

**Competition Commission of India**



# **COMPETITION AND REGULATION**

*by*

**K.K. Sharma**  
**Advisor (Law)**

**Seminar on Competition Policy and Law**

**Bengaluru, 30-01-2009**



# Rationale

- ◆ Resources are limited/ finite
- ◆ Economic well being
  - Better off societies
  - Worse off societies
- ◆ Society should maximize welfare
  - Allocative efficiency
  - Productive efficiency
  - Dynamic efficiency
- ◆ Welfare maxima limited by resources



# Benefits of Competition

- ◆ Promotes efficiency and innovation
- ◆ Ensures abundant availability of goods and services of acceptable quality at affordable / lower prices
- ◆ Offers wider choice to consumers



# Perfect Competition

- ◆ Products are homogenous
- ◆ Perfect information- symmetry
- ◆ Large number of buyers and sellers
- ◆ Quantity of product bought/sold relatively so small as not to affect market price
- ◆ Free entry and exit



# Reality

- ◆ Can these factors and, therefore, perfect competition exist?
- ◆ Need free/complete competition exist?
- ◆ Need there be really a free entry to the market?
- ◆ Or should there be some check on entry?
- ◆ If entry is not free, how perfect competition would be achieved?



# How much Competition

- ◆ Should a brain surgery be decided by auction or bidding process?
- ◆ Should an accountant be hired by open tendering process? without any check on the inputs which go into the making of an accountant
- ◆ Should an engineer be hired to build a bridge without any assurance of his competence?
- ◆ Will you be happy to sent your child to a school where the teachers are appointed without regard to their quality through some openly known process



# Natural Monopolies

- ◆ How many NG gas/ water pipes, sewage pipe, electric/telephone/internet wire connection?



# Standards

- ◆ How many electric plugs you want to have to charge your mobile or other electric gadgets?
- ◆ Should some products be allowed into the free market even if they pose health hazards?
- ◆ Would you like to change your mobile hand set every time you choose a SIM card from different competing service providers?





# Access

- ◆ Whether the society has all the resources, in enough quantity, to cater to needs of all?
- ◆ Or do we need a check on consumption, so that access is not denied to many?
- ◆ Should a villager on a remote island in Lakshadweep not have access to a post card as delivering it to him is uneconomical?
- ◆ Should society ensure that many of those who cannot afford should have basic minimum needs?



# Civil Society

- ◆ If there are buyers/sellers for some product/services which are not in conformity with the collective conscience of the civil society, should they be allowed into the free market?
  - Indian Penal Code (IPC)
    - S 371 – habitual dealing in slaves
    - S 372/373 – selling/buying minors for ...
    - etc...



# Right or Left

- ◆ Should Competition, essential in a free market economy, be allowed a free run?
- ◆ Are free markets free enough to escape failures?
- ◆ Is world really divided in capitalist/socialist blocks?



# Natural Progression

- ◆ Evolution of the Competition law and regulations
- ◆ Mind set
- ◆ History of regulations from pre-independence till date
- ◆ Salt movement
- ◆ Essential commodities
- ◆ Is regulation not as old as civilization?



# Present Regulatory Status-I

- ◆ BIS/Agmark/FDA ; safety, public health
- ◆ Networking industries-last mile connectivity
  - power, telephone (wire network), Banking/Credit card (is it? One India-One bank), water supply/sewage, natural gas supply, cable operators, internet etc.



# Present Regulatory Status-II

- ◆ Areas needing to have minimum standard guarantor e.g. education (AICTE, CBSE, ICSE , UGC etc. ), medicine (MCI), Law (BCI), Chartered Accountancy (ICAI), Cost and Works Accountancy (ICWAI), Company Secretaries (ICSI), Other Professional bodies, UGC teachers (NET)
- ◆ Products which are in limited quantities and have to be made available for vast populations



# Technology Dependence

- ◆ Can technology provide freedom from this mind set and duplicity of services – more so with regards to last mile connectivity
- ◆ Letters- Telegram- Telex –Fax- Email
- ◆ Fixed line network to CDMA technology / wireless
- ◆ Electricity/ Energy/ Heat etc. may be the next frontiers



# Economic Regulations

- ◆ Are constraints on market behaviour or structure by public authorities

## Examples:

- laws, subordinate legislation, formal and informal orders, regulations issued by institutions created by the government





# Need of Sector Regulators

- ◆ Technical expertise necessary to determine access, maintain standards, ensure safety, determine tariffs, ensure Universal Service Obligation (USO)
- ◆ Structural compulsions
  - natural monopolies-economies of scale/scope
  - network industries



# Sector Regulator

- ◆ 'In-market'
- ◆ Usually ex-ante
- ◆ Sets 'rules of the game'
- ◆ Entry conditions, technical details, tariff, safety standards, access, etc
- ◆ Direct control on price/quantity/quality
- ◆ To prevent inefficient use of resources, meet USO and protect consumers



# Commonly Present

- ◆ Sectors having natural monopolies
- ◆ Sectors needing USOs
- ◆ Network industries
- ◆ Infrastructure sectors
- ◆ Utilities

Examples:

Water, Electricity, Telecom etc.



