



Nepal ❖

– Apurba Khatiwada ❖†

Nepal is a small landlocked country in the foothills of the Himalayas. China borders her in the north and India on the other three sides. The population of Nepal is estimated at around 26.6 million and total land area is 147,181 square kilometers.

Nearly 25 percent of the population lives below the poverty line. In addition, there are large disparities across income groups, between urban and rural areas, and across socio-ethnic groups.

Economy

Nepal still has a highly underdeveloped economy with agriculture accounting for 35 percent of the GDP and 76 percent of the employment. Manufacturing and services account for 5 and 50 percent of GDP respectively. Other than the difficult terrain and paucity of natural and trained human resources, the violent Maoist insurgency and unstable political situation interrupted the promise of economic development and liberalisation that started after 1990. The nation is still at the middle of a very messy constitutional transformation that started with the overthrowing of monarchy in 2006.

Hereditary and autocratic Rana regime ruled Nepal until 1951. During this period, the Ranas isolated Nepal from the rest of the world and the economy was based almost entirely on subsistent agriculture. Very few industries were established during this period and except for the establishment of a few agro-processing units, no serious attempt was made for economic and industrial development.

After the end of the Rana regime in 1951, Nepal entered the modern era without schools, roads, electricity, telecommunications, industry or civil services. The new Companies Act of 1951 made it possible to establish private limited companies for the first time in the history of Nepal.

| PROFILE | |
|--|--------------------------|
| Population: | 26.6 million |
| GDP (Current US\$): | 13.8 billion |
| Per Capita Income: (Current US\$) | 742 (Atlas method) |
| Surface Area: | 147.2 thousand sq. km |
| Life Expectancy: | 65.2 years |
| Literacy (%): | 86.5 (of ages 15 and 24) |
| HDI Rank: | 157 |
| <i>Sources:</i> <ul style="list-style-type: none">- Central Bureau of Statistics, Government of Nepal 2012- Human Development Report Statistics, UNDP, 2011- Economic Survey of Nepal, Ministry of Finance, Government of Nepal, 2011/2012 | |

As a result, approximately 100 joint stock companies were established between 1952 and 1964. However, it was only with the formulation of the first five-year plan in 1956 that serious attempts at progress in economic and industrial development were initiated.

Nepal's industrial development was dominated by establishment of import-substituting public enterprises. The generous aid from Russia and China, which helped to establish industries, contributed to this process. The first five decades in the life of modern Nepal saw the establishment of government-owned industries, producing jute, sugar, cigarettes, cement, bricks, shoes, etc.

Though the 1974 Industrial Enterprises Act shifted the Government's focus from the public to the private sector, the industrial sector remained dominated by public sector enterprises until the early nineties. In fact, the state is still involved in many business activities such as telecom, oil etc.

❖ Original paper written (2006-07) by Navin Dahal and updated in April 2013.

† LL.M. (Cantab), Advocate, Supreme Court of Nepal. Khatiwada is a Legal Associate at South Asia Watch on Trade, Economics & Environment (SAWTEE). The author would like to put on record his gratitude to Ratnakar Adhikari and Dhruv Chandra Regmi for their comments and suggestions as well as to Navin Dahal who contributed the earlier version of this chapter.

Competition Evolution and Environment

Until the 90s the predominant focus of the planners seemed to have been on the supply of goods and services by the public sector. Understandably, ensuring competition was not a priority and in many cases, public monopolies were promoted by the state. The restoration of multiparty democracy in 1990 saw a shift in government policies in favour of economic liberalisation and the privatisation of many public sector enterprises. Nevertheless, the state failed to regulate the market after privatisation which created fertile grounds for private businesses to start carrying out anticompetitive conducts. Apart from few legislations in between that had limited implications in regard to regulating market competition, the regulation of competition in the market did not become the state's priority. It was only in 2007 that Nepal drafted the Competition Promotion and Market Protection Act (hereinafter "Competition Act"). Moreover, it took another 3 years to draft the implementing rules of the Act. The fact that not a single Commercial Court in the country has reported that it has heard a case under the Act indicates that the Act is yet to be implemented.

Competition Law in Nepal

During the negotiations with the members of the WTO for Nepal's accession to the WTO, Nepal made a voluntary commitment to enact a competition law. Consequently, in 2007 the Competition Act was promulgated.

