COMPETITION DISTORTIONS IN INDIA – A CUTS DOSSIER

(CDI-48: April to June 2020)

For earlier Dossiers please see: http://www.cuts-ccier.org/Competition_Distortions_India.htm

This periodic dossier produced by CUTS International looks at the interface of policy issues which have an impact on competition in India, which can be both negative and positive. News as published is used without verifying their accuracy. The purpose is to flag issues to the layman as well as to the specialised policymakers and regulators, rather than be judgmental about them. This would require greater analysis particularly in terms of cost and benefits therewith.

Dear Reader,

Greetings!

We are pleased to present to you the Competition Distortion Dossier for the April to June 2020 quarter. To ensure that you do not miss any updates from this quarter, we have extensively covered the most significant news stories from these three months that have an impact on the competitive atmosphere in India. We understand that this dossier would reach you at a time when the whole world is fighting a fierce battle against one of the greatest healthcare crises that we have seen so far.

The COVID-19 pandemic has forced us to revisit our assumptions relating to inclusive economic development and measures necessary to achieve it. Some developments in this regard are covered in this 48th edition of the dossier.

Taking forward from previous editions, we have divided the dossier into three parts: Trade Policies; Policies Promoting Competition, and Policies Inhibiting Competition.

In the first part, we cover developments regarding the COVID-19 relief package and associated trade concerns along with stories focusing on the imposition of anti-dumping duty on raw materials for solar and other industries.

Throughout the Dossier, developments under the 'Aatmanirbhar Bharat Abhiyan' plan have also been covered, whilst examining the possible adverse effects on competition. At the same time, there are several good news in this bulletin in the area of promotion of competition. One particular case is that of private companies and start-ups in the space-tech industry being allowed to use ISRO's geo-spatial data and facilities. This will open up the space industry to greater competition and innovation.

Another important story is the move by the CCI to do away with the requirement of disclosing certain non-compete restrictions for approving any combination. This will give greater flexibility to companies to self-assess and reduce the information burden on parties.

We hope you enjoy reading these stories as much as we did, reporting them. Our best wishes to you and your family for dealing with the COVID-19 crisis.

Cheers!

Contents

1. TRADE POLICIES

Tariff, non-tariff barriers coming to curb power equipment imports, especially from China[1]

Among the proposals, the Power Ministry has suggested stringent quality standards for imports of all kinds of power equipment to be fixed and sub-standard products to be rejected outright with the supplier being blacklisted. Goods so imported shall be tested in Indian laboratories for adhering to Indian standards and checks would also detect the presence of malware that has the potential to jeopardise the security of critical infrastructure installations of the country.

Also, the Ministry has suggested re-imposition of basic customs duty (BCD) at the rate of 20 percent on imports of solar cells and modules when the period of the existing 15 percent safeguard duty ends. The move is expected to check imports of solar gear from China that supplies about 80 percent of solar cells and modules to India.

Food for Thought

Since the past few years, India has been dependent on Chinese imports for power equipment – big and small, especially in the solar power sector. It is estimated that today 80-90 percent of modules in India are imported as opposed to 2011 when India controlled 70-80 percent of global supplies of solar modules.[2] The target for quite some time has been to gain back India's position as the frontrunner of export and domestic supply for quality solar modules.

The biggest hurdle in achieving that has been the low prices offered by Chinese products. The reason for such cost disparity is that the know-how in China is supplemented by the low cost of capital, cheap raw material, labour, and infrastructure – all of which is lacking in India.

To counter Chinese imports, re-imposition of basic customs duty (BCD) of 20 percent on solar cells and modules, the imposition of stringent quality standards for imported power equipment, and other measures have been proposed for promoting Modi's yet-another self-reliant plan of Atmanirbhar Bharat Abhiyaan.

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1 https://energy.economictimes.indiatimes.com/news/power/tariff-non-tariff-barriers-coming-to-curb-power-equipment-imports-especially-from-china/76615430

2 https://energy.economictimes.indiatimes.com/news/renewable/covid-19-provides-opportunities-for-domestic-solar-module-manufacturing/75660075

However, similar attempts at countering Chinese imports by merely imposing a BCD of 25 percent[3] has proven inefficient in 2018;[4] instead of shifting consumption trends, the imposition of BCD stalled major solar power projects. Providers decided to bide time on the restrictions instead of buying local products.[5]

Thus, the need of the hour is an aggressive strategy in line with the National Solar Mission, for the long-term development of the industry. Such strategy shall address price competitiveness, profitability, feasible finance, and capacity gaps.[6] It could also be useful to offer competitive rates of interest for developers who use domestic equipment.[7] It is equally important to invest in research & development (R&D), which can be done by allocating custom duties, particularly antidumping, collected on imported modules to incentivise solar energy companies.

It will be a better strategy to incentivise local manufacturers, rather than restricting imports. To make India a manufacturing hub, greater innovation needs to foster inwards.[8] So long as local solar companies depend on Chinese solar companies, the challenge will remain. It will require such drastic measures for India to match the scale, quality, and low price of Chinese products and further India's solar technology and manufacturing.

