

# Competition Regime in India: What is Required?

*The scope and context of the term 'competition' has undergone a significant change since India embarked on the path of globalisation and liberalisation in 1991. It is sad to note that the Indian policy response towards nurturing competition in a market driven economy in the new era started on a wrong note. The Monopolies and Restrictive Trade Practices (MRTP) Act, 1969 (the existing competition law) was amended in 1991, which stripped the MRTP Commission (the existing competition authority) of its powers to conduct a pre-merger scrutiny. It was a case of throwing out the baby with the bathwater.*

*Since 1991, India has been witnessing increasing foreign direct investment inflows, growing numbers of mergers & acquisitions and accelerated trade liberalisation which have influenced the structure of the concerned markets and conduct of corresponding domestic and international players. Hence a legal instrument that could regulate and not restrict competition in a globalising and liberalising market place was the need of the hour.*

*Responding to this challenge, the government, in 1999 decided to set up an Expert Group that would look into drafting of a state-of-the-art competition policy and law. It is in this context that this briefing paper is all the more relevant. This paper discusses various dimensions, the new competition policy and law should address. Furthermore, it also suggests an institutional structure that would ensure fair regulation of competition in a country as diverse as India.*

## Backdrop

Since 1991 a number of measures have been taken by the Government of India to accelerate reforms in order to instill competition in various markets. However, in many cases the will has not been matched by deeds or has met with opposition from various vested interest groups. Impact analysis of measures that have been promulgated to accelerate the reform process reflects that:

- Initiation of such steps has been continuously mortgaged to political and bureaucratic aspirations;
- Although some institutional capacity has been added to the system, it seriously lacks teeth;
- Furthermore very few concrete measures have been taken to empower these institutions with adequate financial and human resources;
- The pace at which institutions need to be created, and nurtured, to regulate markets has been far too slow in comparison to what is actually desired;
- Last but not the least policy makers have not been able to properly comprehend the domestic implications of international trade agreements to which India is a signatory. Thus our institutional responses have been lackadaisical and sometimes even misplaced. The result has been that at times domestic players have not been provided the desirable level playing field to compete with foreign companies, some of them being

giants, whereas some times they have been granted undue protection.

Under these circumstances, setting up of a committee by the Indian Government to review existing law and to legislate a new competition law, is a welcome step. While the outcome of the Committee is still awaited, this briefing paper is based on the basic premises that India needs a *new* competition law. It would not be advisable to tinker with the existing MRTP Act and hope to improve it. There is too much baggage which is associated with it. However, it will be useful to analyse the same and use these learning to craft out a totally new competition law. One can quote here the examples of both the United Kingdom and South Africa who have recently enacted new competition laws and scrapped their existing laws.

This briefing paper endeavours to find out broadly as to what are the elements that should be considered to shape the new competition regime for India. The requirements for the new competition regime is being mapped out under the following broad heads:

- Competition Policy
- Competition Law
- Competition Authority
- Providing necessary checks and balances
- Dealing with Cartels
- Dealing with Mergers and Acquisitions
- Interaction with international trade policy instruments
- Conclusion

The paper also contains a flow chart that outlines a structure of the proposed competition regime for India and helps in understanding the logic behind the placement of each instrument/institution in the suggested matrix.

## Competition Policy

1.1 The first and foremost thing which is required to be done is to formulate a sound competition policy (hereinafter 'the Policy'), bearing in mind the three principle goals of competition policy:

- Consumer welfare;
- Economic efficiency; and
- Check on concentration of economic power

1.2 While formulating the Policy the changing contours of the market in light of the globalising economy should be taken into account. Importantly, the Policy needs to be published in the form of a Policy Statement.

1.3 In order to avoid persisting confusion in various sectors of the Indian society vis-à-vis terms such as Competition Policy, Competition Law, and Competitiveness, the Policy statement should clearly define the same. For instance, following a seminar in April 1999 the National Productivity Council has drafted a National Competitiveness Policy, the purpose of which is to strengthen domestic industry so that it can compete in the international markets as well as the domestic markets. Some newspapers called the seminar as if it was debating the "national competition policy".