Objectives of the Act, as highlighted in its preamble, are to:

- make national economy more open, liberal, market oriented and competitive by maintaining fair competition in the market;
- increase national productivity, and prevent improper intervention, monopoly and restrictive business practices in the market;
- increase the quality of goods and services and to ensure availability to the consumers, quality goods or services at lower price;
- prevent anticompetitive conducts in the market.

The Act prohibits and punishes anticompetitive agreements, abuse of dominance, anticompetitive mergers and amalgamation, bid rigging, exclusive dealing, market restriction, tying, and misleading advertisement as anticompetitive conducts and defines individual responsibility for the violation of the provisions of the Act. Further, the Act makes anticompetitive conducts as punishable offence.

Some of the salient features of the Competition Act are as follows:

a. Anticompetitive Agreements (Section 3): The Act has given a lot of emphasis on prohibiting anticompetitive agreements and cartels. It has defined "agreement" broadly and covers contracts, agreements, understanding or

arrangements concluded in writing, oral or by conduct that may or may not be enforceable according to prevailing law. Similarly, agreement also covers decisions of or recommendations between two or more persons or enterprises. Under anticompetitive agreements, the Act prohibits conducts such as, price fixing, market restriction, limiting production or output, market or customer division, exclusive dealing, price discrimination, bid rigging, syndicate system in transportation or distribution of goods or services.

b. Abuse of Dominance (Section 4): The Act prohibits abuse of dominance that forecloses competitors from a relevant market; limit production or output; price discrimination; provide unfair trading conditions; predatory pricing and tying. Dominance has been defined as either 40 percent market share in the territory of Nepal, or the ability of an enterprise to affect relevant market or implement unilateral decision in the relevant market.

c. Anticompetitive Mergers and Acquisition: The Competition Act prohibits mergers, acquisitions or amalgamation that result into more than 40 percent market share in Nepal of the enterprise after merger, acquisition or amalgamation. There is no room for exception to the provision.

d. Other Anticompetitive Conducts: In addition to the above conducts, the Act further prohibits bid rigging, exclusive dealing, market restriction, tying (irrespective of dominance) and misleading advertisements. All these conducts, except misleading advertisements, also fall under the prohibitions defined under anticompetitive agreements and abuse of dominance. However, the mental element is not essential in case of such conducts neither it is essential to establish dominance in order to find tying and exclusive dealing. The intention of the drafters, therefore, seems to be that a strict liability should follow in cases of exclusive, dealing, bid rigging, market restriction, tying and misleading advertisement.

e. The Developmental Dimension of the Competition Law and Exceptions: The Act provides a series of exceptions and exemptions by taking into consideration developmental dimension of competition law. The Act exempts small cottage industries, agricultural production and cooperatives, purchase of raw materials, export businesses, exercise of collective bargaining rights of labors, research and development related acts, management related cooperation and cooperation to improve organisational capabilities from the application of the Act. The Act also provides two exceptions in case of conducts that are otherwise abuse of dominance under the Act. Two exceptions include, acts carried out as an exercise of intellectual property rights (IPRs) and acts that improve the quality of goods or services when the resulting improvement is in the interest of customers.

f. Anticompetitive Exercise of IPRs: The Act has delegated authority to the government to draft a Regulation defining anticompetitive exercise of intellectual property rights. The Regulation can regulate and control possible anticompetitive conducts, such as exclusive grantback conditions, pooling and cross licencing, refusal to licence etc., in the exercise of IPRs.

g. Special Power of the Government: The Act is applicable in cases of both public and private entities. However, according to the Act, the government can exercise special power to exempt the application of the Act in a certain region or for certain duration in order to address the crisis of production or distribution of any goods or services.

h. Extraterritorial Application of the Act: The Act also provides for extraterritorial application of the Competition Act. Hence, competition authorities and courts can exercise jurisdiction over any conduct that violates the provisions of the Act, even when such conduct is carried from outside the territory of Nepal.

i. Punishment: Anticompetitive conducts under the Act are punished with fines. The Act provides for individual responsibility for any violation of the Act. Therefore, the chief or partners of an enterprise are criminally liable when an enterprise violates the Act.

