Towards a Functional Competition Policy for India (FunComp)
Project Review Meeting
Saturday – Sunday, 30-31 October 2004, Chokhi Dhani, Jaipur

Proceedings of the Meeting

DAY ONE

Session I: Presentation was made on the two chapters **Evolution of Competition Policy & Law in India** and **Competition Act, 2002: The Approach**

1.1 Since S. Chakravarthy, writer of the two chapters could not attend the meeting, Nitya Nanda of CUTS made the presentation on his behalf. Following were highlighted:

1.2 *Evolution of Com petition Policy & Law in India*

- Historical Developments leading to the enactment of the MRTP Act: constitutional provisions, development strategy after independence and its impact, reports of certain committees formed during the time, which led to the enactment of the MRTP Act 1969
- The thrust of the MRTPA including its objectives and coverage were highlighted
- Amendments to MRTPA of 1984; economic reforms and 1991 amendment to MRTPA
- Experience with the working of the MRTPA, highlighting in particular the number of cases disposed under the Act and the budget allocation for the MRTP Commission.
- Metamorphosis from the MRTPA to the new competition law, the Competition Act, 2002
- Reference was made to the Consumer Protection Act (COPRA), and sectoral regulatory authorities highlighting their linkage with the competition law

1.3 *Competition Act, 2002: The Approach*

- Highlighted main provisions related to the four components of Competition Act, 2002 (CA'02) viz., anti-competitive agreements, abuse of dominance, combinations regulation, and competition advocacy
- Pointed out certain exceptions provided in the Act, relating to the applicability of the provisions relating to anti-competitive agreements. The exceptions relate to the protection of intellectual property rights (IPRs) and export cartels. In the context of IPRs, gave an account of the stand-off between IPRs and competition principles by highlighting experiences of other countries and the experience of India under the MRTP Act and relevant provisions of CA'02.
- Highlighted the soda ash case and how it was dealt with under the MRTP Act and relevant provisions in the CA'02 to address the problems covered in the judgment of Apex Court
- Highlighted provisions in the CA'02 which undermine the independence and autonomy of the Competition Commission
- Pointed out the difference between the MRTPA and the CA'02

1.4 Following comments were made on the two chapters:

Comments made jointly on both the chapters

1.4.1 The chapter on Evolution of Competition Policy & Law should mention about why the MRTP Act did not deliver? Presently, the section on "Experience with the working of the MRTPA" mentions about disposal of cases and budget. Inadequate budget is an important

consideration. However, there are issues relating to how the Act was being worked. After identifying all such factors, the chapter on "The Approach of Competition Act, 2002" needs to assess, to what extent these factors have been addressed in the new competition law and if these have been addressed, then how?

1.4.1.1 One such example that can be cited, is the ineffectiveness of MRTPA vis-à-vis merger regulation. This was mainly on account of the 1991 amendment, which removed pre-merger approval requirement under the MRTPA. However, MRTPA still had power under provisions relating to restrictive trade practices (RTP) and monopolistic trade practices (MTP) to take action against mergers that were anti-competitive. This reasoning was used by the HLL employees' union in the HLL-TOMCO merger case. However, Supreme Court ruled that the 1991-amendments to MRTPA did not empower the Central government to pre-emptively stop a merger, because it is likely to affect competition. Thus, 1991-amendments removed ex-ante power of MRTPA to block merger deals. This vacuum has been plugged by the Competition Act, 2002, which gives ex-ante power to the Competition Commission to block certain combinations if found to adversely affect competition.

1.4.1.2 Another example that can be cited is the criteria used for defining an anti-competitive practice. In the MRTPA the criteria for defining an RTP and MTP was very ambiguous and subjective as the definition emphasised on the criteria of *reasonableness* . This led to the problem of how one defines what is reasonable, which is quite subjective and ambiguous. In this context, reference was made to an article by Jaivir Singh, (EPW December 9, 2000), which does an analysis of the provisions related to MTP and concentration of economic power, which were not actively implemented. The article attributes this inaction to the ambiguity in the phrasing of the law. In contrast, CA'02 has specified criteria to assess whether a practice has an appreciable adverse effect on competition by laying out certain parameters.

1.4.2 The cases that were decided under the MRTPA have set a precedent. However, it is important to realise that the context under which these cases were decided has changed drastically. Take the example of the HLL-TOMCO merger case. This case was decided under the MRTPA in the context existing during that time. Now, one needs to interpret the Supreme Court judgement under the provisions of CA'02 and the existing scenario rather than following the precedent set by the Supreme Court decision. The context and focus of the Competition Act has now changed and the chapter on the Approach of Competition Act should bring out cases outlining the difference in the interpretation of MRTPA and the CA'02 with reference to specific cases. This would help the practitioners and the court and would ensure functionality of the CA'02.

1.4.3 The two chapters are expected to highlight why the MRTPA was inadequate to deal with competition issues, how the Competition Act'02 takes care of them and in what ways is CA'02 an improvement over MRTPA. However, the two chapters do not bring these out clearly.

<u>Comments specifically on the chapter on Evolution of Competition Policy & Law</u>

1.4.4 While dealing with why MRTPA failed to deliver, the chapter should clearly mention where the law failed to deliver and where law makers failed to deliver. In this context, it is worthwhile to note that the MRTP Commission was created at a time when all the process attributes of competition such as entry, price, scale, location, etc. were regulated. Thus,

MRTPA had no influence over these process attributes of competition, as these were part of a separate set of decisions. This partly explains why MRTPA failed to deliver.

1.4.5 The chapter needs to bring out what are the impediments to making competition policy functional. It should bring out clearly why and how institutions as a whole failed to deliver in the earlier regime.

1.4.6 The chapter needs to mention about the social context in which the policy and law evolved

1.4.7 The empirical description given in the chapter needs to be made more specific. For instance, the table on annual budget of the MRTP Commission mentions that it was very small percentage, however, there is no mention of a benchmark against which this figure is considered small. The section needs to mention about similar figures for say, other countries and then derive the conclusion that budget allocation for the MRTP Commission is small.

Comments specifically on the chapter on The Approach of Competition Act 2002

1.4.8 The chapter is very lengthy at present. It needs to be short and to the point dealing specifically with the various provisions of the Act.

1.4.9 Information provided in the chapter needs to be updated taking into account the current controversy, which is pending before the Supreme Court. It needs to analyse the various suggestions that are coming up in particular, the amendments to the Act that are being talked about.

1.4.10 The chapter does not give any specific citation at places where US and UK laws are being mentioned.

1.4.11 The chapter mentions about bringing a balance between IPR and CA'02 but does not mention how to bring this balance?

Session II: Presentation was made by TCA Anant on the chapter **Central Government Policies: Interface with Competition Policy Objectives**

2.1 Following were highlighted:

- Discussed competition as a *process*. Mentioned that the *process* dimension of competition becomes manifest once it is realised that much of the ongoing economic activity is characterised by situations where it is not known beforehand as to who will do the best and by using what means. Thus, competition is the *process* whereby skills and knowledge are acquired and put to the best possible use.
- Central message of the chapter is that all government policies be assessed on the touchstone of competition. There may be conflicts between objectives of competition policy and those of other policies (e.g. environment policy may lead to entry barriers) but there is a need to make an impact assessment of any policy and identify the dimensionality of the impact, in particular on competition. Once these impacts are acknowledged, one can take measures to deal with them. All government policies should have an explicit statement about the likely impact of the policy on competition.
- Gave an account of trade policy, industrial policy, public sector policy, tax policy and labour policy highlighting how these impede the functioning of the market process.

2.2 Following comments were made on the chapter:

2.2.1 The chapter should analyse public sector policy of the government and highlight how it impedes/promotes competition. Further, the impact of the working of public sector units on competition needs to be analysed and covered in the chapter. There are certain sectors where protection is given to public sector units, which result in restricting competition. For example in telecommunications, access deficit charge is paid to BSNL, which is alleged to be using the amount for resorting to anti-competitive practices. Such cases need to be highlighted. The chapter should clearly bring out the various political-economic factors that come in the way to ensuring competition in such cases.

