

## Competition Policy in South Asian Countries

### Introduction

*Competition is the foundation of an efficiently working market system. According to Adam Smith, competition is the precondition that protects freedom of decision and prevents actions of self-interested individuals from leading to anarchy or chaos but rather to economically optimal, socially fair and desirable market results. However, there are several pre-requisites that have to be met in order for the competition process to run smooth. These are free market entry and exit, transparency of the market, freedom of trade and contract, consumer's ability and willingness to be informed about transparent markets and consumer and producer freedom in decision-making, etc.*

*Often, these prerequisites are not met in developing countries. This holds especially true for countries in South Asia. For example, in most South Asian countries, the markets are severely distorted due to government interference such as price control, restrictive labour laws, setting of interest rates and other externalities like asymmetry of information, etc. Similarly, consumers have very little freedom of decision-making in situations where basic needs are not guaranteed and the only goal is to survive. As a large part of the population in South Asian countries still lives below the poverty line, it is clear that these people can hardly exercise their 'right to choice'.*

*Also, the economic climate in South Asian countries is, thus, not favourable for competition to perform its functions. There is, therefore, an even greater need for competition policy and law in developing countries than in industrialised countries.*

*At the same time, with globalisation, anti-competitive practices have become more international in scope. As South Asian countries have, and continue to, become more integrated in the international economy, the number of threats from external actors to competition in their markets is also increasing. An effective competition policy and law are necessary for dealing with cross-border issues, even though it may not be sufficient at times.*

*This paper discusses the approaches towards competition policy in South Asia. The countries covered are Bangladesh, Bhutan, India, Nepal, Pakistan and Sri Lanka. It discusses the prevailing competition regimes in these countries and the ways the countries attempt to deal with cross-border competition concerns.*

### Economic Policy Environment in South Asia

The main objective of competition policy and law is to preserve and promote competition as a means of ensuring efficient allocation of resources in an economy. This should result in growth, equitable distribution and lowest prices and adequate supplies to consumers. For a developing economy handicapped by resource constraints, efficient allocation of resources is absolutely essential to make optimum utilisation of limited resources.

Having a competition policy means more than having a generic competition law. But, the competition policy may also include the option of not having a competition law. Many countries that have not enacted a competition law generally have a

competition policy in some form or other, defined or not. A competition law would obviously form part of such a policy. It also includes deregulation, foreign direct investment and other policies that are intended to promote competition; for example, the abolition of quantitative import restrictions or maintaining low tariffs.

The inter-relationship between competition policy and other economic policies has a direct bearing on the extent to which competition policy objectives can be pursued without being constrained by, or in conflict with, other public policy objectives. Thus, there is no guarantee that good legislation will meet its aims. Creating a good competition culture depends on effective implementation and a supportive policy environment.

## Competition Regimes in South Asia

South Asian countries, like most developing countries, do not have much experience in the area of competition policy. In the utility sectors in these economies, the services have, typically, been provided by state-owned enterprises and there has not been any regulatory framework in place, the philosophy being that the state functions keeping in mind the best interest of its citizens and, hence, no such regulation is required. This led to inefficiency and low quality of services in such sectors.

But, the situation is now changing. The countries are, however, gradually gearing up to face the changing situation. The process is, however, not an easy one. All the countries in the region are developing economies, but that hardly makes them homogenous. Any policy or law has to be placed in the context of the domestic environment: economic, social, culture, political, historical and the existing legal framework.

### Bangladesh

Although all the policies of the government endeavour to create a suitable environment for fair competition in Bangladesh, it does not have a competition law. Evidence suggests that the current policy needs to be complemented with at least some regulatory framework to address anti-competitive practices by businesses. (See Box 1).

An important issue for the competition policy in Bangladesh is that, despite substantial liberalisation and deregulation, the Government does not allow further entry into certain industries known as reserved, regulated or over-saturated. Currently, edible oil, electric, corrugated iron sheets, etc., industries are considered to be over-saturated and entry of new firms is restricted. This is against the spirit of competition environment. It is widely believed that, in the name of over-saturated sectors, the Government is providing protection to inefficient firms.

