

Towards a Functional Competition Policy for India

The FunComp Project

Proceedings of the 1st Brainstorming Session

20 March 2004, New Delhi

Introduction

Competition policy is an integral part of economic policy. This is why the Raghavan Committee report called it the fourth corner stone of economic policy. This committee developed proposals for a new law, which has since been enacted. Sadly enough India does not have a competition policy but only a competition law first in the form of the MRTP Act, 1969 and now the recently enacted Competition Act, 2002 (CA 2002). The reason perhaps is lack of proper awareness about competition policy and its adverse and positive impact on various sections of the economy.

The Functional Competition Policy Project undertaken by Consumer Unity and Trust Society (CUTS) is an attempt to fill this gap and help the government to come up with a Competition Policy that would be suitable to India. For this CUTS proposes to engage various experts in the area to prepare a report in four months time. The report will be more in the form of a discussion paper, which would highlight the issues that could lay out the road map for further research in future. The structure of the report is annexed to this document.

To discuss the proposed topics and exchange views of experts a brainstorming session was held on 20th March 2004 at TERI, New Delhi. While 22 chapters/topics were identified as the proposed structure of the report, only the first 10 chapters covering the macro issues could be discussed in the limited time of about three hours. The discussions did cover the broad policy framework as well as the issues specific to the chapter. Proceedings of the session are presented below.

I. Opening Session:

1.1 S Sundar (SS), TERI

Chairman of the meeting, SS welcomed the participants. He noted that until recently the Indian economy was marked by controls and restrictions. We had the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) that focused more on controlling monopolies rather than on promoting competition. Consciousness among people in general on competition was missing. However, India has adopted a new competition law with a new thrust. At this juncture, it is necessary to bring a group of experts on a platform and sort out the relevant issues, including clarifications. He also observed that an interesting feature of the new law is that the competition authority will have a mandatory advocacy role.

Suggestions for the Project:

- There is little awareness about competition policy in the country. The project should address this and attempt at developing a forward looking thinking on competition issues.
- The study should highlight the experiences of the working of MRTP Act and draw lessons for the Competition Act, 2002 (CA 2002).

1.2 Pradeep S. Mehta (PSM), CUTS

Talking on the broad agenda circulated to the participants PSM, as the moderator, observed that the agenda was based on experiences of the working of competition policy and law throughout the world. The aim of the project is to help the government evolve a competition policy for India, as there is none at present.

It was emphasised that the term “functional” was important in this context as the project was not aimed at evolving an “ideal” competition policy. The idea is to suggest a competition policy that is “implementable or doable”.

He pointed out that the present project being a short-term, one cannot expect the same to go into finer details. Hence, the aim of the project is to prepare a roadmap, which would in future guide a detailed research in the area. Secondly, he also pointed out that the report can by itself be a good project proposal, for which funding would be sought to do a more detailed research in each of the sectors.

Further, he stressed on the emergence of Indian chaebols like Tatas, Reliance, Sahara etc., which might lead to competition concerns. There were favourable developments also in some sectors such as in telecom and it was important to transfer these practices and experiences to other sectors.

Suggestions for the Project:

- In each of the chapters, the writers should highlight macro (country-level) as well as micro (local-level) issues and also take account of the cross-cutting issues such as privatisation, disinvestment, etc.
- The report should be as reader-friendly as far as possible, so that it can reach out to a large number of stakeholders, including parliamentarians to get a better buy-in.

II. Evolution of Competition Policy & Law in India

2.1 Dr S. Chakravarty (SC) highlighted the main features of CA 2002. He said that Directive Principles of State Policy under the Constitution mandate the government to control concentration and promote competition. In accordance with this policy, monopolies under the MRTP Act were defined in terms of size, which affected growth of big companies. In CA 2002, however, big size or dominance per se is not considered bad. It is the abuse of dominance that is frowned upon. Competition Act was passed to replace the MRTP Act and to promote competition and keep a check on anti-competitive practices in view of the liberalised market-oriented economic regime followed since early nineties. The new Act deals with the following three practices:

- Anti-competitive agreements such as price fixing, retail price maintenance etc.,
- Abuse of dominance, and
- Control of combinations such as M&As where merger notification is voluntary

2.2 It was noted that the competition law takes care of competition to the extent of actions by market players which adversely affect competition or some offence is

committed. However, to promote competition proactively it is necessary that other policies of the government are in consonance with the objective of promoting competition in the market.