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3 The duty began at 25 percent between July 30, 2018, and July 29, 2019; 20 percent between July 30, 2019, and January 29, 2020; and 15 percent for the period between January 30 and July 29, 2020. https://energy.economictimes.indiatimes.com/news/renewable/40-per-cent-duty-local-testing-to-curb-all-power-gear-imports-from-china/76635777[4] The duty began at 25 percent between July 30, 2018, and July 29, 2019; 20 percent between July 30, 2019, and January 29, 2020; and 15 percent for the period between January 30 and July 29, 2020. https://energy.economictimes.indiatimes.com/news/renewable/40-per-cent-duty-local-testing-to-curb-all-power-gear-imports-from-china/76635777

4 The duty began at 25 percent between July 30, 2018, and July 29, 2019; 20 percent between July 30, 2019, and January 29, 2020; and 15 percent for the period between January 30 and July 29, 2020. https://energy.economictimes.indiatimes.com/news/renewable/40-per-cent-duty-local-testing-to-curb-all-power-gear-imports-from-china/76635777

5 www.livemint.com/politics/policy/india-solar-duty-fails-domestic-producers-as-demand-dwindles-1548852897091.html

6 https://www.orfonline.org/expert-speak/why-india-needs-to-nudge-domestic-manufacturing-for-solar-industry-67388/

7 Supra No. 1

8 https://www.theweek.in/news/biz-tech/2020/06/25/solar-companies-dependence-on-china-may-prove-to-be-a-challenge.html

Spinning industry wants no anti-dumping duty on acrylic fibre[9]

Feeling the heat due to losses incurred on account of COVID-19 lockdown, Ludhiana's spinning industry, which wishes to resume production of yarn, is now demanding that the anti-dumping duty on the import of acrylic fibre should be withdrawn with immediate effect.

Accusing a group of three India-based manufacturers of forming a cartel for lobbying against the withdrawal of duty, the spinners are demanding that it's high time the centre accepts their 25-years-old demand of doing away with the anti-dumping duty and saving their industry. If this is not done then due to the ongoing economic crisis ensured by the lockdown there is no chance of survival of the spinning industry, which employs a huge workforce and produces raw material for the entire textile and garment industry.

Food for Thought

As has been discussed in the previous editions of CDD, the prolonged imposition of anti-dumping duty (ADD), although aimed at protecting the domestic industry, is likely to have a negative long term impact on both the industry as well as the consumer as it distorts competition in the market.

The spinning industry is a prime example of this, where ADD on acrylic fibre has been imposed on many countries, like, Thailand, the US, Japan, Korea, Portugal, Spain, Italy, Mexico, Germany, UK, Bulgaria, EU, China, Ukraine, Peru and Belarus since 1997.[10] *For all the anti-dumping investigations that have been initiated in the area, the same three producers of acrylic fibre in India are found to be responsible.*[11] *Ludhiana Spinners Association (LSA) and North Indian Textile Mills Association (NITMA) allege that the petitioners Indian Acrylics Limited, Vardhman Acrylics Limited, and Pasupati Acrylon*

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9 http://timesofindia.indiatimes.com/articleshow/75665937.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

10 The US, Thailand, Korea in 1997, Japan, Portugal, Spain and Italy in 1998, Mexico and Turkey 1999, Taiwan 2000, UK, Germany, Bulgaria, Brazil 2002, Belarus 2004, https://www.antidumpinglaws.com/content.php?id=Acrylic%20Fibre; https://www.textileexcellence.com/news/trade-policy/india-considering-anti-dumping-duty-on-acrylic-fibre-from-five-countries/

11 M/s Indian Acrylics Limited, M/s Vardhman Acrylics Limited and M/s Pasupati Acrylon Ltd have been petitioners in all of the investigations into acrylic fibres.

Ltd have formed a cartel and exercised preferential dealings with the related industry members,[12] causing great harm to the industry.

It has been estimated that 10 lakh jobs and 7,500 Micro, Small, and Medium Enterprises (MSMEs)[13] will be affected by the combined effect of COVID-19 and the monopolistic practices of the petitioners. Moreover, the prolonged protection of the acrylic fibre industries has led to a decline in the competitiveness of the textile industry in the winter wear market.[14]

It has been reported that the inverted duty structure, i.e. duty being imposed on acrylic fibre and not on its products like sweaters and shawls, has led to an influx of cheaper Bangladeshi variants dominating the local products.[15] As a result, while India and Bangladesh were on the same footing in 1992 in the world sweater market, in 2018, India's share was negligible at US$0.07bn as compared to US$10.3bn of China and US$2.5bn of Bangladesh.[16]

Thus, it would be beneficial to look into the removal of ADD on acrylic fibres to ensure the competitiveness and survival of the MSMEs in the spinning industry, who have been hit hard due to COVID-19. It has been suggested by many industry leaders, that high duties should be imposed on value-added products down the value chain, such as sweaters, yarn, etc. to stop imports and encourage 'Make in India'.[17] Alternatively, given that duty-based methods have already been used for two decades, it might be beneficial to introduce measures aimed at reducing the bottlenecks faced by the domestic industry and enhancing their competitiveness through incentives.

