



‘ Competition Law & Government’

Dr. Geeta Gouri
Member

Competition Commission of India



Why does Government intervene in markets ?

‘Markets can fail or may not deliver the right outcome’

❖ **To influence Market Outcomes:**

- Addressing externalities- e.g. pollution, congestion etc.
- Using markets to deliver public services.
- Adjusting the outcomes for different groups

❖ **To make markets work more effectively:**

- Setting the market framework
- Protecting competition in markets
- Ensuring that consumers are able to exercise choices.

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How government intervene in markets?

Direct participation

Indirect Participation

Supplier

Buyer

Tax & Subsidies

Policies & Regulations

PSEs

public procurement
for IT, Defence etc.

Tax incentives to some
industries

licensing

Oil & food subsidies

Planning

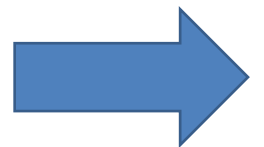
Departmental

Non-Departmental

Procurement: 40% of GDP

PSEs: 20% of GDP

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Applicability of Com. Law on Government Activities

Competition Act, 2002, defines the term "**enterprise**" in section 2 (h) as :

"a person or a department of the Government.....,

but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space"



Applicability of Com. Law on Government Activities

- All the **commercial** activities of the government, **excluding the sovereign function**, come under the purview of Competition Act, 2002
- No distinction between PSEs and Private Enterprises under the law...
- Provisions related to Anti-Competitive Agreements, Abuse of Dominance, Combinations equally applicable to PSEs
- Equality of PSEs and private enterprises enshrined in Article 299 of Constitution of India - Competition Act, 2002 further strengthens this mandate
- Activities of PSEs carrying out functions of the State may come under Article 300 of the Constitution of India i.e. sovereign functions – exempted by Completion law .

'Competitive neutrality' enshrined under Indian competition law



Government as an enterprise...

Hon'ble High Court of Delhi in its judgment in writ petition(C) 993/2012 filed by Govt. of India through Railway Board against Competition Commission of India and Others.

Hon'ble High Court has highlighted the clear distinction between sovereign and non-sovereign functions of the Government as under:-

- *Primary, inalienable and non-delegable functions of the Government are to be considered as sovereign functions of the Government under Section 2(h) of the Competition Act, 2002.*
- *Welfare, commercial and economic functions are not sovereign functions and state while discharging such functions is as much amenable to the jurisdiction of CCI as any other private entity discharging such functions*
- *Running of Railways is a business activity that comes within the purview of Section 2(h) of the Competition Act, 2002 and hence it is an enterprise*

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*'in the premises, it is held that only primary, inalienable and non-delegable functions of the constitutional government should qualify for exemption within the meaning of 'sovereign functions' of the government under section 2 (h) of the Competition Act, 2002. **welfare, commercial and economic activities, therefore, are not covered within the meaning of 'sovereign functions'** and the State while discharging such functions is as much amenable to the jurisdiction of the competition regulator as any other private entity discharging such functions'*

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Few Governmental Activities Which are Prone to Raise Competition Concerns

- Policies which governs the entry and exit of firms or individuals into or out of markets;
- Policies which controls price or production levels;
- Policies which restricts the quality, level or location of goods and services available;
- Policies which restricts advertising and promotional activities;
- Policies which restricts price or type of inputs used in the production process;
- Policies which confers significant costs on business; or
- Policies provides advantages to some firms over others



Key points Policy makers have to keep in mind

The aim for policy makers should be to minimise the distortions to markets, subject to achieving the desired policy objective. While formulating policies, they should consider the following questions:

- **Does the intervention affect the possibility of entry and exit in a market ?** – *for example by granting exclusive rights to supply, limiting the number of suppliers, or significantly raising the cost to new firms of entering the market?*
- **Does it affect the nature of competition between firms in a market?**- *either through direct restrictions (such as price or product regulation) or by reducing the incentive for firms to compete strongly?*
- **Does it affect the ability of consumers to shop around between firms and exercise choice?** – *for example, does it raise costs of switching?*

When a proposed intervention is likely to adversely affect competitive markets, policy makers should consider possible alternatives which might be less restrictive of competition.



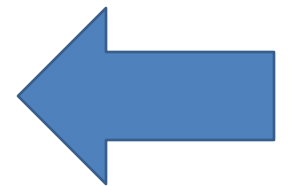
Government, PSEs and Competitive Neutrality

‘Competitive neutrality occurs where no entity operating in an economic market is subject to undue competitive advantages or disadvantages’ - OECD

What is Competitive Neutrality?

Government businesses operating in a market should not enjoy competitive advantages simply as a consequence of their public ownership.

Government can affect markets in wide variety of ways





Benefits of Competitive Neutrality

- It eliminates potential resource allocation distortions arising from the public ownership of significant business activities.
- It encourages fair and effective competition in the supply of goods and services.
- It helps orient pricing decisions of government businesses comparable to their private sector competitors.
- It provides a level playing field to the private sector.
- It helps in establishing competitive pricing practices and improved quality of government services.

The government is only required to apply the principles of competitive neutrality to the extent that the benefits outweigh costs.



Competitive Neutrality Issues...

- ❖ Monopoly power and exclusive rights conferred to PSEs- postal service, railways, coal mining, Oil majors Preferential access to resources, such as land, and other raw materials
- ❖ Purchase price preference in public procurement
- ❖ Subsidies:
 - ❖ i.e subsidies to oil PSEs but not private sector forcing them to stop operations
- ❖ Concessional financing/ Low cost capital- provided via state-controlled financial institutions, at below-market interest rates



Competitive Neutrality Issues ...

- ❖ Implement multiple and sometimes conflicting objectives while operating commercially.
 - ❖ Universal service obligations, charge lower tariffs
- ❖ Obligations to undertake non-commercial activities
- ❖ Public sector accountability; wage structures- long term contracts



Competition Law and Competitive Neutrality : CCI's role

Contributing towards level playing field for PSEs and private enterprises:

- Effective enforcement against both PSEs & private enterprises in a competitive neutral manner
- Advocacy for competitive neutral policies –
 - Alerting policy makers on market competition distorting policies
 - Conduct competition assessment of such policies against social objectives
 - Advocating regulatory reforms in liberalized sectors



Balance of Competitive neutrality and Social objectives

Competitive neutrality essential to promote fair competition in the markets, but sometimes government may deliberately depart from competition neutrality:

- ❖ To maintain public service obligations
- ❖ To use PSEs as a tool for industrial development
- ❖ To protect fiscal revenue



Advocacy mandate under Competition Law

- Under section 49 (1) of the Competition Act, Central/State Govt. may seek CCI's opinion on policies.
- To undertake measures for promotion of competition advocacy, creating awareness and imparting training about competition issues u/s section 49 (3) of the Act.



CONCLUSION

- Open competitive markets are the engine of economic growth
- Competition Law is therefore an important institutional pillar for a thriving market economy as competitive pressures hone production efficiency and stimulate product and process innovation fundamental to competitiveness and economic growth.



THANKS

Promoting Fair Competition for the Consumer!

Website : www.cci.gov.in

Disclaimer: Views are personal

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