1.4 In defining a National Competition Policy or its basic framework, the overarching role that would be played by the Policy, in promoting healthy competition should be illustrated upfront.

1.5 The document on National Competition Policy needs to clearly spell out the synergy between Competition Policy and other policies or laws having direct or indirect effect on competition. For instance trade policy, foreign investment policy, consumer policy/law, intellectual property policy/laws, regulatory policy, labour policy/laws etc. Furthermore, the Policy should provide for an interface between the Competition Authority (established under the new Competition Law) and other regulatory authorities and as far as possible should define their roles in respective sectors/fields.

1.6 The Policy should be flexible enough in its application so that it does not impede growth or the development goals of the country. It should allow positive discrimination (i.e. exemptions and exceptions) for some sectors or entities keeping in view, public interest, national development objectives and priorities, and also the need to provide a level playing field for domestic industry. However such discrimination should have reviewable time limits, as far as possible. Sunset industries should not be confused as sunrise or infant industries. Please see Diagram 1 for a visual explanation.

1.7 Last but not the least the Policy should contain measures that would promote competition- culture in the country.

## II. The New Competition Law

2.1 The MRTP Act, 1969 must be repealed and a new legislation enacted in its place.

2.2 The new Law should be flexible enough to accommodate the dynamics of the Competition Policy.

2.3 The Competition Law (herein after 'the Law') should provide for a Competition Authority and delegate it with necessary powers to make its own rules and regulations for its rules of business, together with the power to make changes in those rules from time to time, if so needed.

2.4 The Law should declare and incorporate the fundamental principles of competition.

2.5 The Law should give due recognition to consumer interest and only in exceptional cases should public interest be allowed to have primacy over consumer interest. For this purpose the Law should identify or at least provide a direction or a framework that could be used to identify such exceptional circumstances.

2.6 Viewing the Indian socio-economic scenario, the Law should incorporate development dimensions in its approach. Positive discrimination for some sectors or entities should be allowed in order to provide level playing field. However, these provisions should be given a narrow interpretation and should not be stretched as to defeat the very objective of the Law. In this regard the Law could take into account the prevailing market inequalities.

2.7 To avoid infrastructural bottlenecks and red-tapism the Law should provide for a swift judicial process. To this end, it should separate the investigative, prosecutorial and adjudicative functions. The limitations surfaced due to experience with the existing MRTP Commission should be taken into account to improve the judicial process.

2.8 The Law should adopt 'size of market share' and not the 'size of company' as the criterion for determining 'dominant undertaking'. For this purpose, it should take into consideration not only national market but also the international market of the concerned firms.

2.9 The Law should be 'preventive' in nature rather than 'curative'. To this end, it should incorporate deterrent provisions such as exemplary fines on violators, including bodies of such violators, and in some cases, like cartels, it should be coupled with imprisonment provisions.

2.10 Importantly, the Law should provide that the fines collected by the Competition Authority should be put into a special fund for the purpose of consumer education on competition issues. This fund will remain under the supervision and control of the Authority. Furthermore, in the event of any compensation be payable by the perpetrator to its customers and these be not identifiable, for instance in case of a class action order, again these moneys should be deposited in such a fund.

2.11 As in the existing MRTP Act, Government departments and public enterprises engaged in

manufacturing and supply of goods/services should be within the purview of the Law and should be treated alike with their competitors in private sector. The entities dealing with sovereign functions can, however, be excluded. But 'sovereign functions' need to be given a narrow interpretation.

2.12 Most importantly, any other law or provisions in other legislations, which are in conflict with the provisions of the new Competition Law, or can be taken care of by the same, should be repealed and/or amended. It is not enough to have an overriding clause, as often it creates ambiguity.