j. Competition Authorities: Investigations under the Act are carried out by Investigation Officers appointed by the Government of Nepal, the Competition Promotion and Market Protection Board or a subcommittee formed by the board. In addition to investigation, the board is responsible for advising the government on competition law, policy and for carrying out advocacy campaigns, training etc. The board is also responsible for the preparation of strategies to ensure effective enforcement of the Act and to carry out studies and research on the area of competition law. However, the board has become very inefficient and inactive. The board, including market officers, has failed to conduct a single case of anticompetitive conducts and file a case in the court. Perhaps, the composition of the Board has made it difficult for the Board to function properly and independently of the government. As most of the members of the Board are *ex-officio* members who already have important and demanding responsibilities, they have not been able to devote adequate time and energy towards the functioning of the Board.

k. Court: The commercial bench of Appellate Courts have jurisdiction to hear cases under the Act. A commercial bench is a specialised bench formed in Appellate Courts to hear cases relating to commerce and businesses.

Other Laws that Affect Competition

In addition to the Competition Act, the following laws also provide rules that are similar to the prohibitions defined by the Competition Act. As such the following laws can be relevant for the maintenance of fair competition in the market:

- Essential Services Operation Act, 1957;
- Food Act, 1966;
- Nepal Standards (Certification Mark) Act, 1980;
- Pharmaceuticals Act, 1978;
- Export and Import Act, 1957;
- Telecom Act 1998;
- Insurance Act 1990;
- The Companies Act 2007;
- Nepal Rastra Bank Act 2020;
- Bank and Financial Institution Act 2007;
- Nepal Agency Act, 1957; and
- Privatisation Act, 1994.

Anticompetitive Business Practices

Cartels

Cartels are the most rampant forms of anticompetitive conduct in Nepal. Associations of businesses openly fix price and devise various mechanisms of noncompetition. Particularly, price fixing is seen as a legitimate objective of associations. For example, in 2010, the Banker's Association of Nepal fixed the interest rate the commercial banks provide on the deposits. The Association defended its decision citing unhealthy competition in interest rates that may ultimately force some banks out of the market. No action was ever taken against the Association and the commercial banks continued to abide by the decision and fixed interest rates on deposit.

Box 1: Price Fixing by Major National Dailies

From December 11, 2011, the three most read and circulated Nepali National Dailies raised price of the newspapers from 5 NPR to 10 NPR. The three national dailies, *Kantipur Daily*, *Nagarik Daily* and *Annapurna Daily* raised their price effective from the same day and by exactly the same amount. In addition, all three dailies cited same reasons to justify their decision. It was also reported that the three dailies held meetings together and decided about the price hike. The decision to raise price was clearly a breach of the Competition Act and a telling example of cartel. However, no action was taken against the publishers.

Syndicate Systems

Syndicate system is pervasive in surface transportation sector in Nepal. Particularly, goods transportation sector is marred by the system. The members of a syndicate oppose attempts by competitors to enter into a market by resorting even to violence. Furthermore, members of syndicate have in the past also resorted to other indirect ways of enforcing syndicate such as requiring permit or

Box 2: Syndicate System in Surface Transportation

Majority of transport entrepreneurs in the country have formed local syndicates, which allow none other than syndicate members to ply their vehicles on the designated long routes. They have not only prevented other entrepreneurs from entering the transport business, but were also involved in vandalising buses which trespass on the demarcation of different syndicates.

Ironically, while the Government adopted a liberalised and free economy about a decade ago, it also created a provision in the Transportation Act for syndicates.

Syndicate operators claimed that they did not allow non-members/buses to ply on 'their' highway, and if they did ply, they would be fined heavily. Companies outside the syndicate system felt that it created problem for their operations. They blamed the Government for being a mute spectator of the system and held it responsible for perpetuating near monopoly, thereby rewarding inefficiency and carelessness.