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12 http://timesofindia.indiatimes.com/articleshow/75665937.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

13 https://textilevaluechain.in/2020/05/10/views-of-ludhiana-spinners-association-lsa-on-anti-dumping-duty-on-acrylic-fiber/

14 https://kohantextilejournal.com/lsa-nitma-protest-against-anti-dumping-duty-on-acrylic-fiber/

15 https://timesofindia.indiatimes.com/city/ludhiana/spinning-industry-wants-no-anti-dumping-duty-on-acrylic-fibre/articleshow/75665937.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

16 https://in.apparelresources.com/business-news/trade/anti-dumping-duty-acrylic-fibre-policy-must-change/

17 https://timesofindia.indiatimes.com/city/ludhiana/spinning-industry-wants-no-anti-dumping-duty-on-acrylic-fibre/articleshow/75665937.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

India slaps anti-dumping duty on certain steel imports from China, South Korea, Vietnam[18]

India slapped definitive anti-dumping duty on certain steel products imported from China, South Korea, and Vietnam after a probe found that these items caused injury to domestic producers.

The Revenue Department said in an order that flat-rolled product of steel coated with an alloy of aluminium and zinc was exported from these countries below their normal value, resulting in dumping and causing injury to domestic producers. The rate of duty imposed varies from country to country and from exporter to exporter with the highest rate applicable on exports from China at US$128.9 per tonne.

The provisional anti-dumping duty imposed on the product in October 2019 had expired in April 2020 and the definitive duty imposed is applicable for five years starting from October 2019, said the order.

Food for Thought

The Directorate General of Trade Remedies decided to impose ADD for five years in the range of US$13.07 to US$73.10 per tonne on imports of 'flat-rolled product of steel, plated or coated with an alloy of Aluminium and Zinc' from China, Korea, and Vietnam.[19] The application was made by Indian Stainless Steel Development Association, Jindal Stainless Ltd., Jindal Stainless (Hissar) Ltd., and Jindal Stainless Steelway Ltd.[20] against China, Korea, EU, Japan, Taiwan, Indonesia, US, Thailand, South Africa, Mexico, UAE, Singapore, Hong Kong, Vietnam, and Malaysia for various steel products. Additionally, the government has extended the ADD on certain other varieties of steel products from China, Malaysia, and Korea till December 04, 2020.[21]

India is currently the world's second-largest steel producer behind China[22] and the ninth biggest exporter.[23] The 'dumping' is due to the price difference between imported

18 https://www.livemint.com/news/india/india-slaps-anti-dumping-duty-on-certain-steel-imports-from-china-south-korea-vietnam-11592933858413.html

19 https://www.financialexpress.com/economy/india-imposes-anti-dumping-duty-on-certain-steel-products-from-china-vietnam-korea/2001726/

20 http://www.dgtr.gov.in/sites/default/files/Initiation%20Notification_0.pdf

21 https://www.business-standard.com/article/markets/govt-extends-anti-dumping-duty-on-certain-steel-items-till-december-4-120060400844_1.html

22 Based on 2019 data https://www.worldsteel.org/media-centre/press-releases/2020/Global-crude-steel-output-increases-by-3.4--in-2019.html, https://economictimes.indiatimes.com/industry/indl-goods/svs/steel/india-replaces-japan-as-second-top-steel-producer-worldsteel/articleshow/67721395.cms?from=mdr

23 Based on 2017 data https://legacy.trade.gov/steel/countries/pdfs/exports-India.pdf

and domestic products. The procedure of calculation of nominal value and dumping margin for deciding ADD is capricious at best.[24] *Steel is a common input for many industries like automobiles, components, machinery, engineering goods, electrical equipment, and construction. The imposition of such duties forces the user industries to buy domestic steel on inflated prices*[25] *and induces import of steel-intensive goods such as earthmover and construction equipment from countries like China. It also makes the export of steel-intensive value-added products difficult.*

While low-cost imports edge out competing local producers from the market, they enable those industries using these imports as raw materials to become competitive. This competing interest among primary and secondary producers is pronounced in the domestic steel industry where producers of finished goods prefer low-cost imports. Policymakers must weigh the competing interests of the entire value chain while deciding on tax policy.[26]

Anti-dumping action adversely affects the competitiveness of the domestic user industries by forcing them to consume high priced domestic steel. Consequently, dumping also impacts the price of the product in the importing country (since the exported item would be sold at a lower price than the price of the domestic product) thus hitting margins and profits of manufacturing firms. This is not ideal, especially in the current situation, when the economy is severally hit by the pandemic and the subsequent lockdown.

2. POLICIES PROMOTING COMPETITION

ISRO facilities to open for startups, private firms; new geospatial policy soon[27]

The government will allow private firms and startups to use the infrastructure and facilities of India's space agency to build satellites and rockets, besides formalising a national geospatial policy to allow local entrepreneurs to use remote sensing data of the country's satellites and build applications for areas such as agriculture.

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24 Many questions on the same have been raised internationally and domestically

25 CDD edition 45 talks about the effect of import duties on the user industries.

26 https://www.livemint.com/news/india/india-slaps-anti-dumping-duty-on-certain-steel-imports-from-china-south-korea-vietnam-11592933858413.html

27 https://economictimes.indiatimes.com/news/science/isro-facilities-to-open-for-startups-private-firms-new-geospatial-policy-soon/articleshow/75776524.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cpps

"Private sector is doing a lot of work in the space area... To provide a level playing field for private companies, will make a provision for them to benefit from Indian Space Research Organisation's (ISRO's) assets," Finance Minister Nirmala Sitharaman said. "We will provide predictable policy and regulatory environment to private players".

