

COMPETITION DISTORTIONS IN INDIA – A CUTS DOSSIER

(CDI 53: July to September 2021)

For earlier Dossiers please see: <https://cuts-ccier.org/competition-distortion-in-india/>

This periodic dossier produced by CUTS International looks at the interface of policy issues that have an impact on competition in India, which can be both negative and positive. News, as published, is used without verifying its 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 the Competition Distortion Dossier #53 for the year's third quarter, i.e., July-September 2021. To ensure that you do not miss any updates from this quarter, we have extensively covered the most important news stories from these three months that impact the competitive landscape in India.

We have covered developments regarding current trade policies where we discuss anti-dumping duties on imports of certain flat-rolled aluminum products from China. While placing such a duty is imperative in certain situations, we have discussed how Hindalco Industries Ltd. (dominant player in the respective market) has been trying to enhance its profits by persuading the government to impose the anti-dumping duty.

In the dossier, keeping in mind the Mega Privatisation Drive as part of the Union Budget 2021-22, the sale of Air India to the Tata Group has been discussed at length, giving a backdrop on the roller coaster ride that Air India has had. We believe that this step will improve upon the backlashes faced by the airlines and enhance healthy competition in the market. This is also in addition to NCLT approving the consortium for the acquisition of Jet Airways airlines.

Setting up a New Vehicle Registration Series would enhance public mobility and ease of living, which would positively affect the market as labour is the most valuable resource of any commercial entity. Keeping the *ease of doing business* (EoDB) vision in mind, the government established a single-window system for businesses, startups and investors. This policy is adopted primarily with a focus on eliminating the tedious window to the window procedure.

The dossier also contains comments on the policies inhibiting competition. The Reserve Bank of India has brought out a notification that, in the name of consumer protection, puts a halt on recurring digital payments. The hidden nuances reveal how it inhibits EoDB, particularly for startups and small businesses and ease of living, for consumers.

Further, we have discussed in what ways NITI Aayog had objected to major provisions of the draft e-commerce rules which were released. We agree with the recommendations given by the national think tank as it arbitrarily puts liability on e-commerce platforms as against the brick and mortar stores.

We hope you enjoy reading these stories as much as we did, reporting them.

Cheers!

Contents

A. Trade Policies	3
Imposition of Anti-dumping Duty on Products of Aluminium from China	3
Anti-dumping Duty Approval on Caprolactam.....	4
B. Policies Promoting Competition	5
Government Launches the Single Window System.....	5
Government Announces New Vehicle Registration Series	6
50+ City Gas Distribution Areas to be declared as Common Carriers	8
Privatisation of 13 Additional Airports.....	9
Government Sets up Asset Management Companies for Bad Banks.....	10
Jet Airways Back in the Hangar.....	12
Privatisation of Air India	13
Supreme Court upholds the Inverted Duty Structure.....	15
C. Policies Inhibiting Competition	16
Recurring Payment Notification by the RBI.....	16
Objections of NITI Aayog on the Proposed E-commerce Rules.....	18

A. Trade Policies

Imposition of Anti-dumping Duty on Products of Aluminium from China

The Directorate General of Trade Remedies (DGTR) had undertaken an investigation probe and concluded that China's dumped imports of 'Certain Flat-Rolled Products of Aluminium' have adversely impacted the domestic industry. Based on this, in September 2021, DGTR recommended that the Ministry of Finance impose anti-dumping duty against importing the said items from the said country.

The DGTR has recommended US\$65 and US\$449 per tonne on imports. After appropriate examination, the concerned Ministry had abided by the recommendation of DGTR and imposed anti-dumping duty on the said good via a notification dated September 07, 2021.

Food for Thought

Dumping in the international trade terminology occurs when a country or a firm exports an item at a price lower than the price of that product in its domestic market. Dumping impacts the cost of that product in the importing country, hitting the margins and profits of domestic manufacturing firms.

The application for a request to place such anti-dumping duty on certain flat-rolled aluminum products from China was made by Hindalco Industries Ltd., which accounts for about 71 percent of the total Indian market share of production of the said item. This declined by six percent after the market share of the said imported products from China increased by 11 percent.¹ Hindalco has been facing losses due to the increase in costs from the imported dumped goods.

The imposition of anti-dumping duty is permissible under the World Trade Organisation (WTO) regime. The duty is to ensure fair trading practices and create a level-playing field for domestic producers vis-a-vis foreign producers and exporters. According to global trade norms, a country can impose tariffs on dumped products to provide a level-playing field to domestic manufacturers. The duty is imposed only after a thorough investigation by a quasi-judicial body in India, DGTR. India and China are members of this Geneva-based organisation, which deals with global trade norms.²

However, what is unexplored is whether the differences in the prices of the raw materials needed to manufacture the said product have a role in why Hidhalco faced enhancement

¹ <https://taxguru.in/custom-duty/anti-dumping-investigation-imports-flat-rolled-products-aluminium.html>

² <https://www.businesstoday.in/latest/economy/story/govt-recommends-anti-dumping-duty-on-some-aluminium-products-from-china-306401-2021-09-10>

of cost and, thereby, losses. While competition is up-leveled in the sense that foreign players like China have been dealing in the said goods in India's domestic market, competition within India has weakened as the domestic industries have not been able to sustain, which indirectly has affected the job and investment opportunities.

