

# Draft National Competition Policy 2011

## Foreword

The Ministry of Corporate Affairs constituted a Committee for framing the National Competition Policy and related matters (Committee), under the Chairmanship of Shri Dhanendra Kumar, Former Chairperson of Competition Commission of India. Other Members of the Committee included Shri Sudhir Mital, Additional Secretary, MCA, Shri Pradeep Mehta, Secretary General, CUTS, Smt. Pallavi Shroff, Advocate, Shri Anand S Pathak, P&A Law Offices, Shri Amitabh Kumar, J. Sagar Associates, Shri G.R. Bhatia, Luthra & Luthra Law Offices, Shri Manas Kumar Chaudhuri, Khaitan & Co and Dr. Navneet Sharma, CUTS Institute of Regulation and Competition.

The Committee noted the earlier steps towards a National Competition Policy (NCP) in India. These included recommendations of the Raghavan Committee, commitment of the Government in the Parliament/ Standing Committee of the Parliament, Planning Commission Working Group on NCP and CCI Advisory Committee on NCP. The Committee noted that the Planning Commission had constituted a Working Group, chaired by Mr. Vinod Dhall, the then Member of the Competition Commission of India in 2007 to recommend, taking into account the best international practices, a set of comprehensive policy instruments and strategic interventions to effectively generate a culture of competition to enhance competition in the domestic markets, to recommend ways of enhancing the role of competition and competitive markets in the government policy making at the central and state levels, and to advise on the most effective and workable institutional mechanism for synergized relationship between sectoral regulators and the CCI. Shri Pradeep S Mehta and Mrs Pallavi Shroff were also members of the earlier Working Group, among others, and Shri Amitabh Kumar was its member-secretary. A gist of the recommendations of the Working Group was incorporated in the 11th Five Year Plan document with the approval of the Cabinet and the National Development Council (“NDC”). The Committee also noted that the Ministry of Corporate Affairs had requested the Competition Commission of India (“CCI”) to draft a consultation paper on a National Competition Policy in 2007. The Competition Commission of India had constituted an Advisory Committee under the chairmanship of Dr. Vijay Kelkar. Shri Pradeep Mehta and Mrs Pallavi Shroff were also members of this Committee, among others, while

Shri Amitabh Kumar serviced the Committee in his role as DG, CCI. The CCI Advisory Committee adopted the Planning Commission Working Group's Report, which was captured in Chapter 11 of Planning Commission's 11<sup>th</sup> Plan Policy Document: (Annexure I of the NCP) adopted by the National Development Council (NDC) in December, 2007. In view of the above and since the basic framework already stands approved by the Government and the NDC, the principles of this draft National Competition Policy have been derived from the above Policy Document, juxtaposed in the present economic context.

The other main development since 2007 has been the constitution of the Competition Commission of India (CCI) in 2009 and commencement of enforcement of the provisions of the Act by it. The Committee has noted that the CCI is now fully operational and is undertaking enforcement of all provisions of the Act, including anti-competitive agreements, abuse of dominance, mergers and acquisitions as well as advocacy. The Act, however, provides that while formulating a Competition Policy, the Government may make a reference to the Commission under section 49 (1) of the Act, for its opinion on possible effect of such policy on competition, and may thereafter take further action as it deems fit. Also, the Government made a commitment before the Parliamentary Standing Committee on Finance to bring out a National Competition Policy. The Committee had submitted a draft Policy to the Government. The Ministry placed the draft on its website seeking public comments, and also made a reference to the CCI. The Ministry forwarded all the comments, including those of CCI, received by it to the Committee for its consideration while submitting a final report.

The Committee also noted that the Planning Commission has set up a Task Force on National Competition Policy headed by Shri Pradeep Mehta, under the Steering Committee on Industry chaired by Shri Arun Maira, Member (Industry), Planning Commission, to seek inputs for preparation of the strategy for the XII-Plan to raise contribution of manufacturing in the GDP to 25 percent by 2025. This Task Force also includes Smt. Pallavi Shroff, Shri Amitabh Kumar and Dr Navneet Sharma as Members, among others. Its purpose is to look at the National Competition Policy as part of the new Business Regulatory Framework being developed by the Planning Commission.

The draft National Competition Policy Statement is aimed at laying down an overarching policy framework for infusing competition principles in various statutes, regulations and policies of the Government and promoting a competitive market structure in the economy, thereby unleashing the next wave of economic reforms aimed at making our economy more competitive, boosting productivity and helping in achievement of inclusive growth. This Policy statement also includes some suggestions on the methodology and an illustrative list of parameters for undertaking Competition Impact Assessment of concerned statutes, regulations and policies.

To achieve the aims of the Policy, an institutional framework has also been proposed to undertake, coordinate and oversee its implementation in cooperation with Central Ministries, CCI, State Governments and sub-State authorities.

Adopting and implementing a Competition Policy in the opinion of this Committee would herald a new wave of reform after 1991 unshackling and unleashing the full growth potential of Indian economy and entrepreneurship of our youth. In this connection, the following words of Dr. Manmohan Singh, Prime Minister of India are relevant:

*“On this occasion when you are celebrating two decades of economic reforms and liberalisation, I affirm our commitment to a new wave of reform. I am aware of the fact that much more needs to be done to make our economy more competitive.... I sense a mood for renewal, as I did 20 years ago. We did not disappoint India in the summer of 1991. We will grasp the nettle once again. India stands at the threshold of new opportunities. It is my firm conviction that we can and we will grasp these opportunities for posterity’s sake, we will overcome<sup>1</sup>.”*

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<sup>1</sup> PM’s speech at Business Standards Award 2011 on 26.03.2011

## Draft National Competition Policy Statement of the Government of India

### XIth Plan on National Competition Policy

**“To strengthen the forces of competition in the market, both competition law and competition policy are required. The two complement each other. The competition law prohibits and penalizes anti-competitive practices by enterprises functioning in the market; that is, it addresses market failures. Sector regulatory laws mimic competition in the areas of natural monopolies. Other regulatory laws, such as those for intellectual property or anti-dumping or even capital markets, too have an important interface with competition.”**

**“The aim of the competition policy is to create a framework of policies and regulations that will inform other policies to facilitate competitive outcomes in the market. Competition policy is a critical component of any overall economic policy framework. Competition policy is intended to promote efficiency and to maximize consumer/social welfare. It also promotes creation of a business environment, which improves static and dynamic efficiencies, leads to efficient resource allocation and consumer welfare, and in which abuse of market power is prevented/curbed. It also promotes good governance by restricting rent seeking practices of economic actors”.**

Extract from Para 11.23 of Chapter 11 of the Policy Document: “Inclusive Growth” as part of the 11<sup>th</sup> Five Year Plan adopted by the National Development Council in December, 2007 (Annexure – I to the draft Policy Statement)

([http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11\\_v1/11th\\_vol1.pdf](http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11_v1/11th_vol1.pdf))

## 1. Introduction

- 1.1 India, embarked on a new trajectory of economic liberalisation in 1991. The reforms initiated recognised the need for removing various fetters on trade and industry with a view to unleashing the energy and dynamism of competition in the market. In his Budget Speech, Dr. Manmohan Singh, the then Finance Minister underlined, “*no power on Earth can*

*stop an idea whose time has come” and that “It is essential to increase the degree of competition between firms in the domestic market so that there are adequate incentives for raising productivity, improving efficiency and reducing costs”.*

- 1.2 The last two decades since 1991 have witnessed significant changes in terms of opening of markets, factor mobility and regulatory environment. The Central Government as well as State Governments have enacted/adopted several statutes and policies with intent to promote competition (such as National Transport Policy, National Electricity Policy, National Telecom Policy, National Tourism Policy) The benefits have been substantial and manifested in various segments of economy, e.g. telecom, civil aviation, transport, manufacturing, etc. However, the progress across sectors has been somewhat uneven, and so also the trickledown effects on the common man. Underlying this success is a structural shift in India's growth trajectory. Further, like many other similar economies under transition, there have been residual restraints and anti-competitive impact of policies and laws in several areas of the economy. The time is now ripe for the introduction of an overarching National Competition Policy to realize the full growth potential of the economy.

## **2. Competition, Competition Law, and Competition Policy**

### ***What is competition?***

- 2.1 Competition refers to a situation in a market place in which firms/entities or sellers independently strive for the patronage of buyers in order to achieve a particular business objective, such as profits, sales, market share, etc. By responding to demand for goods and services with lower prices and higher quality, competing businesses are pressured to reduce costs, innovate, invest in technology and better managerial practices and increase productivity. This process leads to achievement of static, dynamic as also resource/allocative efficiencies, sustainable economic growth, development, and poverty alleviation.
- 2.2 Importantly, competition is not automatic, and requires to be promoted, protected and nurtured through appropriate regulatory frameworks, by minimising market restrictions and distortions, and provision of related productive inputs such as infrastructure services, finance, human capital etc.

***What are competition law and competition policy?***

2.3 Competition Policy means government measures, policies, statutes, and regulations including a competition law, aimed at promoting competitive market structure and behavior of entities in an economy<sup>2</sup>. Competition Law is a sub-set of the Competition Policy. The Raghavan Committee had observed that “***Competition law must emerge out of a national competition policy, which must be evolved to serve the basic goals of economic reforms by building a competitive market economy.***”

2.4 The World Trade Organisation (WTO) defines competition policy as:

***“the full range of measures that may be used to promote competitive market structures and behaviour, including but not limited to a comprehensive competition law dealing with anti-competitive practices of enterprises”.***

World Bank also provides a definition of competition policy as:

***“government measures that directly affect the behaviour of enterprises and the structure of industry. An appropriate competition policy includes both:***

- (a) policies that enhance competition in local and national markets, and***
- (b) competition law, also referred to as antitrust or antimonopoly law.”***

2.5 Competition Policy is a broader term which includes all government policies and laws whereas competition law is a specific statute with a predefined mandate to adjudicate on violation(s) of the law. It would be seen that a competition law is a regulatory instrument to check the prevalence of anti-competitive practices whereas a competition policy is a proactive and positive effort to build a competition culture in an economy. To strengthen the forces of competition in the market, both competition law and competition policy are required. The two complement each other. The competition law prohibits and penalizes anti-competitive practices by enterprises functioning in the market i.e. addresses market failures.

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<sup>2</sup> Several agencies such as the World Trade Organisation (WTO), the World Bank, UNCTAD etc have attempted to define the terms competition policy.

WTO (1999), “The Fundamental Principles of Competition Policy: Background Note by the Secretariat”  
Working Group on the Interaction between Trade and Competition Policy WT/WGTCP/W/127

## Competition Policy, Competition Law & Competitiveness

2.6 Competition policy, competition law and competitiveness are three distinct concepts. Competition Law is a sub-set of Competition Policy. Besides encompassing the law, Competition Policy tries to bring harmony in all government policies that affect competition and consumer welfare, such as trade policy, industrial policy etc. Competition does lead to better competitiveness but it is not necessarily the other way. As per Michael Porter, competitiveness means ability of a firm or a nation to compete which is based on the productivity of the entity concerned.

