

India Competition & Regulation Report (ICRR)

Report of 2nd National Reference Group Meeting

Saturday, 9 December 2006, New Delhi

Background and Introduction

CUTS International has undertaken a research project to prepare the first of its kind 'India Competition and Regulation Report (ICRR)'. The project, supported by the British High Commission, New Delhi, has been undertaken against the background that while India has embraced market-oriented economic reforms for the past 15 years, there is, as yet, no periodic review to assess competition and regulation scenario in the country. ICRR is an attempt to fill this vacuum. The report would be prepared on a biennial basis and provide inputs to policy community and other stakeholders to take necessary actions to promote well-functioning markets. For more on the project, please visit www.cuts-international.org/icrr.htm

A National Reference Group (NRG) comprising of eminent experts and economists in the country has been constituted to guide in the implementation of this project. Former Under-Secretary General of UN, Shri Nitin Desai is the chairman of the NRG.

This second meeting of the National Reference Group was organised to review drafts of various sections of the report. Nitin Desai (ND), Chairman ICRR NRG, welcomed all participants. Following sections of the report were discussed in the meeting:

- Introduction Chapter: Role and Tasks of Competition Policy and Law in India
- Regulatory Issues in Transportation
- Competition Regime and Consumer Welfare
- India Competition Perception Index

Following sections of the report were not discussed and are to be reviewed in the next meeting:

- Competition Issues in Pharmaceuticals
- Competition Regime and Business Welfare
- Theme Section: Competition Regime and Enhancing Access

Follows a brief report of the proceedings with key outcomes.

1. Introduction Chapter: "The Agenda for Competition Policy and Law in India"

1.1 Draft of chapter is available at

<http://www.cuts-international.org/documents/ICRR07Introduction.doc>

1.2 The chapter has been written against the background of India's experience with Competition Policy and Law. In terms of law, India enacted the Monopolies and Restrictive Trade Practices (MRTP) Act in 1969. This Act was complemented by the enactment of Consumer Protection Act (COPRA) in 1986. In terms of policy, India did not have a competition-enabling environment until the economic reforms initiated in 1991. The changing economic milieu created the need to review the competition law of the country. Accordingly, a new law, Competition Act was enacted in 2002, which is set to replace the MRTP Act. Meanwhile, reforms continued in respect of various policies, several of which are nevertheless found to be at variance with the overall objectives of a market-led economy. Considering the situation,

Competition Commission of India (CCI) and the Planning Commission of India are engaged in an exercise to draft a National Competition Policy in order to streamline government policies and make them consistent and coherent with the competition principles. Against this background, the chapter seeks to discuss the nature of the challenges in the implementation of Competition Policy and Law in India.

1.3 Following issues from the chapter were highlighted in the presentation:

- Analytical and enforcement methods used in competition law need to be tailored to the socioeconomic and institutional conditions and stage of development of Indian economy. India cannot follow the approach of other countries, in particularly developed world.
- It would be difficult to implement a conduct oriented approach to implementing competition law in India due to several reasons:- government is a key player in the economy; transaction costs are high; large family-owned business are in operation; liberalisation process is still in progress; existence of fragmented markets; presence of large informal sector; etc. There are also issues relating to policy objectives, other than promoting and protecting competition (such as poverty reduction), which often take precedence and need to be factored in.
- The chapter categorises various sectors of the economy into different categories, based on nature of challenges that would be encountered in enforcing competition law. The identified categories include:- traditional manufacturing; non-tradable goods and services; new economy network industries; previous regulated sectors now experiencing regulatory reforms; and agriculture and rural economy.
- Among the recommendations made to promote competition culture and environment in the country include:- competition advocacy and compliance education; institution/capacity building of all stakeholders; developing coordination mechanisms to work with state governments, sector regulatory agencies, relevant stakeholders, including the industry; developing merger guidelines; setting priorities for competition offences.