N. B. Many noted economists, such as Jagdish Bhagwati and Late T. N. Srinivasan, have criticised anti-dumping as a toxin against free trade. Both these gurus have been advisers to CUTS.

Anti-dumping Duty Approval on Caprolactam

The DGTR had recommended anti-dumping duty on caprolactam used in nylon-making from the European Union, Korea, Russia and Thailand. On September 28, 2021, the Central Board of Indirect Taxes and Customs (CBIC) proposed this anti-dumping duty, which raised Gujarat State Fertilisers & Chemical's (GSFC) share price from ₹4.61 to ₹129.45. Caprolactam is a synthetic crystalline compound that is used in nylon manufacture.

On a consolidated basis, the net profit of GSFC rose 349.65 percent to ₹136.11 crore on a 13.10 percent rise in net sales to ₹1850.91 crore in the first quarter of June 2021 over the first quarter of June 2020.

GSFC manufactures fertilisers and industrial chemicals. The company had earlier filed an application for anti-dumping duty on caprolactam as cheap imports originating in, as it was allegedly disrupting trade for domestic players.

Food for thought

The imposition of anti-dumping duty is permissible under the WTO regime. An anti-dumping duty is a duty levied on imported commodities. Anti-dumping duties are required when foreign companies cut costs through government subsidies. The company had requested the DGTR to recommend the imposition of an anti-dumping duty because it claimed that material injury was being caused to the domestic industry due to dumped imports from the subject countries.

GSFC is one of the significant producers of caprolactam in India. It has two caprolactam plants with rated capacities of 20,000 tonnes per annum (TPA) and 50,000 TPA. The imposition of anti-dumping duties means that the imported goods are subjected to countervailing duties to the extent of the special benefits they get to reduce their cost of production. This protects the interests of a local producer like GSFC.

The anti-dumping duty on caprolactam will protect against domestic market failure and aim to preserve a playing field level and safeguard local firms and markets from unfair

competition. However, one can look at it as having to fulfill its motive as an immediate and effective consequence of such a duty was a hike in its share prices.

B. Policies Promoting Competition

Government Launches the Single Window System

With the motive to revamp India's business climate, Commerce and Industry Minister Piyush Goyal announced the launch of the 'National Single Window system' (NSWS) for businesses, startups, and investors (both foreign and Indian). It is motivated by the idea of EoDB by helping new ventures freedom from 'window within a window' and with the requirement of coordination with and running to multiple government offices.

The platform currently has nine States and 18 Central Departments in its fold. It is expected that further five States and 14 Central Departments could join by November 2021. The policy has been set up as a one-stop-shop for all business approvals and clearances. For transaction transparency, the portal further allows recorded video consultation sessions with the executives.

A report published by World Bank in 2020 ranked India 63rd at the EoDB - a jump from 142nd to 63rd rank in the last six years. The higher rankings usually include simpler and better protection of property rights, business regulations, and cohesive incorporation of the new entities in the state.

Food for Thought

Cumbersome applications and delays in various clearances processes have discouraged large multinational corporations from scaling operations or investing in India, an issue that many small and medium enterprises face. The NSWS for businesses, startups, and investors (both foreign and Indian) has attempted to eradicate such investment hurdles by allowing a simpler process for entities to invest and to apply for various approvals for setting up the units.³

The idea is to spare investors to run from one government department to another to submit the documents and information and seek various work permits. It will allow higher predictability, lower transaction costs, and speedy operations, resulting in a more competitive global and domestic market.⁴

The national competitiveness will also improve with enhanced transparency, governance, and reduced corruption. A more straightforward process will allow more enterprises to

³ [PSU Study on Single Windows Systems.pdf](#)

⁴ <https://blogs.worldbank.org/trade/single-window-systems-what-we-have-learned>

leave behind cumbersome policies, allowing more constructive competition and related policies.

Like the World Bank, the Department for Promotion of Industry and Internal Trade (DPIIT) conducts an annual reform exercise for all States/UTs under the Business Reform Action Plan (BRAP). The larger objective of attracting investments and increasing EoDB in each state within India was sought to be achieved by introducing healthy competition through ranking states based on their performance in implementing BRAP.