ISRO has over a dozen facilities that design and develop communication and earth observation satellites and rockets that can carry up to six tonnes of payload into space.

Food for Thought

In India, there are over 120 startups who are working in developing space-related technologies. However, because of government regulations, they have been unable to use ISRO's available facilities for even testing their products. Thus, the announcement by the Finance Minister that the Government of India has decided to give startups and private firms access to ISRO's geospatial data, will ensure the development of newer technology at lower costs for Indian firms.

In furtherance of this, a special geospatial data policy will be released by the government. Until now, Indian companies that were working on agricultural or geo-positioning applications have been emptying their pockets trying to mine data from international sources.[28] The introduction of a regulatory system, providing access to geospatial technology and data is likely to enable more investment and economic activity in the sector thus enabling Indian private companies to be competitively engaged in the global space market.[29] This is also in line with the approach adopted by the EU European Space Agency. Additionally, the National Aeronautics and Space Administration (NASA) has also partnered with selected US companies to help private commercial companies mature their technologies at a competitive pace.[30]

Even though these bold statements by India's Finance Minister has excited the space community, the real test is now. As always, implementation is key. These statements need to be followed up with cold and hard actions, enabling policies and appropriate regulatory frameworks. Narayan Prasad and Prateep Basu, two prominent faces in the Indian space start-up segment, have argued that despite ISRO's success, "India's space

28 https://www.spacedaily.com/reports/India_allows_private_firms_start_ups_a_sneak_peek_into_ISRO_data_999.html

29 https://timesofindia.indiatimes.com/india/union-cabinet-approves-setting-up-of-in-space-a-new-space-board/articleshow/76554135.cms

30 https://www.nasa.gov/press-release/nasa-announces-us-industry-partnerships-to-advance-moon-mars-technology/

competitiveness has suffered from the absence of a globally reputed, private space industry."[31]

At the same time, the private sector seems to be more concerned about the implementation rather than the announcement. There are particular concerns about issues such as sharing intellectual property (IP) for products developed by the private sector. Right now, all IP is controlled by ISRO and supplies will simply replace ISRO technical and production facilities. This means that most suppliers will have no real IP of their own.

Ambiguities may also arise concerning the liability of different parties. At present, ISRO is the sole owner of space technology in India, limiting its liability and exposure for violations of international treaties and accidents. In case private players are introduced, their liability along with ISRO's will have to be defined in ways that do not render the sector un-investable and do not impose unreasonable obligations on the agency.[32]

These issues revolving around IP and data need to be addressed to ensure they do not further any competition concerns. Indeed, ISRO needs to expand its operations significantly if it wants to remain competitive, both in the domestic and international markets. The biggest advantage of the Indian space programme is the ability to provide reliable launches in cost-effective manners. However, competition is picking up in this sector.

Elon Musk's Space X, Jeff Bezos' Blue Origin, and other start-ups from China are already miles ahead, wanting a share of the global commercial market. The only way for India to catch up is if ISRO and the private sector can work together, effectively and synergistically.

Overcoming clearance delays: Embedded approvals for mineral blocks[33]

According to an order issued by the Mines Ministry, the system of embedded clearances will be tried in at five green-field blocks in each mineral-rich state on a pilot basis, with the intent to scale it up over time.

[31] https://www.orfonline.org/research/indias-space-programme-a-role-for-the-private-sector-finally-66661/

[32] https://finshots.in/archive/isro-and-private-participation/

[33] https://www.financialexpress.com/economy/overcoming-clearance-delays-embedded-approvals-for-mineral-blocks/1982700/

Having shown a steely resolve to promote investments in the mining sector through several steps taken recently including the system of single-licence with the certainty of tenure across the mining value chain, the government has now come out with a scheme under which non-coal, non-fuel mining blocks will have most clearances ready before these are put up for auction.

According to an order issued by the Mines Ministry, the system of embedded clearances will be tried in at five green-field blocks in each mineral-rich state on a pilot basis, with the intent to scale it up over time.

Food for Thought

Obtaining clearances has emerged as the most time-intensive process involved in mineral exploration in India. While in other overseas mining hubs exploration can start within two years of the auction, in India it takes somewhere between six to eight years. It has been repeatedly pointed out that of the 47 greenfield mines allotted by auction since 2015, zero mining leases have been executed.[34]

In the aftermath of Finance Minister Nirmala Sitharaman's announcement of a ₹20tn stimulus package and structural reforms in the mining sector, the Ministry of Mines has provided guidelines for a fresh round of auctions of greenfield mineral blocks that have 'pre-embedded clearances'. These clearances will allow successful bidders of Greenfield mineral blocks, to immediately commence mining operations, instead of having to wait indefinitely for mandatory clearances from the government. To ensure such ease, the state governments are to set up Project Monitoring Units that will do all the preliminary work of obtaining up to 20 clearances for the block.