### III. The Competition Authority

3.1 A Competition Authority (herein after 'the Authority') should be established in place of the existing MRTP Commission. It should have more teeth and wider role than the existing MRTP Commission for effective enforcement of the Law with powers to implement its own decisions. It should also be the reference body for recommendations on the formulation or alterations of national economic policies in general and Competition Policy in particular. In other words the government must refer all matters that have a bearing on the competition aspects of the market to the Authority for its recommendations. And its recommendations should be given due regards. In technical terms the Authority must act as Competition Advocate, with the aim to foster 'conditions' that will lead to more competitive market structure and business behaviour, without its direct intervention.

3.2 The Authority should be an independent statutory body without any political or budgetary control of the Government. The salaries of the Members and other expenditures of the Authority should be charged upon the Consolidated Fund of India.

3.3 The Authority should be a multi-member body constituting of both full time as well as part time members, who will be experts in economics, business, administration, international trade and law. Selection of the members of the Authority should be done in a manner, which will ensure qualitative status of the body. It should be immunised from political influence. As far as possible only *active* persons of demonstrated integrity and capacity be recruited as full time members, rather than *retired* judges or civil servants. In fact, this is the usual practice all over the world.

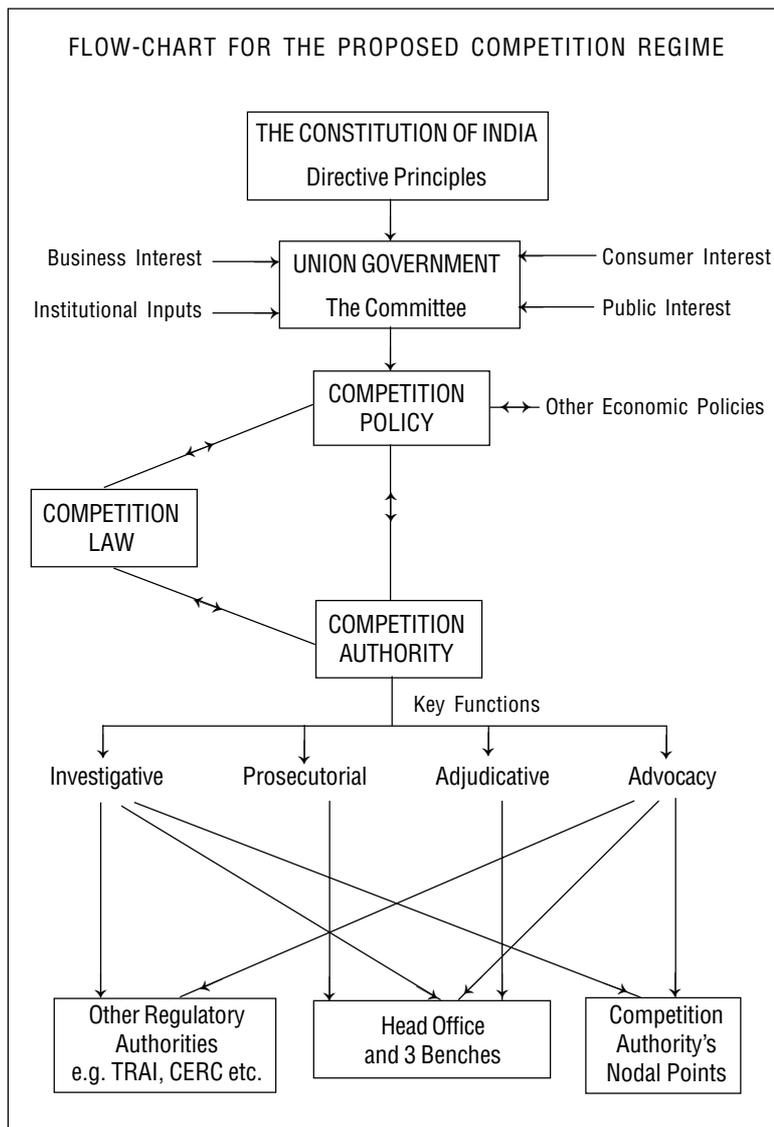
3.4 Proceedings of the Authority should be transparent, non-discriminatory and rule-bound. For this purpose, the Authority should make a body of rules, which may be called as 'the Competition Rules' for its functioning.