Despite the COVID-19 pandemic, India is rapidly recovering and becoming one of the fastest-growing countries. With foreign direct investment (FDI) continuing to flow steadily, the country is poised for significant economic growth. Such development, along with the one-stop-shop policy, will allow more healthy competition among the states. It will pave paths for India to become more neighbour-friendly, by allowing them ease of accessing the market and thus increase competition among industries and investors.⁵

In conclusion, the one-stop-shop policy will provide practical means of improving business. This, however, is not a simple thing to implement and develop.⁶

The country will know if certain conditioning needs to be in place to support such reforms from trial and error. Carefully executed preparatory work can significantly help achieve an improved probability of success and competition in India at both national and regional levels.

According to our research, it is the ease of running a more cumbersome business and involves higher transaction costs. In most cases, the bureaucracy does it as a nuisance factor by extracting rents from running operations using its vastly defined and undefined powers. Lack of accountability allows even the concerned officials to get away with murder. Thus officials are unafraid about being pulled up.

Secondly, we have also advocated for a high-level Ombudsman to deal with investors' grievances authoritatively and speedily. This has not been thought of, despite several good examples from around the world.

Government Announces New Vehicle Registration Series

In August 2021, the Ministry of Road Transport and Highways (MoRTH) announced a new all-India registration facility for vehicles – called the Bharat Series (BH series) – that will free owners from the re-registration process when they shift from one state or union

⁵ <https://www.financialexpress.com/economy/one-stop-shop-single-window-approval-system-for-investors-launched/2335632/>

⁶ <https://www.mondaq.com/india/government-contracts-procurement-ppp/1115694/one-stop-shop-for-business-approvals-india-launches-national-single-window-system39>

territory to another. It will be voluntary to defence personnel, employees of the central government/state government/central/state public sector undertakings and private sector companies/organisations, which have offices in four or more states/Union territories. The MoRTH vide notification dated August 26, 2021, has introduced this new registration mark for new vehicles to facilitate the seamless transfer of vehicles.

The vehicles registered under this regime will have the letters BH on the registration plate instead of two letters denoting the state where it was registered. This also introduces a new element to the registration number, the year when the vehicle was first registered. The new registration number format under the Bharat series will be YY BH #### XX, where YY is the year of first registration, BH for Bharat Series, #### means the 4-digit numerical number, and XX stands for alphabets AA to ZZ.⁷

Food for Thought

Station relocation is a common phenomenon that occurs with both government and private sector employees. Such movements create a sense of unease in such employees' minds regarding transferring registration from the parent to another state. Under Section 47 of the Motor Vehicles Act, 1988, a person can keep the vehicle for not more than 12 months in any state other than the state where the vehicle is registered.

Further, a new registration with the new state-registering authority has to be made within the stipulated time of these 12 months. The steps undertaken by a passenger vehicle user to re-register a vehicle includes obtaining a no-objection certificate from the parent state for assignment of a new registration mark in another state; assignment of new registration mark after the road tax on a pro-rata basis is paid in the new state and application for refund of the road tax in the parent state on pro-rata basis.⁸ This provision to get a refund from the parent state on a pro-rata basis is cumbersome and irrational and varies from one state to another.

The motor vehicle tax will be levied for two years or in multiples of two. This scheme will facilitate the free movement of personal vehicles across states/UTs of India upon relocation to a new state/UT. After completing the fourteenth year, the motor vehicle tax shall be levied annually, which shall be half of the amount charged earlier for that vehicle. In the new "BH" series regime, the road tax will be 8 percent for vehicles costing up to ₹10 lakh, 10 percent for vehicles costing between ₹10-20 lakh and 12 percent for vehicles

⁷ <https://www.opindia.com/2021/08/union-govt-launches-new-bh-series-vehicle-registration-system/>

⁸ <https://auto.economictimes.indiatimes.com/news/policy/govt-introduces-new-registration-mark-under-bh-series-for-new-vehicles/85707697>

costing over ₹20 lakh. There will be two percent extra charge for diesel vehicles, and the tax for electric vehicles will be 2 percent less.⁹

This is seen as a citizen-centric step for enhancing mobility. A human being is the most valuable resource in a market or sector. Nurturing this resource has the potential of reaping sweet fruits in the market output. However, since vehicle registration is a state prerogative, and this new registration seems to be more of a centralised process, what remains to be seen is if a new centralised transport office will bypass the prevalent state transport organisations. This new registration could also impact Goods and Services Tax (GST) with the split between central and state governments coming into question.

50+ City Gas Distribution Areas to be declared as Common Carriers

The Petroleum and Natural Gas Regulatory Board (PNGRB) seeks to declare more than 50 city gas distribution licensed areas, including Delhi, Mumbai and large parts of Gujarat, as common carriers. This would entail changes in the exclusivity of the CGD network. Exclusivity is the leverage given by PNGRB to an entity proposing to lay, build, operate or expand a CGD network from the purview of a common carrier or contract carrier for five years from the date of authorisation.