The move has been hailed as pioneers in the mining sector. Reduction of delays, simplification of the process for obtaining, and exploring the block coupled with a reduction in cost – will lead to greater interest in the sector both by domestic and international players. Greater interest will boost the competitiveness of Indian mining companies, globally. This will also inevitably decrease the import dependence of many user industries, increase employment opportunities,[35] *and overall help the Indian economy drive up auction prices.*

All positives aside, several concerns need to be addressed. In case of violation of terms of clearances obtained by the state on behalf of the successful bidder, who will be held

[34] https://www.newsclick.in/Centre-Govt-Guidelines-Ease-Mining-Green-Violations-Environmental-Clearances-Modi-Govt

[35] http://www.ficci.in/pressrelease-page.asp?nid=3731

accountable? Regarding environmental clearances, a 25 percent increase or decrease is allowed without a fresh approval[36] *– this could lead to greater environmental deterioration. Further, to prevent any conflict of interest or competition distortion, the process of allocating mining blocks should be made as transparent as possible.*

One other major concern that must be dealt with is of operational safety, where the need is for clear, detailed guidelines ensuring safety. The new National Mineral Policy of 2019 introduces no new measures or practices to address an obvious decline in safety, with 377 deaths reported between 2015 and 2017 and fatalities increasing year-on-year since 2016.[37]

However, there is no room to ignore the onset of the COVID-19 pandemic and the subsequent challenges it has brought with it. The conjecture is that some of the important reforms in the mining sector might get deprioritised, at least temporarily, in the face of the immediate priorities to control and subvert the pandemic. This means that the immediate focus on jobs may end up conflicting with other objectives like productivity and safety, including infrastructure projects for mineral evacuation.

Non-compete restrictions: CCI plans to amend Combination Regulation[38]

Parties entering into a combination may not henceforth be required to furnish information on non-compete restrictions for its examination by the Competition Commission of India (CCI)- which is the competition watchdog. They will not be required to justify such non-compete restrictions if the CCI's current thinking is anything to go by.

The CCI proposes to amend its Combination Regulations to do away with the requirement of furnishing such information in Form I that is in vogue in respect of Combination transactions. Draft notification for this purpose has now been issued for public comments and the comments have to be mailed by June 15, 2020, an official release said.

[36] https://www.newsclick.in/Centre-Govt-Guidelines-Ease-Mining-Green-Violations-Environmental-Clearances-Modi-Govt

[37] https://www.mining-technology.com/features/mining-in-india-future/

[38] https://www.thehindubusinessline.com/economy/non-compete-restrictions-cci-plans-to-amend-combination-regulations/article31599280.ece

Food for Thought

Non-compete clauses form an important part of various corporate transactions. They provide purchasers some protection against competition from sellers so that they may benefit by obtaining the full value of the transferred asset (tangible or intangible). Such non-compete clauses can be necessary for purchasers to gain the loyalty of customers and to fully utilise the know-how acquired. In the case of Combinations (M&As, Joint Ventures, etc.), such clauses can be necessary to ensure that the parties are committed to the combination agreements and do not, independently, end up competing with it.

However, are these clauses being essentially agreements not to compete, they can give rise to competition concerns and lead to scrutiny by the Competition Commission of India (CCI). There have been instances where the CCI has directed the parties to modify the scope of their non-compete clauses to obtain approval for their transaction.

The general approach that the CCI has followed is to assess whether the non-compete clause is "directly related and necessary to the combination" for approving. In this context, the CCI issued a Guidance Note on Non-Compete Restrictions[39] highlighting its "general approach" towards non-compete clauses in various transactions.

In 2001, the European Commission decided to no longer assess such ancillary restrictions together with the transactions. The CCI recently took a similar step, wherein it issued a press release seeking public comments regarding the examination of non-compete clauses under the regulation of Combinations.

The restrictions put forth by the Guidance Note on the structure and extent of the non-compete clause had made it commercially impractical for the parties in a combination agreement to profit from the inclusion of such restrictions. The same was recognised by the regulator who opined that a general set of standards for assessment of non-compete restrictions may not be appropriate for a modern business environment.[40] It was also found that the 201-day timeframe for assessing combination cases is not feasible.

To provide greater flexibility to businesses, the CCI proposed changes to do away with the requirement of disclosing certain non-compete restrictions while seeking CCI's approval. These proposed changes seek to shift the burden on the parties to the

39 http://cci.gov.in/sites/default/files/Non-Compete/Guidance_Note.pdf

40 https://www.thehindubusinessline.com/economy/non-compete-restrictions-cci-plans-to-amend-combination-regulations/article31599280.ece

transaction, to ensure that the non-compete clause is competition compliant.[41] *This will also allow parties a free-hand in designing the non-compete clauses, which could be beneficial in capital intensive industries.*

Flexible non-compete clauses will help sectors to have custom trade restrictions depending on the need while still not impeding competition. At the same time, shorter non-compete periods will ensure that in fast-moving markets like e-commerce, innovation and competition are not stalled. This will also reduce the information burden on both, the parties and the CCI.

India to end federal control of gas prices, lift LNG transport use[42]

India will gradually end federal controls on gas pricing as it seeks to attract foreign investment and technology to lift local output, Oil Minister Dharmendra Pradhan said.