### 3. Need for Competition Policy

3.1 The 2001-Nobel Prize winner Joseph Stiglitz has rightly said:

***“Strong competition policy is not just a luxury to be enjoyed by rich countries, but a real necessity for those striving to create democratic market economies”.***

3.2 National Competition Policy is necessitated as an overarching Policy framework to infuse greater competition across sectors, and unleash full growth potential of the Indian economy. Faced with dynamic market realities, there is a need for promoting economic democracy, the forces of competition and transparency in markets in keeping with the rapidly changing market conditions to ensure the protection of consumer interests, while at the same time protecting the rights of market players to fair competition.

3.3 The need for Competition Policy was also articulated by the Finance Minister in 2009<sup>3</sup> when he underscored that: ***“Competition law alone is not sufficient for realising the gains from greater competition”.*** He further added that: ***“There is need to engage in advocacy with stakeholders, including public institutions, in order to build a culture of competition that is receptive to and supportive of the new competition regime.”***

3.4 Competition has a two-way linkage with various policies of the Government such as: fiscal policy, trade policy, investment policy, labour policy, consumer policy, environment policy, policy on intellectual property rights, sectoral regulatory policies etc.

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<sup>3</sup> Speech of Shri Pranab Mukherjee, Minister of Finance at the National Conference on Competition, Public Policy and Common Man, 16<sup>th</sup> November 2009, New Delhi

- 3.5 While a series of reforms in various sectors have been introduced from time to time and on incremental basis since 1991, the progress across sectors has been relatively uneven. Notably, some sectors have successfully imbibed competition culture; several other sectors still witness weak competition. An overarching policy framework seeks to harmonize these efforts, which would help policy reviews by the concerned authorities in relevant sectors, including at Central, State and Sub-state level.
- 3.6 Barriers, both fiscal and others, at the state level hinder inter-state trade and tend to fragment the national market. A sub-State authority is an extended arm of the Government, and includes municipalities, panchayats, housing boards, universities, professional institutes, roadways, and corporations, which may be created by statutes or other mechanisms but engaged in production, supply or distribution of goods or provision of services. It is desirable to introduce competition principles in the states and sub-state authorities since their policies and practices influence competition in the relevant market significantly, and in fact may have greater and day-to-day impact on the common man.
- 3.7 National Competition Policy has been taken up for consideration in different fora within the Government at different points in time during the last two decades. The Government of India has expressed its intent and views on the need and form of the National Competition Policy on various occasions. An account of various developments so far has been presented in the Annexure–II to this document.

#### **4. Premise of Competition Policy**

- 4.1 The fundamental role of competition policy is to guarantee consumer welfare by encouraging optimal allocation of resources and granting economic agents appropriate incentives to pursue productive efficiency, quality and innovation.
- 4.2 The basic premise of the National Competition Policy is to unlock full growth potential of Indian economy, which among other things could also help in tapping the opportunities arising from the demographic dividend of our country.
- 4.3 It has been observed that certain policies and laws at the state level sometimes tend to artificially segment markets in India. Policies and/or laws, which interface with a large section of the country's population such as agriculture, power etc, may erode substantial

benefits potentially emanating from a national market and the presence of competition across all sectors.

- 4.4 National Competition Policy may also help to promote good governance by transparency, accountability through competing responses and avoidance of rent seeking. It would also have a positive co-relation with other strategic national objectives like employment, R&D efforts and environmental objectives. It also respects the sovereign functions of the State like defence, security, etc, and would seek to encourage competition related measures only in matters having economic impact on the market.
- 4.5 The National Competition Policy is not dogmatic and is mindful of appropriate balance in matters having bearing on social, environmental, security and other strategic issues of national importance; the only thing is that a conscious view may have to be taken but the concerned authorities in balancing the competing considerations. It does not seek *laissez faire* markets, blanket deregulation, disinvestment, welfare cutbacks, and reduced social services. It does not seek to prevent government from increasing expenditure on welfare or levels of government-funded or subsidized social services, or maintaining government ownership of businesses. It explicitly recognizes the need of government intervention in markets through optimal regulation, where it is justified. It seeks to strike a balance, of course with reasons, between competition policy objectives on the one hand, and other policy considerations such as prudential supervision, service quality, social service commitments, safety etc on the other.

## **5. Benefits of Competition Policy**

- 5.1 A review of cross-country literature suggests a positive association between GDP growth and degree of competition. Many empirical studies of select industries in OECD countries suggest that competition enhances productivity at industry level and lowers consumer prices<sup>4</sup>. Enhancement of productivity is caused by the pressure generated by competition on firms to innovate or enhance efficiency of operations both of which are associated with

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<sup>4</sup> 11th Five Year Plan Report on Inclusive Growth,

[http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11\\_v1/11th\\_vol1.pdf](http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11_v1/11th_vol1.pdf)

lower costs. Higher productivity is also associated with enhanced output and therefore increased employment.

- 5.2 Public procurement of goods or services is a key economic activity of governments accounting for 20-30 percent of GDP in India as per estimates available. As per the findings of an OECD survey, savings to public treasuries between 17 percent and 43 percent have been achieved in some developing countries through implementation of competitive procurement processes. In view of the huge public expenditure on procurement including in infrastructural sector, substantial savings can be achieved in India by infusing greater competition, which in turn could release resources for the much needed investment in social sector development in the country.
- 5.3 Studies<sup>5</sup> have outlined positive correlation between good governance and competition. Competition also leads to greater transparency and lower corruption. It has been found that by eliminating barriers to the entry of new firms, competition policy helps to create an enabling environment for entrepreneurial development, an essential pre-requisite for a vibrant economy, and so essential in India's context with its demographic dividend and need of creation of new employment opportunities. The role of competition in promoting inclusive growth is also well recognised, as also in promoting greater efficiency, innovation and productivity. Michael Porter in his book 'Competitive Advantage of Nations' has outlined the role of government as a catalyst which should encourage companies to move to higher levels of competitive performance.
- 5.4 There is extensive economic literature wherein the effects of competition distortions have been brought out. For example, in his book, the Power of Productivity, William Lewis says that one of the main obstacles to economic growth and poverty reduction in many countries is the many policies that distort competition. Similarly in the theory of political economy developed by Anne Krueger<sup>6</sup> and Gordon Tullock<sup>7</sup>, the authors argue that in many market

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<sup>5</sup> Organisation for Economic Cooperation and Development and R. Shyam Khemani, 1998. A Framework for the Design and Implementation of Competition Law and Policy (Washington, World Bank).

<sup>6</sup> Anne O Krueger, "The Political Economy of the Rent Seeking Society", American Economic Review, Vol 64, No 3, June 1974.

<sup>7</sup> Gordon Tullock. "The Economics of Special Privilege and Rent Seeking", Kluwer Academic Publishers, Massachussets, USA, 1989.

oriented economies, especially developing economies, like India, governmental restrictions upon economic activity are pervasive facts of life. These restrictions give rise to a variety of forms and people often compete for the rents.

5.5 OECD<sup>8</sup> has observed that with the globalisation and increasing global integration, a large number of developing countries and transition economies are rapidly adopting competition legislation and are strengthening the existing competition policies (Annexure IV to this draft Statement presents competition policies of select countries). On future trends, OECD noted that:

***“we can conclude that in the near future, competition policies will be the core policies in the countries that pursue constant economic development regardless of their current economic status”.***

In view of the growing global recognition of the strong linkage between competition policy and the pillars of economic development, as evidenced in several countries, the OECD stressed:

***“the building of a competition culture is the most important step to be followed by all countries that are committed to promote a more market based economy”.***

## **6. Objectives of National Competition Policy**

6.1 The National Competition Policy aims to promote economic democracy, achievement of highest sustainable levels of economic growth, entrepreneurship, employment, higher standards of living, and protect economic rights for just, equitable, inclusive and sustainable economic and social development, and supports good governance by restricting rent seeking practices.

6.2 In this background, the National Competition Policy will endeavour to:

- a) preserve the competition process, to protect competition, and to encourage competition in the domestic market so as to optimize efficiency and maximise consumer welfare,

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<sup>8</sup> OECD (2003), The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency. CCNM/GF/COMP/WD(2003)7

- b) promote, build and sustain a strong competition culture within the country through creating awareness, imparting training and consequently capacity building of stakeholders including public officials, business, trade associations, consumers associations, civil society etc.,
- c) achieve harmonization in policies, laws and procedures of the Central Government, State Government and sub-State Authorities in so far as the competition dimensions are concerned with focus on greater reliance on well-functioning markets,
- d) ensure competition in regulated sectors and to ensure institutional mechanism for synergized relationship between and among the sectoral regulators and/or the CCI and prevent jurisdictional grid locks,
- e) strive for single national market as fragmented markets are impediments to competition, and
- f) ensure that consumers enjoy greater benefits in terms of wider choices and better quality of goods and services at competitive prices.

## 7. Competition Policy Principles

7.1 Taking into account the needs of and priorities for promoting a healthy competition culture the principles of the National Competition Policy are:

- (a) **Effective prevention of anticompetitive conduct:** The Competition Act, 2002 prohibits anti- competitive agreements and combinations which have or are likely to have appreciable adverse effect on competition. It also seeks to prohibit abuse of dominant position by an enterprise. There should be effective control of anticompetitive conduct which causes or is likely to cause appreciable adverse effect on competition in the markets within India. The Act establishes the CCI as the sole national body to enforce the provisions of the Act, as also its obligations under Section 49 (3) for competition advocacy. It is envisaged that the implementation of NCP will strengthen competition culture in the market and complement the endeavours of CCI.
- (b) **Fair market process:** Market regulation procedures should be rule bound, transparent, fair and non-discriminatory. Public interest tests are to be used to assess the desirability and proportionality of policies and regulations, and these would be subject to regular independent review.

- (c) **Institutional separation between policy making, operations and regulation** i.e. operations in and regulation of a sector should be independent of the government branch which deals with policy formulation in the sector and is accountable to the Legislature.
- (d) **‘Competitive neutrality’**, such as adoption of policies which establish a ‘level playing field’ where government businesses compete with private sector and vice versa.
- (e) **Fair pricing and inclusionary behaviour**, particularly of public utilities, which could be imbued with monopolistic characteristics and a large part of the consumers, could be excluded.
- (f) **Third party access to ‘essential facilities’**, i.e. requiring dominant infrastructure owners to grant to third parties access (e.g., electricity, communications, gas pipe lines, railway tracks, ports etc) to their infrastructure on agreed terms and conditions and at regulated prices, aligned with competition principles.
- (g) **Public Policies and programmes to work towards promotion of competition in the market place;**
- (h) **National, regional and international co-operation** in the field of competition policy enforcement and advocacy.
- (i) **Where a separate regulatory arrangement** is set up in different sectors, the functioning of the concerned sectoral regulator should be consistent with the principles of competition as far as possible. Also there should be an appropriate coordination mechanism between CCI and sectoral regulators to avoid overlap in interpretation of competition related concerns.

### **Deviations from Principles of Competition Policy**

7.2 Any deviation from the principles of competition should be only to meet desirable social or other national objective, which should be clearly spelt out. The deviations should adhere to the following rules:-

- (a) the desirable objective be well defined,
- (b) should be decided in a transparent and rule bound manner,
- (c) should be non-discriminatory between public & private enterprises
- (d) and also between domestic and overseas enterprises,
- (e) the mode, manner and extent of deviation should have the least anticompetitive effect.