All the city gas areas identified for the new proposed regulation have already exceeded their exclusivity period. For cities like Delhi and Mumbai, the exclusivity period expired in 2012, while for many others, it ended in the years up to 2021. After the regulator declares a city gas area as a common carrier, the original licensee must permit about 20 percent or more of its network capacity for use by other suppliers.

Food for Thought

Any pipeline used by more than one consumer on an open-access basis is called a common carrier pipeline. In the matter at hand, the policy to declare CGD networks as common carriers would entail that third party suppliers have access to supplying natural gas and are allowed to establish and operate Liquefied Natural Gas (LNG) stations within the already established CGD networks.

However, allowing any entity to supply natural gas through virtual mode would jeopardise an authorised entity's recovery of its high capital investment to lay and expand gas network capacity during the exclusivity period. Companies like Indraprastha Gas in Delhi, Mahanagar Gas in Mumbai and Gujarat Gas in several cities, Gail Gas, Indian Oil-Adani Gas, Bhagyanagar Gas, Maharashtra Gas, Sabarmati Gas, Central UP Gas, Megha Engineering and Infra, Tripura Natural Gas Company, and Rajasthan State Gas, severely

⁹ <https://www.autocarindia.com/car-news/government-considers-in-registration-series-to-ease-interstate-vehicle-transfers-420663>

affected by this policy reform requested not to reopen the issue of LNG supplies, scope and the exclusivity¹⁰ as it expected to create confusion with respect to the settled issue and discourage the CGD companies. Additionally, apprehensions are also linked with how non-regulated use by third parties may lead to the wastage of a valuable commodity.

These aversions seem to be motivated by a monopolistic motive of consolidating the distribution power in limited hands. The concept of allowing capacity in CGD network to be utilised by any entity on a non-discriminatory basis shall incentivise emergence of independent shippers of natural gas who shall enter into contract carrier or common carrier arrangements with entities owning such infrastructure for transportation of natural gas which, in turn, shall lead to the development of competitive natural gas markets, as it would reduce the entry barriers to the industry.¹¹

Having said that, there is no denying that it may appear unfair to those established distribution companies that have invested considerable amounts in erecting the infrastructure. Probably what could be done is while CGD networks are being opened to third-party suppliers, strict regulation could be put in place for regulating their mechanisms. Additionally, incentivising the current CGD companies to do not distort competition would help muster support from them.

Such an experiment, if successful, can also be applied to the electricity sector. However, in either case, the wheeling charges have to be reasonable, fair and non-discriminatory to be determined by the regulator.

Privatisation of 13 Additional Airports

The board of the Airports Authority of India (AAI) has approved to privatise 13 airports. This is the government's first major asset monetisation exercise as part of the National Monetisation Pipeline (NMP), announced by Indian Finance Minister Nirmala Sitharaman in her Budget speech in February 2021. The government is aiming for a private investment of ₹3,660 crore in airports by 2024.

The AAI board has approved the privatisation of six major airports, Bhubaneswar, Varanasi, Amritsar, Trichy, Indore, Raipur, and seven smaller ones in Jharsuguda, Gaya, Kushinagar, Kangra, Tirupati, Jabalpur and Jalgaon, according to sources. The smaller airports will be clubbed with the six major airports for scale and size, making it attractive to investors.

¹⁰ <https://timesofindia.indiatimes.com/city/ahmedabad/cgd-cos-oppose-bid-to-change-exclusivity/articleshow/84906241.cms>

¹¹ <https://www.citygasdistribution.com/common-carrier-contract-carrier/>

The NMP aims to unlock investments in public sector assets spread across 13 sectors, from roads and railways to airports and urban real estate. The AAI will start preparing bid documents to complete the entire procedure early next year, i.e., 2022.

Food for Thought

More than the fact that competition is being promoted by attributing the said airports to the PPP model, what is instead required is ensuring proportional development of non-profitable airports in an innovative manner. That has been done by clubbing such airports with the profitable airports and leasing them out as a package.

The Buddhist circuit of Varanasi-Kushinagar-Gaya is likely to get significant interest from bidders due to the tourism potential of these cities, apart from Varanasi being a prominent destination in itself. This is the first time that smaller airports are being clubbed with bigger ones while opting for the PPP model in which a private player develops and expands airports on a revenue share model. At the same time, their ownership remains with the government, for instance, in cases like major airports of Hyderabad, Bengaluru, Delhi, Mumbai, etc.¹²

This round of privatisation could very well be the last chance for an entity looking to enter India's airport sector. On the flip side, with returns assured on aero assets, some existing players will look to increase their scale rather than allow fresh entrants and competition. It is feared that clubbing not-so-profitable airports with the most viable airports would decrease the full valuation. The smaller loss-making airports have negligible traffic and are expected to remain a cash drain in the coming years.

