

**International Conference on  
Competition & Development**

**How Can Competition Policy  
Promote Inclusive Growth?**

**Monday, March 19, 2018, New Delhi**



## *Inaugural Session*

### **Political economy aspects of competition & development**

**Chair:** Fredric Jenny, Chairman, OECD Competition Committee

**Speakers:** Pradeep S. Mehta, Secretary General, CUTS International (Welcome Address); Montek Singh Ahluwalia, Former Deputy Chairman, Planning Commission of India (Keynote Address); DK Sikri, Chairman, Competition Commission of India (Discussant); Teresa Moreira, Head, Competition Policy and Consumer Protection, UNCTAD (Discussant)

#### **Proceedings**

Competition policy and law in development paradigm has a strong political economy dimension, which is akin to that of the 'growth' vs. 'redistribution' discourse. The growing economic concentration and inequality around the world has engendered a fresh wave of debates and discussions within the global antitrust community. In line with such a wave, the focus of the inaugural session of the conference was the political economy aspects of competition & development, and what could be the way forward.

#### **1. The threat of rising protectionism, policy induced distortions to competition – Is competition policy up for the challenge?**

It is quite evident that the global trend in favour of protectionism has been on the rise. As the forces of protectionism are increasingly being reflected in government policies, the possibility that consumers and businesses will lose in the long run is also rising. The US, which used to be the champion of free trade, has triggered the present wave of protectionism. The Indian government too has intervened in international trade by raising custom duties etc. which might pose barriers to competition.

It is unfortunate that an "intellectual climate change" has taken place and the general tendency is to erect protectionist barriers in the name of protecting the domestic industry. As was highlighted, the actual effect may be the opposite as the burden of protectionism is expected to be borne by domestic consumers and exporters.

In addition to this, government induced distortions to competition in the market remain largely unchecked. India's earlier version of competition law, the MRTP Act is an appropriate example and can itself be termed as anti-development law in the sense that it promoted license raj. It was designed to curb monopolistic and restrictive practices, but it ended up curbing the very growth of industry. However, in the post-liberalisation era, with the introduction of the Competition Act, 2002 (which repealed the MRTP Act) 'conduct' as opposed to 'size' became the lens through which competition rules were to be enforced. Rather than dominance, it was the 'abuse' of dominance that triggered

enforcement. Despite this reformatory step, there are still government laws and regulations that act as barriers to competition or have market distortionary effects. An example is the law governing the regulation of agricultural produce markets by market committees.

The APMC Act in effect breeds traders' monopolistic behaviour resulting in suffering of farmers. More so, the Essential Commodities Act, which imposes stock limits of essential commodities, acts as hurdle in the entry of private players that could enhance competition. Similarly, the present price control regime for pharmaceuticals and medical devices has lost its focus – originally thought as preventing spike due to monopolistic pricing is now being used as a weapon to make product affordable – and have distortionary effects on market competition.

As a result, the role of competition policy has become all the more important, considering the double whammy posed by trade related protectionist tendencies and government induced competition distortions.

## **2. The proposed role of competition policy and law**

In light of these political economy challenges, the possible role of competition policy and law was discussed. The crux was that the implementation of competition policy & law ought to be aligned with the 2030 Agenda for Sustainable Development Goals. Achievement of SDGs 1 (no poverty), 2 (zero hunger) and 3 (good health and well-being), for example, will be aided significantly by rectifying anti-competitive practices prevailing in food and agriculture sector as well as pharmaceutical sector, which tends to harm poor the most. In fact, competition policy and law is directly or indirectly linked to most of the SDGs and hence can be a useful complementary tool in their achievement.

Moreover, there must be some constructive role that competition authorities could play by raising the issue of government induced anti-competitive effects (both in forms of protectionist trade policies or distortionary domestic policies). Competition advocacy, as a function of competition authority, becomes important here. The CCI has engaged in competition assessment of various laws and policies and communicate the findings to relevant authorities in the government. For instance, CCI, in collaboration with several reputed institutions, had conducted competition assessment of various laws, including the Model APMC Act, 2003. Competition assessment is now also on the agenda of NITI Ayog. The CCI will also be building capacity for such an assessment and evaluation. The consensus is now to move in that direction and conduct more such assessments.