- 7.3 There should be accountability in the process so that deviations are not made without adhering to the accepted principles. As a general rule, any deviation should be an exception with pre-determined tenure. There should be an inbuilt sun-set clause to ensure its continuation only until it is found necessary.

## **8. Government Initiatives**

### **Central Government Initiatives**

- 8.1 The following initiatives are envisaged to effectively generate a culture of competition and to enhance competition in the domestic markets with the involvement of all the stakeholders:
- a. Several existing policies, statutes and regulations of the Government may restrict or undermine competition. A review of such policies, statutes and regulations from the competition perspective shall be undertaken with a view to removing or minimizing their competition restricting effect.
  - b. Proposed policies, statutes or regulations that affect competition should be subject to Competition Impact Assessment, as outlined in subsequent paragraphs.
  - c. Where a regulatory regime is justified, the principles of competition would be taken into account in the regulation. Regulation needs to be diluted progressively as competition becomes effective in the regulated sector.
  - d. The competition authorities need to be functionally autonomous and financially independent.
  - e. In order to ensure effective competition, third party access to essential facilities in the infrastructure sector owned by dominant enterprise on reasonable and fair terms should be provided.
  - f. Incorporate competition clauses in bilateral and regional trade agreements, which will go a long way in preventing anti-competitive behaviour and potential anti-competitive cross-border conduct.
  - g. Ministries/Departments which have set up regulatory authorities should consider rationalizing their manpower.
  - h. The Government will encourage all Departments/Ministries to set up an in-house cell to undertake Competition Impact Assessment of various policies, statutes, regulations/rules

enforced by them. The in-house cell in a Department/ Ministry will be headed by a senior officer, not below the rank of Joint Secretary of the Ministry/ Department concerned. The head of in-house cell may be mandated with responsibilities: (a) to carry out Competition Impact Assessment of the policies and statutes administered by the Ministry/Department, (b) aligning public procurement regulations and practices with competition principles, etc.

### **State Government Initiatives**

8.2 The process of economic reform is incomplete unless it permeates to the level of State Governments. The initiatives at the State Government level would require undertaking pro-competition reforms keeping in mind the principles of the National Competition Policy. There are many economic areas of state legislations, regulations, policies and practices that may impact or inhibit competition in the markets. The following initiatives are envisaged:

- a. The State Governments may undertake a review of existing policies, laws or regulations from the competition perspective and also undertake a Competition Impact Assessment of proposed policy, law and regulations before these are finalised.
- b. The concerned Departments of the State which have set up regulatory authorities may consider rationalising their manpower.
- c. The State Government may encourage all their Departments/Ministries to set up similar in-house cells to undertake Competition Impact Assessment of various policies, statutes, regulations/rules enforced by them.

### **Sub-State Authority Initiatives**

8.3 A sub-State authority is an extended arm of the Government. It has wider connotation and includes municipalities, panchayats, housing boards, universities, professional institutes, roadways, corporations, etc. created by statutes engaged in production, supply or distribution of goods or provision of services. The following initiatives are envisaged:

- a. The statutes, laws, procedures which govern the sub-State authorities may be reviewed so as to align them with the broad principles of the National Competition Policy.

- b. Future policies, rules, regulations, etc. may be subjected to a Competition Impact Assessment.
- c. State Government may encourage sub-State Governments to set up similar in-house cells to undertake Competition Impact Assessment of various policies, statutes, regulations/rules enforced by them.

## 9. Oversight Measures

9.1 Institutional arrangement to oversee implementation of the NCP: The Government has already set up the Competition Commission of India and the Competition Appellate Tribunal to enforce competition laws. To further infuse the principles of competition, enhance the role of competition and competitive markets in government policy making at the central and state levels and promote competition culture in the market place, the Government will establish and resource an agency, the National Competition Policy Council.

9.2 The National Competition Policy Council will *inter alia*:

- (a) Facilitate and provide technical assistance to the in-house cells of different government departments/ministries at the Central and state governments in undertaking competition assessment of the policies, laws, regulations and practices under their purview.
- (b) Encourage consumer movement in implementation of the National Competition Policy by building their capacities and strengthening their resource base;
- (c) Encourage formulation, adoption and wide dissemination of Competition Policy Principles in all ministries, departments and bodies of the central government, state, sub-state governments, business and cooperative sectors to increase representation, accountability and transparency.
- (d) Undertake, or get undertaken through expert agencies, sectoral studies or reviews in accordance with transparent procurement principles, and make recommendations for fostering policies and practices that increase competition in the concerned sector.
- (e) Undertake measures to build capacity of government departments, ministries and other stakeholders.

- (f) Formulate an incentive scheme under which financial grants will be given to State Governments linked to the progress in aligning their policies and laws with the principles of the National Competition Policy.
- (g) Take measures to create public awareness and undertake advocacy regarding NCP, among various stakeholders, including consumer organizations.

9.3 Competition Impact Assessment: It has been envisaged that the NCPC will work with and assist government departments and ministries in undertaking Competition Impact Assessment to see if any anti-competitive effect is exerted by a provision in the law/regulation/ and policies, enforced by them. An illustrative list of parameters for undertaking Competition Impact Assessment is enclosed at Annexure–III. The National Competition Policy Council will facilitate development of a Manual for undertaking Competition Impact Assessment suited to the local context.

9.4 As recommended in the XI Five-Year Plan document approved by NDC, the National Competition Policy Council should be autonomous in its functioning. For this purpose it should be provided secretarial assistance and adequate funding. The Council should be appropriately positioned in the Government, to enable it to best discharge its role of monitoring progress of the implementation of the National Competition Policy.

9.5 Following from the decision of the National Development Council (XI Five-Year Plan document, para 11.31):

*“Given the wide canvas of NCP, a suggestion has been made by the Working Group on Competition Policy for setting up an institutional arrangement for monitoring the progress of the implementation of the policy. A small and compact Competition Policy Council of about 25 members could be set up which would be advisory, nonstatutory and autonomous in its functioning and be headed by an eminent non-official person and comprising key officials from economic Ministries/Departments, and non-officials from media, academia and civil society. The task of the Competition Policy Council would be to review the progress in the implementation of NCP such as reviews of policies, regulations and practices, and the competition impact assessment of new laws, regulations and policies.”*

it is recommended that a National Competition Policy Council (NCPC) may be constituted as enumerated in the above decision, with appropriate involvement of CCI, Ministry of Finance, Planning Commission, key economic Ministries. Ministries/ Departments concerned with sectoral regulations and eminent technical experts as also members of civil society. The Council should be able to undertake competition assessment of various existing and proposed laws, regulations and policies of various Ministries/ Departments, in association with their in-house competition cells, and wherever needed, enlist the support of external research institutions, think-tanks, experts, consumer organization etc, and help in building up capacity. Several parameters for undertaking such competition assessment have been enumerated in Annexure III.

- 9.6 The task of the National Competition Policy Council would be to monitor the progress in the implementation of the National Competition Policy such as reviews of laws and policies, and the competition impact assessment of both existing and new laws and policies and it would recommend the release of financial incentives to the State Governments based on the progress in the implementation of the policy.
- 9.7 Similarly as decided by the NDC in XI Five-Year Plan, and as mentioned earlier, it is envisaged that an incentive scheme may be instituted under which financial grants may be given to State Governments linked to the progress in aligning their policies and laws with the principles of the National Competition Policy. The grants could be released based on recommendations received from the National Competition Policy Council regarding the progress made by the various State Governments.

## **Coordination between the Competition Commission of India & Sectoral Regulators**

### **10.1 Introduction**

- 10.1.1 Competition law seeks to promote efficient allocation and utilisation of resources, which are usually scarce in developing countries. A competition law lowers the entry barriers in the

market and makes the business environment conducive to promoting entrepreneurship. It also ought to be acknowledged that each sector has its own set of issues and problems unique to them and efficient management of sector specific issues/problems at a micro level is equally critical in ensuring effective competition in the market.

10.1.2 Regulations are public constraints on market behaviour or structure. They usually refer to a diverse set of instruments by which governments set requirements on businesses and citizens<sup>9</sup>. Regulations can be categorised as under:

(i) Economic Regulations – which intervene in market decisions such as pricing, competition and entry/exit.

(ii) Technical Regulations: which regulate the technical aspects which are distinct and unique to the sector.

(iii) Social regulations – which protect public interest such as health, safety, environment.

(iv) Administrative regulations – administrative formalities through which government collects information and intervenes in individual economic decisions.

10.1.3 With regards to economic regulation, the role of sectoral regulators is critical since they generally apply an *ex ante* prescriptive approach while competition authorities, except in the important area of merger review, generally apply an *ex post* enforcement approach. This essentially happens because sector-specific regulators typically engage on a moment to moment basis with the sector they are responsible for and intervene more frequently based on a constant flow of information reporting from regulated entities. At the same time competition agencies generally rely more on complaints and gather information only when necessary in connection with possible infringements of the law.

## 10.2 Regulatory Regime in India

10.2.1 Regulation may be justified or warranted in sectors which have natural monopolies or network industries; more so where a universal service obligation exists. However, regulation

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<sup>9</sup> OECD Reviews of Regulatory Reform: Background Document on Regulatory Reform in OECD Countries, OECD (2004d)

may not be required where these features do not prevail. Such sectors should ideally be left to the forces of competition. Even sectors where regulation is required, it should be competition based or competition driven. One of the objectives of the regulation, incorporated in the sectoral regulatory law, should be to create a competitive market in so far, as this is feasible. As competition in the regulated sectors expands, the regulation should hopefully become lighter and ultimately economic regulation may become no longer necessary. Therefore, sunset clause based on considered timelines appropriate to the regulated sector may be considered in all economic regulatory laws so as to leave the industry to market forces once effective competition is achieved.

10.2.2 The objective of a sectoral regulator is to provide good quality service at affordable rates, but the promotion of competition and prevention of anticompetitive behaviour may not be high on its agenda or the laws governing the regulator may be silent on this aspect. Besides, a sectoral regulator may not have an overall view of the economy as a whole and may tend to apply yardsticks which are different from the ones used by the other sectoral regulators. In other words, there is a possibility of the lack of consistency across sectors as regards competition issues. On the other hand, the CCI, which is expected to have developed the core competence, expertise and capacity in competition related issues, will be able to apply uniform competition principles across all sectors of economy. Besides, enforcement and penalising violations of Competition Act is the exclusive area of the CCI. Even otherwise, the general principle for economic efficiency would be, whoever can do a thing in best and most professional manner should do it.

10.2.3 The conflicts between CCI and the sectoral regulators could be caused by legislative ambiguity or jurisdictional overlap or legislative omission. Interpretational bias of the bureaucracy involved could further aggravate the conflicts. Conflicts between the two may be generated by the market players and legal arbitrators for obvious reasons. Conflicts are bound to hurt consumers and the uncertainties that go with them can increase investment risks. Conflict resolution by a court of law may perhaps be time consuming, and therefore, be only the last alternative.