1.4 Following comments/suggestions were made on the chapter

- The distinction and relationship between Competition Policy and Competition Law should be made clear in the chapter. The chapter should bring out the aims/goals of Competition Policy and throw light on the complexity of competition environment in India.
- Focus more on policy part rather than emphasising on Competition Law and the CCI. The latter is just one agency, which can at best do advocacy with respect to policy matters. Role of other agencies/groups in influencing government policy needs to be recognised. The chapter should identify areas of government policy, where competition issues matter (e.g. promoting trade) and areas/circumstances where government actions should be kept out of the lens of competition (e.g. banning child labour).
- The chapter should explore the standards of evidence (from an economic perspective) that would be relevant or useful in doing any case analysis. The issue of what evidence is required or what parameters are to be considered to term a practice as anti-competitive is quite complicated. For instance, how to distinguish between what may be called, 'innovation rent' and 'anti-competitive behaviour'? It was argued that the present approach that focuses on consumer welfare in determining the nature of a business practice is one-sided. It needs to be appreciated that business operates in an environment of uncertainty that involves risks. Consumer interest and producer interest should therefore be given symmetric treatment in any case analysis. This consideration could inform the standard of evidence, the paper is expected to explore.
- The chapter should give proper attention to competition constraints that arise from government's actions. There should be a separate section on government or public policy

acting as a source for promoting competition or hindering the implementation of Competition Policy and Law.

- There was a debate on whether government policies should be brought under the purview of the Competition Act. One argument was that in order to have an effective Competition Regime, all government policies should be brought under the scanner of the Competition Act. A counter argument was that no country in the world has this arrangement where government policy making could be challenged under the Competition Law. Competition Law deals with only private infringement and in terms of policy, it could only play an advocacy role. If Competition Authority were given the task of screening government policy making, then it would be larger than the legislature, which is certainly not desirable. A better alternative could be (and as practiced in several countries) to allow the competition authority to analyse government policies and make its opinion non-binding. It was suggested to include a box and highlight experience of other countries in terms of how government policy is dealt with from a competition perspective. It was observed that the paper presently gives an ambitious role to the CCI (that of screening policy), which is not desirable. Instead, the paper could suggest preparation of non-binding report by the CCI on the state of competition with reference to government policy. This could be a part of the annual report of CCI.
- There should be a discussion on the interaction between competition and sector regulation; Consumer Protection Act and Competition Act. The chapter should include a discussion on 'essential facilities' and the issues arising from it.
- The chapter should be updated taking into account the issues covered in the Competition Amendment Bill and the report of the Parliamentary Standing Committee.
- The categorization of industries that is proposed needs a closer look. Some of the dimensions that could be considered to review the taxonomy include:- Industries that were regulated in the past but not now; industries that continue to be regulated; Tradable goods; Industry structure (i.e. dominated by large or small firms); Organisation structure (i.e. public or private); Degree of market integration (i.e. geographically integrated or fragmented; market differentiation); impact of government involvement (as policy maker, purchase, controller of resources); transaction costs involved.
- As per a recent study (http://www.icrier.org/publication/working_papers_183.html), inter-state price differences have narrowed down. This implies less fragmentation of commodity market in India. The chapter could consider this evidence appropriately.
- It was observed that there is little scope for setting priority for the competition regulator, as attempted in the chapter. CCI would be required to act whenever there is some complaint irrespective of its own priorities. This should be appropriately considered.

2. Regulatory Issues in Transportation

2.1 Draft of chapter is available at:

http://www.cuts-international.org/pdf/ICRR07_Transport.pdf

2.2 The chapter has been written against the background that transport sector has grown at 10 percent annually for several years now. However, these numbers hide bottleneck issues, which have been widely documented. If remedial action is not taken more speedily, transport could become one more hurdle to rapid growth. A massive enhancement is required in the supply of all transport infrastructure and services. In general, there is a significant degree of competition in transport services and it is also reasonably well regulated. The infrastructure side is where the bottlenecks exist, and is a different story altogether.