However, for emerging markets like India, which are transiting from heavy government to more private participation, some issue of jurisdictional conflicts may arise between sectoral regulators and competition authorities, which need to be proactively dealt with. It needs to be understood that regulation has three dimensions – technical, economic

and competition. While technical and certain aspect of economic regulations are in sectoral regulator's domain, the competition aspect is in the domain of the competition authority. However, there could be certain areas of jurisdictional overlap that may give rise to conflict.

Each regulator has distinct legal framework in which it operates and judicial maturity lies in recognising the nuanced differences and respecting them. For instance, while availability and technical constraints from points of inter-connection in telecom sector have to be reviewed by the telecom regulator, matters such as "refusal to deal" with an entrant requires investigation of the alleged behaviour by a competition regulator. In a competitive market *ex post* assessment of competition becomes the work of a competition authority.

### **3. Growing inequality and the role of competition policy**

In the context of political economy with respect to competition and development, 'inclusive growth' has come into the centre of global debates. The growing inequality, despite enforcement of competition law across jurisdictions, has been flagged as a global cause of concern. It also now been increasingly accepted that the benefits of economic growth does not automatically trickle down to the people at the bottom of the pyramid. This demands economic development to be broad-based so that the benefits accrue to larger masses in a sustainable manner. Therefore, socio economic upliftment of the marginalised people should not be the end but a means of economic development.

Be that as it may, the economic growth nurturing remains the driving force behind development. The virtue of competition lies in enhancing the size of the cake in the above-said context. Competition is in the centre of efficient market functioning, by bringing in allocative, productive and dynamic efficiencies. Thus, competition pushes economy towards higher growth trajectory.

India is one of the fastest growing large economies, yet optimum economic outcome may not have come at the individual levels. Those who are in market power are in position to turn the scales in favour either by violating the rules of the game or by inducing the changes in the rules to their advantage. But those who do not enjoy such market power may tend to collude with others in order to collectively influence economic outcome, which can result in sub-optimal performance for the economy as a whole. Competition principles demand that the rules of the game are same for everyone and the market power is not used to change the game in favour of few.

Therefore, the role of competition authorities, particularly in the emerging economies, is to ensure that there is no market distortion, which reduces consumer welfare and promotes lopsided growth and inequality. However, existence of a robust competition regime is a necessary but not sufficient condition for ensuring overall development.

Competition can certainly help lower rung in the society but it cannot substitute good governance.

While competition law generally addresses supply-side factors, it does not address demand-side bottlenecks that may arise due to low level of disposable income and consumer demand. Such factors can be addressed through comprehensive socio-economic framework. For instance, in India we have direct benefit transfer schemes, public distribution schemes, national rural employment generation scheme etc. But these are short term measures to address the demand side constraints. Purchasing power enhancement in a sustainable manner can be best achieved through transformative measures, like ensuring better education and healthcare systems. These issues are well reflected in the Agenda 2030 for SDGs.

The SDGs guide a number of UN bodies in its endeavours, including UNCTAD that has the motto of “prosperity for all”. The UNCTAD’s present works are mainly driven by six of the 17 SDGs – viz. no. 5 (gender equality), 8 (inclusive and sustainable economic growth), 9 (inclusive and sustainable industrialisation and foster innovation), 10 (inequality), 12 (sustainable consumption and production pattern) and 17 (global partnership). Its main role is in assisting developing countries in better integration of economy, including using competition policy & law to achieve sustainable and inclusive development.

Findings in the relevant UNCTAD studies show that competition can play an important role in economic policy from development perspective. Of particular importance is competition assessment of new and existing laws and regulatory frameworks. Competition law enforcement is important but competition needs to be disseminated in the country to achieve inclusiveness. The absence of this can induce disenchantment among the masses about liberalisation, which can lead to protectionist trends.