Source: Anticompetitive Practices in Nepal, Adhikari and Regmi, CUTS and SAWTEE, 2001

licenses to operate in a market, refusing to deal with customers who deal with competitors outside the syndicate and so forth. Syndicate often results into exorbitant price that are unreasonable and extremely exploitative of the customers. In fact, a recent study has shown that syndicate system in goods transportation in Nepal may cost the market in the region of 4.2 to 5.78 billion NPR.¹

In August 2012, Liquefied Petroleum Gas (LPG) entrepreneurs started a strike to force the government into accepting their 16-point demands which included, among others, requirement of a "prior permission of the association [LP Gas Industry Association Nepal] for opening a new gas industry".² The demand was clearly to create a syndicate system and to prevent new entrant into the market.

Tied-selling

Tied-selling occurs when an enterprise compels consumers, as a condition of sale, to purchase additional and different products or services while purchasing products or services they intend to purchase. In some occasion, enterprise may also bundle products together and sell two or more products together at a price lower than the price customers would have paid for those two products separately. Bundling does not always lead to anticompetitive effects in the market unless done by a dominant enterprise with the intention to exclude competitors from the market or create barriers to entry into the market.

Tying generally tend to occur in markets where there are related products or services. For example, common form of tying in Nepal occurs in the health sector, where doctors generally require their patients to only buy medicines from a recommended chemist, or have tests done at the same or a particular clinic. Similarly, many schools compel students to buy their uniforms, books, note books from a particular store or suppliers.

Another case of tied-selling in Nepal has been in the cement market. Cement distributors and retailers often demand that for every certain sacks of Nepalese cement purchased, which is a fast-selling item; certain number of sacks of Indian cement must be purchased, which is a slow-selling item.

Regulatory Legislation

The enactment of the Industrial Enterprises Act, 1992 and Foreign Investment and Technology Act, 1992 were major steps in the liberalisation of Nepali economy. The Acts opened the market for foreign investment in most of the sectors of the economy and also abolished licensing, except for in a few areas concerning national sovereignty and security, public health, and the environment. This, together with the lowering of tariffs created a platform for competition in Nepal.

The reduction and restructuring of import duties; and elimination of most quantitative restrictions and import licensing requirements, as part of the reform programmes, played important roles in enhancing competition in the domestic market. Due to the reforms, the average rate of protection has declined from nearly 111 percent in 1989, to 22 percent in 1993 and, to 14 percent in 2002. Most rates since 2002 fall at 05-25 percent, whilst more than 70 percent of the rates exceeded 25 percent in 1990 (HMGN/MOICS 2003, 19).

The Black Marketing and Certain Other Social Crimes and Punishment Act, 1975

This Act was promulgated in order to maintain the health, convenience and economic well-being of the public; and also to prohibit restrictive business practices, such as black marketing, profiteering, deflection of commodities, hoarding and creation of artificial scarcity.

Section 2(a) of the Act states that 'in case any person sells any commodity at a price higher than the price fixed by His Majesty's Government; and, in case His Majesty's Government has not fixed the price, at a price higher than the price determined by the producer, importer, or main distributor of the commodities, prescribed by His Majesty's Government by notification in the Nepal Gazette; the price at which such commodity was sold shall be refunded and the commodity shall be confiscated'. Perhaps, this provision was appropriate in the pre-liberalisation era when the Government was involved in price control and when

there were restrictions on imports and is less significant in today's liberal environment. However, the provision also has role in the preservation of competition by controlling a dominant or monopolistic enterprise from maintaining monopoly profit.

The Industrial Enterprises Act, 1992

The Industrial Enterprises Act, 1992 marked a significant shift in the industrial policy of Nepal. It heralded the end of the license system and was catalytic in infusing competition into the market.

The preamble of the Act states '...for the overall economic development of the country, it is expedient to make arrangements for fostering industrial enterprises in a competitive manner, through the increment in productivity, by making the environment of industrial investment more congenial, straightforward and encouraging'. This, probably, was the first time that competition was mentioned in a government law.

One of the main competition promoting measures, in the Act, is Section 9(1). Section 9(1) provides that permission need not be required to establish, extend and diversify any industry other than those producing explosives, including arms, ammunition and gunpowder; security printing; bank notes and coin minting; and cigarettes, *Bidi*, cigars, chewing tobacco industries, and industries producing goods of a similar nature utilising tobacco as the basic raw material; and alcohol or beer producing industries. The Act was crucial in breaking barriers to entry into Nepali market and sought to create environment for competition against incumbent dominant or monopolist enterprises.