India, which is a large emitter of greenhouse gases and has multiple gas pricing regimes, aims to raise the share of gas in its energy mix to 15 percent by 2030, from 6.2 percent.

"Proliferation of gas prices can be an incentive to the investors to come to India and take advantage of the pricing and marketing freedom and produce more and invest more," Pradhan said at the BNEF summit.

Food for Thought

Unlike the crude oil prices which are linked to the international market, the domestic gas prices in India are determined every six months as a weighted average of four international benchmarks: the US-based Henry Hub, Canada-based Alberta gas, UK-based NBP and Russian gas. Given the prolonged weakness in the international gas market, the formula has kept the domestic prices far lower than the price of imported gas.[43] *This has, in turn, caused the domestic production of gas to slide.*

India's domestic gas output has declined 7.0 percent between 2013-14 and 2018-19, while the gas import dependency increased from 34 percent to 47 percent in this

[41] https://www.vaishlaw.com/wp-content/uploads/2020/05/COMPETITION-NEWS-ALERT-CCI-invites-public-comments-on-proposed-amendment-to-the-Combination-Regulations.pdf

[42] https://economictimes.indiatimes.com/industry/energy/oil-gas/india-to-end-federal-control-of-gas-prices-lift-lng-transport-use/articleshow/76647963.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

[43] https://www.thehindubusinessline.com/opinion/columns/from-the-viewsroom/from-the-viewsroom-step-on-the-gas/article22259513.ece1

period. In 2019-2020 the gas dependency has increased to over 50 percent.[44] *Investment in the area has also suffered. In 2014, the government was under pressure to go for market-based pricing. However, it was rejected arguing that the domestic supply is short of demand, which will increase prices. Thus, the government decided to stick to price regulation. For the same reason, it also exercises control over the allocation of gas.*

The government needs to dismantle all controls on gas supply and pricing, deregulate its imports, and appoint an independent entity for the infrastructure for import, handling, and transportation. Such infrastructure should then be made accessible to all players in an equitable and non-discriminatory manner at a tariff determined through competitive bidding.[45] *This will help foster competition, provide a stable and predictable policy environment, and thus, attract investment.*

On the other hand, the Kelkar Committee suggested that any move to completely lift price regulation should be done gradually. This means that the present system of regulated gas pricing for domestic production would continue for a few years, but during that period, producers would be given the freedom to sell a portion of the total output under market-determined prices with their customers.[46]

President promulgates 'Agri Ordinances' aimed at boosting farmers income[47]

The President of India has promulgated the Ordinances on June 05, 2020, that was approved by the cabinet. These ordinances are aimed at giving a boost to rural India for farmers engaged in agriculture and allied activities.

Agriculture Minister Narendra Singh Tomar has asked all chief ministers of states to implement the provisions and create an ecosystem for farm growth. He stressed the need for continued support in the development and growth of the agriculture sector in the newly reformed environment.

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[44] https://www.thehindubusinessline.com/opinion/editorial/domestic-gas-price-should-be-market-linked-to-spur-output/article30618097.ece#

[45] financialexpress.com/opinion/price-control-the-gas-on-gas-price-deregulation/1791413/

[46] https://energy.economictimes.indiatimes.com/news/oil-and-gas/domestic-gas-pricing-reform-on-cards-controls-may-be-lifted/76708188

[47] https://economictimes.indiatimes.com/news/economy/agriculture/president-promulgates-agri-ordinances-aimed-at-boosting-farmers-income/articleshow/76222667.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

“The two ordinances - The Farmers’ Produce Trade and Commerce (Promotion & Facilitation) Ordinance 2020 and the Farmers' (Empowerment and Protection) Agreement on Price Assurance and Farm Services Ordinance 2020 will create a conducive ecosystem for private investment in agriculture,” said a senior Agriculture Ministry official.

Food for Thought

The two ordinances follow the amendment to the Essential Commodities Act, 1955 removing farm products from the list of regulated items. The amendment along with the two ordinances liberalise the agricultural market and pave the way for ‘One India, One Agriculture Market’. Farmers’ Produce Trade and Commerce (Promotion & Facilitation) Ordinance 2020 aims to create an environment of barrier-free trade within and between states and allows farmers to sell their products anywhere in the country.

Currently, farmers are forced to sell their produce at state-regulated markets i.e. Agriculture Produce Market Committees (APMCs), where the price of the product is decided by the trader cartels in an opaque manner. Fewer buyers and tightly regulated trade with too many entry barriers often lead to farmers receiving a lower price.[48] *Also, restrictions imposed by states had so far prevented seamless movement of farm produce across the country. The amendment proposed, if implemented in the right spirit, will help address this roadblock and help both farmers and consumers by bringing in relative higher price stability. Additionally, the amendment also allows farmers to sell to anyone outside the APMC yard, which will foster competition among buyers and reduce other cesses that many state governments have been imposing on APMC markets.*

The Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Ordinance 2020 tries to provide more protections and promote contract farming in the country. The government expects it to transfer the risk of unpredictable prices from farmers to firms better equipped to handle it. Contract farming is to help growers access the latest technology, reduce marketing costs, and improve farm incomes.