2.2.2 In the context of reservation in small-scale industries, presently domestic large players are not allowed to produce the same products, however, small players are facing competition from foreign firms. The chapter needs to assess if this sort of competition is okay?

2.2.3 The process attribute of competition emphasised in the chapter should also take into account the outcome, as the process by itself may end up creating a virtual monopoly and harm consumers' interest.

2.2.4 The chapter should suggest measures on how to operationalise the transparency aspect as mentioned in the chapter?

2.2.5 Most often, government policies are prepared keeping in mind the public interest dimension, which is itself misused. The chapter should assess how to reconcile public interest with consumer interest?

Session III: Presentation was made by Aditya Bhattacharjea on the chapter **Cross-border Issues and Competition Act, 2002**

3.1 Following were highlighted:

- The recognition of challenges posed by cross-border competition problems is not a recent phenomenon. The 1946 Havana Charter provided for the obligation of each member to take appropriate measures and cooperate to prevent such practices. However, competition provisions were opposed by the US. Later, the UNCTAD Set was adopted in 1980, but it is a non-binding instrument.
- Gave a brief account of various types of cross-border anti-competitive practices that affect countries, including international cartels. Highlighted that though many international cartels are known to have operated in developing countries, but only Brazil, Korea and Mexico took some action.
- Highlighted that the principle underlying anti-dumping is different from that underlying competition law. While the former seeks to protect domestic competitors, the latter seeks to protect competition. Until recently, the main users of anti-dumping laws were developed countries, though increasingly developing countries too are taking recourse to these laws. India has now emerged as the most active user of anti-dumping. By applying stricter standards required in predatory pricing cases, would limit the misuse of anti-dumping for protectionist purposes.
- Highlighted the Indian experience in dealing with cross-border competition cases. Gave a brief account of the ANSAC case, where the MRTP Commission responded to complaints by manufacturers' associations against groups of foreign companies who had

been selling at low prices. But the orders of the MRTP Commission were set aside by the Supreme Court. Pointed out relevant provisions from the CA'02 in dealing with cross-border competition abuses.

- Highlighted the need for international cooperation to check cross-border competition abuses and mentioned about the efforts being made at the international level in this regard, such as at the International Competition Network, and UNCTAD.

3.2 Following comments were made on the chapter:

3.2.1 The chapter should analyse, reasons advanced by India to oppose the inclusion of competition policy at the WTO level. This may have implications for the future application of Competition Act on cross-border issues.

3.2.2 The issue of cross-border trade in services needs to be flagged now itself. There are certain concerns in terms of how Competition Act would deal with cross-border competition abuses in services. These relate to defining competition in a particular service, defining the market for services and how CCI will deal with them.

3.2.3 While analysing how to check cross-border issues, we should also consider enforcement of foreign judgements. To enforce a foreign judgement, bilateral treaties with the countries concerned are required. India has treaty with only nine countries. The chapter needs to assess, whether India can enforce judgement of competition authorities in these nine countries?

3.2.4 Apart from using the instrument of bilateral treaties, the chapter should assess how domestic laws treat foreign judgement in their own internal assessment. Suppose for example that a certain set of companies have been prosecuted in the US for forming a cartel and the US decree is public knowledge. In such a case, can our law permit us to take that as a presumption of guilt? If not, then there should be such provisions in the law where we take the foreign decree as a presumption of guilt and put onus on guilty companies to prove their innocence. This would be helpful especially in cases of cartels where it is difficult to get evidence. This happened in the case of vitamins cartel where the Korean competition authority took action against companies based on public information provided by US agencies. The point here is that to assess if our law and structure permits us to take the course as was taken by the Korean competition authority.

3.3 Aditya's reply

- On including India's stand at the WTO on Competition Policy in the chapter, it was mentioned that this itself would require a separate chapter. However, it was mentioned that India opposed competition policy and the other three Singapore issues primarily because there was lack of awareness about the implications of these issues, there was lack of expertise to deal with these issues and there were implementation issues relating to other existing agreements.
- On the issue of enforcement of foreign judgements, it was suggested that this should be best left to the lawyers. Further, in the present scheme of things we cannot reverse the burden of guilt on the parties. However, what we can do is to have different criteria for cross-border violations, which lessen the evidentiary burden on the competition agency. For example, foreign cartels can be treated as the mirror image of dumping. If it is found that companies are over-charging relative to price charged in other markets, then one can proceed on the presumption that there is cartelisation.

- On the issue of taking action against companies that have been found guilty of cartelisation elsewhere, it was pointed out that markets, world over, are segmented and strategic behaviour of companies may be different in different national markets. Hence, competition agency should consider other factors also before taking any action against these companies.

Session IV: Presentation was made by Raghav Narsalay on the chapter **Competition Policy and Consumer Welfare**

4.1 Following were highlighted:

- The term 'competition' and 'consumer' have much more than a simple economic or legal dimension attached to them in a socially diverse country as India. It was highlighted that competition is more a political process rather than an economic one, especially in India, which is home to a number of powerful corporate and non-corporate interest groups.
- The chapter views consumer welfare where even the poorest and remotest household/ individuals are able to access goods and services at affordable prices. There is caste as well as class dimension to consumer welfare and therefore even sociological dimension becomes critical.
- Increase in competition does not always lead to consumer welfare. For example in networking sectors, there are costs of competition, on account of duplication of competing facilities and lost scale of economies. This is why regulation is used as an instrument to attain consumer welfare.
- Highlighted how consumers, especially those who belong to the marginalized groups, have been impacted by injection of competition; exposed the complementary role of regulation and competition; highlighted relevant provisions in the Competition Act for achieving consumer welfare; and the linkage between COPRA and CA'02 in promoting consumer welfare.

4.2 Following comments were made:

4.2.1 Those who did not agree with the approach of the chapter, mentioned the following:

4.2.1.1 Goal of competition policy is not to solve economy's developmental problems or social problems. We need to be very clear with what are the objectives of competition policy. Do not agree that redistribution is an objective of competition policy, as is brought out in the chapter. The chapter should focus on competition policy aspects and not get into development dimensions, as the objectives are conflicting in nature and would affect the functionality of a competition regime.

4.2.1.2 The issue of access by marginalized group should be addressed through other policies – it is not an issue in the realm of competition policy and law.

4.2.1.3 Blanket exemption to a particular community is not going to serve the purpose. Take a hypothetical case, where a particular SC/ST village is being served by two shops owned by people belonging to SC/ST. Suppose they merge, and charge a higher price. In such case, an exemption to SC/ST under the competition law will result in a situation where the SC/ST community will be the victims of anti-competitive practice. Hence, the focus should be on competition issues.

4.2.2 Those who acknowledged the approach of the chapter, mentioned the following:

4.2.2.1 Competition agency should be encouraged to look into equity and social issues as well, as this would amount to implementing the Directive Principles.

4.2.2.2 From a historical perspective, competition law in several countries (European countries, USA, Canada), was introduced mainly out of social justice concerns, to control the concentration of economic power and to promote small business. It is only in the last three decades or so that they have moved away from this objective and adopted efficiency standards. Even now in case of EU, there are exceptions to promote small enterprises. Even South Africa has provisions to protect certain communities

4.2.3 Other comments:

4.2.3.1 Highlight working of the Consumer Protection Act and bring out its impact in ensuring consumer welfare. Provide relevant data to highlight the capacity of consumer forums to tackle anti-competitive behaviour.

4.2.3.2 Most complaints filed in the MRTP Commission were those that were brought by service providers and manufacturers. There have been rare instances, when cases were brought by consumers – the most affected lot. The chapter needs to identify the reasons thereof.

4.2.3.3 Concept of fairness in competition works differently for competitors and as between firms and consumers. For instance, the competition between BSNL, a public sector enterprise, on the one hand and private telecom operators on the other is absolutely unequal. Whereas BSNL has an all India license with provision of multi-services, private telecom operators are given circle-wise license and they are allowed to offer services subject to the provisions of license. Moreover, BSNL has a captive market share (all government connections), while private operators do not have this privilege. Example of Reliance behaviour in telecom was cited, where it used technology to breach licensing conditions, which though unfair to competitors was favourable to consumers. The question is, how to define fairness? In such conflicts, whether competitors' interest should prevail or consumers' interest should prevail? The chapter should flag such issues.