#### Box 1: Price-fixing in the Banking Sector

- Under the structural adjustment reforms in the 1990s, Bangladesh experienced an interest rate deregulation. The ultimate purpose of the interest rate deregulation was to ensure a smooth and efficient functioning of the financial market under competitive market forces. Under the reform measures, banks are now totally free to determine the structure of deposit and lending rates.
- Nevertheless, fixation of interest rates is not determined by competitive market forces but rather through price-fixing and cartelisation. When it comes to fixing interest rates, banks are divided into two distinct clubs: one Private Commercial Banks club and a National Commercial Banks club. The relatively smaller banks of each club generally follow the relatively bigger ones in terms of price fixation, rather than trying to compete with one another by differentiating interest rates.

The regulatory framework in the country is yet to be developed. The telecom regulator, Telecommunication Regulatory Commission, has recently been established. However, the weakness of the regime is apparent from the fact that, despite the private mobile operators playing a major role in providing connectivity, especially in rural areas, a majority of mobile subscribers do not have access to fixed lines provided by the state-owned telecom giant.

However, in the so-called regulated sectors, which are gradually being opened up and some participation of the private sector is taking place, it has been alleged that these are being done in a non-transparent and unpredictable policy environment. This has resulted in increased business transaction costs and widespread rent-seeking opportunities. This does not allow participation of efficient firms in the business and the economy may have to carry this baggage of inefficient firms, even when the regulatory framework is more or less developed.

### Bhutan

At present, the country has no competition law in place. Nevertheless, the Ministry of Trade and Industry (MTI) and other government departments have taken some steps to increase competition for protecting consumer interests. However, there doesn't arise any need for a sophisticated competition law in a country like Bhutan, where there is hardly any industrial base.

In pursuance to this, the Government initiated a process of 'de-monopolisation', as early as 1992. Under this scheme, the Government requires any principal company supplying goods to Bhutan to have more than one dealer in the country, in order to bring about greater competitiveness and provide better services for consumers. As a result, the prices of the commodities supplied by these companies have reduced and the consumer choice in product has increased.

The country is debating a legislation (Bhutan Consumer Protection Bill, 2001) that would promote competition and consumer welfare. This proposed Bill aims at filling the gaps in existing set of laws. To enforce this legislation, the Bill envisages the establishment of two separate bodies: the Consumer Welfare Council, which will develop overall policy; and the quasi-judicial Fair Trade Commission would be charged with implementing the legislation.

The country has been able to create some sectoral regulators and is in the process of creating some more. In 1999, the Bhutan Telecommunication Act was passed for promoting the efficient functioning and management of the telecommunication sector, as a result of which, this sector became a state corporation and a regulatory authority.

### India

The Indian competition law, the Monopolies and Restrictive Trade Practices Act (MRTPA), 1969, was

the first piece of competition legislation enacted in South Asia. The enactment of the MRTPA was to give effect to the Directive Principles in Articles 38 and 39 of the Constitution of India, which, in essence, suggest that the Government should try to ensure that the ownership and control of material resources of the community are distributed in a way that best serves the common good; and the operation of the economic system does not result in the concentration of wealth and means, to the common detriment. Under the Act, the firms wanting to expand or invest were required to obtain separate permission from the Central government and there was heavy bias against large firms.

The Act was further amended in 1991 which brought an end to the provisions requiring firms to get approval from the government if they wanted to expand or invest, reflecting the change in policy brought about by the 1991 economic reform process.

The existing competition law was enacted several decades ago with a focus on curbing monopolies and concentration of economic power. The law itself was quite consistent with contemporary intellectual fashions and, perhaps, the needs of the economy. Over time, however, the existing law has been considered inadequate.