3.5 The Authority should be located at New Delhi, with its Benches at Calcutta, Mumbai and Chennai. The Authority should also have its nodal points in at least all the States of the country with limited powers and functions.

3.6 The Authority should have clear responsibility in the area of competition-education and competition advocacy in order to promote a healthy competition culture in the country. The nodal points of the Authority should be made to shoulder responsibilities in the avenue of competition-education and competition advocacy. Funds from the special Fund (as mentioned above) could be utilised for this purpose.

3.7 The Authority should have its own research and investigative staff. The Authority should be supported with adequate budget and powers for conducting thorough research and inquiries. This wing, however, should not have prosecutorial powers in order to protect the integrity of its functions.

3.8 The Law should provide for decentralisation of the functions of the Authority. Of the four functions viz. investigative, prosecutorial, adjudicative and advocacy, the Authority's nodal points and other regulatory



authorities (like Telecom Regulatory Authority of India (TRAI), Central Electricity Regulatory Commission etc.) could perform, in their respective regions/fields, two of them viz. investigative and advocacy (*see the flow chart*). However, the powers of different regulatory authorities and the Competition Authority, in this regard, should be clearly defined under the Law in order to avoid any overlap and conflict. Whether, the Competition Authority could be vested with powers for hearing appeals against adjudication of sectoral regulatory authorities, is an issue that needs to be analysed. Interestingly provisions in this regard are contained in the competition legislation adopted by UK. Such an analysis is also important in the Indian context given the current thinking of the government about setting up a separate appellate body for challenging the decisions of the newly constituted TRAI.

3.9 The dynamism of the Competition Policy can only be preserved if necessary amendments are made from time to time by incorporating learnings from the experiences of Competition Authority into the Policy. The Union Government therefore needs to vest certain powers with the Authority in this regard.

3.10 The demarcation of jurisdiction of the Authority and the Consumer Courts under Consumer Protection Act, 1986 in respect to restrictive/unfair trade practices should be based on the nature of goods and transactions involved (or likely to involve). For instance, it could be suggested that non-commercial transactions of consumer goods could remain under the jurisdiction of Consumer Courts, while commercial transactions of consumer goods and transactions of capital goods should be brought under the jurisdiction of the Authority.

3.11 Appeals against the decisions of the Competition Authority should lie *only* with the Supreme Court. Which means that the Authority should be brought within the ambit of Article 323B of the Constitution of India, which would not allow High Courts to interfere with the decisions of the Authority. In the case of the existing MRTP Act, the High Courts often injunct the MRTP Commission from proceeding any further in a matter, thereby making the situation more complex.

#### **IV. Providing Necessary Checks and Balances**

4.1 It is evident that the set up, as proposed under the paper, would provide wide discretionary powers to the Executive at two levels: first to the Union Government in formulating and suggesting changes in the Competition Policy (given the importance attached to the policy); and second to the Competition Authority as an implementing agency. Given this the provisions for 'control' at both the levels need to be carefully drafted and crafted. However, the control should not be such as to curb the very objectives of 'flexibility' and 'independence' of the Authority.

4.2 Art 39A of Part IV of the Constitution of India (i.e. Directive Principles of State Policy) could be amended suitably so as to provide for basic directions of creating a competition culture, which will include the existing check

on concentration of economic power. Such an amendment can provide the necessary backbone to the proposed new Competition Policy.

4.3 Consultation with various interest groups during formulation of the Policy is a must, as this itself would provide the Policy with legitimacy. The documentation of the Policy and its adoption by the government would provide transparency and also serve as a tool towards accelerating reforms.

4.4 With respect to the 'control' at the second level i.e. at the implementation level, the Competition Principles as laid down in the Competition Law could serve as a necessary safeguard. In this regard the Law should provide for judicial review of the Authority's action on the touchstone of these Principles. While, on one hand, the Competition Law and Policy together would provide enough guidance for the Authority to exercise its discretion, it could also provide, on the other hand, necessary background for the Supreme Court to review the Authority's action.

