to the effectiveness in promoting economic efficiency and consumer welfare

as part of economic development. It locates the rationale for competition policy in a South African context.
pp 45, #0209, Rands (RN) 10/ INR Rs.100/US$10, ISBN: 81-87222-64-6

5. Competition Regime in Pakistan – Waiting for a Shake-Up
The report introduces the existing competition legislation and competition policy issues in Pakistan and gives recommendations on how to improve upon the existing legislation and the capacity of the competition authority. It also deals with the social and economic policies of the Government that affect competition.
pp 41, #0210, Pakistani Rupees (PKR) Rs. 100/INR Rs.100/US$10, ISBN: 81-87222-63-8

6. Enforcing Competition Law in Zambia
The paper examines the adequacy of the Competition and Fair Trading Act of 1995 as applied in Zambia. An attempt has been made to relate competition law to economic development policy in general and, more specifically, to market liberalisation policies, policies on FDI, consumer protection and other sector-specific regulations.
pp 54, #0211, Zambian Kwacha (ZK) 5000/INR Rs.100/US$10, ISBN: 81-87222-67-0

7. Reorienting Competition Policy and Law in India
The Report reviews the existing Competition Law, the Monopolies and Restrictive Trade Practices (MRTP) Act and the proposed new law, focusing on the implementation of the MRTP Act.
pp 47, #0212, INR Rs.100/US$10 ISBN: 81-87222-61-1

8. Pulling up Our Socks
This is the project report under the competition policy project (7-Up), of CUTS. The report compares the institutional framework in the project countries and analyses important issues like legal provisions, autonomy of the institutions, financial and human resources, etc.
pp 68, #0303, INR Rs.250/US$15, ISBN: 81-87222-74-3

9. Towards a Healthy Competition Culture...
This monograph is prepared under the competition policy project (7-Up), of CUTS, intends to build awareness in policymakers and negotiators and stimulate debate on competition policy in the national and international contexts.
pp 68, #0304, Rs.50/US$5, ISBN: 81-87222-75-1

10. Friends of Competition
This monograph is prepared under the competition policy project (7Up2) of CUTS, aims to outline an ideal capacity building programme for promoting

an effective and healthy competition regime in the targeted countries.
pp 40, #0301, Rs.100/US$10, ISBN: 81-87222-72-7

11. Fairplay Please!
This research volume is the second in our 7Up series, the first being: Pulling Up Our Socks, which focused on what is needed to buttress the existing competition regimes to make them more effective. The present volume is a compendium of the synthesis report and six country chapters prepared within the framework of our 7Up2 project. However, the current project was more challenging, as five of the six countries did not have a competition law, with India being need to promote fairplay in the marketplace.
pp 216, #0610, Rs 900/US$50, ISBN: 81-8257-076-X

ADVOCACY DOCUMENTS

1. Promoting Competition Policy and Law in Bangladesh – A Civil Society Perspective
This advocacy document is a part of 7Up2 project, which provides a comprehensive analysis of the competition scenario in Bangladesh, and put across key recommendations to carry the national agenda on competition policy and law in the country.
pp 30, #0603, Rs 50/US$10, ISBN: 81-8257-070-0

2. Promoting Competition Policy and Law in Vietnam – A Civil Society Perspective
This advocacy document is a part of 7Up2 project that provides a synopsis of the competition scenario in Vietnam, and puts across key recommendations to carry the national agenda on competition policy and law in the country.
pp 42, #0602, Rs 50/US$10, ISBN: 81-8257-069-7

3. Promoting Competition Policy and Law in Lao PDR – A Civil Society Perspective
This advocacy document is a part of 7Up2 project that provides a comprehensive analysis of the competition scenario in Lao PDR. It puts across key recommendations to carry the national agenda on competition policy and law in the country.
Pp 78, #0601, Rs 50/US$10, ISBN: 81-8257-067-0

NEWSLETTERS

1. ReguLetter
This is a quarterly newsletter of CUTS-CITEE and covers developments related to competition policy and economic regulations. It deals with macro and micro issues, restructuring process, pharmaceuticals sector, telecom, utilities, financial sector and corporate affairs. *Rs.150 p.a./US$30*

2. Policy Watch

This is a quarterly newsletter covering developments on policy responses, implementation and distortions. Current developments in the areas of infrastructure, trade & economics, governance & reforms and accountability are covered in the newsletter.

Rs.150 p.a./US$30

3. CIRCular: 'CIRCular' is a bi-monthly newsletter of CUTS Institute for Regulation and Competition (CIRC), which carries special articles on the subjects that CIRC covers.

Electronic NewsletterS

7Up2

This is a bi-monthly e-newsletter of CUTS Centre for Competition, Investment & Economic Regulation (C-CIER), the objective of which is disseminating information about policy developments related to competition. It focuses on anticompetitive practices related to six countries i.e. India, Nepal, Bangladesh, Cambodia, Lao PDR and Vietnam.

7Up 3 (7Update): News stories and articles pertaining to competition and regulatory issues are very scarce in the 7Up3 project countries (Botswana, Ethiopia, Malawi, Mauritius, Mozambique, Namibia and Uganda). Therefore, the 7Up3 e-newsletter intends to fill up this void by presenting news related to the subject from the project countries, every once in two months. A brief overview of the project progress is also provided at the outset.