4.2.3.4 There is a need to build the capacity of consumer groups to make implementation of Competition Law and Consumer Protection Law effective. The chapter should highlight this.

4.2.3.5 The chapter should attempt to develop a standard that links competition policy to consumer welfare.

4.3 Raghav's reply

- On the issue of what is the purpose of competition policy, it was mentioned that historically one sees that there is a strong case for incorporating social dimension. However, social dimension is distinct from consumer welfare and will try to bring out this difference more clearly in the chapter.
- The chapter attempts to suggest that coexistence of strong institutions with a strong competition regime is required to ensure that benefits of competition reach people.
- The point relating to how consumer movement can be strengthened especially at local level still needs to be incorporated in the chapter. There is a need to work out a plan of

action to help consumer organisations at local level to understand these issues and to work on these issues.

- As mentioned, the doctrine of fairness of competition works differently for competitors and consumers and this would be a challenge before the competition commission. This leads to a further question of defining "competition for whom?" Who is a consumer? The definition of consumer is not easy. The chapter attempts to raise such issues and does not attempt to provide solutions.

Session V: Presentation on two chapters were made in this session.

5.1 Mahesh Uppal made a presentation on **Telecom Sector** and highlighted the following:

- Evolution of regulatory framework in the Telecom sector in India
- Mentioned that opening of the sector to private players preceded the setting up of the regulatory body and highlighted that independence of the Telecom Regulatory Authority of India (TRAI) is a matter of concern
- Highlighted several competition concerns in the Telecom sector, such as:
    - BSNL has an all India license for all services, while its competitors are required to take separate licence for each circle and each service
    - BSNL receives an Access Deficit Charge (ADC), which it uses to undercut its competitors, while at the same time does not maintain any transparency in the use of ADC
    - Refusal by BSNL to share its infrastructure

5.2 Following comments were made:

5.2.1 If one looks at the growth in telecom subscribers in an incremental sense, then growth of subscribers is more in the private sector than for BSNL. In view of this fact, the issue that BSNL has a single licence, while its competitors are required to take separate licence for each circle is of little significance.

5.2.2 However, it was mentioned that private telecom operators were the first to offer mobile phones. Hence, they are the incumbents for mobile telephony and it is only later that BSNL came into mobile telephony. This is the reason why private telecom operators are having more telephones than BSNL. Moreover, while BSNL is one entity, the private telecom operators are several.

5.2.3 There is a conflict of roles concerning the Ministry of Communication. Successive Ministers for Telecommunications have always been having the viability and profitability, and the well-being of BSNL/MTNL upper-most in their mind. This is natural because the Ministry of Communications is the administrative organ of the Government of India, in charge of these state-owned enterprises. If any of these state-owned enterprises perform badly, then the Minister is criticised. Therefore, if in any dispute or in any matter, the interest of BSNL/MTNL on the one hand and private telecom operators on the other clash, then the Minister takes the side of BSNL/MTNL.

5.2.4 There are four learnings from the opening up of the telecom sector and the setting up of the regulator, which have implications for competition issues:

- Drafting of the TRAI Act was open to ambiguous interpretations, and subsequently the Act was redrafted. The lesson is that the Act should be drafted in a way, such as the possibility of ambiguous interpretations is minimised.
- In case of overlapping jurisdictions, the process must be clearly established as to which forum, firms are required to approach for relief or redressal. It is believed that the first port of call should be the sector specific regulator.
- TRAI should handle the issue of spectrum allocation and the process needs to be transparent. One of the lacunas in today's policy is that whereas the licence is technology neutral, spectrum is not. This conflict in policy needs to be addressed.
- The issue of number portability and its implications for competition needs to be analysed.

5.3 K J Joseph made a presentation on **Information Technology** and highlighted the following:

- Gave an overview of the recent growth performance in the IT sector, and the role played by various state policies and institutional interventions. It was highlighted that the success of IT sector of India is a typical case of pro-active state intervention and not benign state neglect.
- In the hardware sector, the unbranded segment, which controls about 53 percent of the market, is providing competition to the branded segment. Though there is a revenue loss to the government from the operation of the unbranded segment, but it needs to be considered that if this segment is ignored then the branded sector is concentrated.
- Given that Microsoft is a dominant player in operating system, the chapter flags the issue of open source software.
- It was pointed out that though India has emerged as the major software producer but has not been able to emerge as a major software user.
- It was pointed out that in software services, there are numerous firms and most of them appear to be operating under sub-optimal conditions. Hence, enabling government policy is required to promote consolidation in the IT industry.

5.4 Following comments were made:

5.4.1 The chapter should highlight what is the share of Indian market in software and hardware? Who is meeting this requirement? Try to address these issues by looking at software consumption rather than production. It is expected that a large chunk of the software market in India is being served by imported softwares particularly the branded ones. What is the role of competition policy in this regard?

5.4.2 The chapter should develop further on the issue of open source software. This would imply software development on a platform without the need of taking a licence from Microsoft. The chapter could argue that as a pro-competitive measure, open source platform should be used for public software, for example, which could then be used as a lever to make Microsoft offer better licence terms.

5.4.3 The argument for government intervention on the basis of structural analysis may be misleading. Rather detailed studies are required to make any such argument.

5.4.4 The chapter mentions that hardware sector minus the unorganised sector is highly concentrated. However, it does not consider the product composition of organised sector and unorganised sector nor is there an acknowledgement of economies of scale and scope

parameters, which may require the setting up of a large sized firm. Therefore, just by comparing the relative share of the output of organised and unorganised sector and concluding that unorganised sector is providing competition to the organised hardware manufacturing may be misleading. In fact, most of the hardware manufacturers are based in software processing zones and some of them compete with the world's best technologies in the global market. There are in fact sales restrictions for domestic market for these firms, which in turn stifle their growth. Hence, in such cases intervention is required to relax state regulations. There is need to look at forces that govern the emergence of competition in the market and not just at structural indicators.

Session VI: Presentation was made by Amirullah Khan on the chapter **Pharmaceuticals Sector**

6.1 Following were highlighted:

- Most of the diseases in India are water-borne and if we take care of the water and sanitation issue, then most of the problems will be solved.
- Of the essential drugs, nearly 95% of them are off-patent and the remaining 5% would be off-patent next year. Thus, when we are talking of patents, we are effectively talking about those 10-12 new drugs that are going to come from next year onwards and not about any of the essential drugs that exist today. Hence, patenting is not really a big issue as far as pharma is concerned.
- There are a large number of drug manufacturers (about 20,000) in the country who came up because the policy allowed reverse engineering of drugs. Such a large number of manufacturers poses problem for monitoring the quality of drugs manufactured by them and leads to the problem of spurious drugs. Hence, consolidation among drug manufactures is desirable.
- There are really no competition issues in the pharma sector if one were to look beyond the old arguments of access to poor. In fact, increased competition will ensure access to poor.

6.2 Following comments were made:

6.2.1 It is surprising to hear that TRIPS has nothing to do with competition policy. In fact, TRIPS agreement is the only agreement at the WTO, which has substantive provisions on competition policy. TRIPS has an interface with competition issues as it is about transfer of monopoly rights for a period of twenty years.

6.2.2 The chapter should analyse how M&As have taken place in the pharma industry; what are the issues involved and their implications for competition.

6.2.3 There is a lot of lobbying that takes place in the pharma sector. These alliances often influence decision-making and any decision taken in such a scenario is not grounded on competition *per se*. This could be a major challenge to the competition authority, as to how it will tackle such issues.

6.2.4 The chapter should look at the post-2005 scenario and identify what competition issues may emerge. Now, patenting of generics is taking place in a big way to protect the revenue streams. The chapter should highlight this issue and its implications for the competition regime.