Given this, the potential bidders will look at it in a bundle and may negate the bundle value more than the sum of independent parts. An answer to this could be to monetise the profit-making airports at a higher value. However, that may make the rich richer and the poor poorer.

Government Sets up Asset Management Companies for Bad Banks

In 2021-22, Union Budget Finance Minister Nirmala Sitharaman announced the formation of the two companies, i.e., National Asset Reconstruction Company Ltd (NARCL) and Indian Debt Resolution Company Ltd (IDRCL), in her budget speech. NARCL is an asset reconstruction company and IDRCL is an AMC. The formation of a

¹² <https://timesofindia.indiatimes.com/business/india-business/13-more-airports-to-be-privatised-7-small-airports-to-be-clubbed-with-6-big-ones-for-this-ppp-round/articleshow/86065553.cms>

'bad bank' a financial institution aimed at helping banks better manage the problem of their non-performing assets (NPAs).¹³

After setting up the NARCL in July 2021, IDRCL was created in September 2021 with a capital of Rs 50 crore. The primary objectives of the company are to undertake all kinds of debt management, operational management, resolution advisory, support and consultancy services about debt resolution and insolvency resolution.

Other objectives include providing advisory services relating to debt resolution, managing the affairs of the corporate debtor or person and assisting asset reconstruction companies (ARCs) in acting and executing 'in the name and on behalf of the corporate debtor or person of all deeds, receipts and other documents, according to the company's memorandum of association.

Food for Thought

A bad bank is an entity established to separate the stressed assets held by a regular bank from its performing assets. The core function of the bad bank is to buy bad loans from banks at a discount rate to recover money from various defaulters. This helps regular banks to focus on their normal business activity without worrying about the stressed assets.

Due to the COVID-19, India is facing its worst-ever economic damage; bad banks may boost the entire Indian banking sector. Given short-term and long-term issues, NPAs in India has reached an alarming level by combining with the stringent provisioning policies and guidelines of regulators and the ruling governments. The NARCL, which the IDRCL backs, is an attempt to absorb and rehabilitate the NPAs plaguing its banking system. A robust banking system is a prerequisite for developing a sound financial and economic system.

Competition in the banking industry is pertinent for efficiency and social welfare maximisation. It is critical to ensure that the banking sector is not just competitive and efficient but also stable. The establishment of a bad bank is an initiative that will level the playing field in the banking industry. Transferring toxic assets to the bad bank will relieve pressure on the regular bank's capital to enable them to engage in profitable/growth-oriented business operations.¹⁴

By stabilising the market, the bad bank will also help market participants in the banking industry to stay in the competition. However, one of the disadvantages of a bad bank is

¹³ <https://www.hindustantimes.com/india-news/bad-bank-to-help-monetise-chronic-npas-worth-2-lakh-crore-101631816471483.html>

¹⁴ <https://ijrar.org/papers/IJRAR19J1117.pdf>

that banks will tend to be less careful while granting loans if bad bank always manages their toxic assets.

Most importantly, the two news institutions must also research the reasons for the bad NPAs so that such lessons can be used in the future to avoid them. However, this may not help fully because many NPAs have resulted from crony capitalism or sheer fraud.

Jet Airways Back in the Hangar

The oldest private airline, Jet Airways's decks, is cleared to fly high again. The Naresh Goyal-founded airline had been laden with debt and shut down in April 2019. The National Company Tribunal (NCLT) has cleared the Jalan-Kalrock plan to revive Jet Airways. Karlrock Capital is a financial advisory and assets management company, whereas Jalan is a Dubai-based NRI businessperson. In the claim of ₹15,000 crores, the consortium proposed paying nearly ₹1,200 crores to creditors over the next five years and re-establishing a full-service airline with 25 aircraft fleet.

The order from the tribunal came precisely after two years of the start of the insolvency proceedings. It is pertinent to note that the airline is the first to see a resolution under the Insolvency and Bankruptcy Code (IBC). Even though the order paves the way for the airline's amelioration, the operation resumption hinges on the negotiation between the government and consortium on the issue of the airport slots.

A bench comprising Janab Mohhamed Ajmal and V Nallasenapthy approved its resolution plan with riders. The historic slots will not be available and the appropriate authority will consider the new allocation. After two successful bidding rounds, the creditors' committee selected the current consortium to restart the airline with over 99 percent votes.¹⁵

Food for Thought

With SpiceJet running empty, Gofirst amid a power tussle, and Air India getting in the laps of Tatas, the Indian Aviation Space is turbulent. The consortium, as portrayed, does not have prior experience operating an airline but is confident of manoeuvring the airline back on the runway soon. While knowledge and skills can be acquired, it is deep pockets that matter in such a sector.