10.2.4 The above matter has been addressed in detail in the XI-Plan document (chapter 11, para 11.33) and approved by NDC as below:

*“The interface between the Competition Commission vis-à-vis sectoral regulators is critical. The basic premise to be recognized is that sectoral regulators have domain expertise in their relevant sectors. The Competition Commission, established under the Competition Act, 2002 on the other hand, has been constituted with a broad mandate to deal with competition for which certain very specific parameters are laid down under the Act. A formal mechanism for coordination between the Competition Commission and the sectoral regulators is, therefore, of key importance. Coordination between sectoral regulators and Competition Commission should be made mandatory through suitable provisions in the Competition Act, 2002 and sectoral laws.”*

10.2.5 In essence a framework for an interface between a competition regulator and a sectoral regulator should deliver the following benefits:

- a) appropriately identify issues of concern
- b) ensure appropriate channelisation of various concerns to the appropriate forum and obtaining corrective action at the earliest;
- c) establish a framework that avoids duplication of effort;
- d) conserve the Commission's resources and limit its ambit only to matters of competition; and
- e) promote capacity building and developing expertise both at the level of the competition regulator and the sectoral regulator.

10.2.6 CCI and the sectoral regulators need to cooperate and establish a forum for regular exchange of ideas.

## **11 Review of the NCP**

1. There will be a review of National Competition Policy every five years from the date of its notification.
2. An annual report of the work undertaken will also be submitted by the NCPC to the Government and will be available in the public domain.

3. The reviews by the Ministries/Departments of the Central Government and the other State/Sub-State bodies of their laws, regulations, policies and practices submitted to the appropriate governments will be reviewed annually.

## **12 Conclusion**

The Indian economy today stands at a historic crossroads. The widespread economic reforms programme pursued with consistence and calibration over nearly two decades now, has unleashed unprecedented growth momentum and pushed the development frontiers of the economy. The time has come to undertake the second wave of growth oriented reforms which can help in bolstering economic growth and tap the creative energies of our vibrant entrepreneurial force. The National Competition Policy can help in reaping full growth dividends in various sectors of the economy and respond to the needs and aspirations of our people.

## Consumer Protection and Competition Policy

( Chapter 11, Vol1 of XI Five Year Plan)

### CONSUMER PROTECTION

**11.1.** Promotion of consumer welfare is the common goal of consumer protection and competition policy. At the root of both consumer protection and competition policy is the recognition of an unequal relationship between consumers and producers. Protection of consumers is accomplished by setting minimum quality specifications and safety standards for both goods and services and establishing mechanisms to redress their grievances. The objective of competition is met by ensuring that there are sufficient numbers of producers so that no producer can attain a position of dominance. If the nature of the industry is such that dominance in terms of market share cannot be avoided, it seeks to ensure that there is no abuse on account of this dominance. Competition policy also seeks to forestall other forms of market failure, such as formation of cartels, leading to collusive pricing, division of markets and joint decisions to reduce supply. Mergers and acquisitions also need to be regulated as they reduce competition.

### CONSUMER PROTECTION POLICY

**11.2.** The consumer movement in India is as old as trade and commerce. In Kautilya's Arthashastra, there are references to the concept of consumer protection against exploitation by the trade and retailer with respect to quality, short weight, measurement and adulteration of goods. Yet until the late 1970s, there was no systematic movement in the country for safeguarding the interest of consumers. But now it is widely acknowledged that the level of consumer awareness and protection is a true indicator of development of the country and progressiveness of civil society. The main reason for this is the rapidly increasing variety of goods and services which modern technology has made available. In addition, the growing size and complexity of production and distribution systems, the high level of sophistication in marketing and selling practices and in advertising and other forms of promotion, mass marketing methods and consumers' increased mobility resulting in

reduction of personal interaction between buyers and sellers, have contributed to the increased need for consumer protection.

**11.3.** Protection of consumer rights in modern times dates back to 1962. On 15 March 1962, the Consumer Bill of Rights was proclaimed by the United States President in a message to the Congress. The message proclaimed: (i) the right to choice, (ii) the right to information, (iii) the right to safety, and (iv) the right to be heard. Subsequently, the right to consumer education, the right to a healthy environment and the right to basic needs (food, clothing, and shelter) were added by Consumer International. In India, 24 December is celebrated as National Consumer Rights Day as the Consumer Protection Act, 1986 was enacted on that day. 15 March is observed as World Consumer Rights Day since 1983, when International Organization of Consumer Unions declared it so. In India, 15 March was also adopted as the National Consumers Day and has been observed since then. Another significant day in the history of world consumer movement is 9 April 1985, when the General Assembly of the United Nations adopted a set of guidelines for consumer protection and the Secretary General of the United Nations was authorized to persuade member or law. These guidelines constituted a comprehensive policy framework outlining what governments need to do to promote consumer protection in the following areas: (i) physical safety, (ii) protection and promotion of consumer economic interests, (iii) standards for safety and quality of consumer goods and services, (iv) measures enabling consumers to obtain redressal, (v) measures relating to specific areas (food, water, and pharmaceuticals); and (vi) consumer education and information programme.

**11.4.** These guidelines provided an internationally recognized set of basic objectives, particularly for governments of developing countries, enabling them to identify the priorities and structure of their consumer protection policy and legislation. Subsequently, the guidelines were expanded to include 'sustainable consumption' which was an important subject in the changed social, political and economic scenario. The importance of 'sustainable consumption' is aptly highlighted in Mahatma Gandhi's words, 'the rich must live more simply so that the poor may simply live'. Sustainable development is crucially dependent on sustainable consumption. Article 21 of the Constitution requires the State, inter alia, to protect life, which must be construed as including the right to a

healthy and safe environment. A healthy and safe environment is inalienably linked with sustainability and promotion of sustainable consumption.

**11.5.** The concern in the Indian Constitution for protection and promotion of an individual's rights, and for the dignity and welfare of the citizen makes it imperative to provide for the welfare of the individual as a consumer, a client and a customer. The rights under the Consumer Protection Act, 1986 flow from the rights enshrined in Articles 14 to 19 of the Constitution of India. The RTI, 2005 which has opened up governance processes of our country to the common public also has far-reaching implications for consumer protection.

**11.6.** The consumer protection policy creates an environment whereby the clients, customers, and consumers receive satisfaction from the delivery of goods and services needed by them. Good governance requires efficiency, effectiveness, ethics, equality, economy, transparency, accountability, empowerment, rationality, impartiality and participation of citizens. The concern of consumer protection is to ensure fair trade practices; quality of goods and efficient services with information to the consumer with regard to quality, quantity, potency, composition and price for their choice of purchase. Thus, proper and effective implementation of consumer protection law promotes good governance.

**11.7.** Education is the most powerful tool for the progress of the country and is a social and political necessity. Education helps an individual—as a consumer—in making rational choices and protects him from trade and business-related exploitation. But more is needed for the effective functioning of the national market to create an increased level of awareness of consumer rights, and for this consumers have to be educated about rights and responsibilities through concerted publicity and awareness campaigns. In the awareness campaigns, special emphasis needs to be given to vulnerable groups such as women and children, students, farmers and rural families and the working class. The report of the study on the Consumer Protection Act commissioned by the Comptroller and Auditor General (C & AG) of India and conducted in July– August 2005, brought out that 66% of consumers were not aware of consumer rights and 82% were not even aware of the Consumer Protection Act. In rural areas, only 13% of the population had heard of the Consumer Protection Act.

**11.8.** Standards, which are the essential building block for quality, play a key role in consumer protection. Standards could be on technical requirements (specifications), standard terminology (glossary of terms), good practices (codes of practice) or test methods or management system standards. Developed countries generally rely on management system standards like ISO 9001 (Quality Management System), ISO 14001 (Environmental Management Systems) and hazard analysis and critical control points (HACCP) as an indicator of the ability of an organization to meet quality needs and address environmental concerns. These standards are set generally by governmental or inter-governmental bodies but there are some private initiatives as well, which are widely used such as OHSAS 18000 (Occupational Health and Safety), SA 8000 (Social Accountability) and WRAP (Worldwide Responsible Apparel Production).

**11.9.** Setting standards is not enough for assuring the consumer of quality. For this, governments need to establish 248 Eleventh Five Year Plan conformity assessment and enforcement. The constituents of quality infrastructure are:

- Standardization
- Standard development
- Standard information
- Metrology
- Quality assurance/conformity assessment
- Testing
- Inspection
- Product certification
- Management Systems Certification (ISO 9000/14000/22000/27001/ OHSMS, etc.)
- Regulation and enforcement
- Accreditation

## **CONSUMER PROTECTION IN INDIA**

**11.10.** The Consumer Protection Act was enacted in 1986 based on United Nations guidelines with the objective of providing better protection of consumers' interests. The Act provides for effective safeguards to consumers against various types of exploitations and unfair dealings, relying on mainly compensatory rather than a punitive or preventive approach. The Act applies to all goods and

services unless specifically exempted, and covers the private, public, and cooperative sectors and provides for speedy and inexpensive adjudication. The rights provided under the Act are:

- The right to be protected against marketing of goods and services which are hazardous to life and property
- The right to be informed about the quality, quantity, potency, purity, standard and price of goods and services, as the case may be, to protect the consumer against unfair trade practices
- The right to be assured of access to a variety of goods and services at competitive prices
- The right to be heard and assured that consumer interest will receive due consideration at appropriate fora
- The right to seek redressal against unfair or restrictive trade practices or unscrupulous exploitation of consumers
- The right to consumer education

**11.11.** Under the Consumer Protection Act, 1986 a thre-tier, simple, quasi-judicial machinery has been established at the national, State, and district levels for hearing cases raised by consumers. The Act had been amended in 1991 and again in 1993. A comprehensive amendment was last made in 2002 for making the Act effective, functional and purposeful. The amended Act, inter alia, provides for the attachment and subsequent sale of the property of a person not complying with an order.

**11.12.** Although implementation of the Consumer Protection Act can be viewed as a success, there are still serious shortfalls in achieving consumer welfare because of the deficiencies in quality infrastructure in the country. First, there is a regulatory deficit in many products and services which impact on the health, safety and environment of the consumers and mandatory standards have not been prescribed for such products as electrical and electronic goods, IT and telecom equipment, industrial and fire safety equipment and toys. There is a multiplicity of regulatory/standardization/conformity assessment bodies and proliferation of certification and inspection bodies. At present, the Quality Council of India (QCI) is the main accreditation body for conformity assessment bodies taking up product or system certification or for inspection bodies, and the National Accreditation Board for Laboratories performs the same function for laboratories.

However, there is no compulsion on the conformity assessment bodies, inspection bodies or laboratories to obtain accreditation, thus creating a lack of certainty about the existence of quality products, systems, inspections and laboratories. Laboratory infrastructure is weak in terms of international norms. Quality professionals lack the skills to guide quality improvement efforts in industry. There is apathy among businesses towards standardization in general, and lack of awareness among them about the impact of standards on quality, competitiveness, and profitability. There is absence of consumer demand for quality goods and services primarily because of lack of awareness among them regarding quality issues. In short, there is absence of a quality culture in the country. At a time when tariff barriers are falling worldwide as a result of multilateral trade negotiations and in the context of Foreign Trade Agreements (FTAs), and technical barriers to trade have become more significant as determinants of trade flows, urgent action has become necessary to correct the situation in the country as described above. If the quality of Indian products and their conformity with international standards is to be accomplished by Indian producers, the impulse must be generated from within the country. Nothing can have a more powerful impact on the producers than the demand for quality products by quality-conscious domestic consumers.