2.3 Following issues from the chapter were highlighted in the presentation:

- Transport infrastructure is primarily a natural monopoly and services part tends to be highly capital intensive. The capital intensity aspect has implications for the way the industry is regulated. Under the circumstances, oligopolistic market structure seems to be an optimal one for transport services, as too many players could lead to inefficiencies and wastages.
- Competition and regulation issues in the sector have to be viewed from the perspective of capital requirements. Presently, since there are no entry barriers, there are far too many service providers, and the situation does not seem sustainable. In the past, civil aviation sector witnessed certain airline operators going bust, for want of capital. Given the huge capital requirement in the sector, the relevant question that arises is:- should contestability be limited by a capital size requirement for entering the sector?
- Another issue that impinges on competition and regulation in the sector is the issue of conflicting jurisdictions, and existence of multiple laws. For instance, though the Motor Vehicles Act is a national law, different states have added some provisions of their own and established host of agencies: Road Transport Authority, Transport Commissioners, etc. which increases the complexity of the sector. Then there are sectors, such as shipping and aviation, where international dimension needs to be accounted.
- Trucking industry is quite fragmented with approximately two million trucking firms, about 80 percent of which own less than three trucks. The existing environment encourages small size firms and discourages large-fleet size. Market is highly fragmented between running within the district, inter-district, inter-state, etc. Among the barriers to entry of large-fleet size firms is the existence and dominance of freight forwarders. Only about 2-3 percent of the customers directly access the truck owners and book their goods. It is the intermediaries who play a major role and determine the degree of competition and therefore prices. There is a need to regulate the behaviour of freight forwarders. Another constraining factor to entry of large firms is the practice of overloading, which has been made compoundable, and creates an incentive to break the law. Further, there are several dimensions of the policy on truck industry (rather than road transport) that has implications for competition issues in trucking.
- Railways are performing a whole range of activities in-house which has gradually diverted its attention from the core business of transportation. It is desirable to unbundle railways activities and hive off those which have no relevance to its core activities. Transportation services might remain a government monopoly for the foreseeable future, but there is a clear case for introducing competition in the production side or in the non-transport areas. However, care needs to be taken to prevent the emergence of single buyer, single seller monopolies.

2.4 Following comments/suggestions were made on the chapter

- Among the key issues that discourage entry of large-fleet sized trucking firms lies in other areas of policy including:- (i) barriers to entry that existed till recently in the manufacture of trucks; and (ii) taxation structure that discriminates against multi-axle vehicles, which are more efficient and favours operation of second-hand two-axle vehicles. Though there are no formal barriers to entry in the sector, but barriers in other related areas have implications and needs to be appropriately highlighted. Another key restriction (that discourages large-fleet sized firms) in the trucking industry arises from a stipulation in the law, which mentions that the law would apply in case of firms that have five or more workers. Consequently, most operators own less than five trucks to be out of the purview of the law.
- According to a research study commissioned by the CCI and undertaken in the western part of India, there is no competition problem in long distance trucking. Cartelisation is found in

short-distance trucking due to the existence of truckers union, but this is primarily a law and order issue. These findings could be appropriately incorporated in the chapter.

- In case of seaports, airports, railway tracks (which are in the nature of natural monopoly), the issue of ‘essential facilities’ is quite pertinent for discussion from the perspective of competition and regulation. A related issue is a situation where the provider of ‘essential facility’ is also the service provider, and competes with other service providers in the usage of this ‘essential facility’. This raises the issue of putting in place a proper mechanism to provide right to access the essential facility to all parties concerned. In the absence of such mechanism, competition concerns could arise. The chapter should discuss the issue of third party access to essential facilities. Examples from other countries could be discussed in the Indian context. Taking the example of the now failed Air Sahara-Jet Airways merger and the issue of slot allocation, it was suggested that ‘right’ to access essential facility should cease the moment an operator stops providing service. A service provider should not own the ‘right’.
- In case of railways, competition issue should be looked at by dividing the sector into two segments: fixed stock and rolling stock. The policy has to be evolved in such a manner to introduce competition in the rolling stock segment, as fixed stock segment is an ‘essential facility’.
- There could be a separate discussion on certain unifying themes that emerge in the context of the transport sector. These could include:- ‘essential facility’, ‘capital requirements’, and impact of other policies/practices that determine competitive outcomes in the transport sector.
- The chapter should identify certain objectives that would influence the growth of the transport sector and then look at each regulatory law to assess if these objectives are being met or substantive changes are necessary. This would lend sharper focus to the transportation chapter.
- Certain issues are presently missing in the paper, which could be included, such as passenger transport in roads, and railway concession agreement and dedicated freight corridor initiative of railways.
- There was disagreement on the recommendation that government should give some incentives for technological upgradation in the trucking industry (the manufacturing side). It was observed that market forces should ideally determine these issues. But since market is presently sending out weak signals to manufacturers, this issue could be addressed by enforcing safety requirements. It was informed that there has been a growth in the operation of multi-axle vehicles, which has been guided by market forces and facilitated by supporting road infrastructure.

3. India Competition Perception Index

3.1 Survey results are available at:

http://www.cuts-international.org/pdf/ICRR07_IndiaCompetitionPerceptionIndex.pdf

3.2 The index seeks to gauge perception of ‘informed’ stakeholders on competition and regulation scenario prevailing in the country. A questionnaire was prepared targeting five broad stakeholder groups: government officials, business representatives, CSOs, academia, and media. The idea was to get feedback from the group of informed stakeholder who have a fair idea of competition and regulation scenario. The questionnaire sought to assess perception of stakeholders on: awareness and knowledge on regulatory and competition issues; level of competition and nature of practices prevailing in the market; and impact of government policies,

measures on competition. The target was to get a total of about 500 responses and it was informed that 600+ responses have been received.