The Foreign Investment and Technology Transfer Act, 1992

The Act was enacted concomitantly with the Industrial Enterprises Act, 1992. The preamble of the Act states the objective as 'to promote foreign investment and technology transfer for making the economy viable, dynamic and competitive, through the maximum mobilisation of the limited capital, human and the other natural resources'.

The Act has opened up all the sectors to FDI, barring a few, such as, cottage industries, real estate and those affecting national security. By promising approval within 30 days of application, the Act tries to facilitate FDI in Nepal. Foreign investors are allowed to hold 100 percent ownership in industries. The opening up of the economy to foreign investment was a major policy shift by the Nepalese Government and, in principle, was competition-enhancing.

Consumer Protection

The Consumer Protection Act, 1998

This Act was adopted to protect the interest of consumers, not to induce competition in the market *per se*. This Act addresses restrictive and unfair trade practices (UTPs).

UTPs in turn are defined by the Act as sale or supply of consumer goods or services by making false or misleading claims about their actual quality, quantity, price, measurement, design, make, etc; or the sale or supply of consumer goods, produced by others, affecting their quality, quantity, price, measurement, design, make, etc. This Act also prohibits the sale of sub-standard goods or services.

As such, this Act mainly addresses 'irregularities concerning the quality, quantity and prices of consumer goods or services'. Having said that, the provisions to ensure the benefits for consumers do affect, albeit indirectly, competition as most unfair business practices affect both consumers and competitors.

Particularly, those provisions in the Act that ensure consumers' rights 'to choose goods and services at competitive prices'; and those that prohibit 'the creation of circumstances to influence demand, supply or price, of any consumer good or service, by fixing the quota of raw materials needed for any consumer good, or reducing the production of any consumer goods, or taking any other similar actions or by hoarding any consumer goods or services, or otherwise creating an artificial shortage, or selling and supplying such goods or services at specified times or places only, or taking any other similar actions in collusion with others', can have positive impact on competition.

The enforcement of the Act has, however, been very weak as it has neither been able to protect the consumers' interest, nor promote competition in the Nepalese economy.

Sectoral Regulatory Framework

Till the early 90s, the state had complete control over the basic amenities of the public and there was virtually no involvement of the private sector in the areas, such as power, telecom, and water supply. In line with the economic liberalisation process initiated by the Government in the early 90s, the utilities and other services sectors, traditionally dominated by state monopolies, were opened to the private sector. The generation of power was opened in the early nineties, and the private sector was allowed in the telecom sector in 2003.

Following regulatory agencies have been established to regulate different sectors of the economy and are also responsible for maintaining competition in the respective markets.

- The Nepal Telecommunications Authority (NTA) – to regulate the telecommunication sector;
- Electricity Development Board – to regulate the electric power sector;
- The Insurance Committee – to regulate the insurance sector; and

- The Civil Aviation Authority – to regulate the civil aviation sector.

Furthermore, the Central Bank, Nepal Rastra Bank, regulates the financial and banking sector in Nepal, and the Securities Board oversees the securities market.

The Nepali telecommunications sector has witnessed a major development in the competition structure of the market in the recent years. Once the state-owned monopoly – Nepal Telecom dominated the market since its inception in 1975. However, following privatisation and opening up of foreign investment in the sector, many telecom companies have entered the market and consequently competition among different telecom companies has been very encouraging. With the competition in the telecom market, the price has gone down and the reach of telecommunication has widened quite extensively.

The Telecommunications Act 1998 provided for the privatisation of the NTC and the establishment of a regulatory body – the NTA. The NTA regulates telecom market, including internet service providers. The NTA since its establishment has been active in regulating market behavior and competition among telecom companies.

Nepal Rastra Bank (The Central Bank) exercise wide regulatory power over banks in Nepal. Some of its regulatory powers have implications on the competition among banks. Along with the Companies Registrar's Office, the Central Bank can prevent concentration of market power in a company or bank by preventing any merger or acquisition that may hamper competition in the market.