2.3 In addition to dealing with the above three practices, the Competition Commission of India (CCI) has also been entrusted with the task of competition advocacy. CCI would make recommendations to the Government departments and other agencies when issues relating to competition is involved. In this context, PSM pointed that CCI does not have a proactive role as the Government is required to consult CCI only when it wants. On this SC observed that advocacy role of CCI involves training, capacity building and educating the government, which would be quite effective. However, 'political will' would be one of the key determining factors for establishing an effective competition policy.

2.4 PSM observed that CCI will not be looking at Unfair Trade Practices (UTPs) and this will be disadvantageous for it, as UTPs make news which the common man identifies with easily and political buy-in becomes easier. UTPs are now under the Consumer Protection Act (COPRA). Interestingly, however COPRA deals with retail level anti-competitive practices also.

2.5 On M&As, PSM observed that merger related provision in CA 2002 is more like a Damocles' sword as merging companies, who would be at a risk if they decide not to notify. But unscrambling the egg would be quite difficult. On this SC mentioned that there is a provision in CA 2002 according to which if, within one year of the formation of the combined entity CCI sees that the merger is going to have adverse impact on competition then the merged entity can be asked to demerge even if they do not notify. But after one year CCI would not be able to do so.

2.6 TCA Srinivasa Raghavan (SR) suggested that it is important to bring common people's concerns to the fore. Men on the street should know what they are likely to get from the implementation of CA 2002. He emphasized that the papers should be written in a reader-friendly language. In this context, PSM pointed out that this has been one of the USPs of CUTS as the papers prepared at CUTS use reader-friendly language, style and format. SR also raised the issue of defining a commonly acceptable definition of 'competition'. He suggested that the definition could be based on the degree of sensitivity of consumers demand to product price.

2.7 TCA Anant said that it is difficult to define competition. Different people have different notions about competition. It was also pointed out that competition is not just about price war. Quality and service of product is an important component of competition. Competition is about markets and about the degree of choice. Therefore in defining the domain of competition we have to look at particular sectors. Since competition is as much concerned with market players as it is with common man, competition in different sectors would have different meaning. Doubts were however expressed by Subhasis Gangopadhyay on defining competition for different sectors as it would be a mammoth task and whether we should venture to do that.

2.8 SC pointed out that 'competition' under CA 2002 is defined in terms of practices. No definition of competition as such is given because there is lack of consensus on

any particular definition of competition. For understanding the concept of competition under the Act we have to refer to the Preamble.

Other Suggestions

- Following suggestions were given with respect to defining ‘competition’:
 - (i) Definition should be based on attributes such as price and quality. The degree of choice given to consumers in terms of quality, services, reliability of services, etc. should be incorporated in the definition of competition. It was also recognized that the definition of competition based on these attributes might vary from sector to sector.
 - (ii) Use the definition as it is approached in CA 2002.
 - (iii) To define competition by analysing “lack of competition”
 - (iv) To develop different notions of competition (positive/negative) by keeping in mind that competition is not just about prices but a means to an end. Some criteria can also be developed to reflect a desirable level of competition.
- The chapter should highlight the factors that led to the enactment of MRTTP Act, how the Act was implemented and its effect on competition in the market.
- Definition of ‘consumers’ in terms of intermediate users, final users, etc should be explored.
- Advocacy role of CCI should also include creating awareness among consumers about the impact of competition policy.

III. The State of Competition in the Indian Manufacturing Industry

3.1 Biswanath Goldar pointed out that the following issues would be examined:

- (1) How is performance related to concentration?
- (2) Identify the impact of import liberalization.
- (3) Identify industries which are attracting FDI

It was pointed out that the purpose of the Chapter is to highlight the trends based on certain parameters. He observed that we do not see major increase in concentration in Indian industry. Though imports have had an impact but situation does not seem to have changed much.

3.2 Shankar Acharya suggested to make a comparison between domestic and import prices or to find out if tradable sectors are more efficient than the non-tradable sectors. Another suggestion by PSM was to look at the differences between wholesale and retail prices over a time period, which might indicate the degree of competition at the retail level.

3.3 T.A. Bhavani suggested that the problem of appropriate data needs to be recognized in analysing the state of competition in the Indian manufacturing industry. She also observed that an important factor that makes a difference is the range of products. Laveesh Bhandari also highlighted this issue. Referring to a study done by him and Vivek Srivastava, Bhandari pointed out that in some sectors concentration ratios have gone up and in some they have gone down. He observed that a range of products helps to maintain competition. Anant said that the study done by Laveesh Bhandari does not help to measure competition. It rather helps to throw light on

productivity and growth. Therefore writers should be cautious on the data they are using for the analysis.