## **STRATEGY FOR THE ELEVENTH FIVE YEAR PLAN**

### **Establishment of National Quality and Standardization Authority**

**11.13.** As of today, the Bureau of Indian Standards (BIS), set up under the BIS Act, 1986 functions as the National Standards Body. Apart from the BIS, there are other organizations which are formulating specifications for their own internal use. In some areas, regulators are also prescribing the standards to be observed by the industry concerned. There is need to have a mechanism for the declaration of a harmonized Indian standard in different areas. For this purpose, the establishment of a National Quality and Standardization Authority through appropriate legal framework to ensure uniformity of approach for setting of standards and ensuring regulation of conformity assessment, is necessary. The framework should provide for setting voluntary standards in all areas of economic and social activities, and mandatory regulations in areas that impact on health, safety, and the environment. A national system of conformity assessment and compliance should be established to bring in complete synergy in standardization, conformity assessment and enforcement. In sectors critical to health and safety like food or drugs, infrastructure upgradation should be supported for MSE sectors to attain national/international standards/regulations like GMP/Good Hygienic

Practice (GHP)/HACCP. A National Regulatory System Database should be developed. More specifically, the following are the measures that need to be undertaken:

#### (I) STRENGTHENING REGULATION

11.14. Some of the priority elements that should be considered by the concerned ministries or their agencies (Regulatory Bodies) for strengthening the regulation are:

- Mandatory standards for products which impact on health and safety of the consumer and on the environment such as electrical appliances, electronic, IT and telecom products, medical devices, industrial safety and fire safety equipment, helmets, plastic and other material used for food packaging.
- GHP/GMP/HACCP being made mandatory as a rule under the PFA Rules/ Integrated Food Law for the food industry and for hotels and restaurants.
- Mandatory national standards for compliance by all water agencies—rural or urban.
- Introduction of law for product liability provisions including punitive damages as a deterrent for substandard goods.
- Laying down residue limits for contaminants for raw materials as well as food products.
- Mandatory compliance with Good Agricultural Practices or Good Animal Husbandry Practices (GAHP) by commercial farms.

#### (II) EXTENDING VOLUNTARY STANDARDS INTO THE SERVICES SECTOR

11.15. For consumer protection, voluntary standards should be extended to the area of services, in particular, medical and hospital services, financing and investor services provided by non-banking financial companies, real estate services, e-commerce, and so on.

#### (III) NATIONAL STANDARDS SYSTEM

11.16. The Bureau of Indian Standards (BIS) may be made the national standards body and repository of all voluntary national standards. Wherever voluntary standards are being formulated by

other standards development organizations which are recognized as national (like Indian Roads Congress or Agmark), these may be published as national standards by BIS while these bodies continue to make these standards.

#### (IV) POLICY ON CONFORMITY ASSESSMENT

**11.17.** The policy should be laid down for the government recognizing only one National Accreditation Body for conformity assessment for each area of activity. All conformity assessment bodies should be required to obtain accreditation either from national or international accreditation bodies within a reasonable period. As a general rule, functions of regulation, standardization and conformity assessment should be performed separately. Similarly, there is need to enlarge consumer choice in the matter of certification. Appropriate mechanism would need to be evolved for this purpose.

#### **Setting up of National Consumer Protection Authority**

**11.18.** There is need to deal effectively with deceptive practices, including misleading advertisements. Besides, there would be a gap in legislation to be caused by the proposed winding up of the Monopolies and Restrictive 250 Eleventh Five Year Plan Trade Practice Commission (MRTPC) with respect to unfair trade practices. The gap can be filled in by establishing a National Consumer Protection Authority through enactment of a National Consumer Protection Authority Act.

#### **Enhancing Consumer Awareness**

**11.19.** There is necessity for continuing consumer awareness campaigns on a large scale to sensitize the population on basic aspects such as Maximum Retail Price (MRP), Gold Hall Marking, Indian Standard Institute (ISI) mark on products, and expiry dates. As and when voluntary standards are extended into the services sector or regulations are imposed for mandatory compliance with standards for reasons of health, safety or environment, the content of awareness campaigns would need to be expanded.

#### **COMPETITION POLICY**

**11.20.** The Approach Paper to the Eleventh Five Year Plan recognized the need for creating a competitive environment to stimulate private investment. It emphasized the need for increased

reliance on competitive markets subject to appropriate, transparent and effective regulations. A major objective of the Eleventh Plan is to recommend policies that spur private sector investment while ensuring fair competition by guarding against restrictive business practices.

**11.21.** A review of cross-country literature suggests that there is a positive association between GDP growth and competition. Empirical studies have suggested that competition enhances productivity at industry level, generates more employment and lowers consumer prices. A pro-competitive policy environment has been found to be positively associated with long-term growth. Competition-enhancing policies have pervasive and long-lasting effects on economic performance by affecting economic actors' incentive structure, by encouraging their innovative activities and by selecting more efficient ones from less efficient ones over time. The positive effects of competition are well illustrated by the recent experiences in India in several sectors such as telecommunications, automobiles, newspapers and consumer electronics, where there has been a fall in real prices/tariffs and marked improvement in the quality of goods/services. This experience demonstrates the benefits of ensuring competition in other sectors of the economy.

**11.22.** The reforms initiated since 1991 recognized the need for removing fetters on trade and industry with the view to unleash the competitive energies. The Industrial Policy Statement of 1991 emphasized the attainment of technological dynamism and international competitiveness. It noted that Indian industry could scarcely be competitive with the rest of the world if it had to operate within an over-regulated environment. To enhance competition in the domestic markets and to generate/promote a culture of competition in the country is part of this broader agenda on reforms. The economic reforms undertaken by the government have been generally on a sector by sector basis and the progress across sectors has not been uniform. While some sectors have successfully imbibed a strong competition culture, relatively weak competitive pressure exists in a number of sectors, such as electricity, in India. There are several policies and laws that can have significant bearing on competition. These should be made competition-friendly as far as possible.

**11.23.** To strengthen the forces of competition in the market, both competition law and competition policy are required. The two complement each other. The competition law prohibits and penalizes anti-competitive practices by enterprises functioning in the market; that is, it addresses market failures. Sector regulatory laws mimic competition in the areas of natural monopolies. Other regulatory laws, such as those for intellectual property or anti-dumping or even capital markets, too

have an important interface with competition. The aim of the competition policy is to create a framework of policies and regulations that will inform other policies to facilitate competitive outcomes in the market. Competition policy is a critical component of any overall economic policy framework. Competition policy is intended to promote efficiency and to maximize consumer/social welfare. It also promotes creation of a business environment, which improves static and dynamic efficiencies, leads to efficient resource allocation and consumer welfare, and in which abuse of market power is prevented/curbed. It also promotes good governance by restricting rent seeking practices of economic actors.

**11.24.** During the Tenth Plan period, the Competition Act, 2002 was enacted. The Act established the CCI to eliminate practices having adverse effect on competition, promote and sustain competition in markets, protect the interest of consumers and ensure freedom of trade carried on by other participants, in markets in India. The Competition (Amendment) Act, 2007 passed by the Parliament in September 2007 has incorporated some changes in the Competition Act, 2002 including the establishment of a Competition Appellate Tribunal to hear appeals from the orders of the CCI. Until recently, as the substantive provisions were not notified, CCI was engaged, inter alia, in promotion of competition advocacy and creating awareness about competition issues. This activity will continue, even after the operationalization of the Competition Commission, which should happen soon.

**11.25.** During the mid-term appraisal of the Tenth Plan, it was recognized that there is an urgent need for articulating a National Competition Policy (NCP) in India, which should fully reflect the national resolve to accelerate economic growth, improve both the quality of life of the people of the country, national image and self-esteem. It further noted that NCP would bring about a competition culture amongst economic entities to maximize economic efficiency, protect consumer interests and improve international competitiveness.

**11.26.** The Planning Commission, in the context of the formulation of the Eleventh Plan, constituted a Working Group on Competition Policy with wide representation of professionals from government and non-government organizations. As suggested by the Working Group, there is a need for the government to adopt a broad-based, overarching and comprehensive NCP to promote coherence in the reforms process, to establish uniform competition principles across different sectors and to harmonize all other policies keeping in view the competition dimensions.

**11.27.** The broad objectives of the NCP should be: (i) to preserve the competitive process and to encourage competition in the domestic market so as to optimize efficiency, (ii) promote innovation and maximize consumer welfare, (iii) to promote, build and sustain strong competition culture within the country; (iv) to achieve harmonization in policies, laws and procedures regarding competition dimensions at all levels of governance, (v) to ensure competition in regulated sectors and to establish an institutional mechanism for synergized relationship between the Competition Commission and sectoral Regulators, and (vi) to strive for a single national market.

**11.28.** The NCP should be based on the following principles: (i) there should be effective control on anticompetitive conduct which undermines competition in markets in India; (ii) there should be competitive neutrality or a level playing field among all players, whether these be private enterprises, PSEs or government departments engaged in non-sovereign commercial activity; (iii) the procedures should be rule bound, transparent, fair and non-discriminatory; (iv) there should be institutional separation between policy making, operations and regulation; (v) where a separate regulatory arrangement is set up, it should be consistent with the principles of competition; (vi) third party access to essential facilities on fair terms should be available; (vii) any deviation from the principles of competition should be only to meet desirable social, environmental, developmental or other national objectives which are clearly defined, transparent, non-discriminatory, rule based and having the least competition restricting effect. The above principles of competition should be applicable across all sectors of the economy and be incorporated in policies, which govern them.

**11.29.** Several existing policies, statutes and regulations of the Central Government restrict or undermine competition. A review of such policies, statutes and regulations from the competition perspective (this is referred to as ‘regulatory impact assessment’ in several countries) may be undertaken with a view to remove or minimize their competition restricting effects. Proposed policies, statutes, regulations that impact competition should also include a competition impact assessment through an internal mechanism which should form one of the inputs in any decision-making process in this regard. Regulatory impact analysis should be a precondition for introducing regulatory changes in any sector. Any disinvestment or privatization attempt should take into account the competition dimension. In a globalizing economy, incorporation of competition clauses in trade agreements will go a long way to check anti-competitive behaviour and potential anticompetitive cross-border transactions/mergers having an adverse effect in India.

**11.30.** The initiatives at the State Government level would require undertaking pro-competition reforms, keeping in mind the principles of NCP. There are many economic areas of State policies and regulations that impact or 252 Eleventh Five Year Plan inhibit competition in the market. These restrictions also tend to fragment the national market and undermine the freedom of economic actors. The State Governments should be encouraged to undertake a review of existing policies, laws or regulations from the competition perspective and also undertake a competition impact assessment of proposed policy, law and regulations before these are finalized; while seeking expert assistance of CCI and other expert agencies. Similarly, the statutes, laws and procedures which govern the sub-State authorities need to be reviewed so as to align them with the principles of NCP. All State Governments have, at the instance of CCI, established Nodal Points within their administrations to deal with the subject of competition; the State Governments are encouraged to give these Nodal Points an effective role in this regard.