While the Ordinance can help in the integration of the agriculture market and increase competitiveness in the sector, there remain certain glaring concerns. Contract farming in India has existed since the green revolution but has never played an important role

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[48] https://www.livemint.com/politics/policy/centre-takes-steps-to-bring-the-farmer-closer-to-the-market-11591213424847.html

in modernisation or improvement in the sector due to the issues of power imbalance and dispute resolution. This attempt to revive and revitalise the concept has not addressed either of those issues. The Ordinance provides for an "impartial reconciliation board" for dispute settlement while being silent on how fair terms will be ensured or providing written agreement as a mandatory condition.

The board is to be appointed by the Sub-Divisional Magistrate (SDMs). Since SDMs and their officers also perform myriad other duties like law and order, census, elections, VIP visits, etc, it would be unrealistic to assume that they will be able to find time for settling the disputes. By making same-day payment mandatory, most disputes relating to payments can be avoided.[49]

Both the Ordinances, if implemented in their correct spirit, can be good for the proliferation of the agricultural product market in the country, cause price stabilisation, reduce wastage of agricultural products and reduce the uncertainty and burden the Indian farmers face while feeding the people of this country.

NITI Aayog decides to work with key stakeholders on Online Dispute Resolution framework[50]

As India fights the COVID crisis, NITI Aayog, in a first, has decided to work with the key stakeholders to develop Online Dispute Resolution as a viable and sustainable form of dispute avoidance and dispute resolution.

It has also synergised the legal acumen of Supreme Court Judges and the experience of industry experts to reduce the burden of courts, by making dispute resolution cheaper, quicker, and credible as conventional methods of dispute resolution.

Food for Thought

The NITI Aayog's plan to develop an Online Dispute Resolution system had been in the works for some time but the push needed to make it a reality came from the COVID-19 pandemic and the following lockdown. The aim is to digitally analyse the dispute issues so that only those issues that require judicial resolution reach it. It will use the alternative dispute resolution (ADR) practices of mediation, arbitration, and conciliation to arrive at solutions acceptable to both parties in the pre-litigation stages.

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49 https://thewire.in/agriculture/apmc-farmers-market-fair-price

50 https://economictimes.indiatimes.com/news/economy/policy/niti-aayog-decides-to-work-with-key-stakeholders-on-online-dispute-resolution-framework/articleshow/76676139.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

As of November 2019, 59,867 cases were pending in the Supreme Court and 44.75 lakh cases in various high courts. At the district and subordinate court levels, the number of pending cases stood at 3.14 crore.[51] *According to a survey conducted by NASSCOM, around 110 companies mentioned that approximately ₹200 crore are stuck domestically due to disputes.*[52] *As of 18 May 2020, 450 of Confederation of Indian Industry's MSME members estimate ₹895 crores to be stuck in disputes.*[53] *This provides ample reason for the framework to be established as a pre-litigation mandate for repeated matters.*

The framework is believed to be able to make justice cheaper, easier, and quicker without compromising the integrity of the process.[54] *The mechanism also boasts scalability and effectiveness over the traditional courts. However, it will need to resolve disputes without glitches, inspire confidence, and ensure transparency and fairness, for it to gain traction and be widely accepted.*

Thus, the framework is bound to decrease the addition of new repetitive business-related disputes to the court's docket and decrease the cost of the business in India. Such a decrease in business cost and the resultant boost in the market outlook of India is bound to decrease the burden on the existing players, allowing them to expand and grow while also attracting greater competition and investment from abroad.

This is especially beneficial for the MSMEs who currently must approach the MSME Facilitation Council appointed by the states for the delay in payment-related issues. Alas, these Councils themselves cause huge delays, thus defeating the purpose. This is compounded by the fact that the accountability of civil servants is negligible so there is a slag. This may even resolve disputes part of the economic revival of India.[55]

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51 https://thewire.in/law/pending-court-cases

52 https://niti.gov.in/catalyzing-online-dispute-resolution-india#:~:text=ODR%20is%20the%20resolution%20of,negotiation%2C%20mediation%2C%20and%20arbitration.

53 https://www.freepressjournal.in/business/rs-1819-crore-of-unpaid-dues-to-msme-members-cii-poll

54 https://niti.gov.in/catalyzing-online-dispute-resolution-india#:~:text=ODR%20is%20the%20resolution%20of,negotiation%2C%20mediation%2C%20and%20arbitration.

55 Justice Sanjay Kishan Kaul, Judge, Supreme Court of India on the ODR https://niti.gov.in/catalyzing-online-dispute-resolution-india#:~:text=ODR%20is%20the%20resolution%20of,negotiation%2C%20mediation%2C%20and%20arbitration.

3. POLICIES INHIBITING COMPETITION

Govt notifies changes in rules disallowing global tender for procurement up to Rs 200 cr[56]

The government has as part of the Economic Support Package for Micro, Small and Medium Enterprises (MSMEs) notified amendment to the General Financial Rules, 2017 disallowing global tender for government procurement in goods and services valued less than Rs. 200 crores. The move was announced by Finance Minister Sitharaman along with Rs 3 lakh crore of collateral-free loans, which would benefit about 45 lakh small businesses.