Recognising this, the government of India appointed a High Level Committee on Competition Policy and Law, in October 1999, to shift the focus of the (existing) law from curbing monopolies to promoting competition and to suggest a modern competition law in line with international developments and to suit Indian conditions. As a result the competition Bill, 2001, was introduced in the parliament, which has now been passed.

This new law provides for a modern framework for competition. It deals with three areas: (1) anti-competitive practices arising from either horizontal or vertical agreement; (2) abuse of dominant position; and (3) the regulation of combinations or merger control. The emphasis has shifted from a structural to a behavioural approach to competition.

India has also created several sectoral regulators over the years. For telecom, it has the Telecom Regulatory Authority of India (TRAI) and an appellate tribunal. For electricity, there is the Central Electricity Regulatory Commission (CERC) at the federal level and State Electricity Regulatory Commissions (SERCs) in most states. The Securities and Exchange Board of India (SEBI) looks after the operation of capital market, while the banking and finance sector is regulated by its central bank, the Reserve Bank of India.

Although India seems to be in the right direction towards building a framework that would foster greater efficiency in resource allocation and consumer welfare through maintaining and promoting competition, much will depend on the way it is implemented.

## **Nepal**

Nepal does not have competition legislation as such. The Consumer Protection Act, 1997, recognises the right of the consumers to choose goods and services

at competitive prices. The Act addresses anti-competitive practices by prohibiting the creation of circumstances that would lead to any adverse impact on the market, or on the demand, supply or price of goods or services through collusion, quota fixing or by creating artificial scarcity of goods and services.

It further empowers the government to prepare a work plan to monitor, prevent and control monopolistic and unfair trade practices.

In Nepal, utilities remain public monopolies till date and a separate regulator has been set up only in the telecommunication sector. This is as a result of telecommunication policy 1999 in which government has taken some steps towards privatisation of the sector. The Nepal Telecommunication Authority has granted a license to a private company to operate cellular mobile services. Unfortunately, the Telecommunication Policy explicitly states that no more than two operators in both hardware and cellular telephone services will be allowed and therefore limits the scope of competition.

## **Pakistan**

The objective of the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance (MRTPO) is to provide measures against undue concentration of individual economic power; monopoly power; and restrictive trade practices.

The MRTPO prohibits undue concentration of economic power. The law prohibits any non-public undertaking with assets exceeding a certain threshold. The asset limits of the MRTPO put the privately held companies at a serious disadvantage, as they are not allowed to grow beyond certain limits, which might be discouraging to entrepreneurship. The provisions relating to undue concentration of power are, therefore, more designed to diversify ownership of the economy rather than promoting competition and consumer welfare.

With regards to monopoly power, the MRTPO does take a 'rule of reason' approach as it sets out instances in which monopoly power may be justified, such as when it substantially contributes to efficiency, technological progress or growth of exports. It is up to the person or enterprise involved to establish such a justification. They must show that the otherwise prohibited situation is 'necessary' to achieve one of the benefits mentioned and that the benefits are not outweighed by the costs, due to the restraints on competition.

With regards to utilities, the Pakistan Government has set up a number of sectoral regulators such as the National Electric Power Regulatory Authority (NERPA), Pakistan Telecommunication Authority (PTA), etc. These authorities work independently and only seek advise from the Multilateral Competition Agreement (MCA) from time to time, even though they are not legally bound to do so.

## **Sri Lanka**

Within the liberalised economy, a need was felt to set the boundaries for the firms operating in markets. To

this end, the Fair Trading Commission Act (FTCA) was passed in 1987. The objective of this FTCA was to establish the Fair Trading Commission for the Control of monopolies, mergers and anti-competitive practices. Under the law, a very important consideration for the FTC to take into account is 'public interest'.