**11.31.** Given the wide canvas of NCP, a suggestion has been made by the Working Group on Competition Policy for setting up an institutional arrangement for monitoring the progress of the implementation of the policy. A small and compact Competition Policy Council of about 25 members could be set up which would be advisory, non-statutory and autonomous in its functioning and be headed by an eminent non-official person and comprising key officials from economic Ministries/Departments, and non-officials from media, academia and civil society. The task of the Competition Policy Council would be to review the progress in the implementation of NCP such as reviews of policies, regulations and practices, and the competition impact assessment of new laws, regulations and policies.

**11.32.** An incentive scheme could be instituted by the government under which financial grants may be given to State Governments linked to the progress in aligning their policies and laws with the principles of NCP. The grants could be released based on the progress made by the various State Governments on the recommendations received from the Competition Policy Council.

**11.33.** The interface between the Competition Commission vis-à-vis sectoral regulators is critical. The basic premise to be recognized is that sectoral regulators have domain expertise in their relevant sectors. The Competition Commission, established under the Competition Act, 2002 on the other hand, has been constituted with a broad mandate to deal with competition for which certain very specific parameters are laid down under the Act. A formal mechanism for coordination between the

Competition Commission and the sectoral regulators is, therefore, of key importance. Coordination between sectoral regulators and Competition Commission should be made mandatory through suitable provisions in the Competition Act, 2002 and sectoral laws.

**11.34.** Regulation may be justified or warranted in sectors which have natural monopolies or network industries; more so where a universal service obligation exists. However, regulation may not be required where these features do not prevail. Such sectors should ideally be left to the forces of competition. Even in sectors where regulation is required, it should be competition based or competition driven. One of the objectives of the regulation should be to create a competitive market in so far as this is feasible. As competition in the regulated sectors expands, the regulation should ideally become lighter and ultimately economic regulation may not be necessary. Therefore, a sunset clause based on considered timelines appropriate to the regulated sector may be considered in all economic regulatory laws so as to leave the industry to market forces once effective competition is achieved. Any anticompetitive conduct can always be addressed by the Competition Act, 2002.

**11.35.** Successful implementation of competition policy and law largely depends upon its acceptance by the people. Competition advocacy buttressed by good enforcement plays a vital role in securing the willingness and acceptability of a competition policy and law. Competition advocacy can also be looked at as law enforcement without intervention. An important tool of advocacy is the ability of many competition authorities to give an opinion on proposed legislation and public policy on their own, so that the law makers and policy makers consider the competition dimension and give reasons for deviating from them for the benefit of the public. The assistance of CCI and other expert bodies could be utilized for conducting studies in this regard.

**11.36.** The concept and the role of competition are relatively new to the Indian business community. There is, therefore, a pressing need to increase the level of awareness about the benefits of competition and the contribution of the competition law in this respect among the public, more particularly among the business community. The Commission has been given, under the Act, the mandate to generate public awareness; its efforts in this area may be further strengthened. The Commission should formulate, publish and post in the public domain, guidelines covering various dimensions related to competition law for enhancing public awareness. Such guidelines will help enterprises by bringing greater clarity about the provisions of the competition law and the manner of its enforcement. The Commission should also engage in Compliance Education for business.

**11.37.** There is strong commonality between competition policy and law on the one hand and consumer protection policy and law on the other. An effective competition policy lowers entry and exit barriers and makes the environment conducive to promoting entrepreneurship, which also provides space for the growth of small and medium enterprises and consequent employment expansion. Competition law concentrates in maintaining the process of competition between enterprises and tries to remedy behavioural or structural problems in order to re-establish effective competition in the market. The consequence of this is higher economic efficiency, greater innovation and enhancement of consumer welfare. Thereby the consumer experiences wider choices and greater availability of goods at affordable prices. On the other hand, the consumer protection policy and law are primarily concerned with the nature of consumer transactions, trying to improve market conditions for effective exercises of consumer choice. Thus, the two disciplines focus on different market failures and offer different remedies, but are both aimed at maintaining well functioning, competitive markets that promote consumer welfare. The two disciplines are mutually re-enforcing.

## Genesis of Competition Policy in India

### Introduction

As enumerated earlier, the process of economic reforms which had been initiated in 1980s gathered pace and momentum in 1990s. The Industrial Policy Statement of 1991 noted that operating in an over regulated environment was detrimental for competitiveness in the international economy and technological dynamism. There were major complementary policy reforms in the financial sector, especially in banking, stock market and insurance. The same thread ran through other sectoral reforms like in telecom, civil aviation, manufacturing, and other infrastructure sectors where public private partnership (PPP) was introduced in a big way. Alongside, a new competition law was enacted in 2002 and need for a Competition Policy was also articulated by the Government. National Competition Policy has been taken up for consideration in different fora within the Government at different points in time during last two decades.

The Government of India has expressed its intent and views on the need and form of the National Competition Policy at various occasions. At the time when the Government of India was considering to bring in a new competition law, the then Finance Minister, during a debate in Lok Sabha<sup>10</sup> in 1999 informed the House that the Government will come out with a National Competition Policy. Prior to that, pursuant to WTO's Singapore Ministerial Declaration in 1996, which established a Working Group on the Interaction between Trade and Competition to ostensibly propose the adoption of competition laws by member States, an Expert Group was established by the Union Ministry of Commerce in October, 1997 to study the interaction between trade and competition policy in India, including anticompetitive practices and the effect of mergers and amalgamations on competition. In its report submitted in January 1999, the Expert Group suggested enactment of a new competition law and recommended harmonisation of competition principles, competition policy and objectives, and competition law enforcement efforts. This laid the ground for future developments in the direction of ushering in a National Competition Policy.

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<sup>10</sup> Lok Sabha (1999), "Further Discussion on the Insurance Regulatory and Development Authority Bill, 1999", XIII Lok Sabha Debates, Session II (Winter Session), Thursday, December 2, 1999

**A. *Raghavan Committee's Recommendation on National Competition Policy***

Following the Government's resolve to enact a new competition law, a High Level Committee on Competition Policy and Law (the ***Raghavan Committee Report***) was set up, which in its report recognised the need for a National Competition Policy and noted that:

*“An effective competition policy promotes the creation of a business environment which improves static and dynamic efficiencies and leads to efficient resource allocation, and in which the abuse of market power is prevented mainly through competition. Where this is not possible, it requires the creation of a suitable regulatory framework for achieving efficiency. In addition, competition law prevents artificial entry barriers and facilitates market access and complements other competition promoting activities. Trade liberalisation alone is not sufficient to promote competition and there is a need for a separate competition policy.”*

**B.** In 2004, the Common Minimum Programme of the United Progressive Alliance (UPA), also recognised the need for promotion of competition across sectors and noted that:

*“Indian industry will be given every support to become productive and competitive. All regulatory institutions will be strengthened to ensure that competition is free and fair. These institutions will be run professionally.”*

**C. *Standing Committee on Finance (2006-07) Observations***

The issue of a National Competition Policy was considered by the Standing Committee on Finance<sup>11</sup> (2006-2007) of the Fourteenth Lok Sabha while considering the relevant issues in the context of Competition (Amendment) Bill 2006. The Committee made a reference to the Competition Policy and recommended the inclusion of 'state governments', in addition to central government, within the ambit of competition policy provisions.

**D. *CCI Advisory Committee on National Competition Policy (2007)***

The Ministry of Corporate Affairs had asked the Competition Commission of India (CCI) in 2005-06 to draft a 'Consultation Paper on Competition Policy'. Accordingly, an Advisory

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<sup>11</sup> Lok Sabha Secretariat (2006), Forty Fourth Report – Competition (Amendment) Bill, 2006, Standing Committee on Finance (2006-2007) , December 2006

Committee, under the chairmanship of Dr. Vijay Kelkar was set up by the CCI wherein a sub-committee, under the chairmanship of Shri P. G. Mankad, was also set up to finalise a draft 'Consultation Paper'. In the meantime, the Planning Commission Working Group, as referred to in the following para, submitted its report which was accepted by the Planning Commission in 2007. In September 2007, the CCI Advisory Committee decided to adopt the report of the Working Group of the Planning Commission as the "final draft Consultation Paper on Competition Policy.

***E. Planning Commission Discourse on the National Competition Policy (2007)***

The issue has been discussed at the Planning Commission in the context of the Ninth and Eleventh Five Year Plans. During the mid-term appraisal of the Ninth Plan, it was recognised that there is an urgent need for articulating a National Competition Policy (NCP) in India, which should fully reflect the national resolve to accelerate economic growth, improve both the quality of life of the people of the country, national image and self-esteem. It further noted that NCP would bring about a competition culture amongst economic entities to maximize economic efficiency, protect consumer interests and improve international competitiveness. During the Tenth Plan, the Government through the National Common Minimum Programme announced a strong resolve to promote competition in the economy and independent professionally run regulatory institutions. During the Eleventh Plan, a Working Group on Competition Policy submitted its report to the Planning Commission. In addition, the Eleventh Plan Document in chapter 11 made a reference to need for a competition policy. The Chapter 11<sup>12</sup> notes that:

***“To strengthen the forces of competition in the market, both competition law and competition policy are required. The two complement each other. The competition law prohibits and penalizes anti-competitive practices by enterprises functioning in the market; that is, it addresses market failures. Sector regulatory laws mimic competition in the areas of natural monopolies.***

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<sup>12</sup> Extract from Para 11.23 of Chapter 11 of the Policy Document: "Inclusive Growth" as part of the 11<sup>th</sup> Five Year Plan adopted by the National Development Council in December, 2007 ([http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11\\_v1/11th\\_vol1.pdf](http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11_v1/11th_vol1.pdf))

*Other regulatory laws, such as those for intellectual property or anti-dumping or even capital markets, too have an important interface with competition.*

*The aim of the competition policy is to create a framework of policies and regulations that will inform other policies to facilitate competitive outcomes in the market. Competition policy is a critical component of any overall economic policy framework. Competition policy is intended to promote efficiency and to maximize consumer/social welfare. It also promotes creation of a business environment, which improves static and dynamic efficiencies, leads to efficient resource allocation and consumer welfare, and in which abuse of market power is prevented/curbed. It also promotes good governance by restricting rent seeking practices of economic actors. Given the wide canvas of NCP, a suggestion has been made by the Working Group on Competition Policy for setting up an institutional arrangement for monitoring the progress of the implementation of the policy. A small and compact Competition Policy Council of about 25 members could be set up which would be advisory, nonstatutory and autonomous in its functioning and be headed by an eminent non-official person and comprising key officials from economic Ministries/Departments, and non-officials from media, academia and civil society. The task of the Competition Policy Council would be to review the progress in the implementation of NCP such as reviews of policies, regulations and practices, and the competition impact assessment of new laws, regulations and policies.”*

Subsequent to the submission of the Report of the Working Group on Competition Policy, its recommendations, contained in a document titled ‘Inclusive Growth, Vol I, as part of the 11th Five Year Plan, was adopted by the National Development Council in December, 2007<sup>13</sup>.

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<sup>13</sup> Planning Commission (2007), Eleventh Five Year Plan 2007-2012, Vol I – Inclusive Growth.