Food for Thought

The amendment is part of the Atmanirbhar Bharat plan and is designed to be a big boost to domestic suppliers, especially MSMEs, especially those that are hit hardest by the COVID-19 pandemic. In India, MSMEs account for about one-third of the country's GDP and employs more than 11 crore people. The amendment along with other measures like subsidised debt and payment of dues taken by the government is aimed at overcoming the disruptions caused by COVID-19 and ensure that competition sustains in the market.

The amendment classifies companies based on the local content - higher the local content, higher the preference. Companies with less than 20 percent of local content will be barred from most government tenders.[57] However, the reality is that the government procurement system is plagued with difficult issues, which if not addressed, can lead to limiting the effects of such initiative.

General issues like lack of transparency, accountability, bid-rigging, and widespread corruption are supplemented by those of networks, connections, past knowledge, and influence of the bigger players with the government. High eligibility criteria and cost associated with the tendering process and inability of MSMEs to make tender specific changes are entry barriers for these firms.

If implemented without adequate design considerations, these eligibility rules may impose huge ex-ante costs on--especially small--firms and deter them from applying in

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[56] https://economictimes.indiatimes.com/news/economy/policy/govt-notifies-changes-in-rules-disallowing-global-tender-for-procurement-up-to-rs-200-cr/articleshow/75867265.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

[57] https://economictimes.indiatimes.com/news/economy/policy/govt-modifies-public-procurement-norms-to-give-more-preference-to-local-suppliers/articleshow/76246116.cms

the first place. This may have serious public policy implications with the potential to turn firms into monopolies, adversely affecting competition in the area.[58] *Even though it appears that the step is to ensure the survival of the domestic producers and support them in the time of uncertainty, one cannot help but see it as another step in the protectionist march for big domestic corporates undertaken by the government. The measures might be seen as warranted now but we need to consider the long-term impact of the same on the competitiveness of the domestic manufacturers and sustainability of the Indian economy.*

Facebook's US$5.70n investment in Jio approved by CCI[59]

The CCI has cleared Facebook's proposed acquisition of a 9.99 percent stake in Jio Platforms, the digital arm of Reliance Industries on June 24, 2020.

The US$5.7bn (Rs 43,574 crore) deal, the single largest FDI in the technology sector in India was announced in April. The US social-networking major had set up a separate entity Jaadhu Holdings LLC for investing. The CCI has approved "acquisition of 9.99 percent stake in Jio Platforms by Jaadhu Holdings LLC", according to a tweet.

Jio Platforms was created in October 2019 to house all-digital initiative of Reliance.

Food for Thought

As of January 2020, Reliance Jio is the biggest telecom company with a 32 percent market share with a base of over 1.15 billion SIM card connections.[60] *WhatsApp has over 400 million users in India while Facebook has about 250 million users.*[61] *This makes this a marriage of Titans. Although the deal is intended to be beneficial to small businesses and kirana-stores due to Jio-Mart's hyperlocal offering, the dominant position of the parties in their respective markets gives rise to the potential for abuse of position.*[62]

[58] https://thewire.in/business/merely-disallowing-some-global-tenders-wont-help-msmes-indias-procurement-process-needs-reform

[59] https://theprint.in/economy/facebooks-5-7-billion-investment-in-jio-approved-by-competition-commission-of-india/448136/

[60] https://www.livemint.com/companies/start-ups/facebook-jio-deal-rings-alarm-bells-for-vcs-internet-firms-11592495980297.html

[61] https://theprint.in/economy/facebooks-5-7-billion-investment-in-jio-approved-by-competition-commission-of-india/448136/

[62] https://www.livemint.com/companies/start-ups/facebook-jio-deal-rings-alarm-bells-for-vcs-internet-firms-11592495980297.html

The combination of personal data available on the two platforms gives rise to privacy and competition concerns like platform neutrality and platform to business contract terms. There is also anxiety regarding some form of vertical integration between the network service provider and social media and/or communication service provider, wherein Facebook and WhatsApp may start working better on a Jio network.[63]

Vertical integration can cause refusal to deal, tying, bundling of services, predatory pricing, and loss of possible innovation all of which are detrimental to the competition even in seemingly unrelated markets.[64] *Strong network effects, high returns to scale, and access to a massive amount of data may be incentive enough for the firms to engage in anti-competitive conduct.*[65]

It seems strange that the CCI approved this transaction without so much as a second guess. Considering the current situation, and the recent upward trend for protectionist measures and creating national champions, this decision by the CCI, though strange, is not all that surprising. Reliance Jio will be the foremost national champion in India, and it seems unlikely the government or any regulator will intervene in the process.

Having said that, the CCI needs to be mindful of approving such transactions without an in-depth analysis. This could potentially discourage new entrants in the market, create lock-in effects, and reduce competition by increasing concentration.[66]

63 https://thewire.in/business/jio-facebook-deal-regulation-scrutiny

64 https://cuts-ccier.org/pdf/CUTS-CIRC_Submission_to_Competition_Law_Review_Committee.pdf

65 https://www.livemint.com/companies/start-ups/facebook-jio-deal-rings-alarm-bells-for-vcs-internet-firms-11592495980297.html

66 https://thewire.in/business/facebook-jio-deal-what-indias-competition-regulator-will-have-to-consider