The law does not proclaim any situation or conduct as illegal *per se*, but applies a rule of reason approach with the onus on the authorities to establish that a certain situation or conduct is against public interest. Therefore, once the FTC establishes that a certain situation or conduct meets the definition of a monopoly, merger or anti-competitive practice, it then has to proceed considering whether this monopoly, merger or anti-competitive practice is contrary to 'public interest'.

This common public interest test is very broad and the FTC has the power to take into account "all matters that appear to be relevant". Special consideration is given to consumer and producer issues, maintaining and promoting a balanced distribution of industry activity and promoting 'effective' competition in the domestic market as well as export market.

Utilities sector is largely unregulated, except in the telecom sector, where the Telecommunications Regulatory Commission (TRC) has been established under the new amendment to the Telecommunication Act passed in 1996. A new telecommunication policy adopted recently includes issues on Internet, interconnection, mobile services, consumer protection and opening of international gateways.

It is clear from the Sri Lankan experience that the promotion and maintenance of competition requires an integrated approach.

There is enormous scope for the South Asian countries to learn from each other. Each of them has its share of achievements, failures and mistakes. These will be of immense value in evolving a comprehensive competition policy framework in all these countries.

### Cross-border Concerns

With the progressive opening up of their trade regimes, the South Asian countries have to deal more and more with the influence of actions that take place, or at least originate, outside their borders. This is particularly so for the relatively smaller countries like Sri Lanka, Nepal and Bhutan, whose dependence on trade is substantial. The situation in Nepal and Bhutan is even more peculiar, as the majority of their imports come from India. Thus, they also suffer from most of the anti-competitive practices that might be prevailing in India. These two countries are landlocked and use Indian soil as their transit route. Thus, the alleged collusive practices in the Indian road transport sector have important bearing on them.

Similarly, the alleged cartelised operations of the Indian Cement Industry can cost Sri Lanka heavily, as it is

highly dependent on India for the product. Due to the bulky nature of the product, import of cement from other countries is not very cost-effective. But, the cross-border concerns in these countries are not limited to within the region only.

As the South Asian countries integrate more and more to global economy, they become more prone to the anti-competitive practices operating on a global scale, or originating elsewhere in the globe. Their ability to deal with these cross-border competition concerns is, therefore, of vital importance to the level of competition in their domestic markets.

While governments through various measures regulate domestic markets, there is hardly any mechanism for regulating the international market. Besides this, very few people in the country appreciate the international dimension of competition policy and its integral relationship with trade and consumer welfare, and national economic development. Some of the international competition challenges are:

- International cartels
- Cross-border M&As (Mergers & Acquisitions)
- Anti-competitive practices by TNCs
- Dumping

While these countries already face formidable constraints in implementing and enforcing the competition law of the country, when dealing with cross-border, they have to deal with the additional problem that implementation and enforcement of law are limited by territorial aspects. However, one of the main problems in this regard has been the lack of awareness. If the awareness on domestic competition concerns is already low, the same for the cross-border concerns is even lower. Thus, not only cross-border anti-competitive practices go unnoticed in the countries without a competition law, they go unchallenged even in the countries where there is a competition law. Nevertheless, some attempts were made to deal with such cases, although the instances are rather rare.

### Approaches in South Asian Countries

One important aspect of dealing with cross-border cases is the issue of jurisdiction, since the origin of such practices are by and large outside the territorial jurisdiction of a country. Although there is a general presumption against the extra-territorial application of the legislation, a number of states seek to apply their laws outside their territory in the context of economic issues. On the basis of the so called 'effects' doctrine they have assumed jurisdiction even though all the conduct complained of took place in another state. The true 'effects' doctrine approach needs to be distinguished from other types of jurisdiction such as 'objective territorial' principle, where part of the offence takes place within the jurisdiction, (For instance, when a person shots someone to death across the border. Although the shot was fired in another jurisdiction, the actual killing takes place within the jurisdiction of that state).