6.2.5 The chapter should look at the consumption side of the pharma industry and identify who are the major players and the role of competition agency in this regard

6.2.6 Instead of discussing concentration at aggregative level, the chapter should analyse concentration at product level, as the market is highly differentiated. The example of price difference between insulin and growth hormone was cited. While growth hormone is under IPR protection, insulin is not. However, the two are produced in exactly the same technological circumstance and have same cost implications. But while the price of insulin is about Rs.100 per vial, that of growth hormone is about Rs.40,000 per vial. Of course, the market for insulin is big as compared to that for growth hormones.

6.2.7 The chapter mentions that individual market shares of companies are small and concludes that the industry is competitive. Any conclusion based purely on structural indicators may be misleading.

6.2.8 Pharma sector is one of the most fertile sectors for existence of anti-competitive practices. The sector should be analysed from the viewpoint of competition as a process. It is an industry where cross-border competition concerns arise, for example the vitamins cartel case.

6.2.9 Analyse the distribution network in the pharma industry, the nexus between doctors and drug suppliers. The government is a major buyer of drugs & medicines, and given that bidding process is not transparent, anti-competitive practice may exist.

6.2.10 The sector is characterised by strong asymmetries of information and is a fit case for government intervention. Moreover, because of innovation/IPR etc, monopolies are created and one has to keep a watch to prevent any abuse of monopoly power.

6.2.11 Because of the Drugs Price Control Order (DPCO), all the research is taking in drugs which are outside the ambit of DPCO. The chapter needs to consider the effect of this regulation, as its impact is anti-consumer in the sense that it is not providing any incentive to do research in drugs covered by the DPCO.

6.2.12 If lowest possible prices in pharma sector cannot be assured, it means competition as a process is not working and something is wrong somewhere. In such a situation the role doctors play need to be examined, as consumers are not well informed. The example of Bangladesh was cited where the government has mandated that doctors are bound to write generic names and because of that medicine prices have fallen drastically. This shows that competition as a process may not always ensure competitive outcomes relating to consumer welfare and efficient allocation of resources.

6.3 Amir's reply

- The point of TRIPS and competition policy is being long discussed, hence was not considered.
- Done another paper to look at the issue of IPR in differentiated products and to analyse the existence of monopoly, if any.
- Not much research done on identifying if any anti-competitive practice prevails in any of the product segments in the pharma industry.
- The issue of doctor-pharmaceutical industry linkage not considered because that is for the Indian Medical Council to decide.

- In the context of bringing down the prices of drugs, it was mentioned that pricing is a complex issue and price of any product is not decided to make it affordable to everyone. In fact, it is after a firm reaches a particular size, that it seeks out to reach everyone.

Session VII: Presentation on three chapters were made in this session

7.1 K V Ramaswamy made a presentation on **State of Competition in the Manufacturing Sector** and highlighted the following:

- The chapter makes a preliminary assessment of the extent of competition in markets in the nineties based on available evidence. It looks at changes in market concentration, impact of import competition and FDI, and price and profitability trends.
- Of the thirty industries that were selected, concentration ratio is found to have increased in twelve industries and declined in fifteen industries. Interestingly, one or two large firms are found to dominate industries experiencing high levels of concentration. Reduction of import tariffs and quantitative restrictions have increased the threat of import competition.
- FDI inflow is concentrated in only a few industry groups such as pharmaceuticals, machinery and chemicals. MNE related M&A were concentrated in non-electrical machinery, food household appliances, pharma and personal care products.
- Estimated price-cost margins show an increasing trend. Structure of market concentration is fast changing since the 1990s. Greater churning of market shares in individual industries is taking place. Both domestic and foreign owned firms have taken dominant positions in many industries.
- Highlighted the need for developing a reliable and consistent data base. Linkage between industry, trade and FDI data needs to be established and maintained on a continuing basis.

7.2 Following comments were made:

7.2.1 Analyse the correlation between competition and relative price movement, this would throw some idea about the nature of competition in the manufacturing sector.

7.2.2 The chapter should not draw conclusions based on concentration indices. Several of the conclusions mentioned in the chapter do not come out from the information given in the chapter. In fact, given the limited objective of the project, there is no need to draw such strong conclusions without giving relevant and adequate information in the chapter.

7.2.3 In most cases the change in concentration index is small (for example from 0.14 to 0.16, or 0.40 to 0.46). To conclude analytically that concentration has increased or decreased without noting the statistical significance of the changes would be misleading. This has an obvious bearing on the conclusions drawn.

7.2.4 The relevant statistic to show that import tariff levels have declined, is the effective rate of protection (ERP) and not the nominal rate. It is clear that, for the limited purpose of the chapter no such calculation can be done. However, some references are there which have calculated changes in ERPs in the 'nineties (eg. Nouroz's book on Import Protection). Moreover, import liberalisation may not be sufficient to ensure existence of competition, as there may be international cartels.

7.2.5 The objective of the chapter is limited. The chapter should focus on raising issues and do a limited survey of existing literature rather than attempting to do draw strong conclusions.

7.3 Nitya Nanda made the presentation on **Cement Sector** and highlighted the following:

- Gave an overview of the cement industry. Pointed out that India is world's second largest cement producing country. Factories are clustered in a few locations and the industry is of regional nature. Presented region-wise information on capacity, production, consumption and average prices.
- Cement industry is known to be prone to cartelisation worldwide. There have been complaints of cartelisation in India as well. With government being one of the major buyers, there exists possibility of bid rigging.
- Highlighted risks of collusive practices and anti-competitive behaviour and recommended that the competition commission should take a close look at mergers between large firms. It was also suggested to look at bid offers in government procurement, which can give important clues if there have been patterns of systematic rotation of winning bids and stable share of companies in overall procurement.

7.4 Following comments were made:

7.4.1 The chapter is good at description but lacks analytics. There is a tendency to assume cartelisation rather than derive it from the information given in the chapter. Though there may be strong evidence supporting the existence of cartelisation in cement industry, but the chapter does not contain enough information to support this conclusion. Instead the chapter should analyse time series, profits, prices, cost structure, etc. These data are easily available and a robust analysis can be carried out to support the argument for cartelisation.

7.5 A S Firoz made the presentation on **Steel Sector** and highlighted the following:

- Gave an overview of the structure of the steel industry. The steel industry in India exhibits larger degree of heterogeneity and differentiation than in other countries. There is a complex interplay of forces of dependency and integration within the steel industry with interesting implications for the competition scenario.
- Intra-industry competition is complex due to merchant operations, where a buyer of an intermediate product can compete with the mill producing that in the market for the finished product. The pricing issues relating to the intermediate product has been a major controversy where the producers of the same, are being accused of adopting unfair means to squeeze the merchant mills.
- Imports have been the most important source of competition for the domestic firms. The industry is not globally competitive for historical reasons and with global pricing in bad days being divorced from costs; the level of competition for the industry when the global market is down can be unbearably high.
- Steel industry was regulated till 1992. Various relaxations have been made since economic reforms were initiated in early nineties. But, the government has been intervening to protect domestic players from competition against imports, which nevertheless has declined in recent years.

- Competition authority or the regulatory authority for steel being talked about can work on the supply side to take effective steps to reduce pricing power of dominant firms or to check alleged cartelisation.

7.6 Following comments were made:

7.6.1 The chapter should analyse time series, profits, prices, cost structure, etc to make a definite statement about the existence of cartelisation. The information provided presently in the chapter is not adequate to draw any such conclusion.

DAY TWO

Session VIII: Presentation was made by Manish Agarwal on **Mergers & Acquisitions in India: Implications for Competition**

8.1 Following were highlighted:

- High incidence of merger activity in India during the post-91 period as compared to the pre-91 period. M&As have been largely of horizontal nature and there is evidence of increased concentration in industries where there was a high frequency of horizontal mergers.
- High frequency of MNCs related M&As, particularly after 1997 and more in the form of acquisitions rather than mergers.
- M&A regulation is covered under MRTP Act, Companies Act, SEBI Takeover Code, certain sectoral Acts and regulations such as Telecom, Electricity, and Banking.
- Post-1991 amendment to MRTPA, no pre-M&A regulation from competition perspective, especially after the Supreme Court verdict in the HLL-TOMCO merger case.
- Two concerns relating to provisions governing "combinations" in the Competition Act:
    - The expression "combination" as defined in the Act is very narrow in scope and leaves out those M&As, which fall below the threshold limit but may cause appreciable adverse effect on competition, and
    - Effective date of a combination is not specified in the Act (in case of mergers, whether it will be the date when merger order is passed by the high court or the date when assets and liabilities of the target company gets vested in the acquirer company)
- As on date, the only M&A regulation from competition perspective exists in the Telecom sector - reference Department of Telecommunications guidelines in this regard.