The consortium has plans to revive the airline as a "Full-time carrier", with the operations in all historic domestic slots, alongside international slots. The incarnation hubs will

¹⁵ <https://www.hindustantimes.com/business/jet-airways-revival-plan-gets-nclt-nod-101624395019898.html>

remain in Mumbai, Bengaluru and Delhi. Tier two and tier three cities will also have smaller hubs, alongside tier-one cities.

Alongside Air India (Tata group) and other pre-existing airlines, the aviation sector is ready to welcome Jet Airways. It further plans to launch itself in the air cargo business. This will allow healthy competition in the aviation market. The airways launch will intensify competition in the domestic market when the aviation sector is facing strong headwinds. This will help boost the economy in the cities, aviation in smaller cities and lastly, the airways stand back in the economy.¹⁶

Existing airlines, like IndiGO, Vistara and Spicejet, owing to the COVID-19 pandemic, are in heavy losses. Some of the other additional factors, such as an increase in crude oil prices, suspension in international travel, and weak demand in the last year, have increased the risk of losses. Additionally, the third wave of COVID-19 can jeopardise the strategy to survive. At least for the previous three months, there has been an increase in domestic traffic. The pandemic has boosted post-pandemic travel across states and tourist destinations.¹⁷

Jet Airways will face more competition in today's aviation market than ever, with the investment king, Rakesh Jhunjhunwala backed Akasa, also planning to start its operations by mid-2022. The resumption of operations at Jet Airways will be beneficial for passengers as increased competition will, in all likelihood, drive fares down and the host of service providers in the aviation ecosystem.¹⁸

Privatisation of Air India

After more than two decades and a few attempts, the government finally sold Air India, its flagship national airline. Déjà vu for Maharaja, indeed, as it returned home to the Tata group, its founding father.

The airline was founded in 1932 by Jehangir Ratanji Dadabhoi Tata (JRD) and named Tata Airlines. In 1948, Air India was launched internationally with flights to Europe. Such international services were among the first PPP in India, with the Tatas keeping 25 percent, with the government holding 49 percent, and the public owning the rest. In 1953, Air India was nationalised and for the next four decades became the prized possession for India, commanding a majority in the domestic airspace.

¹⁶ <https://qz.com/india/2023498/nclt-approves-the-jalan-kalrock-consortiums-jet-airways-plan/>

¹⁷ <https://www.newindianexpress.com/business/2021/jun/22/jet-airways-is-back-nclt-clears-jalan-kalrock-consortiums-resolution-plan-for-airlines-2319845.html>

¹⁸ <https://www.businesstoday.in/industry/aviation/story/jet-airways-set-to-make-comeback-in-2022-will-it-be-a-cakewalk-this-time-306595-2021-09-13>

In 1994-95, Air India gradually reduced its market share with the private players entering the market.¹⁹ The National Democratic Alliance (NDA) government in 2000-01 tried to sell the minority stake in Air India as a part of its opening up the aviation sector to the private sector. Singapore Airlines, along with the Tata group, showed interest in buying the stake. Later, Singapore Airlines eventually pulled out of the bid due to trade unions opposing the privatisation.

In 2017, the government approved its privatisation, however until now, it was hard to sell. Even though the airline has a lot to offer in terms of the Aircraft fleet, from a professional workspace, lucrative routes, etc., investors were hesitant to invest in the airline under massive debt obligations.²⁰

Pre-conditions are that the group will not lay off any of its employees for a minimum of one year, after which employees will be offered Voluntary Retirement Scheme (VRS). Tata takes full ownership of the airlines, along with the subsidiaries AI express and AI STATS. The latter is a ground handling 50-50 Joint venture with Singapore Airport Terminal Services. The government did not sell any non-core assets, including its Mumbai Air India building.²¹

Food for Thought

This disintegration of Air India marks the biggest consolidation in the aviation space of India. The Tatas now own two full-service and carrier brands- Air India and Air Vistara, AirAsia India, and AI Express, respectively.²² Going back to the year 1986, even after the bombing of Air India flight, the company's profits remained intact. Part of the reason could be attributed to the monopoly it was enjoying in the sector. With no competition whatsoever, the airline reined its supremacy in the Indian skies. For over five decades, Air India cemented its position in the Indian market. Even with the entering of the private players, Air India was the only airline to cater abroad. It marked ₹300 crore profits in the financial year 1992-1993.²³

Privatisation meant drastic reconditioning in the company. The airlines could follow the model of budget airlines given the domestic competition in the aviation sector while it runs its operation internationally. This kind of model has been partially adopted by the airlines initially, as it uses its Boeing aircraft for international operations, while Airbus aircraft is being deployed for domestic operations. The privatisation will allow the

¹⁹ <https://www.livemint.com/economy/what-air-india-s-sale-means-for-the-country-11634666119066.html>