According to the level of development and socio-economic condition, some jurisdictions can consider “public interest clauses” or “sector specific exemptions” in their competition laws. South Africa, for example, has public interest clause in their competition regime, which has contributed not only to competition, but also economic development. Similarly, in food and agriculture sector, it may be necessary to consider abuse of buyers’ power that can damage producers and consumers.

Therefore, with the appropriate of competition law and competition policy, governments can purse the goal of inclusive growth. Further, the international community, donor agencies, business and civil society committed for the achievement of SDGs may like to bestow greater weightage to competition policy and law.

## Discussions

Is it a good idea that competition law enforcers should be given tools to influence government policies? Or would it be better to have two separate institutions – one for competition enforcement and other (within government; like Productivity Commission in Australia) that continuously develop competition policy agenda for the government? Which will be the effective way?

- Being a statutory body outside and independent of government, it acquires certain status and hence its recommendations will carry more weight. Within government whatever is done, is already within government and hence may not be given that much weightage. In India, such role is played by the NITI Ayog (earlier by the Planning Commission), but it does not seem to have that much influence. For instance, government went on to increase custom duties, contrary to what NITI Ayog had suggested.
- It would be useful if competition authority brings out annual competition assessment reports, containing among other things status of legal and regulatory barriers to competition and international best regulatory practices.
- CCI is planning to undertake sectoral studies to build a knowledge-base, before it advises the government. For instance, CCI is currently working on auto-taxi sector in order to advice certain state governments.
- Competition authority having better experience and technical expertise, will have a credible voice to influence government, particularly that of the developing countries.
- In India, during the era of the Planning Commission there was a report that had chapter on competition and consumer protection, which induced formation of a Committee by the Ministry of Corporate Affairs to draft a National Competition Policy. The draft competition policy (drafted in 2011) clearly recommends that this role should be given to a new body called Competition Policy Council, rather than to dilute the competition enforcement function of the CCI.
- It may be noted that as far as the effectiveness of competition advocacy is concerned, it is still not clear as to what would be an apt strategy for advocacy that would succeed in influencing governments. Perhaps a designated nodal point in the government to look into the recommended competition reform agenda can substantially enhance effectiveness of such advocacy.

## *Round Table 1*

### **Ensuring equity through competition reforms**

**Chair:** Tembinkosi Bonakele, Commissioner, Competition Commission of South Africa

**Speakers:** Eleanor Fox, Professor, New York University School of Law; Pierre Jacquet, President, Global Development Network; Allan Fels, Former Chairman, Australian Competition and Consumer Commission; Dhanendra Kumar, Former Chairman, Competition Commission of India; Vicente Bagnoli, Professor of Law, Mackenzie University, Brazil; Sumit Majumdar, Professor of Technology Strategy, University of Texas.

#### **Proceedings**

The session captured the redistribution effects of public policy, with the objective of increasing economic efficiency and ensuring inclusive growth. The need for governments to develop a trickle-down vision for alleviating poverty through inclusive growth was highlighted. Caution was also made in this regard, so as to not confuse inequality with poverty. Inequality was considered to be wider than poverty, since it encompassed different aspects of the economy.

#### **1. Trade-off between efficiency and inclusivity**

The possibility of a trade-off between efficiency and inclusivity, along with the inverse correlation between inequality and efficiency (i.e. dimensions of inequality resulting in economic inefficiency, and efficiency giving rise to inequalities) was believed to have weakened the arguments in favour of enhancing efficiency, especially in developing countries.

The rising inequality in countries was considered as worrisome, which has been highlighted by many reports. This pressed the need for ensuring equality in opportunity, which required ending discrimination in providing opportunities. The average income of the top 10 percent of a country's population was proposed to be 10 times than that of the lowest 10 percent. Also, 50 percent of the household assets were held by the top 10 percent in OECD (Organisation for Economic Cooperation and Development) countries. In India, the top 1 percent has captured more income than the bottom 50 percent combined.