In **India**, the Supreme Court has refuted the 'effects doctrine' with regard to the MRTPA in, *Haridas Exports v. All India Float Glass Manufacturers Association*, judgement. The Supreme Court vacated orders of the MRTP Commission, by adopting a strict objective territorial approach. It found that MRTPA only provides jurisdiction for offences carried out in India. It found that the Act specifically applies to the whole of India, except for the State of Jammu and Kashmir, thereby defining the geographical boundary of operation of the Act.

In the same judgement on appeal against the MRTP Commission's interim injunction against the American Natural Soda Ash Corporation (ANSAC), the Supreme Court stated that the formation of a cartel that takes place outside India is outside the territorial jurisdiction of the MRTPA (See Box 2).

The new competition law, however, includes explicit provisions for extra territorial jurisdiction. It is, thus, expected that the forthcoming competition regime of India will adopt the effects doctrine to address cross-border competition concerns and take such cases more seriously.

In **Sri Lanka**, the law does not contain a specific provision that either confers any extra-territorial jurisdiction on the FTC on matters of law relating to competition and anti-competitive issues nor does it expressly exclude the same. The general rule, however, is that the operation of all laws is confined within the territory of the Republic. Nevertheless, in theory, the FTC could use the 'effects doctrine' to look into matters with an international dimension.

To date, the FTC has not considered any such case. Apparently, the FTC on the basis of effects doctrine took up the Glaxo Welcome-SmithKline Beecham merger case. However, it was advised to the Board that the merger did not fall within the purview of the FTC's jurisdiction. Interestingly, there was no need to invoke the principle of 'effects doctrine' in the particular case as both Glaxo and SmithKline had commercial presence in Sri Lanka. The reason behind this advice, however,

cannot be found. Because of this, the merger was not examined any further.

It seems that the Sri Lankan FTC does not apply the 'effects doctrine' nor does it apparently apply the territoriality principle. In general, the FTC is characterised by apathy and a lack of action.

In **Pakistan**, neither the MCA nor the High Court of Pakistan has addressed the issue of extra territorial jurisdiction. The provisions of MRTPO, however, contain similar language with regard to its scope and application as the Indian MRTPA. It too states that the Ordinance extends to the whole of Pakistan.

If the Indian Supreme Court's reasoning were to be applied then that could lead to the conclusion that the MRTPO too lacks extra-territorial application. Another court might very well conclude that the law leaves open the application of 'effects doctrine', or that it at least allows for the stretching of the 'objective territoriality' principle. By lack of clear interpretation by either the MCA or the High Court, the question as to whether Pakistan's MRTPO has extraterritorial application remains unanswered.

The 'de-monopolisation' drive taken up in **Bhutan** in early 1990s also involved a cross-border dimension. Under this scheme, the Government required any principle company supplying goods to Bhutan to have more than one wholesaler in the country, in order to bring about greater competitiveness and provide better services for consumers. This involved, by and large, dealing with companies or the Indian subsidiaries of some TNCs.

The issue did not involve any real clash of interest with the companies, as the wholesalers were exploiting their monopoly position without any benefit to the companies. But, they were just happy to deal with one wholesaler in Bhutan and, hence, required a change in their mindset only. Ironically, the concerned companies also benefited from the drive. It remains to be seen whether a small country like Bhutan can effectively deal with an issue when it involves a clash of interest with a mighty TNC.

Regardless of whether the law allows for extra-territorial application of its provisions or whether a country even has a specific competition law, when dealing with anti-competitive practices that take place or originate across the border, cooperation of the authorities in that country is necessary to successfully tackle these infringements.

So far, the South Asian countries have not engaged in active co-operation, when it comes to dealing with anti-competitive practices either on international level or regional level. In dealing with the Soda Ash case, the Indian MRTP Commission did rely heavily on the European Union's handling of the case, but no formal co-operation was sought.