²⁰ https://timesofindia.indiatimes.com/india/timestopten/msid-86873697,card-86874784.cms?utm_source=newsletter&utm_medium=email&utm_campaign=timestop10_daily_newsletter

²¹ *ibid*

²² *Supra Note 2*

²³ <https://qrius.com/can-privatization-revive-air-india/>

government to reduce its debt burden while reviving confidence in its reforms agenda. It further shows the government's willingness to bite the privatisation reform bullet. This shift in the reforms will allow more investment globally and privatisation domestically. The global reforms will enable collaboration, discussion, and exchange in enhanced views for more stable and sustainable growth of the economy alongside the industry. The improved competition will allow the current airlines to offer better domestic service alongside improved aviation services.²⁴

The success of any policy rests on gauging the intent behind such a policy. The government's right-wing ideology did not drive this privatisation, nor was it driven by classical economic theories. It was primarily driven by an intrinsic uncompetitive business model, the monopolistic structured sector, and fiscal imbalances in the highly competitive global industry sector.²⁵

Under the given circumstances of the airline and shift to privatisation, encouraging a deal with the Tata group could be the best possible home for Air India. It has financial structure, management depth, and other necessary resources for a restructuring exercise of the airlines. It can ultimately leverage its global reach to stitch up an international aero-political network allowing invincible competition at both national and international levels.

It has been a roller coaster ride for Air India until it picked the sky route. With the Tata group winning the Air India Bid, it must make considerable efforts to rebuild the airline. However, the unseen benefit is that it will provide Tata group a market opportunity to strengthen its presence in the Aviation sector, hopefully not to the extent of market dominance.

Supreme Court upholds the Inverted Duty Structure

On September 13, 2021, the Apex court upheld the validity of the Madras High court Judgment²⁶ in favour of Goods and Services Tax Rules, 2017 (CGST Rules) that inverted duty refund is admissible only with respect to inputs for goods and not for input services. The court has set aside the Gujarat High Court judgment²⁷, which declared that Rule

²⁴ <https://www.flightglobal.com/strategy/indigo-chief-welcomes-competition-from-formidable-force-of-privatised-air-india/145899.article>

²⁵ <https://www.livemint.com/opinion/online-views/air-india-on-a-wing-and-a-prayer-as-it-prepares-for-a-tata-takeoff-11633968043858.html>

²⁶ https://www.consultease.com/madras-high-court-2020/madras-hc-case-tvl-transtonnestroy-afcons-joint-venture/#.YW_GURpBzIU

²⁷ <https://taxguru.in/wp-content/uploads/2020/07/VKC-Footsteps-India-Pvt.-Ltd.-Vs.-Union-of-India-Gujarat-High-Court.pdf>

89(5) of CGST rules as ultra vires Section 54(3)²⁸ of CGST Act, for restricting the refund only to input goods.

Section 54(3) talks about the refund of accumulated unused input credits. The Inverted Duty Structure (IDS) is not defined in the CGST Act. The term 'Inverted Tax Structure' refers to a situation where the tax rate on inputs purchased is more than the tax rate on finished goods.

Supreme Court has, however, asked the CGST council to reconsider the formula for refund calculation and take a policy decision for the same.

Food for Thought

IDS means a higher tax on input and a lower tax on output. This leads to businesses facing higher CGST rates on raw materials than on finished products. The formula under Rule 89(5) of CGST rules was revised in an amendment on April 18, 2018, with prospective effect to ensure that refund of unutilised accumulated credit can only be availed on goods and not services.

Goods and Services are distinct at a constitutional level. Article 366(12) of the constitution defines goods and Article 366(26A) defines services. Also, under the CGST Act, the expression 'input' in Section 2(59) means tangible commodities (excluding capital goods). On the other hand, 'input service' in Section 2(60) means any service used or intended to be used by a supplier for business. Hence, 'goods' and 'services' and 'inputs' and 'input services' all have distinct definitions.

The purpose of refund in IDS is to give effect to the doctrine of equivalence or neutrality. The legislation aims that taxpayers should not suffer the consequences of tax cascading solely because of a decision to offer a reduced tax rate on outputs relative to the tax rate on inputs.

As against the question raised on the anti-competitiveness of the legislation, it does not seem to be a deterrent to competitiveness as it is unambiguous and purposeful. As per Article 14 of the Indian Constitution, the Supreme Court agrees that legislation cannot be drawn on ideal situations instead of on the grounds of fairness and equity. The purpose of the legislation was to treat goods and services as separate and it is shown in the definition part of the legislation.