4.5 More so, reasonable and non-arbitrary exercise of discretion is a constitutional requirement. Given this unreasonable or arbitrary exercise of discretion would violate Article 14 of the Constitution of India. This, in addition to para 4.4, would provide sufficient check on the exercise of discretionary powers by the Competition Authority.

#### **V. Dealing with Cartels**

5.1 The Law should treat cartels (i.e. agreements for price-fixing, bid rigging, customer allocation, territorial allocation and/or output restriction) as crime *per se*. Also the Law should explicitly cover all forms of cartels whether written or informal.

5.2 As it is hard to detect and prove cartels, the Law should provide high deterrence for those who indulge in forming or even aiding cartels i.e. to be preventive rather than to be curative.

5.3 The Authority should be given more powers to deal with cartels. For instance, powers to issue 'search warrants', to get the accused to make statement on 'oath', and to have access to various documents of the suspected person(s).

5.4 Whenever the Authority finds or has reasons to believe that the market is not performing competitively, it should *suo moto* investigate to find out whether any cartel is operating in the market. Media reports, trade publications, various statistics, public records may provide indications that market is not performing competitively. Hence, the Authority should keep its eyes and ears open. It may further help them to gather circumstantial evidence.

5.5 Necessary provisions need to be made in the Competition Law to allow the Authority to carry out judicial proceedings based on circumstantial evidence, especially while dealing with cartels, as it is hard to get direct evidence.

5.6 The Authority should encourage general public or affected groups or even whistleblowers to confidently make complaints regarding operation of any cartel in the region. The complainants should be rewarded and also provided with immunity, where required. False complaints should also be dealt with severely.

5.7 For the purpose of dealing with cross-border cartels or other competition abuses, the Authority should have the power to negotiate cooperation agreements with foreign governments either on case-to-case basis or on a blanket basis.

5.8 Export cartels of any country are generally supported by their respective governments and are not violative of their own laws. The Indian Commerce Ministry with its counter parts must also give these issues a careful look.

## VI. Dealing with Mergers & Acquisitions

6.1 The Law should bestow the Authority with the power to *suo moto* initiate investigations with respect to mergers and acquisitions (M&As) before they are consummated. Furthermore, the Law should also make it mandatory for merging entities to seek permission from the Authority before merging. The Law needs to be carefully framed in this context after paying due attention to provisions applicable to M&As under the Securities and Contracts Regulation Act and Securities and Exchange Board of India (SEBI) Guidelines.

6.2 The Authority would need to do cost-benefit analysis of a merger on both economic efficiency and consumer welfare, before concluding that the merger should be allowed or disallowed. Furthermore, the Authority should take into account the impact of the merger not only given the existing market conditions but should also give due importance to the emerging market trends. As these tasks are complex and many a times would be beyond the capacity of the Authority to analyse, the Authority needs to be bestowed with powers to set up an Expert Advisory Body for helping it to analyse the impact of the proposed merger. This will be in addition to its own research findings (see above).

6.3 The Law should provide adequate powers to the Authority for it to have access to relevant information for the purpose of making the assessment regarding any M&A.

6.4 The Law should provide for extra-territorial jurisdiction to deal with M&A taking place outside country, but having adverse effect on the level of competition in the domestic market. Here again the Authority would need to have cooperation agreements with similar bodies in the home countries of the merging entities.

6.5 Mergers of dominant undertakings or mergers that lead to the creation of a dominant undertaking provide a *prima facie* case against such actions. If an undertaking, along with its interconnected undertakings, controls 25% or more of market shares of any product, then the Law should declare that such an undertaking is a dominant one for the purpose of making out a *prima facie* case, if a merger is on the cards involving such undertaking.

## VII. Interaction with trade policy Instruments

### 7.1 Issues under the realm of intellectual property rights

7.1.1 The Authority needs to keep surveillance over the exercise of intellectual property rights and remain alert about the possible abuses that might occur due to monopolistic rights being granted to the IPR holders.

7.1.2 The argument that IPRs promote innovation cannot always be justified for restricting competition in the short run. There is a need to strike balance between short-run static efficiency versus long-run dynamic efficiency.