#### Box 2: ANSAC: American Soda Ash Export Cartel

- ANSAC is an association of six producers of natural soda ash. These producers entered into an association (or Cartel) relating solely to export sales, defined as sales of soda ash produced in United States and its territories for export to any country other than Canada, except sales made under US foreign aid or procurement programmes. According to the membership agreement, which was entered into on December 8<sup>th</sup> 1983, the members are obliged to sell soda ash for export exclusively through ANSAC and not compete with each other outside the US and Canada. In other words, this association is a cartel foreclosing competition among them in the most serious manner.
- Normally, this kind of practice would clearly violate the US anti-trust law, but for the fact that the cartel only forecloses competition on export markets. Now that this is the case, ANSAC falls under the exemption from the US anti-trust law provided by the Webb-Pomerene Act.

## Conclusion

As the South Asian nations are progressively transforming their economies from public-sector-led, government-controlled markets into private-sector-driven free market economies, the need to design and implement an effective competition policy to ensure the proper functioning of market forces increases.

The economic climate in South Asian countries is not favourable for competition to perform its functions, as is in the most developed countries. Therefore, there is an even greater need for competition policy and law in developing countries than in industrialised countries.

The Sri Lankan experience illustrates the importance of an integrated, coherent competition policy. The Sri Lankan privatisation process, although one of its objectives is to increase the level of competition in the market, achieved the exact opposite by granting temporary exemptions from competition principles in order to attract foreign investment. Such a transfer of public monopolies to the private sector must be prevented, as it works counterproductive, to the detriment of consumers.

The situation is no different in other South Asian countries, which also lack an integrated competition policy, despite the fact that they have instituted the constituting elements of such a policy as trade, intellectual property rights (IPR), investment, regulatory and privatisation policies. It is time to take a more holistic approach. In doing so, the South Asian countries should learn from the international best practices.

With the opening up of their progressive trade regime, the South Asian countries have to deal more and more with the influence of actions that take place, or at least originate, outside their borders. Their ability to deal with these cross-border competition concerns is, therefore, of vital importance to the level of competition in their domestic markets. Apart from a need for proper legal provisions to deal with these cross-border transgressions, the option of cooperation should also be further explored and implemented.

Co-operation should also be promoted at the South Asian regional level, either through SAARC or bilaterally. This is especially important to countries like Nepal and Bhutan, as the majority of goods sold in their respective markets are imported, of which the major part comes from India.

It is essential to build up a strong constituency for competition in order to implement competition law. As the competition policy directly regulates the activities of the business, it becomes difficult to implement them, as the corporations are resourceful as well as well organised and act as a powerful constituency against these policies and laws.

Consumers, on the other hand, are relatively unorganised and lack resources; hence a situation is created where there is lack of a strong support base. Businesses, very often, take a shortsighted approach and intend to continue with their inefficiency and rent-seeking behaviour, even if they find it difficult to continue with such behaviour in view of the liberalisation and globalisation. They are, thus, very keen to thwart the effective implementation of a competition policy, even if it affects the efficiency and competitiveness of the economy in the long run.

The effective remedy of such problems seems to be strong and well-educated consumer groups. Moreover, as no policy implementation is free from the influence of lobbying, in the absence of adequate lobbying from the consumer interest groups and with strong business lobbying, the enforcement of competition law very often fails to maintain the balance between business and consumer interest.

As the countries are in the process of reforming their competition legislation or are about to enact their first one, they need to address these issues. For the larger economies in the region, it might be better to have separate authorities dealing with competition, regulation and consumer protection. On the other hand, it might be preferable for smaller economies, such as Bhutan, Nepal and Sri Lanka, to have an omnibus law covering all, given both resource constraints and the size of their markets. Even if there are different laws, the enforcement can be done through a single authority, as is being done by ACCC (Australian Competition & Consumer Commission) in Australia.

Over the past decade, the South Asian countries have set up and implemented many of the constituting elements and policies that make up the competition policy, but, so far, this has not led to the formulation of a coherent and integrated overall competition policy. Now is the time to do so in order to make competition an effective tool for development in the South Asia region.

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