²⁸ https://www.cbic.gov.in/resources/htdocs-cbec/gst/51_GST_Flyer_Chapter36.pdf

C. Policies Inhibiting Competition

Recurring Payment Notification by RBI

The RBI came forward with a notification with a framework for processing e-mandates on recurring online transactions. AFA (Additional Factor of Authentication) has made mandatory for all recurring transactions below ₹5,000 on debit cards, credit cards, UPI, and other Prepaid Payment Instruments (PPIs). All stakeholders are required to ensure full compliance with the framework by September 30, 2021. This directive is applicable to all recurring payments that were earlier debited automatically from customers' cards (credit/debit/prepaid) for mobile, utility, other regular bills, and subscription payments like OTT streaming services.

Banks will send a notification to a customer via SMS and email before the transaction. Banks will notify customers 24 hours before a mandate will be debited, providing enough time for a consumer to alter or cancel a payment. The notification will contain details about the merchant's name, transaction amount, date of debit, reference number of transaction and the reason for the debit. The cardholder will have the option to either disapprove or approve the transaction.

Food for Thought

It has been reported that as of September 30, 2021, the ecosystem was not ready to implement the RBI directive. Several banks were unable to put in place requisite systems to ensure compliance.²⁹ As a result, payments are now failing across the board. Notices of card failures for critical services like Slack, AWS, Apple, Google, web-hosting, and many more, are hitting the inboxes of hundreds of companies and consumers in India. These are services that companies use every day to conduct their business.

Moreover, by introducing a system like this, banks now can decide which recurring payments can be honoured, and which ones will be blocked. Banks are not ready or are unwilling to process regular payments. And despite the RBI's grave warnings, there appear to be few consequences. Theoretically, banks can now maintain "allowlists" for merchants, deciding that their cardholders could pay for Netflix but not for, say, MUBI—an independent website that streams art movies. They could do this even if a cardholder explicitly wants to pay for MUBI.³⁰

The RBI circular intends to balance the safety, security and convenience of transactions. However, a deep analysis of the circular with that of its intent seems to be countervailing.

²⁹ <https://www.thehindubusinessline.com/money-and-banking/small-businesses-start-ups-feeling-the-heat/article37096979.ece>

³⁰ <https://the-ken.com/the-nutgraf/how-india-defeated-the-evil-of-recurring-payments/>

Online transactions are convenient for consumers. When a consumer chooses to pay for a service regularly, it implies that the consumer has an inherent trust in the digital payments ecosystem while benefiting from the convenience that recurring payment offers. While there have been genuine concerns of automatic deductions happening for long periods without consumers' knowledge, appropriate liability and accountability frameworks can be designed to deal with them without taking away the benefits experienced by consumers.³¹

The grave matter is that the RBI did not consult the public at large before issuing such directions. All regulators do consult stakeholders before changing any rule. We had made a plea for postponement and consultation, but our prayers fell on deaf ears. We did not even get a response.

Objections of NITI Aayog on the Proposed E-commerce Rules

The government released the draft e-commerce rules on June 21, 2021, proposing to ban fraudulent flash sales and mis-selling goods and services on e-commerce platforms. NITI Aayog has objected to the key provisions of the rules as being ultra vires and anti-competitive.

In furtherance, the DPIIT has flagged several anomalies, questioned some provisions, and suggested remedial tweaks in an office memorandum sent to the Department of Consumer Affairs.

Food for Thought

Further, while there is a need to protect the brick and mortar stores, digitisation growth and e-commerce in India cannot be expected to be entirely halted through regulations like the proposed rules. The intent is to help the country grow in the coming years while protecting consumer interest and, at the same time, improving EoDB in India.

In continuation of the CUTS International reporting of the analysis on the e-commerce draft rules in the previous quarter,³² in this quarter, NITI Aayog has raised notable objections on the proposed rules framework. The rules required the e-commerce entities to register with the DPIIT. However, these norms have not been made applicable to the brick-and-mortar stores and will create an un-level playing field against a sector that has played a critical role during the pandemic. Additionally, this requirement will also increase the regulatory burden on e-commerce companies against enhancing 'EoDB'.³³

³¹ <https://cuts-ccier.org/pdf/policy-brief-digital-payments.pdf>

³² <https://cuts-ccier.org/pdf/CDIDossier-apr-jun2021.pdf>

³³ <https://www.thehindu.com/business/Economy/proposed-e-commerce-policy-to-be-robust-balanced-says-piyush-goyal/article36806609.ece>

What is somewhat surprising is that the proposed rules intend to hold the e-commerce entities liable for any fallback by the sellers. Such a fallback liability adversely affects investor sentiment and goes against the existing rules under the prevailing FDI rules. Additionally, the rules must not transgress into a jurisdiction beyond consumer protection to vitiate the powers of the other regulations.

NITI Aayog has rightly pointed out a discrepancy between the definition of e-commerce entities, including related parties, as given in the draft e-commerce rules and the FDI policy. This not only creates confusion in the minds of consumers but also for the regulators as well. In case of disputes on the said issue, both parties would stand correct on their respective grounds, creating havoc for the presiding body.

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