8.2 Following comments were made:

8.2.1 The chapter should clearly bring out that under the MRTP Act, review of any M&A proposal was not done by the MRTPC at first instance. But under the Act, the Central Government was given the power to refer a merger or acquisition proposal to the MRTPC, if it so wished. Further, the government was not bound to follow the recommendations of the MRTPC. Hence, the government was the deciding authority in M&A review and not the MRTPC. Quoting the Sachar Committee (1978) report, it was mentioned that in only minority of cases the government referred a merger or acquisition proposal to MRTPC for review. Hence, the merger review provisions that were scrapped in 1991 were never very effective. This has two implications for the chapter:

8.2.1.1 The conclusion drawn in the context of pre-91 and post-91 merger behaviour analysis of erstwhile MRTP firms, that the firms could not have resorted to the behavioural pattern as highlighted in the chapter cannot be drawn very conclusively, as the merger review provisions were never very effective.

8.2.1.2 Secondly, the government often used the M&A provisions for reasons other than what related to competition policy. For example, the government filed a case to order a break up of the Indian Express group of newspapers during the Emergency but the reason was political and not economic. This case was later withdrawn after the Congress party was defeated. Hence, the pre-91 and post-91 comparison cannot be pushed too far.

8.2.2 The chapter refers to the emerging issue of creating national champions in oil industry, banking, etc. This issue should be probed further, and take into account the debate surrounding the 1991 amendments to MRTPA, when pre-merger review provisions were scrapped, as the government wanted a pro-active competition law.

8.2.3 The chapter points out that FDI is more through M&As rather than through Greenfield investments. This would have implications for investment policy. This point can be flagged in the chapter.

8.2.4 Analyse the motives for merger from business perspective such as efficiency gains and see if these motives are getting realised post-merger. Also see if the laws are facilitating or impeding this process. This would be a useful input to the policy makers.

Session IX: Presentation was made by Shubhashis Gangopadhyay on **Banking, Insurance and Other Financial Services**

9.1 Following were highlighted

- The chapter focuses on issues relating to regulatory bodies and regulation and not competition issues such as privatisation or FDI in financial services, etc. It highlights the scenario during pre-reforms period, economic reforms undertaken in financial services and banking sector and highlights way forward in the sector. Makes an assessment of the impact of reforms based on certain performance indicators. Not considering capital markets and the issue of exit policy/bankruptcy laws.
- Post-reforms, there has been a massive improvement in services to consumers in the banking sector. Now, the prime lending rate (PLR) is fixed by the banks themselves and not the RBI. However, a leader-follower behaviour exists in the setting up of PLR, which may be questioned as it does not seem to be determined competitively.
- Though the insurance sector has been opened up, its coverage is still limited to certain segments. The Mutual Fund sector was opened up and now the private funds control about 78 percent of the market. But the small players are still not interested in entering the market. In pension funds, the government was earlier pre-empting resources. With economic reforms, the government is allowing pension funds to play a greater role in the financial markets.
- The role of regulator in financial market is not ensuring cheap finance but in managing risks, where it can play a huge role.
- The speed and adjustment of financial markets should not be determined solely by the expertise and knowledge, that regulators possess. The market's growth should be decided by innovators in the market, and not the regulator. The progress of the market should not

be held back just because the regulatory body is not aware of the fallout of any such development.

- Given that entities in the financial sector are taking up several activities related to different markets in the financial sector, example banks are becoming universal banks; there is need to move away from sectoral regulation to functional regulation i.e. more coordination is required amongst the various sectoral regulators in the financial market.

9.2 Following comments were made:

9.2.1 Not clear why financial sector is being covered in a report, which aims at functionality from a competition policy viewpoint. This is because, typically the financial sector is regulated because of two factors, neither of which is related to competition: disclosure or information, and prudence or risk management. Viewing from both dimensions, there is a possibility of conflict with competition. Example, capital adequacy requirement may act as an entry barrier, but is essential from the perspective of the two factors.

9.2.2 There is a need to reconcile competition and financial sector regulation rather than allow competition as a process or as a desirable state of affairs that goes against the objectives of regulation. This issue is similar to the chapter on Central government policies where there is a need to reconcile competition to ensure that it does not go against other objectives of government's policy.

9.2.3 There is a high level of concentration in banking, especially in credit cards where few banking entities are dominant. Should the competition commission deal with the concentration issue or should it be left to the RBI? However, this leads to the trade-off between prudential regulation and competition regulation. One reason why banks are becoming universal banks is, to spread their risks in various activities to manage their risks efficiently. Its impact on market structure is a secondary issue. The chapter needs to clearly highlight how it fits into the overall objectives of the project.

9.2.4 Though the focus in financial markets has been on prudential and disclosure norms but there are certain examples from international experience, which need to be pointed out. Restrictive trade practice (RTP) in credit cards is an important issue and there are cases where companies have been prosecuted in other countries for indulging in RTPs. Given the dominance of two players in the Indian credit card market, there are competition concerns in terms of contracts and conditions the companies use, which needs to be highlighted. There have also been cases of bid rigging in the insurance sector in other countries. The point is that sectoral regulators do not ordinarily address these concerns and while formulating sectoral regulatory policy, these issues are not considered. The chapter can point out international experience in this regard. In the light of these examples, there is a need to change the perspective of financial sector regulators.

9.2.5 It was clarified that the project is looking at not just competition and consumer protection but also market regulation.

9.2.6 Retail banking deals directly with consumers and there have been complaints in the past of cartelisation in bank charges, alleged to have been led by the Indian Banks' Association. The matter was taken up with the MRTPC but did not succeed.

9.2.7 The chapter does not cover the hire purchase industry, where there are practices, which are fairly anti-consumer if not anti-competitive. In the credit card market, interest rate charged is usurious and there is a need for consumer credit law to regulate these issues. There are areas in the financial sector, which remain unregulated and such issues may be highlighted in the chapter.

9.2.8 In the context of anti-consumer practices, it was pointed out that in banking, there are certain hidden terms of contract, such as penalty for early repayment of loan, which are against consumers' interest. In credit cards, for example, it is initially said that it is free but the credit card statement reveals otherwise.

9.2.9 In the insurance sector, players behave in a manner to limit choice. For example, insurance is mandatory as far as vehicles are concerned. However, insurance companies do not issue a comprehensive insurance policy after a certain age of a vehicle and surprisingly all private insurers behave in the same way, limiting the choice to consumers.

9.2.10 Non-banking Finance Companies often give several incentives, which are not sustainable, and are just fraudulent means to lure customers. The chapter should assess the implication of such practices for competition.

9.2.11 There is a need for better coordination amongst regulators. It is important that where one regulator has taken some action, other regulators should possess the information.

9.2.12 In the context of coordination between competition authority and the RBI, it was pointed out that there was one case where the MRTPC found evidence of cartelisation involving the Indian Banks' Association as they had issued a circular for setting interest rates. However, the MRTPC did not take any action and said that the RBI is already seized of the matter and will deal with it.

9.3 Shubhashis' reply

- The chapter does not offer solutions to solve the various problems that exist in financial services sector through competition and regulation.
- A distinction needs to be made between competition and regulation, especially in the case of financial services. Regulatory bodies exist in the financial services sector because of the fact that markets may fail. There is a lack of competition in the financial sector but picking a regulatory body and suggesting it to do something to deal with the lack of competition may not be the right approach.
- The focus of the chapter is on finding out if a change is required in the regulatory activities and arrives at the conclusion that a change is required in the regulatory mindset.
- The other issues are important but not considered as it would then make the chapter run into hundreds of pages. However, these may be flagged.