3.4 It was noted that in several studies, the term ‘relevant market’ is not properly considered. The writers should examine relevant product and geographical market in their respective analyses.

3.5 Manish Agarwal said that the chapter only focuses on the structural aspect. We should also look at the behavioural aspect of competition such as mergers, acquisitions, joint ventures and strategic alliances. It would be of help if the chapter throws light on such strategies and how they have evolved over time.

3.6 It was suggested that competition can also be looked at on the basis of examination of freedom of trade. We may examine which sectors have more competition by analysing the nature of entry and exit barriers. Price cost margins and impact of imports on competition should also be evaluated.

3.7 Subir Gokarn observed that it may be misleading to think in terms of ideal market structure considering the unprecedented situation we are passing through. In any case we have to deal with sub-optimal market structure. He pointed out that there is also a business perspective to competition and anticompetitive practices are both an aggressive and a defensive mechanism. Guided by their risk management strategy, firms may resort to cartelisation in the presence of exit barriers such as labour laws, absence of bankruptcy laws. PSM disagreed with this view, saying that world over it has been seen that collusive behaviour is mostly resorted to by manufacturers where competition is large, or the capacity is saturated. Hence businesses find that it is better to collude and work rather than be a victim of competitive processes.

IV. Mergers & Acquisitions in India: Implications for Competition

4.1 Manish Agarwal said that he was looking only at mergers and not at acquisitions. He briefed the participants about the following findings from his M.Phil dissertation on Mergers:

- Significant increase in merger activity after 1991.
- Top-10 industries based on proportion of total mergers accounted during post-91: Investments & trust, Loan/credit activity, Trading, Electrical Machinery, Electronics, Textiles, Drugs & Pharmaceuticals, Construction, Beverages, and Iron & Steel – which accounted for 57% of total mergers during 1992-93 to 2000-01.
- Mergers have been mainly of horizontal type and a number of mergers have taken place between companies belonging to the same business group.
- Increase in M&As involving MNCs since 1996, mostly in the form of acquisitions.
- There have been cases of mergers involving sick companies highlighting the existence of exit option for companies in distress.
- Regarding merger behaviour of erstwhile MRTP companies, post-91 amendments, raised competition concerns as there was a significant rise in the percentage of group mergers and intra-industry mergers involving MRTP companies.

4.2 It was observed that during the pre-1991 period, some business groups used to sell same products under different names due to the licensing regime but the situation has changed now. In the pre-91 licensing regime companies used to enter new areas of business because of controls and restrictions on growth and diversification. But after 1991, due to liberalisation and increase in competition, companies are focusing on core competence and are getting out of unrelated businesses. It was further pointed out that concentration levels are increasing in the world. We have not come that far in India at present.

4.3 SC said that the merger provisions under the CA 2002 are liberal because it is shaped to meet the demand of the Indian industry. The Indian industry has been requesting a liberal merger law, which would provide it with the liberty to grow and increase its competitiveness in the global economy.

4.4 In the context of shifting focus from structural to behavioural approach, it was observed that it would be quite difficult to regulate with such approach, as one would not use a rule of thumb as in the case of structural approach.

4.5 On the impact of mergers on efficiency, Shankar Acharya pointed out that some mergers have a positive impact and the results are, in general mixed. Hence, one should be careful in doing this analysis.

Other Suggestions

- To analyse the emerging trend of BPOs and its implications for M&A activity.
- To include case study approach in analysing merger/acquisition from the competition policy angle.
- The policy prescription emerging from this chapter should be such as it empowers the CCI for effective merger regulation.
- To analyse the case of promoting national champions by analysing specific examples such as that of Reliance Industries.

V. Competition Regulation Interface in India

5.1 S. Sundar commended the work done by the Telecom Regulatory Authority of India (TRAI) stating that even with limited powers TRAI has effectively promoted competition. However it was pointed out that the existing arrangement would lead to forum shopping, as there is no clear demarcation between the jurisdiction of the CCI and sectoral regulators. Electricity Act for example retains even competition related provisions with it, which raises the question of role of CCI in such a case. To avoid such conflicts, there are some arrangements in the United Kingdom and Canada. Even in Sri Lanka such attempts have been made.