**F. *The Second Administrative Reforms Commission (ARC) Recommendations (2007)***

The Second Administrative Reforms Commission (ARC), chaired by Dr. M. Veerappa Moily, recommended that:

*“Each Ministry/Department may undertake an immediate exercise to identify areas where the existing ‘monopoly of functions’ can be tempered with competition. A similar exercise may be done at the level of State Governments and local bodies. This exercise may be carried out in a time bound manner, say in one year, and a road map laid down to reduce ‘monopoly’ of functions. The approach should be to introduce competition along with a mechanism for regulation to ensure performance as per prescribed standards so that public interest is not compromised.*

*Some Centrally Sponsored schemes could be restructured so as to provide incentives to states that take steps to promote competition in service delivery. All new national policies on subjects having large public interface (and amendments to existing policies on such subjects) should invariably address the issue of engendering competition.”*

**G. *Committee on National Competition Policy (2011)***

Continuing the pursuit of the core philosophy of promotion of competition across sectors, Ministry of Corporate Affairs, Government of India, vide notification F.No.5/15/2005-IGC/CS dated 8th June 2011, has now constituted the Committee on National Competition Policy and Related Matters (C-NCP) for:

- Framing of a National Competition Policy (NCP)
- Strategy for competition advocacy with government and private sector
- Changes required in Competition Act for fine tuning it and
- Any other matter relation to competition issues

The Committee, after eight meetings, recommended the objectives, principles, initiatives and measures to be taken by the government.

### **Illustrative List of Parameters for Undertaking Competition Assessment**

An illustrative list of parameters, some of which may be considered while ascertaining, if government policies or institutions limit competition may include:

- **Limits on the number or range of suppliers through**
  - Granting exclusive rights for a supplier to provide goods or services
  - Establishing a license, permit or authorisation process as a requirement of operation
  - Limiting the ability of some types of suppliers to provide a good or service
  - Significantly raising cost of entry or exit by a supplier
  - Creates a geographical barrier to the ability of companies to supply goods services or labour, or invest capital
- **Creates and fails to address natural barriers, strategic barriers, regulatory and policy barriers or gender-based barriers**
- **Limits the ability of suppliers to compete through**
  - Limiting sellers' ability to set the prices for goods or services
  - Limiting freedom of suppliers to advertise or market their goods or services
  - Setting standards for product quality that provide an advantage to some suppliers over others or that are above the level that some well-informed customers would choose
  - Significantly raising costs of production for some suppliers relative to others (especially by treating incumbents differently from new entrants)
    - **Reduces the incentive of suppliers to compete through**
      - Creating a self-regulatory or co-regulatory regime
      - Requiring or encouraging information on supplier outputs, prices, sales or costs to be published
      - Exempting the activity of a particular industry or group of suppliers from the operation of general competition law
    - **Limits the choices and information available to customers**
      - Limiting the ability of consumers to decide from whom they purchase

- Reducing mobility of customers between suppliers of goods or services by increasing the explicit or implicit costs of changing suppliers
- Fundamentally changing information required by buyers to shop effectively

**Salient Features of National Competition Policy of Select Countries**

Competition policy is essentially understood to refer to all governmental measures that can have impact on competition, in local and national markets, by directly affecting the behaviour of enterprises and the structure of industry. Competition policy is an instrument for achieving an efficient allocation of resources, technical progress and consumer welfare. It also helps to regulate concentration of economic power detrimental to competition and promotes flexibility in adjusting to the changing economic milieu.

As regards varied functions there are two components of a comprehensive competition policy. The first component refers to a set of governmental measures that enhance competition or competitive outcomes in the markets, such as relaxed industrial policies, liberalized trade policy, conducive trade policy, conducive entry and exit conditions, reduced controls in the economy and greater reliance on market forces. The other component of a competition policy is a competition law and its effective implementation to prevent anti-competitive behaviour by businesses, to rule out abusive market conduct by dominant enterprise, to regulate potentially anticompetitive mergers and to minimize unwarranted government/regulatory controls.

It is but utmost important to seek inputs from the countries that have Competition policy in place before framing a National policy for India. To discuss a few:

**1. EU Competition Policy**

In the UK, two major acts of legislation- the Competition Act of 1998 and the Enterprise Act of 2002 have brought the EC's prohibition system to the UK, changed the name of the old Monopolies and Merger Commission and given it new powers. They have criminalized price fixing, created a specialist appeal and review court for anti-trust cases and eliminated the old "public interest test" replacing it with narrower, effects based "substantial lessening of competition" test. At the same time two major competition policy bodies in the UK – the Office of Fair Trading and the newly renamed Competition Commission have expanded, developed areas of expertise and possibly most adventurous of all they have both been put into the hands of professors of economics.

**Role of Competition policy**

Competition policy is by design both selective and episodic. The vast majority of markets including some that are in fact not very competitive, escape through the net and only a few markets come to be subject of investigation.

The Competition policy is just exactly what one might invent if one thought that markets are, on the whole working fairly well. The selective nature of Competition policy means that it is designed to yield large pay offs from minimal resources. Competition policy - and Competition Commission in particular only swings into operation when serious, egregious problems exist.

**Salient features of Competition policy revolve around:**

**1) Consumer benefits**

The easiest benefit of Competition to quantify is that arising from lower prices and price fixing cases are the obvious place to start an evaluation of competition policy. More broadly and moving beyond price fixing cases in 2000 the Competition Commission in the UK found that the new car prices were 10% too high leading to a customer detriment of about 2 billion pound per year.

As stated earlier competition policy swings into operation only when really serious competition problems are thought to exist and that means that it is in the nature of the policy that there will only ever be a few cases and consequently only a few big winners.

**2) Benefits to Producers**

Competition policy is about insuring that market are and remain competitive. This brings benefits to consumers eventually. However, eliminating anti-competitive practices and dismantling monopoly positions that lead to abuses also benefit firms whose business suffers from these practices and abuses. It is important to recognize that it is businesses large and small who are adversely affected by anti-competitive activity.

No one seriously thinks that Competition Policy ought to provide a safe heaven for small firms just because they are small or that it ought to be used to promote entrepreneurship in some way or another. However, anti-competitive acts that harm other firms ultimately reduce their competitive initiative and their incentives to innovate.

**3) Deterrence effects**

Charm of this is that it is delivered by the Competition authorities even when they are inactive. This is of course a competition policy in action even if the authorities themselves are not actually acting. And, to the extent that firms desist from particular forms of conduct or particular anti-competitive mergers without troubling the authorities, real resource savings

are realized in both the private and the public sector. The joy of deterrence effects is that they are very hard to measure with any confidence.

In a nut shell deterrence effects are basically about everyone knowing the rules of the game and when people who understand the rules are smart enough to discipline themselves to follow these rules, deterrence effects deliver. It is a test of effectiveness of any legal system and of any selective and episodic competition regime that one might want to design – that it is and should be more or less self-policing.

When analysing salient features of any competition policy it is but utmost important to appreciate the fact that open Competition is important as it helps to lower prices and increase choice for the consumers.

The European Commission together with the National Competition Authorities aims to ensure that there is free and fair Competition in the European Union.

**Salient features broadly focus around:**

- 1) Taking action against business practices which restrict competition
- 2) Examining mergers to see if they reduce competition
- 3) Opening Competition in areas previously controlled by State-run monopolies
- 4) Vetting financial support given to companies by EU national governments

**The EU Competition policy focus around protecting the interest of the consumers by ensuring:**

**1) Companies play fair**

In a free market, business is a competitive game. Sometimes, companies may be tempted to avoid competing with each other and try to set their own rules for the game. At times, major player in the game may try to squeeze its competitors out of the market. The European Commission acts as the referee to ensure that all companies play by the same rules.

**2) Examining Mergers**

While companies combining forces can expand markets and bring benefits to the consumers, some combinations may reduce competition and harm consumers.

### 3) Opening up markets to Competition

Services such as transport, energy, postal services and telecommunications have not always been so open to competition as they are today. The European Commission has been instrumental in opening up these markets to competition (also known as liberalisation)

### 4) Monitoring State Aid

It is of fundamental importance that competitors operate on equal basis. Faced with free trade between EU Member States and the opening of public services to competition, national authorities sometimes want to use public resources to promote certain economic activities or to protect national industries. The granting of these resources is known as State Aid. State Aid can distort fair and effective competition between companies in member states and harm the economy, which is why the European Commission monitors State Aid.

### 5) International Cooperation

With increasing globalisation more and more companies, mergers and cartels are international. As a result the activities of the companies based outside the EU may affect Competition within the EU. This has made international cooperation on competition policy essential.

## 2. Australia's National Competition Policy

The implementation of Competition Policy in Australia is done under three institutions.

### *The Australian Competition and Consumer Commission (ACCC)*

The Australian Competition and Consumer Commission (ACCC) was formed on 6 November 1995 by the merger of the Trade Practices Commission and the Prices Surveillance: Authority. Its formation was an important step in the implementation of the national competition policy reform program agreed by the Council of Australian Governments.

The Commission's roles:

An independent statutory authority, the Commission administers the Trade Practices Act 1974 (TPA) and the Prices Surveillance Act 1983 and has additional responsibilities under other legislation. The objective of the TPA, as set out in the legislation, is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection. Under the national competition policy reform program, the TPA has been amended so that, together with relevant State Territory legislation, its prohibitions of anti-competitive conduct apply to virtually all businesses in Australia.

In broad terms, the TPA covers anti-competitive and unfair market practices, mergers or acquisitions of companies, product safety/liability and third party access to facilities of national significance. The Commission is the only national agency dealing generally with competition matters and the only agency with responsibility for enforcement of the TPA and the associated State/Territory legislation.

Under the *Prices Surveillance Act*, the Commission has three pricing functions; to vet the proposed price rises of any business organisation placed under prices surveillance, (b) to hold inquiries into pricing practices and related matters and to report the findings to the responsible Commonwealth Minister and (c) to monitor prices, costs and profits of an industry or business and to report the results to the Minister.

The Commission's consumer protection work complements that of State and Territory consumer affairs agencies, which administer the mirror legislation of their jurisdictions, and the Consumer Affairs Division of Treasury.

The ACCC has a network of offices in all capital cities as well as Townsville and Tamworth to handle public complaints and inquiries. ACCC staff provide guidance to business and consumers on their rights and obligations under the law, but do not give legal advice

### ***The National Competition Council***

The Council of Australian Governments established the Council in 1995 when its members agreed to implement the National Competition Policy. The general role of the Council is to assist COAG with the NCP implementation process. It is a policy advisory body and provides national oversight of NCP. It does not set reform agendas or implement reforms itself, this is the responsibility of the various governments.

Although funded by the Commonwealth, the Council is a national body, with responsibilities to all Australian governments. As a statutory body, the Council is also independent of the executive (political) arm of any government. The Council comprises five part-time councillors drawn from different business sectors and parts of Australia. It is supported by a secretariat of around twenty staff located in Melbourne.

The Council's main specific roles are:-

1. The assessment of Governments' progress in implementing the competition reforms – and recommendations as to the level of competition payments. To share the benefits of competition, the Commonwealth makes substantial financial payments to the States and Territories provided they make satisfactory progress First Tranche Assessment, Second Tranche Assessment , Third Tranche Assessment. The provision of advice on the design and coverage of access rules under the National Access Regime.
2. Undertaking other projects as requested by a majority of Australian governments. (These can include reviews and advice relating to restrictive or anti-competitive legislation, the structural reform of public monopolies, prices oversight, and competitive neutrality).

3. Undertaking community education and communication in relation to both specific reform implementation matters and National Competition Policy generally.