7.1.3 The Authority should note that proper application of any competition law should avoid two extremes: too stringent an application could lessen innovation; an ineffective or insufficient application could result in an over extended grant of market power. Both outcomes would have an adverse impact on output as well as an inhibiting effect on trade. Given this, the Authority should strike a balance between unjustified monopolies and protection of the investment by the owner of intellectual property. It is expected that the Authority will exercise the '*Rule of reason*' approach in such a situation.

7.1.4 The provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) packaged with GATT (1994) that relate to the treatment of anti-competitive practices are Articles 6, 8, 31 and 40.

- According to the Article 6 of the TRIPs Agreement and subject to provisions containing national and most-favoured-nation treatments, nothing in the Agreement shall be used to address the issue of the exhaustion of IPRs for the purpose of dispute settlement under the Agreement. Exhaustion of IPRs means, that once the right holder or the person authorised releases the products that are subject for IPRs, its IPRs are considered to be exhausted. In that case the third parties' use or sale is not considered as an infringement of the IPRs. In sum, the TRIPs Agreement does not disallow parallel importing. As parallel imports improve competition in the market, it should be allowed expressly by the Competition Law.
- Article 8 (principles) of the TRIPs Agreement, allows a Member to take appropriate measures needed to prevent the abuse of IPRs by right holders or resort to practices which do not unreasonably restrain trade.
- The provision for compulsory licensing provided by Article 31 of the TRIPs Agreement recognises anti-competitive practices as one of the grounds for 'use without authorization of the right holder'. In fact the conditions required for invoking 'compulsory licensing' on the ground of anti-competitive practices is more lax than that provided for the other grounds [Article 31(k)]. For this purpose, the Indian laws on IPRs and the Competition Law should have adequate provisions and also provide for requisite powers to the respective authorities.
- Article 40 of TRIPs mentions that the Agreement does not prevent Members from specifying in their legislation licensing practices or conditions that may in particular case constitute an abuse of IPRs having an adverse effect on competition in the relevant

market. A Member may adopt appropriate measures to prevent or control such practices *in the light of the relevant laws and regulations of that Member*. This implies that India needs to have necessary laws/regulations in place to exploit the advantage under this Article.

7.1.5 The above-mentioned points clearly call for harmonisation of IPR Regime and Competition Regime and most importantly co-ordination between competent authorities established under IPR laws as well as that under Competition Law. Nevertheless, in ultimate analysis, the provisions under various legislations for protection of intellectual property should be subservient to the Competition Law.

7.2 Dumping has a direct relation with competition and market behaviour. The Competition Law should also cover dumping and the Authority should have the powers to launch anti-dumping actions, when it receives a complaint from the affected parties. The Anti-Dumping Authority under the Ministry of Commerce is currently enjoying this power.

7.3 The General Agreement on Trade in Services of the World Trade Organisation also recognises the potential of competition abuse by undertakings involved in providing services and that these need to be regulated through appropriate competition legislation.

7.4 The Authority should be mandated to encourage interaction and co-operation with other competition

authorities of the world on the basis of doctrine of reciprocity and develop positive comity to handle cross-border abuses.

## Conclusion

The above discussion has tried to draw an outline of the competition regime for the country, which could be suitable for an open and liberalised economy in the long run. It broadly suggests that with the Competition Policy as the key instrument and the Competition Authority as the key body, the market can be effectively regulated.

A synergy between the Competition Policy and various other policies (as identified above), on one hand, and by coherence between the Competition Authority and other competent authorities, on the other, is necessary for the whole set up to yield desired benefits.

In light of the above discussion, it is clear that to formulate/legislate an effective Competition Policy/Law for Indian conditions, an integrated research, predominantly from legal and economic perspective, is required. More so, the whole exercise demands coordinated interactions between experts and organisations that represent both the consumer and business interest. The outcome from these interactive sessions could serve as first hand input for the research works. Of course it will take more time and energy as desired, but the same is required and worth devoting to, otherwise we may end up with a 'bad omlette'. And before we say Jack Robinson, there will be demands for further amendments.

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