Journey of India in promoting a competition enforcement regime

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The first competition law in India was passed in 1969: the Monopolies & Restrictive Trade Practices Act. It was passed on the premise in the Constitution under the Articles 38 and 39, which seek to promote the welfare of people by securing….that the ownership and control of material resources of the community are so distributed as best to subserve the common good; and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

Furthermore, since the launch of economic reforms in 1991 several infra sectors were deregulated, such as electricity, telephones, civil aviation, roads, ports, airports etc. This lead to the adoption of regulatory laws and establishment of sectoral regulators, which also form a part of the competition policy rubric. However, this presentation is limited to the competition law regime.

Briefly the history of the MRTPA:

PAST

- Planned economic development since the 1950s
- Industrial Policy Resolution of 1948 and 1956 (Government intervention and regulation)
- Public sector: Commanding heights of the economy
- Some amount of private enterprise through licensing and control
- The Mahalanobis Committee (February, 1964) found that the top 10% population cornered 40% of the income.
- Hazari Committee (September, 1967): Established to examine the Industries Development and Regulation Act, 1951 found disproportionate growth of big business houses.

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- According to the Monopolies Inquiry Commission (Dasgupta, October, 1965) few business houses were controlling a large number of companies and large scale restrictive and monopolistic trade practices existed. This Committee also drafted the Monopolies & Restrictive Trade Practices Bill
- Enactment of the MRTP Act, 1969, followed by Foreign Exchange Regulation Act in 1973.
- Hindu rate of growth (3.5%) over much of 1960s and 1970s, no competition in the economy while poverty numbers still bad.

PRESENT

- 1991: Reforms adopted: deregulation and liberalisation
- 1995: Globalisation spurred by the establishment of the WTO
- 1996: Discussions at the WTO following the Singapore Ministerial Conference lead to establishment of a working group on trade and competition policy, to review the provision of competition laws in Member states and explore global cooperation.
- 1999: Govt appoints the Raghavan Committee to examine the MRTPA and suggest new law, submits report in May, 2000 with a Concept Bill placed on the website of Deptt of Company Affairs
- 2002: Competition Act adopted by Parliament. A writ petition in Supreme Court challenges the same on grounds of chairmanship being a judge or a bureaucrat.
- 2007: Competition Act amendments adopted creating two bodies: Commission to be headed by an expert and an appellate tribunal by a judge to comply with the Supreme Court's observations.
- 2009: Provisions of the Act except regulation of combinations notified and full strength Commission and Appellate Tribunal established.
- 2011: Regulation of combinations (mergers etc) notified to be effective from June, 1, 2011.

Interlude

Reforms adopted in 1991 saw the unleashing of economic forces in the country. The MRTPA was also amended to drop merger regulations so as to allow companies to restructure and grow. Growth rates went up to 7 and 8 percent, now touching 9 percent due to competition in the economy. The new government, which came into power in 2004 adopted the National Common Minimum Programme which asserted that competition will be promoted actively, and that monopolies will not be tolerated. The same government was re-elected in 2009 but the same spirit did not seem to prevail.

CUTS did a Competition Perception Index in 2006/7 with a purposive sample of 600 respondents from across the society. It showed that 54.7 percent people are aware that competition has increased substantially. However 47.4 percent believed that government policies are themselves restrictive and do not promote competition, while 43.2 percent people believed that the existing market regulatory laws are ineffective.

The same exercise was carried out by CUTS in 2008 which showed marked improvement in terms of perceptions of people who believed that the level of competition has gone up considerably. If one looks at the data of non-business people surveyed it showed an increase from 50.66 to 54.23 percent. Business sampling showed a considerable improvement, from 49.11 to 54.24 percent. The largest improvement was perceived in the level of competition in the market from 41.48 to 55.86 percent. The only downside was perceived in the case of 'impact of government policies' where deterioration was recorded.

Some Myths and Realities

When the new law was being adopted there was a heated debate, also in the context of the WTO discussions on trade and competition policy.

Different stakeholders look upon competition policy and law differently. While policymakers consider competition policy synonymous with competition law, business classes take it all as a threat to their existing business. Many in the civil society look at it

as another market access push by western countries to open up our markets. Here we address a few of these myths and realities to get a better understanding of the situation.

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

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

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

However, India, could not take any action against the cartel. In fact, the MRTP Commission was unable to take any action against any of the international cartels that had attracted the attention of other competition authorities. It did, however, respond to complaints against groups of foreign companies who had been selling at low prices, but these orders were set aside by the Supreme Court, which held that the wording of the MRTP Act did not give it any extra-territorial operation. By comparison, the new competition law (Competition Act, 2002) has extraterritorial reach, being based on the *effects doctrine*. Thus, actions or practices taking place outside India but having an appreciable adverse effect on competition in the relevant market in India would come within the ambit of the Act. Therefore, Indian industry can look forward to seeking protection under the Act, when faced with any anti-competitive practice.

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

Reality: In order to address this misconception, we recount the tale of a poor peasant widow, who used the law to get redressal against collusive activities of two photographic studios in a small town.