Accordingly, competition authorities were advised to prioritise and focus more on goods and services that affect low income people the most, such as in areas of agriculture, seeds, fertilisers, essential food items, telecom etc. Access to basic and essential services such as healthcare and education, must also be ensured to all.

Various factors held to be responsible for rising inequalities, were: location of birth, education received, inheritance etc. Therefore, apart from competition, many other factors need to be considered and implemented for bridging such inequalities. Emphasis needs to be placed on not limiting the scope of initiatives to providing a one-time perfect equality of opportunity, but to ensure that the same is effectively implemented constantly in order to end such inequalities.

## **2. Need for an effective competition regime**

Extensive government restrictions on competition are also responsible for harming businesses and leading to inequality, i.e. government policies are often influenced by the rich and powerful, which prove to be detrimental to the lower strata of the society. Advocacy for fair competition should therefore encompass the restrictive practices of the government.

An effective competition regime plays a crucial role in ensuring effective distribution of income. Academicians across the globe should invest more resources on researching on the effects of competition policy and law to search the way forward, especially in light of the new digital markets and two sided markets which have come up.

The session also raised the important issue of a large set of different stakeholders being affected by having a robust competition law and policy. Example of exercise of market power by a firm becomes important in this regard, which may benefit shareholders and employees along with other allied stakeholders of the firm, but may be detrimental for competing firms and consumers. Such issues were proposed to be analysed in depth. A multi-stakeholder approach needs to be adopted to bring in better outcomes with a complete welfare perspective.

A competition policy becomes essential in this regard, since it enables free entry into markets and enforcement tools, which are very useful for inclusive economic growth. A competition policy is also helpful in preserving consumer welfare, and in providing fair opportunities to Small and Medium Enterprises (SMEs) to participate in the economy.

A Brazilian perspective on how competition law and policy can promote inclusive growth by fostering equity was also discussed. The issue of corruption and its adverse impact of curtailing growth of up to two percent were also highlighted. It was further noted that a one-size-fits-all approach cannot be taken for different countries while implementing competition law.

## **Discussions**

The floor discussion was initiated with a comment regarding the actual contribution of a competition policy towards reducing economic underperformance and bringing in



inclusive growth. Example of Korea was cited in this regard, which was said to have achieved this without having a competition policy.

The panellists opined that a competition policy is only one aspect of the overall industrial policy. Countries were suggested to enact and implement an aggregate industrial policy to achieve the above. The role of competition policy is to induce market efficiency and reduce economic inequality. Also, countries would be much worse-off in the absence of a competition law. The fear of law enforcers and various regulators has been noted to be very important for promoting equity. However, adequate stress must be placed on smart advocacy, as a complimentary tool of enforcement. Competition policy should be thought of in a manner in which it can address societal challenges.

## *Roundtable 2*

### **Reforming competition enforcement for development**

**Chair:** Arvind Mayaram, Chairman, CUTS Institute for Regulation and Competition, India

**Speakers:** Ioannis Lianos, Chair, Global Competition Law & Public Policy, University College London, UK; Francis Wang'ombe Kariuki, Director General, Competition Authority of Kenya; Geeta Gouri, Former Member, Competition Commission of India; Amadou Ceesay, Executive Secretary, Gambia Competition and Consumer Protection Committee; Payal Malik, Advisor (Economics) and Head, Economics Division, Competition Commission of India; Ramji Srinivasan, Senior Advocate, Supreme Court of India

### **Proceedings**

Competition law has an inherent role to play in furtherance of development and inclusive growth. However, bearing in mind the possible limitations of the prevalent legal standard of competition enforcement and the diverse nature of challenges being faced by developing nations (socio-political and economic challenges including growing inequality), the enforcement of competition law might prove to be inadequate. The 2<sup>nd</sup> roundtable focused on revisiting the scope and objectives of competition policy and law and whether the same should be reformed so that it helps tackle inequalities and improve access, thereby promoting development.

#### **1. The balance between efficiency and equality**

First, the role of competition law in balancing equality and efficiency were discussed. Usually, equality and efficiency are regarded as antagonistic concepts. Competition law

is typically comprehended as a tool to promote economic efficiency and the challenge of inequality is looked at from the perspective of welfare economics and is tackled through means of redistribution (through taxation measures for instance), which might not actually serve the purpose.