Session X: Presentation was made by Sunil Jain on **Transport Sector**

10.1 Following were highlighted:

- Importance of transport sector in the growth of the economy. Cited the findings from the Rakesh Mohan Committee that about 1-2 percent of GDP is lost due to poor road network
- Impact of transport on competitiveness of industries. For example, cost of shipping goods from India is high relative to other countries such as China, and this affects the

competitiveness of our exports. India is very competitive in cargo related charges but uncompetitive in vessel related charges, thus making the Indian ports uncompetitive.

- Railways are losing market share to roads; sale of goods by transporting them through railways can often be uneconomic as railway charges are quite high
- Post-reforms, transport sector has responded quite well. Share of private airlines is now more than that of Indian airlines; vessel turnaround time has gone down; private ports now handle one-fourth of the traffic, in just a decade's operation.
- But following problems still there:
    - Container traffic by railways monopolised by Concor
    - Productivity in ports still low especially in public-sector run ports
    - Favours given by the government to public-sector airlines: Indian Airlines has a separate terminal inspite of lower market share
    - The Tariff Authority for Major Ports (TAMP) fixes *minimum* port charges, and no port can charge lower than this, which is anti-competitive
    - Government mandates flying on uneconomic routes. In certain cases there are good alternatives available but still the airlines are made to incur losses to comply with this regulation (Example: Shatabdi Express on Delhi to Chandigarh route)
    - Taxes in aviation fuel and other taxes makes domestic airlines uncompetitive in moving international traffic

10.2 Following comments were made:

10.2.1 The chapter highlights inefficiencies in the transport sector and its impact on competitiveness of other sectors, especially in relation to international markets. However, does not address what needs to be done to address these inefficiencies and to make the markets more competitive.

10.2.2 There is no regulator in the transport sector, as in electricity or telecom or financial services. There is TAMP for the ports sector but it's role is confined to fixing port tariffs and is not concerned about issues relating to efficiency or taking measures to create competition in the ports sector. Hence, whatever needs to be done in the transport sector to make it more competitive, has to be done by way of policy changes. Measures to introduce competition need to be taken by the government at the policy level as a major player in the transport sector and not by the regulator. This is where perhaps CCI can play an active role in influencing thinking in the government on how to introduce competition in the various transport sectors.

10.2.3 In the context of ports, the chapter refers to efficiency gains from introduction of competition in container handling at JNPT, and also makes the point that not much has been done to foster intra-port competition. In this context, it would be useful to point out that although the Govt. of India decided in 1996 that major ports would become landlord ports and cargo handling services will be privatised, this has not happened. Neither the GoI nor the ports are conscious of the need to promote competition. In fact, more than once the government has lost the opportunity to create intra-port competition. For instance, in Chennai the government put out all six container berths in one bid instead of dividing them among two or more operators, which resulted in one party getting the facility for all six berths and in the process government lost the opportunity to introduce intra-port competition. It has also to be pointed out that in the present dispensation, where Port Trusts are the owners and also service providers, they are called upon to introduce competition or put out some of their facilities for private handling and face competition from them. This in fact gives ports, as owners as well

as service providers, an opportunity to discriminate against competing service providers. These issues are to be addressed at the policy level and not by the regulator.

10.2.4 While analysing the comparative freight charges from India and from other countries, take into account that there are liner cartels, which fix freight charges through the liner conference. These are large shipping companies, which also operate ports, and thus have vested interests. Shipping Corporation of India, the only liner company in India does not have a very large fleet. The chapter should not just look at competition within the country, but also how monopolies elsewhere can influence pricing and competition within the country. For example, P&O Australia runs container terminal facility in Kalang (Malaysia), Colombo, Karachi, Nhava Sheva (JNPT), and Chennai. They had also bid for Cochin but the GoI did not allow them to bid looking at their monopoly in the region. However, by operating facilities in and around India they are still in a position to hike up rates in India or make operations in India difficult. While inviting bids one should look at existing operations of the bidder to ensure that a monopoly does not emerge. The European Commission does this on a regular basis. For example, the European Commission did not allow Hutchinson Wham Pao of Hong Kong to enter into the Rotterdam port because they were already controlling about 35 percent of container handling facilities in Europe. These are issues, which the GoI is not looking at all and the chapter should take this into account.

10.2.5 In the construction of highways, there is competition for the market rather than competition in the market. However, National Highways Authority has not taken steps to introduce competition for the market, for example by structuring the bid documents in an appropriate way. This issue again has to be addressed at the policy level.

10.2.6 In the transportation of goods via trucks, the chapter mentions that most of the 22mn trucks plying on Indian roads are under single-ownership and there are no large-fleet operators. Although there appears to be competition, given large number of truck owners, the fact is that the entire cargo is handled by about 5000 cargo operators. These operators cartelise and decide the freight and there is no competition at their level. The chapter suggests no measures in terms of how to deal with cartelisation at the level of cargo agents. It might be useful to suggest measures to break the monopoly of cargo agents. One possible solution would be to encourage large fleet owners. The formation of large fleets is currently impaired by restrictive provisions in the laws relating to truck drivers.

10.2.7 In Railways, there is a suggestion that private sector should be allowed to operate containers. But competition with Concor can become effective only if private sector is allowed to run container trains. Further, the Railways Act now allows only the GoI to fix freight, and also restricts the Railways liability for losses. Unless these provisions are changed, private sector cannot effectively compete with Concor. The chapter needs to address these issues.

10.2.8 There is a suggestion that zonal railways should be encouraged to compete with each other. Considering that they operate in different geographic areas, it is not clear as to how this can happen, unless by way of comparative competition rather than real competition. There is in fact a need to examine some of the commercial practices of the Railways, and the legal provisions pertaining to them to see whether their competitiveness vis-à-vis road transport can be improved.

10.2.9 Regulation in transport has been tried in several countries. In India, we need to consider if all the competition issues in the transport sector can be addressed as policy initiatives with the CCI playing an active role with government or that in addition we need a transport regulator (may be a multi-sector transport regulator) to address all the regulatory issues.

10.2.10 One issue that may be considered is that all public sector units are compulsorily required to route their requirements for shipments through the Shipping Corporation of India, which hires ships on their behalf, as an intermediary. This creates a disadvantageous position for PSUs vis-à-vis private sector, who have the freedom to hire any ship. According to one estimate, PSUs face a disadvantage of upto 25% as against private sector firms.

10.2.11 The chapter presently discusses various sectors in transportation separately. Given the existence of inter-sectoral competition for certain services, the relevant market for these services will be different. The chapter should look at these issues as well.

10.2.12 In passenger traffic, the profitable routes are most often monopolised by the state road transport corporations and there is no competition. The chapter may look at these issues as well.

10.2.13 The chapter gives comparative transportation charges from India and from other countries, and highlights that the charges are quite high. However, it is not clear if these are bulk cargo charges or liner shipping charges. The chapter should go further to identify the reasons for this variation.

10.2.14 The chapter should further explore how bids are structured in infrastructure sector. Generally, bids are structured in a way, which allows only a few large players to bid. For example in Chennai, if certain flyovers and bridges are to be built, then all of them are put in the same tender. Though, two-three players bid, but most often, the one who is awarded the contract sub-contracts the work to other remaining players - the so called competitors. The chapter should highlight such examples.

10.3 Sunil's reply in the context of monopoly enjoyed by Concor

- Government follows discriminatory policy in the payment of import duty while moving cargo from ports through railways (i.e. Concor) and via roads, where the discrimination is clearly in favour of Concor. Thus, container movement via roads becomes that much more uncompetitive and serves to preserve the monopoly of Concor.
- A step has been taken to break the monopoly of Concor. Pipavav port in Gujarat has set up a joint venture with Indian Railways, Pipavav Railway Corporation Ltd. (PRCL) to construct, maintain and operate railway line connecting port of Pipavav, in the state of Gujarat to Surendranagar Jn. on Western Railway. Very soon the joint venture will be allowed to run container trains to and from the Pipavav port, breaking the monopoly enjoyed by Concor. With this development, there would be a need for a regulator.