# Competition Authority

- ◆ 'Off-market' regulator
- ◆ Usually *ex-post*
- ◆ Referee
- ◆ Relies on market forces
- ◆ Independent and objective – less prone to influence of market players 'capture'
- ◆ Specialized forum for deciding competition issues
- ◆ Applies competition principles uniformly across all sectors



# Competition Oversight

- ◆ Maximum impact with minimal intervention
- ◆ Uniform competition outcomes across sectors
- ◆ Independent and objective – not prone to influence of incumbents



# Synergy

- ◆ Sectoral regulations prevent inefficient use of resources and protect consumers
- ◆ Competition law aims at prevention of market power and thus ensures efficiency and enhances consumer welfare



# Comparison

- ◆ While sectoral regulation is ex-ante, competition law is, mostly, ex-post
- ◆ Competition law consists of negative commands while industry-specific regulations provide positive commands
- ◆ Sectoral regulations are more direct and concerned with structure while competition law is indirect and more concerned with conduct and behaviour



# Overlap / Conflict

Can arise on account of

- ◆ Conflicts in Laws (legislative ambiguity/overlap/omission)
- ◆ Interpretational bias (bureaucratic bias)
- ◆ Conflicting approaches – market vs. regulation. Regulatory intervention itself may generate or protect anti-competitive situation
- ◆ Inevitable in the absence of clear delineation of jurisdiction
- ◆ Spurred by turf 'warriors'
  - Market players
  - Enforcers
  - Legal arbitrators





# Harms of Overlap / Conflicts

- ◆ Loss of neutrality – “regulatory capture”
- ◆ Delay in delivery – “forum shopping”
- ◆ Adverse effects on investments, mergers & acquisitions
- ◆ Lessening of effective competition resulting in decrease in productivity, efficiency, economic growth and consumer welfare



# Possible Solutions

- ◆ 'Sunset' clauses
- ◆ Expertise available with either is unique and cannot be acquired easily by the other – healthy respect
- ◆ Competition law enforcement can overcome insufficiencies in regulations – e.g. predatory pricing
- ◆ A sectoral regulator can do what a competition authority cannot- e.g. situations might warrant price fixation in public interest, setting standards etc.



# Conflict Resolution

## ◆ Informal

- contacts, meetings and exchange of information
- exchange of officials
- setting up of joint working groups

## ◆ Formal

- right to participate in proceedings before the other
- formal referrals - optional or mandatory
- appeal to a common authority
- no interference in the other's territory
- delineation of jurisdiction –by statute



# Relative Roles

- ◆ Regulators have strength in technical areas
- ◆ Competition authorities have strength in economic/competition matters; principles set by them apply across all sectors
- ◆ Regulation should fade away or minimise as competitive markets emerge
- ◆ Appropriate coordination mechanisms at working level are important. Respect and consideration for each others' roles/strengths
- ◆ As far as possible, laws may delineate jurisdictions, and provide for consultation/coordination procedures



# Indian Position

- ◆ Formal referrals – S 21 & 21A
- ◆ Any statutory authority
  - may make a reference to CCI
  - CCI to give opinion in 60 days
- ◆ Opinion of CCI is not binding
- ◆ CCI may also refer to statutory authorities
- ◆ Reference is not mandatory
- ◆ No provision for CCI to take up *suo motu*
- ◆ No corresponding provision in sectoral regulatory laws
- ◆ Referrals by Central / State Govt. – S 49



# The Electricity Act, 2003

## ◆ S 79 Functions of Central Commission-

(1) The Central Commission shall....

(2) The Central Commission shall advise the Central Government on all or any of the following matters, namely:-

(i)..

(ii) Promotion of competition, efficiency and..