However, equality and efficiency can be seen as complimentary and necessary prerequisites of the social contract. There are three priorities for this social contract to hold together. First priority in this regard is stability of society. Second is efficiency. Third is fairness, which is a way for society to select equilibrium between efficiency and equality. Hence, if competition law merely focuses on economic efficiency, the inherent equilibrium between efficiency and inequality might be hampered, thereby unbalancing the social contract and jeopardizing social stability.

Dynamically, focusing on consumer allocative efficiency and pricing can have an adverse impact on innovation and growth. This is in consonance with growing body of research (by IMF and OECD) which challenges the antagonistic perspective and finds that countries where inequality is high, experience shortened periods of growth. Faster and more durable growth is strongly correlated with lower inequality. Hence, the Schumpeterian argument that bigger players are more efficient might not hold true and needs to be looked at skeptically. For instance, pharmaceutical R&D is focused on product development of existing products and not a lot of investment goes in fundamental research. Fundamental R&D is conducted by smaller firms which are then acquired through the M&A route by giants.

This has several implications for competition law. First, there might be a need to address complex inequality and not mere absolute inequality. We need to develop broader perspective on economic power, which should not be merely limited to market power. There might be other sources of power – e.g. relational market power and superior bargaining power.

Secondly, a consumer well-being standard might be more relevant instead of consumer welfare standard. This is particularly true for markets where most of the consumers or people affected are from the lower income strata; or that monopolistic control over a specific social good may lead to the emergence of dominance, which can further be converted and extended more easily in other markets. There's also a need to establish countervailing powers to block conversion of monopoly power to dominance keeping in mind public interest of fairness and stability, even if it is at the cost of economic efficiency.

There were also opposing views towards the aforementioned argument. It was argued that identifying alternative objectives for competition law might actually prove to have a distortionary impact on markets. This is especially true for jurisdictions such as India where there is a long history of market distortions emanating from government policies

(which were framed in the name of the poor or in the name of public interest) which hampered the natural growth of markets. Also, this would dilute the economic efficiency objective put forth by competition law, lead to protectionist arguments and bring in generalised and ill-informed interventions.

It was pointed out that competition is not an end in itself and is a tool to achieve economic goals. Hence, there's an inherent problem with admitting alternative goals for competition law as the resulting framework would render the current framework less robust and distortions would be injected more frequently. There's a need to be careful when we look at competition law's relationship with redistribution because it usually caters to the 'public interest' standard which can be misinterpreted and wrongly applied. In India's case, this could mean that we would be reverting to the construct of the erstwhile MRTP Act, thereby compromising on efficiencies and economic development. Hence, India's competition authority should, endeavor to maintain distinction between attaining efficiency goals over and above redistribution goals.

It was also highlighted that the competition law in itself has to be expansive and it should not be reformed into a tool to put forth nationalist arguments. It should function on two pedestals: incentives and liabilities. In India, enforcement is more important and generalisations should be avoided. Experience from Indian competition law jurisprudence shows that the aggrieved competitors are usually the informants and there are rare cases which deal with sector specific issues that have the most impact.

There's a need to promote competition and not support competitors' interests, so that common consumers and new start-ups/businesses do not suffer. In addition, there is a need to conduct impact assessment of enforcement actions. Political situation and lack of data in feudal markets have also constrained the Commission's enforcement actions in the past – e.g. APMC and onion market cartel cases.

## **2. Experiences from enforcement and advocacy actions of competition authorities**

One of the chief functions of any market regulator is to inform the government when it's coming up with policies which put forth its economic agenda. Example of Kenya was discussed. In Kenya, Uber disrupted the market and the businesses of incumbent taxi service providers were under threat. The competition authority informed the concerned Minister about a framework for Uber's entry into the market. Uber's entry helped generate employment and consumers were benefitted (prices fell by 300 percent). Taxi services were now being used by the masses and not just the economically well off. This helped in inclusive growth and in narrowing the socio-economic gap.