5.2 It was noted that while we are talking about conflicts between CCI and other regulators, there are other areas of conflicts as well e.g. likelihood of conflict between TRAI and TDSAT (The Telecom Dispute Settlement Appellate Tribunal).

5.3 Harsh Vardhana Singh pointed out that instead of looking into what competition is, it is better to look at the price aspect. Price changes can also change the scenario of market as they have done in the telephone market. It was noted that a regulator's job is to create conditions for competition. Number of players is not always important

because in mobile telephony, the largest price fall occurred when there were only two players and one of them did not even start functioning. The new entrant started with rates 50 percent lower than the existing rates and the incumbent retaliated with a 62 percent cut. It was pointed out that easy entry affects the behaviour of business and has positive impact on prices. This is the approach taken by TRAI also.

5.4 With regard to the possible areas of conflict between sectoral regulator and competition authority, in the case of telecommunications it was pointed out that interconnectivity would be one such area. The legal provisions are not clear in this regard. There is a case pending with TDSAT which gives a glimpse of potential area of conflict between the two regulators. But hopefully issues would be sorted out. However, it was pointed out that it would be difficult for the competition authority to deal with sector specific competition issues, for example interconnectivity in telecom, because it is too technical. There was a query whether it was being hinted that the way to proceed should be to entrust technical regulation to the sectoral regulators and competition issues to the CCI.

5.5 PSM pointed out that in certain sectors such as cable T.V. it is desirable to have monopoly at retail level so as to avoid deterioration of service to consumers due to unhealthy rivalries. In such situations, the regulator needs to cap the prices. Later on it was again pointed out that natural monopolies are desirable in some sectors as there is a social cost attached in setting up the infrastructure in that sector.

5.6 Highlighting the effective role played by sectoral regulator in promoting competition, Harsh pointed out that TRAI regulated in such a way that a framework of competition was introduced. He pointed out that Competition Act will not compel anyone to compete and a concerted effort has to be made to introduce competition. Giving the example of TRAI, he highlighted that tariff plans of TRAI created the framework for competition in the telecom sector. This is what a regulator does and that is why today we have the lowest price in world in mobile telephony.

5.7 It was pointed out that competition may result in falling prices but there is no guarantee that it will lead to increased quality as well. In the telecom sector the most difficult job for the regulator is to arrive at inter-connectivity conditions, which again is a competition issue.

5.8 Chakravarty said that it is good that regulatory bodies are pro-active but if they are extra-constitutionally pro-active then problems could arise.

5.9 While discussing sectors other than telecom, Sanjeev Ahluwalia said that the Electricity Act, 2003 proposes to bring competition in the sector but actually there is a growing vertical consolidation. It is not easy to introduce competition in the electricity sector. Open access system is not workable as it leads to vertical consolidation. The Electricity Act talks about more than one player in distribution, which may lead to increased social costs without increasing competition.

5.10 It was pointed out that one of the jobs of a regulator is to ensure a level playing field for all the players. However, this typically does not happen in India. For example, the incumbent state-owned player is operating in all regions and all

segments of the market. This definitely gives it an added advantage while others have to compete with it on equal footing.

Other Suggestions:

- Sectoral issues where the role of competition authority was felt: Toll tariff fixed by National Highways Authority of India, Cable TV operations, Taxi operations and similar sectors where there are natural monopolies
- The case of TRAI was cited to highlight the effective role played by a sectoral regulator in improving accessibility to service and promoting competition in such a way that consumers got the benefit. In a regulated sector, often the focus is on significant market players. However, the experience of TRAI suggests that the advantage accruing to the significant market players may get nullified by the existing political and social scenario. Hence, these factors need to be taken into account while analysing the competition related issues in regulated sectors.
- The group also noted that existence of competition in a regulated sector may not be the consequence of regulation itself.
- The meeting also recognised that the regulator needs to play an active role in promoting competition and in expanding the choice set of consumers.

VI. Competition Abuses at the Consumer Level: Study of Selected Sectors

6.1 PSM said that CUTS is at present working on the three sectors (health services, cable T.V. and school education). Preliminary findings of the project are that there are different kinds of anti-competitive practices. For example tied sales of school books and uniforms, or the nexus between doctors and diagnostic clinics and medicine stores. In the cable TV market, it is nearly impossible to get an alternate supplier because the areas are neatly divided by the last mile operators (LMOs) to avoid dirty competition.

6.2 State level regulatory bodies are necessary although an omnibus Central Act can help the states to set up regulatory authorities to cover a myriad of retail level services.