Session XI: Presentation was made by Ramesh Chand on **Agriculture Markets in India**

11.1 Following were highlighted:

- The chapter focuses on food crops and the market for food grains.

- There are four stages in marketing agriculture produce, from producers to consumers with agro-commercial firms operating as intermediaries. In the first stage, farmers interact with agro-commercial firms; in second and third stages, agro-commercial firms deal with each other; and in the fourth stage, agro-commercial firms deal with consumers.
- There is evidence of collusive behaviour in price formation and entry barriers in primary markets i.e. the first stage.
- Price spread is affected by distortions in transport of agriculture produce because of, say, operation of truck unions at various places. It also depends on the structure of marketing channel, with highest price spread in cases where product is channelised through intermediaries. Price spread is significantly low where cooperatives operate.
- There are imperfections and poor regulation at retail level. Evidence of asymmetry in price transmission i.e. when prices are increasing they are immediately passed on to consumers however in the reverse case, transmission is slow and only a part of the decrease is passed on to consumers. In order to minimise such practices, some alternatives have been tried in the form of establishing direct links between producers and consumers such as Rythu Bazar, and these have been found to be successful. However, the trader community has tried to sabotage these successful initiatives.
- Government intervention, in cases where market fundamentals are ignored has distorted the market. In fact, it has been observed that government intervention in prices often created perverse incentives for private traders, as they found it profitable to purchase the produce from the government rather than from the market. Further, because of government's intervention in prices, often prices in lean period are lower than that in the harvest period!
- There is need to change the existing regulatory system.

11.2 Following comments were made:

11.2.1 Government is taking steps to provide information to farmers on prices and markets through the use of Information Technology. Assess the extent to which this information availability has influenced prices and behaviour of agro-commercial firms in agriculture markets.

11.2.2 Example of minimum support price (MSP) operations in maize undertaken by the Government of Andhra Pradesh in 2003 was given. It was revealed that poultry farms, the biggest buyer of maize, in their bid to bring down the price in open market operations, tried to import damaged grains from other states but did not succeed due to delay in transportation. Given the resolve of the government, in 2004 the poultry association bought maize from the open market operations. This shows that government intervention through MSP helped check collusive behaviour by agro-commercial firms and resulted in farmers getting a reasonable price for their produce.

11.2.3 Example of government intervention in onion was given, which highlighted how the intervention brought down the prices of onion for consumers. It was revealed that the prices of onion in Andhra Pradesh shooted up after the spread of news that production in Maharashtra, the largest onion producer in the country, would be delayed by a month. The government decided to bring early harvested onions from Nasik and its nearby places at a little higher price. Though the government brought only one-eighth of the total consumption requirement, the prices of onion crashed from Rs 20 to Rs 7 within a month. It went further down to Rs 5 in the subsequent month after the government brought in some more onions. It

should be noted here that, there was no shortage of onions but it was the trade behaviour that had led to rapid rise in prices on onion, which was countered by government intervention.

11.2.4 The concluding part of the chapter should summarise the anti-competitive issues in agriculture marketing, assessment of the extent to which information dissemination will be useful in addressing the problems of monopolies or monopsonies, identify the policy constraints and highlight how these should be handled.

11.2.5 Even though there are commodity exchanges and other channels to make price information available to farmers, however, there potential is not being fully utilised as there are distortions in the movement of agriculture produce across states and also in the international market. The chapter may look at this issue as well.

Session XII: Presentation was made by TCA Anant on two chapters **Interface between Competition and Regulation** and **Professional Services**

12.1 Following were highlighted:

- Market failure is a broader concept and may arise on account of a number of different considerations other than on competition grounds such as network externalities in telecom, systemic stability in financial services, asymmetric information in professional services. Markets may also fail because of imperfect market structure such as cartelisation, which calls for intervention on competition grounds. Since, lack of competition in one of several considerations, why markets fail, competition and regulation cannot be substituted.
- The key objective of regulators is to address the original source of market failure which may or may not be, promoting competition, as lack of competition may not be the source of market failure in the first place. However, competition plays an important role in regulated sectors. Presented a case study of professional services in this regard.
- Focussing on three professions: accounting, law and medicine. Mentioned about their key characteristics, which is idiosyncratic and skill based, where the relation between each buyer and seller is unique, as defined by the specific needs of the buyer. The sector is characterised by asymmetries of information. It is a sector where service provider defines the needs of customer, hence potential for abuse and the need for regulation. Since regulation requires knowledge of the sector and its skills, characteristics of the regulator have to be drawn from the same pool as the people who are providing the service, hence these sectors are also marked by self-regulation, which is a universal phenomenon.
- Highlighted certain characteristics of regulatory design in professional services from the point of view of competition. For example, entry conditions are required to ensure that the person is well qualified. However, we need to assess if entry condition is being operated in a manner which is more burdensome than the requirement to maintain quality in service provision. The risk involved is that, if the profession is captured then we may end in a situation where the entry condition is also used to maintain market return.
- Restriction on advertisements protects incumbency advantages, as somebody who is well established in a profession gets a huge advantage through word of mouth information transmission. Competition authorities in Europe and America have argued that restrictions on advertisements in professions is more burdensome than necessary. Instead, there can be disclosure rules or truth in advertising norms to check flaws in advertising rather than putting a ban on advertising.

- All regulators make certain assumptions about the sector they are regulating, which often creates a regulatory gap such as there are areas or issues, which are not covered. For example, ethical guidelines framed by the Medical Council covers only doctors but leaves out hospitals, which also practice in a similar manner and need to be covered by the guidelines.
- Sectoral regulators should make competition assessment a part of their overall dialogue with stakeholders. Though the starting point for regulation may be considerations other than competition, that does not imply that competition issues disappear.
- Need for greater cooperation between regulators and competition authority. Highlighted various models to give effect to this cooperation. Emphasised that the competition commission should use its advocacy role to participate in the dialogue process carried out by sectoral regulators.

12.2 Following comments were made:

12.2.1 Comments specific to chapter on Interface between Competition and Regulation

12.2.1.1 The revolving door issue that leads to regulatory capture has been addressed in other countries in different manner and the chapter should look at these experiences more closely and see how the regulatory capture issue can be addressed.

12.2.1.2 In the context of working relationship between sectoral regulator and competition authority, the chapter suggests the need for cooperation between the two agencies and presents certain models based on experiences of other countries. However, given our culture, it is doubtful if the cooperation will ever take place, as each regulator may take a rigid stand regarding its role vis-à-vis the competition authority. We cannot expect voluntary cooperation and there has to be legislative mechanisms to ensure cooperation. The law as it presently stands says that when a competition issue arises, the sectoral regulator would consult the CCI, which would give its advise and the sectoral regulator would do whatever it deems fit. This is not expected to lead to a harmonious consultative relationship between the two agencies. Examples of other countries such as UK, Canada, and Sri Lanka were given in this regard. There is a need to advocate for a healthy cooperation between the competition authority and sectoral regulators. The chapter should further develop this recommendation.

12.2.1.3 Regulation is required in cases where competition as a process does not exist. In fact, regulation is a part of competition policy, as the objectives are same: consumer welfare, efficiency gains, and growth of the sector. Though competition as a process does not exist in case of regulated sectors, but regulation is there to bring about competitive outcomes. Hence, competition as a process may not always be possible, but competitive outcomes can still be achieved by having supporting institutions.

12.2.1.4 Highlight cases of regulatory capture by the government as in the case of TRAI, Electricity Regulatory Commissions, where the government puts its own people. These policies distort competition.

12.2.1.5 There are several issues, which come in the realm of sectoral regulation rather than competition policy such as disclosure norms in financial markets. The chapter should highlight the role and scope of competition policy vis-à-vis sectoral regulation and try to reconcile the two, seeing what is the best fit.

12.2.2 Comments specific to chapter on Professional Services

12.2.2.1 There is a distinction between advertising and the right of consumer to get information from service provider. Advertising may be misleading and the existing institutional set-up that we have, is not equipped to check such unfair practices. At the same time, consumers can seek information from service provider, as the law provides for it.