> *Rukmini Devi, a poor, elderly and illiterate widow, lives in a village near Chittorgarh in Rajasthan. She had to sow her unirrigated 5-bigha farm in time, but did not have the resources to buy the seeds, fertiliser, etc. Fortunately, soft loans were available at the local cooperative bank at Rashmi, the sub-divisional headquarters under the government's integrated rural development scheme.*
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> *In view of the frauds which are ubiquitous, illiterate people are required to affix two passport-size photographs to the loan papers. Rukmini approached two local studios to get her photo taken but both were unhelpful, forcing her to go to a usurious money lender. Both the studios, it emerged, were in league with the moneylender.*
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> *Rukmini Devi took the help of a local consumer activist and complained to the local district forum under the Consumer Protection Act against the restrictive trade practice and cartelised activity that the two studios were engaged in. She won the case and collected damages from the studios – and the cartel (duopoly) was broken.*

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

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

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

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

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

Myth: There is no public participation.

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

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

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

- *First*, 'competition law' and 'competition policy' are two distinct concepts (see box below). Competition law is but a subset of competition policy. Besides encompassing the law, policy includes sectoral regulatory laws and the various government policies that enhance competition and consumer welfare. India has a competition law, but not a competition policy. And it needs one.
- *Second*, the market distortionary practices that emerge from any government policy or practice are beyond the scope of competition law.

The Difference between Competition Policy and, Competition Law

Competition policy, competition law and competitiveness are three distinct concepts. Unfortunately, most of the policy community considers these terms synonymous and interchangeable, which is not the case. In India it is most often the government that indulges in or encourages anti-competitive practices.

Though we have liberalised trade, some elements of the policy regime have severe anticompetitive dimensions, such as use of anti-dumping measures. Competition Law is but a subset of Competition Policy. Besides encompassing the law, Competition Policy tries to bring harmony in all government policies that affect competition and consumer welfare, such as trade policy or industrial policy. There are many policies of the government, which create anti-competitive outcomes.

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

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

Therefore, the country needs an effective competition policy and law to ensure that the market functions, and both consumers and the economy gains.

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

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

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

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

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

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

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

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

The present coalition government too considers competition a serious policy issue. Its National Common Minimum Programme, *inter alia*, states:

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

Other countries with competition policies:

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

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

Empirical evidence confirms that a well-designed and -implemented competition policy promotes economic growth by ensuring better allocation of resources. A study carried out

for the Australian economy [2] estimates the expected benefits from a package of competition promoting deregulatory reforms (including improvements in competition rules) to induce an annual gain in real GDP of about 5.5 percent, besides increases in real wages, employment and government revenue.

Following a presentation by CUTS before the Planning Commission, the government think tank, established a working group to consider a National Competition Policy for the 11th Plan Document. The working group submitted a report to the Planning Commission in February, 2007. Some of its recommendations are given below:

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

2. **Every level:** The broad policy initiatives needed to achieve the objectives of National Competition Policy should extend to the levels of the central government, state government and sub-state authorities.

[2] http://www.unctad.org/en/docs//c2em_d10.en.pdf

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

4. **State level too:** Initiatives at the state government level would require undertaking pro-competition reforms keeping in mind the principles of the National Competition Policy. There are many economic areas of state legislation, regulations and policies that impact on or inhibit competition in the relevant markets. These restrictions also tend to fragment the national market and dent freedom of trade. State governments should be encouraged to undertake a review of existing policies, law or regulations from the competition perspective and undertake a competition impact assessment of proposed policy, law and regulations before these are finalised.

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

6. **Competition Policy Council:** Once a comprehensive National Competition Policy has been adopted and announced by the government, it should be incumbent upon the organs of government to abide by the principles of the policy. Similarly, at the state and sub-state levels, it is expected that the policy would be

duly respected. However, given the wide canvas of the National Competition Policy, it would be necessary to set up an institutional arrangement for monitoring the progress of the implementation of the policy. The establishment of a Competition Policy Oversight Council, which would be autonomous in its functioning, has also been recommended. The Council would monitor progress in the implementation of the National Competition Policy, including reviews of laws and policies, and competition impact assessments of new laws and policies.

7. **Overlap between Competition Commission and Sector Regulators:** It recommends that the structural issues be dealt with by the sector regulator and behavioural issues to be dealt with by the Competition Commission. It should also include manadatory consultation between both the regulators as there can be overlapping issues such as mergers which will need to be dealt with by either of the two bodies to avoid forum shopping and jurisdictional gridlocks.

These recommendations were included in the 11th Plan Policy Document[3], and thus provide a means to further the agenda.

This issue is now before a Steering Committee of the Planning Commission established in March, 2011 to develop an Approach Paper for Industry for the 12th 5-year Plan (2012-2017) which will *inter alia* look into regulatory issues including Competition Policy with the goal of creating 100mn additional jobs by the year 2025. It should complete its task by September, 2011. CUTS is a member of this Committee and its Working Group on Regulatory Framework.

[3] http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11_v1/11th_vol1.pdf

Conclusion

Why did the consumer movement take up the battle for a competition policy and law in India? There is a history to it. Few pointers:

1986: Consumer Protection Act, which covered public sector enterprises as well, and provided a complaints resolution forum and a mini-competition authority at the district level. It turned the whole paradigm in India on its head.

Unlike many other developing countries, the spirit of enterprise permeates the socio-economic fabric in India, hence the realization that an open and orderly market can promote consumer welfare and economic democracy: good governance, control of corruption, corporate citizenship among several.

Grass root surveys show that people see globalization and liberalization as an opportunity with some short term losses. This means that we need safety nets both in terms of safeguarding employment and protection of consumers. The latter means a responsive corporate community and laws and institutions to see that they behave.