[S 86(2) says the same for state Commissions]



# The TRAI Act, 1997

## ◆ S 11 Functions of Authority:

(1) ....,the functions of the Authority shall be to-

(2) Make recommendations, either suo motu or on a request from the licensor, on the following matters, namely:-

(iv) measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;



# The PNGRB Act, 2006

- ◆ S 11 Functions of the Board- The Board shall-

- (a) Protect the interest of consumers by fostering fair trade and competition amongst entities;

- Fair Trade not defined; Unfair trade defined under MRTP Act, 1969 in S 36A ; going to be repealed after two years of notification of CA02(S66)





# Competition Act, 2002

## ◆ S 18

.....it shall be the duty of the Commission to....., promote and sustain competition, protect the interest of consumers and ensure freedom of trade carried on by other participants, in the markets in India;



# Australia & Japan

- ◆ In Australia, the competition authority incorporates industry-specific technical regulators e.g. telecom, electricity, gas
- ◆ In Japan, cooperation between JFTC and sectoral regulators is not statutory but is guided by government diktat. JFTC relies heavily on its advocacy role with regulators to prevent anti-competitive policies



# EU & Germany

- ◆ In EU, competition guidelines/directives issued by EU provide that *ex-ante* rules apply only in absence of competition, and specify how relevant market to be determined
- ◆ In Germany, there is division of labour between the competition authority (FCO) and the Regulatory Authority for Telecommunications and Posts (RegTP). Laws were amended to minimize parallel competencies



# UK & France

- ◆ In UK, the OFT and the sectoral regulators have concurrent jurisdictions with a common appellate tribunal (UK CAT) – appeals from sectoral regulators lie to the UK Competition Commission in the first instance
- ◆ In France, a new law provides for mandatory consultation between radio & television sector regulator and competition authority. The sectoral regulator provides technical inputs while the competition authority applies competition law on the basis of given technical inputs



# Canada & Finland

- ◆ The Canadian Competition Bureau is statutorily empowered to intervene before federal and provincial regulatory bodies in policy determination
- ◆ In Finland, the competition authority signed an MoU in 2003 with the telecom regulator defining ways to eliminate overlaps



# Africa

- ◆ In South Africa, sectoral regulations were initially exempted from the jurisdiction of the competition authority but later the exemption was withdrawn
- ◆ In Zambia, the competition authority is represented on other regulatory boards. In addition, all sectoral regulators are required to consult the competition authority



# Others

- ◆ The jurisdictions of the competition authorities and sectoral regulators are blurred in Sri Lanka, Botswana, Kenya and Pakistan. Conflicts are left to be resolved by courts
- ◆ As on date, India may be in this league



# Consultation Provisions

## ◆ Mandatory

**France** – legislation enabled co-operation – sector regulator must consult competition authority

**Ireland** – formal co-operation agreements in accordance with law

**Germany** – formal consultation by law

**Zambia** – statutory requirement on regulators to consult

## ◆ Non-mandatory

**India** – sector regulator may refer a matter and then pass an order 'as it deems fit' – no reciprocal provision in competition law





# Right to Intervene

- ◆ Right to intervene - in sector regulation

**UK** - competition authority has statutory right to study existing as well as proposed sector regulations and issue a public statement - government responds within 90 days

**Italy** - opportunity to competition authority to air their views to which sector regulator must respond

**Canada** - competition authority can intervene in a case before any federal regulator



# Concurrence & Convergence

## ◆ Concurrent power

**UK** – sector regulators in electricity, gas, telecommunication, water and railways have concurrent jurisdiction with OFT – Concurrence Working Party (CWP) decides which authority is best suited to deal with the matter – disputes resolved by Secretary of State – regulation guided

## ◆ Appellate Convergence

**UK** – appeals lie to a common body UKCAT – uniformity in approach



# Statutory Powers

- ◆ Giving statutory powers to the competition authority for some aspects of sector regulation

**Mexico** – competition authority's determination of market power of an enterprise is the condition precedent for regulation of that enterprise by the sector regulator.

**EU** – Competition authority plays significant role in identification of the relevant market and then the telecom regulator determines market power using competition benchmark before ex ante obligations can be imposed on identified enterprise



# High Status

- ◆ High status of head of competition authority

**South Korea** – given Cabinet rank – useful when government retains control over economic decisions – hierarchy helps in pushing pro-competitive agenda



# Some Questions

- ◆ Whether regulations is motivated by increasing welfare and making the scarce resource available to the users or by protecting those who are to be regulated?
- ◆ Opposition to entry of foreign lawyers in India
- ◆ Opposition to medical practitioners duly qualified in one country to practice medicine in another country without passing requisite regulatory tests
- ◆ Requirement of passing separate exam in the same profession to practice in another country- CPA/ CA etc.



***THANKS***

**[www.cci.gov.in](http://www.cci.gov.in)**