3.3 Following are the highlights of the survey results:

- On a scale of 0 to 100, the overall competition perception index returns a score of 54.75. This implies that the perception on competition in the country is neither too good nor too bad, it is fair. There is certainly a room for improvement.
- At a disaggregated level, the perception score on ‘nature of market practices (35.74)’ and ‘knowledge /awareness (39.14)’ are lower than the score on other parameters considered. On the other hand, perception on ‘level of competition in the market (59.08)’ is relatively higher.
- A key message that emerges is, awareness/knowledge on competition/regulation issues in the country is not satisfactory.

3.4 Following comments were received:

- It was observed that the inference of lack of knowledge could be misleading. Presently, the key provisions of the competition law have still not been brought into force and the low score could reflect ignorance or non-interest rather than lack of knowledge. It was suggested to compare the scores with other similar surveys, which could provide a useful benchmark, to draw relevant inferences. Another suggestion was to repeat the exercise with the same set of respondents, once the competition law is implemented and then see the score on this parameter.
- It was observed that this exercise could yield useful results in longer term as the survey is repeated and a trend of perception emerges.

4. Competition Regime and Consumer Welfare

4.1 A revised draft of chapter is available at:

http://www.cuts-international.org/pdf/ICRR07_CompetitionRegimeCWelfare.pdf

4.2 India embarked on the path of economic reforms in early 1990s by shifting to market-driven economic policies. The thrust of economic reforms has been to allow for more competition resulting in best possible choice of quality, lowest prices and adequate supplies to consumers and business. The chapter has been written against this background and seeks to carry out a consumer impact assessment of competition regime (comprising of competition policy & law; other government policy/measures; and sectoral regulatory measures) prevailing in India.

4.3 Following issues from the chapter were highlighted in the presentation:

- Impact of competition regime in India is assessed against the eight consumer rights that emerge from the United Nations Guidelines for Consumer Protection. For the purpose of analysis, these eight rights have been put under three broad categories or rights clusters:- namely Access, Quality and Participation.
- Right to basic needs and choice constitute the principal elements of the *Access* cluster. The chapter looks at impact of competition regime on availability of food (in particular operation of food subsidy), Healthcare (drug prices and control instruments), electricity, education and transportation. Competition regime does have an impact on some of these. Nevertheless, it is realised that ‘Competition Regime’ is not a panacea, but one of the tools that can help in ensuring right to basic needs.
- Competition through its effect on standards can have a positive influence on *Quality*. The role of Bureau of Indian Standards and other government measures (e.g. Food Safety and

Standards Act) is examined. One lacuna in the system is that the regulatory authorities laying down standards do not have the teeth to implement the same and penalise offenders for non-compliance. A related problem is the low level of consumer awareness which means there is not enough demand-pull to make industry interested about implementing quality standards.

- A systematic methodology to carry out consumer impact assessment is developed and applied to the telecommunications sector. The sector has witnessed unprecedented growth, tariffs have fallen rapidly and number of mobile telephones has overtaken fixed line connections. The uniqueness of this sector both in terms of growth, constant technology upgradation, involvement of private players and importance to consumer (urban and rural alike) warrants a deeper study from consumer perspective. The chapter assesses the impact of regulation in telecom sector from consumer perspective.

4.3 Following comments/suggestions were made on the chapter

- There are several overlaps (relating to the discussion on government policies) between the chapters ‘Consumer Welfare’ and Introductory chapter, which needs to be taken care of during editing.
- The term ‘consumer’ should be clearly defined in the paper. Whether it means ‘intermediate consumers as business’ or ‘final consumers’.
- Telecom regulation is not a good example for assessing consumer impact. The amendments made to TRAI Act in 2000, weakened the provisions relating to consumer protection. The telecom regulator sets the quality of service (QoS) benchmarks, and the survey results show that quality of service poor, but TRAI has not taken any action to address the poor QoS performance. A better model could be the working of various State Electricity Regulatory Commissions (SERCs) in the context of setting and enforcing QoS standards. Further, the Electricity law has set up a model for complaint redressal, which could be studied to identify the consumer redressal mechanism that would be appropriate for the country.

List of Participants

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