### ***The Australian Competition Tribunal***

The Australian Competition Tribunal is a quasi-judicial review body constituted under the Trade Practices Act 1974. It was originally established under the *Trade Practices Act 1965* and continues under the *Trade Practices Act 1974* ("the Act"). Prior to 6 November 1995, the Tribunal was known as the Trade Practices Tribunal. Prior to November 1995, it was known as the Trade Practices Tribunal, a name dating from its establishment in 1965.

The Tribunal is a review body. A review by the Tribunal is a re-hearing or a re-consideration of a matter and it may perform all the functions and exercise all the powers of the original decision-maker for the purposes of review. It can affirm, set aside or vary the decision.

Thus, the Tribunal's principal functions are:-

- to review determinations of the Australian Competition and Consumer Commission in relation to applications for, and revocations of, authorisations of conduct and arrangements that would otherwise contravene provisions of the Act, and in relation to notices given by the Commission regarding exclusive dealing, and to review decisions of the Minister or the Commission in relation to third party access to significant infrastructure facilities.

Composition of the Tribunal

- The Tribunal consists of a President and such number of Deputy Presidents and other members as are appointed by the Governor-General. A presidential member must be a judge of a federal court.
- Other members must have knowledge of or experience in industry, commerce, economics, law or public administration.
- For the purpose of hearing and determining proceedings, the Tribunal is constituted by a presidential member and two non-presidential members. Currently, all presidential members are Judges of the Federal Court of Australia.

The Tribunal has no staff or physical resources of its own. The funds appropriated by the Parliament for the purposes of the Tribunal are managed by the Federal Court. Registry services and administrative support for the Tribunal are provided by the staff of the Federal Court.

## **3. HONG KONG**

Hong Kong has the Competition Policy Advisory Group (COMPAG) in place. However it does not have a developed Competition Law. The Competition Policy Advisory Group (COMPAG) established in December 1997, is chaired by the Financial Secretary. This body is set up as a high-level and dedicated forum to review competition-related issues which have substantial policy or

systemic implications, and to examine the extent to which more competition should be introduced in the public and private sectors.

COMPAG has also been giving advice to bureaux and departments in reviewing policies and practices from the competition standpoint, and in proposing new initiatives to promote competition in different sectors.

On 6 November 2006, the Government launched a public consultation exercise on the way forward for Hong Kong's competition policy as a move for the introduction of a new cross-sector competition law and the establishment of a Competition Commission. Whilst the Government received supports for the introduction of a competition law, there were serious concerns in the business sector that the new law may adversely affect normal business operations, in particular those of small and medium enterprises. After much deliberations, the Government came up with a bill. On 6 May 2008 a public consultation paper on the detailed proposals for a competition law. The Competition Bill was introduced into the Legislative Council on 14 July 2010.

### **Objective of Competition Policy**

As there is no international standard or consensus on what is the best approach to achieve competition in order to enhance economic efficiency and free flow of trade. Some economies have competition laws which differ widely in scope of control, enforcement mechanisms and remedies available. Other economies shun the legislative route. The choice is heavily influenced by the characteristics, development history and socio-economic background of an economy.

For Hong Kong, a small and externally-oriented economy which is already highly competitive, the Government sees no need to enact an all-embracing competition law. To maintain overall consistency in the application of the competition policy, we provide a comprehensive, transparent and over-arching competition policy framework through this Policy Statement and reinforce this with sector-specific measures not limited to laws.

In the Hong Kong environment, the Government is promoting economic efficiency and free trade through competition by -

- a. **raising** public awareness of the importance of competition for the enhancement of economic efficiency and free trade;
- b. **identifying**, on a sectoral basis, obstacles and constraints imposed by the Government and other public sector entities which limit market accessibility and contestability and compromise economic efficiency and free trade to the detriment of the overall interest of Hong Kong, and removing them through voluntary, administrative, legislative, etc., measures as appropriate;
- c. **initiating** pro-competition measures, on a sectoral basis, in the Government and public sector through administrative, legislative, etc., measures as appropriate;
- d. **encouraging** the private sector to embrace competition and its stated objective of enhancing economic efficiency and free trade through voluntary action;

- e. **supporting** the Consumer Council's work in drawing up codes of practice that promote competition and its stated objective of enhancing economic efficiency and free trade;
- f. **working together** with the Consumer Council to encourage the private sector to adopt pro-competition measures, such as self-regulatory regimes that preserve and enhance free competition; and to monitor and review business practices in sectors prone to anti-competition behaviour;
- g. **establishing** a central repository of competition-related concerns and complaints to facilitate the identification of possible deficiencies and areas for improvement; and
- h. **providing** a dedicated forum under the Financial Secretary (already established and known as the Competition Policy Advisory Group or "COMPAG" in short) to review policy issues related to competition.

## **Implementation**

The Government is committed to pro-actively nurture and sustain competition for the purpose of enhancing economic efficiency and free trade. COMPAG will invite all government entities to adhere to the Statement, propose initiatives for furthering the policy objective, examine the impact of all new proposals on competition and, where appropriate, bring this to the attention of the Executive Council and the Legislature. They are also expected to ensure that all statutory bodies under their charge pay heed to the Statement as well.

The Government calls upon all businesses to cease existing, and refrain from introducing, restrictive practices that impair economic efficiency or free trade on a voluntary basis. Where justified, the Government will take administrative or legal steps as appropriate to remove such practices if necessary.

Alleged restrictive practices in the public and private sectors may be referred to the concerned policy bureau or government department for consideration. Separately, the COMPAG Secretariat will keep track of all referrals and bring these to the attention of COMPAG should there be substantial policy or systemic implications.

## **Guidelines: Statement on Competition Policy**

The essential elements to assess the overall competitive environment are:

- (a) a stable and effective political environment;
- (b) a regime based on the rule of law;
- (c) a free and open macroeconomic environment;
- (d) abundant market opportunities;

- (e) positive policy towards private enterprise and competition;
- (f) positive policy towards foreign investment;
- (g) no foreign trade and exchange controls;
- (h) a transparent investment and tax regime;
- (i) easy access to financing;
- (j) a sophisticated labour market;
- (k) transparent and fair labour and immigration policies;
- (l) a strong physical infrastructure; and
- (m) free flow of information.

Note : The key to competitiveness in a market is the high degree of easiness of entry and exit. When entry and exit barriers virtually do not exist, the incumbent firms will maintain prices close to the competition level. While competition could still exist and may even be intense with few participants in the market, the prevalence of numerous small and medium enterprises could be an illustration of the pro-competition attributes of the business environment in Hong Kong.

#### **4. Competition Policy of Botswana**

The main objectives of Competition Policy of Botswana are to maintain and promote competition, in order to achieve efficient use of resources, protect the freedom of economic action of firms and, as the ultimate goal, to promote consumer welfare. The Competition Policy thus provides a framework for preventing anticompetitive practices and conducts by firms, and creates a business friendly environment that encourages competition and efficient resource allocation.

The Competition Policy in Botswana has highlighted certain measures which include, inter alia, the:

- (i) adoption of liberal international trade and investment policies;
- (ii) repeal or amendment of Government laws and regulations that unjustifiably limit competition, e.g., legislated entry barriers, professional licences, minimum price laws, land policies, and exclusive licensing in certain sectors;
- (iii) access to essential services, e.g. telecommunications and broadcasting, electricity and water;
- (iv) reform of existing public monopoly structures through, amongst other means, privatisation;
- (v) competitive neutrality; and

- (vi) removal of state subsidies that distort competition;
- (vii) separation of industry regulations from industry operations
- (viii) Prohibition of anticompetitive conduct through a comprehensive competition law; and
- (ix) adoption of a comprehensive approach that applies to all government policies affecting competition in all sectors of the economy, taking into account the possible exemption of certain sectors that are of public interest to the economy.

The government identified 62 that required some changes in tune with the National Competition Policy

## **5. MEXICO**

The federal law of Economic Competition (LFCE) came into force in 1993 in Mexico. A comprehensive policy on competition was adopted as a part of the National programme of Economic Competition (PNCE) in 2001-2006, which operationalized the systematic implementation of a competition regime in the country.

Salient features of the competition policy focussed around the realization by the Mexican administration that a regime conducive to foreign investment would stimulate competition and increase access to technology, thereby raising the productivity of investment. The very fact that the Federal competition Commission (CFC) of Mexico has been quite effective in implementing the competition act (as a means to investment and growth) underlines the linkage between the implementation of the competition act of the country and the ability of Mexico to attract investment.

## **6. MALAWI**

The Competition policy for Malawi was approved in 1997. The broad policy objectives focus around:

- 1) Lowering barriers to entry
- 2) Reducing restrictive business practices
- 3) Protecting the consumer

Salient features of the policy focus around four areas :

- 1) Anticompetitive business behaviour ( fixing, collusive tendering or customer allocation and tied sales) aimed at eliminating or reducing competition

- 2) Unfair business practices aimed at taking unfair advantage of consumers
- 3) Market structures that permit abuse by a dominant enterprise
- 4) Government legislation that affect the freedom in the market.

The Government in these backdrops adopted the Competition and Fair Trading Act (CFTA) in 1998. The MALAWI Competition and Fair Trading Commission, entrusted with responsibility to implement the Competition law of the country, however has been operational only since 2005 and the process of competition administration in the country has remained weak with the competition agency struggling to establish itself institutionally.

## **7. JAPAN**

The development of Japanese Competition policy has been one of the most popular agendas in recent years in japan. The most crucial turning point was the launch of the bilateral negotiation called “Structural Impediment Initiative” (SII) in 1989. In that framework, the Unites States requested the substantial reinforcement of Japanese Competition policy so as to rectify the chronic trade imbalance between the United States and Japan.

The most distinguishing feature of traditional Japanese Competition policy in comparison with American and European models is ‘its immersion in overall industrial policy’.

The following enlist a brief summary of Japans current Competition policy:

- 1) The Antimonopoly ACT (1947), estd in 1947
- 2) Competition Authority: Japan Fair Trade Commission (JFTC)
- 3) Formal Action ( per year) : some 30 cases over some 800 enterprises

The three main pillars of Japan Fair Trade Commission (JFTC) are:

- 1) Rigorous enforcement of the Antimonopoly Act
  - a) Effective and prompt actions
  - b) Establishment of the Competition Policy Research Centre in 2003
  - c) International cooperation
- 2) Initiatives by the JFTC in the process of regulatory reform
  - a) JFTC guidelines under the coordination with regulatory authorities
- 3) Active involvement in the consumer policies
  - a) Consumer policies play a key role in “fair and free competition”
  - b) Prompt action to protect consumer rights

Competition policy was a must for Japan as Japan has been a litigation averse society and the Japanese private parties filed only seven antitrust damage suits by the mid-1980s. There are still many institutional barriers to litigation because of the availability of few lawyers and considerable delays in the judicial system. Also, the Government especially the Ministry of International Trade and Industry directly intervened in business conduct in ways that limited competition. There were also many government interventions that are not backed by specific laws.

### **Reform of the Japanese Competition Policy**

The pace of reforming Japanese Competition Policy was accelerated only from the mid-1990s. Although for a country such as Japan macroeconomic issues are important the main problem in Japan is rooted in microeconomics.