Concluding Observations and Future Scenario

The Competition Act is not a perfect piece of legislation. The Act seems to have been drafted in haste. For example, there are provisions in the Act that are repetitive and contradictory. On the one hand, the Act defines exercise of IPRs as an exception of abuse of dominance, the Act also anticipates Rule that would define possible anticompetitive conducts in the exercise of IPRs. The Act does not cover anticompetitive agreements between/among

distributors. The provision relating to merger and acquisition has prohibited all mergers and acquisitions that may lead to 40 percent market share of the merged entity in the territory of Nepal. This has meant that even such mergers or acquisitions that may have efficiency enhancing results may be prevented. The lack of autonomy of the Board from the government has meant the Board has failed to be proactive in the investigation of anticompetitive conducts and promotion of competition law. Perhaps, the failure is also due to limited understanding of the significance of the Act in the market. The maximum fine defined by the Act is also not adequate and cannot deter enterprises involved in anticompetitive conducts.

Be that as it may, with the promulgation of Competition Act hope of a coherent and effective regulation of competition has arisen. Rigorous enforcement of the Competition Act can certainly maintain competition in Nepali markets. However, the challenges in maintaining fair competition also lie beyond the Act. The enforcement authorities in Nepal do not have experience of enforcing Competition Law and there has been very little training on the issue. With the lack of awareness, consumers and businesses do not realise that many remedies to their exploitation and exclusion lie within the ambit of the Competition Act.

In this regard, adequate training and awareness programmes have become essential. Similarly, the inculcation of competition culture in Nepalese society, and winning of the confidence of all the stakeholders are a must for the effective implementation of an effective competition regime in Nepal.

Further, maintaining fair competition in Nepal also requires close cooperation among various regulatory agencies and the competition enforcement authority. It has both practical and legal benefits. Regulatory agencies are closer to related businesses and are able to exert influence on their behaviour easily. Similarly, the regulatory agencies are also better positioned to understand and gain vital insights on the functioning of the businesses that can be crucial during the investigation in cases of possible anticompetitive conducts.

Suggested Readings

- Adhikari, R. Anticompetitive Business Conduct in Nepal (presentation), *SAWTEE*, Kathmandu.
- Adhikari, R. and Regmi D. C. 2001. *Anticompetitive Practices in Nepal*, SAWTEE, Kathmandu and CUTS, Jaipur.
- Competition Promotion and Market Protection Act, 2007. Ministry of Law/His Majesty's Government Nepal. 2007, Kathmandu.
- Competition Scenario in the Kingdom of Nepal. *CUTS and SAWTEE, Kathmandu*.
- Khatiwada, Apurba, *Competition Law: An Introduction*, Economics Journal, (Society of Economics and Education Students, Tribhuwan University), Vol. II, p 35, 2009.
- Ministry of Industry, Commerce and Supplies/His Majesty's Government Nepal. 2003, *Nepal Trade and Competitiveness Study*, Kathmandu.
- Ministry of Law, Justice and Parliamentary Affairs/ Government of Nepal. 2007, *Nepal Trade and Competitiveness Study*, Kathmandu.
- Regmi, Dhrubesh Chandra. 2011. The Status of Competition Regime in Nepal. (Presentation), World Competition Day 2011. SAWTEE/ SEJON, Kathmandu.
- Study on Impact of Transportation Monopoly: Report on the Roads Goods Transport Industry of Nepal, USAID | Nepal, Kathmandu: 2012.
- Regmi, Dhrubesh Chandra and Thapa, Neelu. 2012. *The Status of Competition in Nepalese Economy*. Briefing Paper, SAWTEE. Nov. 2012, Kathmandu.

Endnotes

- 1 Study on Impact of Transportation Monopoly: Report on the Roads Goods Transport Industry of Nepal, USAID | Nepal, Kathmandu: 2012, p.3.
- 2 See, My Republica Daily, Entrepreneurs to stop selling LPG August 15 onwards. August 6, 2012.

† **Apurba Khatiwada** is a lecturer of international law and legal philosophy at Chakrabarti Habi Education Academy College of Law, Purbanchal University and a Visiting Faculty, Tribhuwan University. He is admitted to Nepal Bar Council and practices law in the Supreme Court of Nepal and Subordinate Courts. Presently, he also serves as a Consultant at South Asia Watch on Trade, Economics and Environment. Khatiwada holds an LL.M. degree from the University of Cambridge, where he concentrated on International Economic Law including Competition Law.