BRIEFING PAPERS

1996

1. Competition Policy in a Globalising and Liberalising World Economy *(CUTS: No. 4/1996)*
2. Globalising Liberalisation Without Regulations! – Or, how to regulate foreign investment and TNCs *(CUTS: No. 6/1996)*

2000

1. Competition Regime in India: What is Required? *(CITEE: No. 5/2000)*
2. Trade, Competition & Multilateral Competition Policy *(CITEE: No. 9/2000)*

2001

1. Contours of a National Competition Policy: A Development Perspective *(CITEE: No. 2/2001)*

2002

1. Dabhol: A Lesson to All *(CART: No. 1/2002)*
2. Foreign Direct Investment in India and South Africa: A Comparison of Performance and Policy *(CITEE: No. 3/2002)*
3. Regulating Corporate Behaviour *(CITEE: No. 4/2002)*
4. Multilateral Environmental Agreements, Trade and Development *Issues and Policy Options Concerning Compliance and Enforcement (CITEE: No. 8/2002)*
5. Multilateral or Bilateral Investment Negotiations: *Where Can Developing Countries Make Themselves Heard? (CITEE: No. 9/2002)*

2003

1. Pulling Up our Socks *(C-CIER: No.1/2003)*
2. How is FDI Related to Economic Development? *(C-CIER: No.2/2003)*
3. Investment Policies that Really Attract FDI *(C-CIER: No.3/2003)*
4. Public Private Partnerships in the Essential Services Sector *(C-CIER: No.4/2003)*
5. Competition and Sectoral Regulation Interface *(C-CIER: No.5/2003)*
6. The Role of International Cooperation in Building an Effective Competition Regime *(C-CIER: No.6/2003)*
7. Investor-to-State Dispute Settlement: What Can We Learn? *(C-CIER: No.7/2003)*
8. National Champions National Interests vs. Competition: *Where to Strike the Balance? (C-CIER: No.8/2003)*
9. Ensuring Corporate Social Responsibility: *What is the World Thinking? (C-CIER: No.9/2003)*
10. Multilateral Framework on Investment *(CITEE: IWOGDA Policy Brief)*
11. Multilateral Competition Agreement *(CITEE: IWOGDA Policy Brief)*

2005

1. Investment for Development (IFD) – Civil Society Perceptions *(Briefing Paper No.1/2005)*
2. Foreign Direct Investment and Competition Policy *(Briefing Paper No.2/2005)*
3. Investment Facilitation and Regulation in Developing Countries *(Briefing Paper No.3/2005)*
4. Better Regulatory Framework for Economic Development *(Policy Brief No.1/2005)*
5. Competition Issues in the Agricultural Produce Markets – From the rural poor to luxurious supermarkets: Who profits? *(Policy Brief No.2/2005)*

2006

1. The Telmex Dispute at the WTO: Competition Makes a Backdoor Entry *(No.1/2006)*
2. Competition Scenario in the Telecommunication Sector in Cambodia, Laos and Vietnam *(No.2/2006)*
3. Competition Law and Property Rights in Vietnam *(No.3/2006)*
4. Extraterritorial Application of Competition Laws in the US and the European Union *(No.4/2006)*
5. Private International Cartels – An Overview *(No. 5/2006)*
6. Evolution of Competition Policy and Law *(No. 6/2006)*
7. Competition & Regulatory Scenario in South and Southeast Asia (Policy Brief No.1/2006)

2007

1. The WTO *Telmex* Case – Implications for Vietnam (C-CIER No 1/2007)

Each Briefing paper is available at Rs.20/US$5

"This is a very timely Report, which takes stock of the regulatory regime in the country, in order to tell us in the government, about what we had promised to do when we came to power, and what we have not been able to do. It shows the way forward to the government to implement its mandate more effectively".

–Kamal Nath
Minister for Commerce & Industry, India

"....the first of a series, to explore many issues relating to an effective enforcement regime for competition and regulation. I commend this.... to see India progress faster and deliver economic growth with equity".

–C Rangarajan
Chairman, Economic Advisory Council to the Prime Minister of India

"This new Report goes further to an earlier CUTS report in exploring what has happened, what is happening and what should be done in promoting competition in India. I hope that the policy makers will utilise this Report in improving the entire framework of India's competition policy".

–Vijay Kelkar
Former Adviser to the Finance Minister

".... a comprehensive and most timely Report on Competition and Regulation in India. India has just enacted critical changes to its competition law and the study reviews the key policy and operational issues regarding that law".

–Allan Fels
Dean, Australia & New Zealand School of Government, Australia

"....competition is especially important for the poor, for whom a gain of even a few rupees from competition adds substantially to consumption.... Farmers get just one-sixth of the retail price of their produce, because of entrenched intermediaries. ..... action is needed on multiple fronts to increase competition and empower consumers".

–Swaminathan Aiyar
Consulting Editor, The Economic Times, Washington DC

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–Frederic Jenny
Judge, French Supreme Court

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