12.2.2.2 The chapter does not assess the impact of GATS on competition in professional services.

12.2.2.3 The chapter should focus on self-regulation aspects of professional services: why self-regulation is required, how it is effective, etc. It is a sector where, services of one professional can only be judged by its peer, hence need for self-regulation. But in order to ensure that people, who are affected and are outside the profession, do not get suspicious about the services provided, self-regulated sectors come out with a set of guidelines or ethical practices.

12.2.2.4 There is a need to push for continuous training of professionals to keep them updated. In US for example, doctors are required to attend conferences and give a record of their activities, or else their licence can be revoked. The chapter should highlight the need for an institutionalised refresher course and training for professionals.

12.2.2.5 The chapter should make a clear distinction between pricing of service and quality of service. The chapter should clearly bring out what it means by 'price' of a service. It should advocate for disclosure norms to provide information about the quality of service.

12.2.2.6 Take up studies of bar councils and medical councils and see how complaints have featured and how these have been handled. There are also chances of self-regulatory bodies failing to take any action, as whatever action they take will be set up against their own fraternity. The chapter should highlight such cases, where self-regulatory bodies failed to take any action.

12.2.2.7 There can be instances of regulatory capture even outside self-regulatory bodies, where a professional tries to protect its own fraternity. Example of Tamil Nadu State Consumer Commission was cited, where a lady doctor was appointed as a member for a period of five years. During her tenure not a single complaint against a doctor or hospital or anyone connected with medial profession succeeded.

Session XIII: Presentation was made by Nitya Nanda on **Competition Abuses at Consumer Level: Study of Selected Sectors**

13.1 Following were highlighted:

- The chapter highlights cases of competition abuses at consumer level by taking up two key services: education and health. In particular, issue of tied selling in health care and education services is surveyed.
- Tied-selling is a genuine concern in both education and health. The incidence of tied selling is more prevalent in private schools and private hospitals. However, concerns of the service providers cannot be ignored as they have reasons to justify the practices.
- Quality of medicines and reliability of testing services are serious issues. There is scope for improvement in enforcement on drug quality. There is need to provide and enforce

service standards for diagnostic testing, as their absence provides an excuse for resorting to tied selling.

- Relatively lower income groups are more bothered about these practices, and such practices are more prevalent in smaller cities and town. This highlights the need for competition policy to be made pro-poor.
- There is need for a regulatory framework or certain guidelines to be framed by local authorities or state governments to check such practices. There is a clear need for regulation at local level. Moreover, consumer forums (courts) need to be encouraged to take up such cases.

13.2 Following comments were made:

13.2.1 There are cases of vertical agreement entered by service providers to exploit consumers. An example was cited where a private hospital entered into a contract with a drug manufacturer to supply drugs to the hospital at prices, which was above the market price.

13.2.2 There are laws/guidelines to prevent such practices but there is a lack of enforcement. The chapter should highlight such provisions in the law and highlight their weak enforcement. There is need for greater public awareness on these issues.

13.2.3 Rather than focussing on prices, the chapter should emphasise on the need to regulate quality of drugs, and prices will automatically follow suit.

13.2.4 Explore the relation between maximum retail price and resale price maintenance.

13.2.5 There is a need to build the capacity of the entire consumer movement to tackle such cases, including consumer groups and consumer courts.

13.2.6 An example was given of a case rejected by the MRTPC on restrictive trade practice undertaken by a private school in Mumbai. The commission upheld the arguments of the school that such a practice was justified to maintain uniformity.

Session XIV: Prabhat Dayal made a presentation on **Interface between State Government Policies and Competition**

14.1 Following were highlighted:

- The chapter focuses on five practices where there is a regulatory failure or the regulatory regime leads to anti-competitive practice.
- Procurement policies of various state governments and how they distort competition between within state units and units from outside the state. Highlighted that such cases often lead to cartelisation among local units as they are protected from outside competition.
- State Government Excise Policy for Liquor. Highlighted differences in the policies followed by various state governments and its impact on competition, consumers and government revenues. Cited the example of Rajasthan, where the excise policy of the government has created monopoly of liquor operators, which has proved harmful to consumers and has also resulted in loss of revenue to the state government.
- Cited anecdotal cases of operation of truck operators' cartel and their impact on the business.

- It was mentioned that it is difficult to get evidence on existence of bid rigging in construction. However, such cases exist, as is highlighted in a statement of the Minister for Public Works, Government of Rajasthan, where the Minister suggested taking measures to break the pool of contractors.
- Cited examples of regulatory failures in services provided at local level such as cartelisation of auto/taxi operators, below standard services provided at gymnasium, beauty parlours, swimming pools, etc.

14.2 Following comments were made:

14.2.1 The chapter should mention about the efforts made by the Ministry of Food Processing Industries, Government of India to formulate model excise law for the states. There should also be mention of entry barriers faced by liquor manufactures, and trade policy followed by various state governments.

14.2.2 State government procurement policy started with the encouragement of small-scale industries and was expanded to protect local units. Some of the states have dispensed with these practices. The chapter should take such examples and show how these states have benefited in terms of say, improvement in quality of products, increase in production, improvement in the competitiveness of local units and make a comparative analysis. This may alternatively be suggested as an issue for further research.

14.2.3 In bid rigging, highlight the case of e-Procurement policy followed in Andhra Pradesh, which has helped a great deal in eliminating such practices, which were quite rampant earlier and has brought transparency in the bidding process.

General Comments

Following general comments were made for the project report:

15.1 The report should clarify: What is the meaning of competition? Can the definition of competition be uniformly applied across all industries? Is competition a process to an end, or is it an end in itself? What is good about competition and what is bad about it? What is the meaning of a functional competition policy?

15.2 Identify the process of how competition issues relating to a particular sector would be addressed, especially in those sectors where there is a sectoral regulator. What would be the role of sector-specific agencies with respect to competition issues? How will CCI consider such cases? The chapters should also highlight what advocacy role, the CCI can undertake to get better policy reforms.

15.3 To ensure functionality, there should be consistency between competition policy and all other policies of the government. Further, there are various other Acts (sectoral regulations, general regulations) and the report should identify to what extent is the Competition Act in conflict/tandem with these other Acts.

15.4 Competition authority and other sectoral regulators should be technically competent. The report should identify the skills required of a competition agency and put these upfront to

highlight that to effectively implement the competition law, the competition commission must possess these skills.

15.5 Each chapter should mention how it fits with the overall objectives of the project.

15.6 Certain chapters, where there are similar issues, can be clubbed together, as they might have similar solutions. For example, sectors where there was earlier public sector dominance and now with entry of private sector, the industry structure has changed, may be clubbed together.

15.7 With unfair trade practices removed, CCI would face a major challenge to get the public buy-in and in creating a public image. This would make its task of dealing effectively with non-consumer issues more difficult. Need to explore how CCI can create a public image. The chapters on competition abuses at consumers level and state government policy highlights systemic issues, which the CCI can take up to create a public image.

15.8 The issue of Development Policy vs Competition Policy is coming up and this needs to be further explored.

Closing Session

- In trying to identify what is a functional competition policy, the review meeting has helped in identifying what it is not, and that competition policy cannot solve variety of problems. There is an interface with other government policies, especially in various sectors. Furthermore, there are other objectives that may supersede the objectives of efficiency and consumer welfare.
- Following structure was proposed for the project report:
    - First section comprising of chapters on Evolution of Competition Policy and Law; The Approach of Competition Act, 2002; M&As and Implications for Competition; and Cross-border Issues and Competition Act
    - Second section comprising of chapters on Interface of Competition Policy objectives with other government policies (both central as well as state governments); interface between Competition and Regulation; interface between Competition Policy and Consumer Welfare
    - Third section comprising of sectoral case studies highlighting complementary/ conflicting role of sectoral policies with competition policy. Some of the chapters can be linked together in terms of the general point that is being illustrated and the role of competition policy that is visualised within the overall sector.

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