Competition Policy and Trade Policy[1]

Competition is the process where the market players vie for the attention of consumers. The market process is known to throw up the best outcome. It brings out the best in people and institutions. It enhances efficiency and avoids waste. Competitive markets bring out the best prices and maximum satisfaction to the consumers. And competition policy is the sum of all economic policies covering industrial, fiscal, trade and monetary policies. When there is perfect competition conditions, with no distortions in the market, policies have no relevance. On the other hand when distortions figure, the need for policies to regulate become relevant as well. Competition policy is thus a necessary concomitant of modern day market economy characterised by imperfect competition.

International trade facilitates productivity growth and tends to equalise income and welfare across the world. It is a potential medium through which the benefits of growth and development could be transmitted across the globe. Thus both competition policy and trade serve the end of efficiency, productivity and welfare maximisation.

Anti-competitive practices can be addressed both by competition policy and by competition law, which is a subset of the former. Anti-competitive agreements, which includes cartels, act as a severe drag on societal welfare. There have been studies by the OECD that indicates that cartel overcharges could be to the tune of ten per cent and above.

Cartels could be cross border. With the increasing trend towards globalisation, international cartels have been spreading their wings more and wider. One of the earliest international cartels that caught global

[1] By Augustine Peter, Member, Competition Commission of India. Views are personal.

attention is the notorious vitamin cartel which saw consumers being overcharged to the tune of US$ 72 million across nine of the affected countries for each of the year of cartel which lasted from 1989 to 1999. Such severe harm inflicted on consumer welfare by cartels prompted some of the mature jurisdictions to think of criminalisation of cartels where the perpetrators are visited with imprisonment, besides penalty.

Opening up of sectors traditionally in the monopoly segment has given tremendous boost to efficiency and consumer welfare. In India the civil aviation and telecom sectors were opened up to competition in the 1990s. While there was only a single player in the domestic civil aviation sector currently the market share of this erstwhile monopoly player is only 13.3 per cent[2]. The largest player currently is Indigo (40.1 per cent) followed by Jet Airways (17.9 per cent), Spice Jet (13.1 per cent) and Go Air (8.4 per cent). Prices have come down substantially due to better efficiency and more efficient management. There are thus five major national civil aviation players, besides regional civil aviation companies connecting different regions of the country, following the Regional Connectivity Scheme, UDAN, Ministry of Civil Aviation, Government of India, October, 2016.

Similar is the case with the Telecom sector. State owned BSNL[3] which had monopoly over the telecom space in India has slipped into insignificance in terms of market share, with the distribution of market share (in percentage) in the 2nd Quarter of FY 2018[4] as follows: Bharati

[2] https://www.equitymaster.com/5minWrapUp/charts/index.asp?date=09/06/2017&story=1&title=Market-Share-of-Indian-Domestic-Airlines---2017-

[3] The erstwhile Central Government Departments of Telecom Services (DTS) and Telecom Operations (DTO)

[4] https://www.bloombergquint.com/markets/2018/02/23/reliance-jio-is-now-indias-third-largest-telecom-company

Airtel (27.96), Vodafone India (20.65), Reliance Jio (19.74), Idea Cellular (17.33), Tata Teleservices (04.39) and others (including BSNL) (09.93) BSNL had monopoly over the telecom space in India. At that time the sector was beset with scarcities and long waiting time for landline connections.

International Trade and Competition Policy

International trade law enshrined in the WTO rules has competition principles built in. These rules are intended to provide a level playing field as between the WTO Members, through the fundamental principles for most favoured nation (MFN) clause, National Treatment (NT) clause etc. Non-discrimination, both vis-à-vis domestic and foreign players (National Treatment) and vis-à-vis like products and services across Member territories (MFN), is the fundamental principle of WTO. As part of the Singapore Ministerial Conference in 1996 efforts were made to bring in Competition Policy as a standalone subject in the WTO. The study process on the Interaction between Trade and Competition Policy that was launched at Singapore in 1996 saw a Working Group being set up in the WTO and long and arduous discussions on the interface between trade and competition policy. While the Working Group process helped better understand the interface, the divergence of views were also becoming more and more clear. The proposal before the WTO Members at Doha Ministerial was focussed discussion by the Working Group on the following:

- Clarifying the core principles on transparency, non-discrimination and procedural fairness;
- Developing provisions on 'hard-core cartels'; and
- Modalities for voluntary cooperation

During the run up to the Doha Ministerial Conference the EU, Japan and Korea had proposed a minimalist approach involving each and every Member country having a competition law based on the principles of non-discrimination and procedural fairness, and absence of dispute settlement provisions. Post Doha the US felt that the best that could be achieved under WTO could be a peer review process. While a large number of developing countries, and in particular Least Developed Countries, had no clear stand on the issue, countries like India felt that any rules on competition policy pure and simple under the auspices of WTO would harm the interests of the weaker Members and that in case an agreement ushers in it has to be a 'strong' one with binding commitments. The whole proposal related to 'competition policy' fell through along with the whole package of 'Singapore issues' including Investment and Transparency in Government Procurement, except Trade Facilitation.