A Gambian<sup>1</sup> study in the tourism sector, which is one of the main pillars of its economy, was also quoted as an example. The study found presence of anti-competitive practices in the industry in the form of exclusivity contracts by a tour operator (TUI), and some hotels and providers of accommodation for tourists. The study also learned that Gambia has become a tour operator-driven destination that depends solely on tour operators, especially foreign-based ones, to bring tourists to the country, which gives them immense power and control over the local accommodation providers, such that they are forced into exclusivity contracts which are not favourable to them.

It was highlighted that most of the distortionary effects barring competition generally emanate from government action and that competition authorities need to intervene and advocate for their removal, especially in sectors that are most crucial in the economic sense for a particular jurisdiction. Authorities should assist the government in achieving the broader economic goals and in turn remove obstacles to economic growth which might be prevalent and might be stopping sectoral growth. Evidence based impact assessment and market studies should be conducted.

### *Dinner Speech*

## **The digital economy and the innovation opportunity: paving the way forward for emerging economies**

**Chair:** Allan Fels, Former Chairman, Australian Competition and Consumer Commission

**Speaker:** Fredric Jenny, Chairman, OECD Competition Committee

In his speech, Mr Jenny focused on the challenges of the digital economy while also shedding light on the antitrust issues of two sided markets, big data, artificial intelligence, all of which have a considerable bearing on the digital economy. Digital economy makes businesses more agile, and hence makes it important for the growth of Small and Medium Enterprises in the developing nations. In addition, it is also a cheaper and easier way of collecting data, inducing a digital fight amongst the data collectors. Reference was made to the United Nations Report on the Access to Digital Economy in Small and Medium firms, suggesting that firms with digital access were more accessible in the international markets and had comparatively more satisfied employees.

Importance of digitalisation in public services and simplifying administrative services in developing nations was also brought to the fore, for example in Japan where digitalised land registry records have made real estate market transparent. Similar examples were drawn from South Korea, Mexico, Brazil and Botswana. Its role in bringing down corruption and increasing competition due to increased transparency was also

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<sup>1</sup> <http://gcc.gm/wp-content/uploads/2016/08/Tourism-Study-validation-FINAL-1.pdf>

mentioned. He also vehemently pressed on the importance of level playing field and role of government in infrastructure vis-à-vis digital economy. He lauded Digital India Campaign of the Government of India.

But necessity of the government intervention in developing economies, intersection of relevant services and their regulation in the digitalised world presents a challenge. One of the most incredible challenges in this regard is big data and its use. It was recognised that competition authorities worldwide have poor tools to assess disruptive innovations that are a direct outcome of big data. The Microsoft, AT&T and Facebook series of cases are important indicators to highlight such lack of tools. Most recently, difficulty in assessing the entry of Uber cabs places the concern of understanding the disruption.

With reference to the two sided markets, he pointed the folly in assessing the markets individually and leaving the interaction of the two markets that have considerable bearing, to speculation and imagination. Competition authorities more often than not pronounce contradictory judgement when face with issues of two sided markets, which leads to confusion. Generally, they err in assessing reduction on one side and efficiency on another and holding them to be same market. The example of Spanish and French appeals courts that pronounced Uber to be transport company and other to be network company is a sufficient indicator of such ignorant failure. Suggestion was made for the authorities to adopt a concept of shared economy and retool themselves to find better results.

He illustrated the competition and regulation aspects of artificial intelligence through an example of Caltech Professor who developed an algorithm, which helped defeat three great poker players through machine learning and deep learning techniques. Competition issues arise when such algorithms are rented or sold to competitive firms who then use it to negotiate deals. This might lead to a situation of anarchy as it will be difficult to find how and who is in fact colluding. In conclusion he suggested that digital economy is interesting area that calls upon the competition authorities to retool themselves and suggest change in liabilities in a deeper sense. Digital economy is complex in the sense as opposed to what was done historically, for there is no one to blame here for anticompetitive behaviour.

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