- Anti-competitive practices in the selected sectors to be taken as systemic cases to the competition authority.
- To highlight the approach of competition authority in dealing with state-level issues such as primary education.
- There was a debate on the issue concerning the impact of a Central law on a subject included in the State list. In this context, it was highlighted that CA 2002 covers enterprises (including state enterprises), services (including education), and statutory authority includes central and provincial statutory authorities.

VII Cross-border Issues and Competition Act, 2002

Aditya Bhattacharjea made the following observations:

- MRTP Commission has not been able to successfully prosecute even a domestic cartel, and bringing foreign cartels to book would be that much harder.

- Supreme Court’s decision in the ANSAC case had an adverse effect on the power of MRTP Commission in dealing with cross-border competition issues. That is why this lacuna was taken care of in CA 2002, which has a provision allowing for imposing import restrictions by giving direction to the importing authority. Criticising this provision, he said that it defeats the purpose of competition policy if a private anti-competitive practice is tackled with an injunction that restrains competition even more. Moreover, the issue is whether such an action would be compatible with WTO rules. The chapter should address this issue.
- Doubts were expressed whether we can effectively use the “effects doctrine” against firms in rich countries. However, it was pointed out that ours is a big market and hence we have a leverage, which can certainly be used.

Other Suggestions

- It was suggested that the chapter should highlight the cases of other competition authorities where extra-territorial jurisdiction is applied and analyse how this issue is approached.
- The chapter should explore how CA 2002 can be made effective in dealing with cross-border competition concerns. This should be based on the analysis of technical, legal and economic competence of the CCI.
- Pointing towards certain trade remedies like antidumping measures it was pointed out that they could be abused for anticompetitive outcomes. For example the Alkali Manufacturers Association of India (an alleged cartel) had used the provisions of the MRTP Act to thwart competition in India by bringing a case against ANSAC. The existence of such practices needs to be taken into account while developing a *functional* competition policy for India.
- In the context of IPR, it was suggested that it should be explored as to how the issue of compulsory licensing will be handled by the competition authority.
- To highlight the role played by import tariffs in promoting competition.

VIII. Central Government Policies: Interface with Competition Policy Objectives

8.1 TCA Anant said that the Chapter has three themes.

- 1- Competition Act 2002 has a provision where government has power to get exemption in public interest. It is important to understand how public interest is defined.
- 2- When government formulates its policy e.g. on disinvestments and how it affects competition.
- 3- The importance government gives on the functioning of the competition authority and giving it the space to enable bringing of inputs into larger policy perspective which would ensure better competition in the economy.

8.2 S Chakravarty spoke about the exemptions allowed under the Competition Act. He opined that the words “Public interest” might create problems.

8.3 S Sundar said that government’s behaviour as an owner of enterprises should also be examined.

8.4 Jaiveer Singh said that impact of lobbying pressure should be examined as they could distort policies. Example of trucking was given stating that it was the most

inefficient sector as it is reserved for small-scale sector. In some sectors government is still the owner which might lead to rent-seeking activities by the actors. Even in some other context if a particular State's interest is affected, it may lead to political lobbying.

8.5 It was emphasised that all relevant laws and policies should be evaluated on the basis of their impact on competition and suitable amendments be made.

8.6 Regarding the leniency provisions in CA 2002, it was observed that the way it has been structured, it may render it ineffective. Because the leniency is available only before the enquiry begins, which is contrary to similar practices elsewhere. We have to find out how it works in other countries, particularly in the United States.

Other Suggestions:

- To define the concept of 'public interest' and how it needs to be incorporated.
- It was suggested that a competition impact assessment can be done along the lines of environmental impact assessment.
- To explore the perception of government on the functioning of the CCI.
- To highlight how IPR abuses are to be dealt by the CCI.

Conclusion:

Due to paucity of time all the chapters could not be covered in the discussion and it was suggested that the group members could send their comments/suggestions directly to CUTS. Overall, the discussion was fruitful as it highlighted the urgency for a thorough research in an area that is still unexplored. Lack of proper research in the area is a major drawback faced by our policy makers.

Since India does not have a competition policy, this project will be an attempt to institute a functional competition policy in the country, covering wide-ranging policies and Acts. Initially, the project will raise issues to be brought out in the form of a discussion paper in 3-4 months time. The project would argue for a National Competition Policy for India and the setting up of a National Competition Policy Council.