The issue is whether competition policy should continue to run through and inspire the WTO rules and agreements or there should be a standalone Agreement on Competition Policy. While under the different trade agreements in WTO single undertaking there is no absolute notion of competition, and each agreement envisages competition prevailing subject to conditions, the fear was that the objective was to bring in competition unconditionally. Competition under GATT is subject to negotiated bound rates on specific products. This is supplemented by rules related to non-tariff barriers to trade. Absolute liberalisation is not envisaged in the Agreement on Agriculture, nor in the General Agreement on Trade in Services (GATS). GATS envisages conditional liberalisation. Given this the effort to hoist competition policy rules on the platform of WTO appeared a half-hearted effort to nullify the

flexibilities that were available to Members. Apprehensions were raised about a 'Trojan horse' being brought on the agenda of WTO[5].

This does not undermine the close relationship between trade and competition policy. Trade rule, be it multilateral, regional or bilateral are based on principles of competition. While all the WTO agreements breathe competition principles, there is also explicit invoking of competition rules in each of the major agreements. Thus Articles II.4 of the GATT and Art. VIII of GATS contain rules dealing with monopolies and exclusive service suppliers. Art 40 of the TRIPS Agreement and Article IX of GATS recognise that anti-competitive practices can adversely affect trade and establish procedures for cooperation by WTO Members regarding such practices. The Reference Paper on regulatory principles, adopted by certain Members as part of Negotiations on Basic Telecommunications Services under GATS, commits such Members to adopt measures to prevent anti-competitive practices by major suppliers[6].

Regional Trade Agreement and Competition Policy Provisions

While the multilateral trading system was slow to evolve and appeared to fail to gather consensus, regional trading arrangements started gathering momentum in the 1990s. WTO website accessed on 23rd February 2018 shows that there are in all 284 physical RTAs in force, sorted by coverage divided into Goods (140), Services (1) and Goods and Services (143). All RTAs in force, sorted by notification were as given in the tabular statement below:

			Grand

[5] Lee, Marc and Morand, Charles (2003), Competition Policy in the WTO and FTTA: A Trojan Horse for International Trade Negotiations? ISBN: 0-88627-350-1

[6] https://ecampus.wto.org/admin/files/course_385/module_1603/moduledocuments/tc-l1-r1-e.pdf

	Accessions	New RTAs	Total
GATT Art. XXIV (Free Trade Agreements)	3	232	235
GATT Art. XXIV (Customs Unions)	10	10	20
Enabling Clause	5	44	49
GATS Art V	7	144	151
Grand Total	**25**	**430**	**455**

It is noticed that only comprehensive RTAs have provisions related to competition policy built in. This is as it would be. Any cooperation in competition policy has to be preceded by convergence of interests, much more than what is required in terms of trade or investment. While trade and investment affect only certain segments of the economy and commerce, competition policy transcends such boundaries and affect the internal laws, regulations and policies so as to provide a level playing field to enterprises, irrespective of nationality, irrespective of public or private ownership. This is why competition law provisions are available only in a limited extent in RTAs. Depth of economic integration in trade and investment, in particular, determine the extent of cooperation in competition law and policy. Economic literature is in abundance to show that there is close correlation between economic integration and competition law provisions in RTAs. The various elements of cooperation on competition in RTAs include: Enactment of Competition Law by the Countries; Notification and consultation – Enforcement / Advocacy; Exchange of information and confidentiality of information; Cooperation of Enforcement Authorities; Addressing the issue of designated monopolies and Government Enterprises and price discrimination; Dispute Settlement; Review and further cooperation (India's FTAs); Addressing the issue of quantitative restrictions and other trade distorting

measures; and Addressing issues of Anti-dumping and Countervailing Duties. ANZCERTA and Canada-Chile Agreements, for example, decided to abolish use of Anti-dumping measures.

Conclusions

There is a close relationship between trade and competition policy. Both aim at enhancement of efficiency and productivity. Both are complementary in the sense that benefits of competition are transmitted through the medium of trade. Competition principles pervade trade rules. However, the efforts to bring in competition rules as a special set of rules failed in WTO. The extent of competition policy provisions in RTAs depends on the depth of economic integration envisaged in the agreement in terms of trade and investment, in particular. There is a direct correlation between the depth of economic integration and competition policy provisions in RTAs.