सत्यमेव जयते

COMPETITION ASSESSMENT TOOLKIT

Fair Competition
For Greater Good

भारतीय प्रतिस्पर्धा आयोग

COMPETITION COMMISSION OF INDIA

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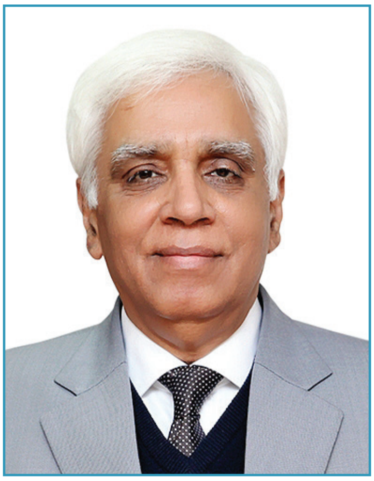
Message from the Chairperson, Competition Commission of India



Economic transformation of India during the last three decades has been discernible. India has attained the status of the fastest growing large economy in the world. With a market larger than USD 2.4 Trillion, India is the sixth largest economy in the world and the third largest in the terms of purchasing power parity (PPP). The high growth trajectory realised in India has been largely market driven. An important element of this economic makeover is competition.

Market dynamics are orchestrated by a combination of invisible and visible hands. The invisible forces of demand and supply drive the outcomes of the market. Competitive environment compliments these forces towards achievement of efficient and optimal economic outcomes. Competition encourages and incentivises suppliers to innovate and operate efficiently in order to offer the best prices and quality to the consumers. However, it is the visible hands that determine the extent of success of the invisible forces. These visible forces are twofold – individual and institutional.

The individual forces in the market are represented by the enterprises engaged in provision of goods and services. They can influence the market outcomes in their favour through anti-competitive conduct such as agreements between enterprises, abuse of dominance by a dominant player or mergers and acquisitions leading to increasing market concentration and power. Adverse effect on competition in markets that are brought about by the actions of these individual forces can be dealt with by direct intervention of the Competition Commission of India (Commission/CCI) – both ex post and ex ante as laid down in the relevant provisions of the Competition Act, 2002 (Act).

The other set of visible hands are the institutional forces, primarily the legislative framework and policies that guide the functioning of the market. While the legislations/rules/regulations evolve over the years responding to the primary policy objectives of the government in a given political economic context, there can be provisions under the legislations which inadvertently lead to anti-competitive outcomes obstructing competition. It is often observed that the policy framework governing many markets in India still bear the footprints of the legacy of a command and control paradigm which existed before the economic reforms were ushered in.

We are still at a nascent stage of competition economy due to the legacy issues. It is an apt time to reflect on the institutional ecosystem within which our markets function and to update it, wherever necessary, enabling it to ferment competition. This necessitates review of upcoming and existing laws and policies from a competition perspective and carry out appropriate modifications. Competition Assessment is a process towards this end.

Competition Assessment has been successfully applied in countries like Australia, Greece, Romania and Mexico which have used the OECD guidelines in this regard. As reported by OECD, these countries have benefitted from such an exercise in terms of tangible macro-economic outcomes.

I am happy to present this Competition Assessment Toolkit, which provides a roadmap for a comprehensive Competition Assessment of policies, legislations, rules and regulations in India. This Toolkit outlines various stages through which the comprehensive exercise has to be conducted as well as provides for a checklist that can be used as a diagnostic tool by stakeholders to assess legislations and policies through a competition lens. This will be useful to policymakers, analysts, researchers and other competition stakeholders. It is also expected that this will be instrumental in stimulating policy introspection.

Economic development can be fostered in a market driven economy within a legislative and institutional framework that assures fair play to all stakeholders. I hope that this Toolkit will be an important advocacy tool in propelling and nourishing a legislative architecture that promotes a culture of competition across all sectors.

D. K. Sikri
Chairperson
Competition Commission of India

Dated: 4th July 2018
Place: New Delhi

Acknowledgments

Ms. Maria Khan (Research Associate, CCI), Ms. Kokila Kumar (Research Associate, CCI), Ms. Tanaya Sethi (Research Associate, CCI) and Shri Pushkar Pandey (Research Associate, CCI) were instrumental in preparation of the initial draft of the toolkit. Useful feedback was received from Ms. Smriti Parasheera and Shri Pratik Dutta from National Institute of Public Finance and Policy.

Valuable inputs towards the development of the toolkit were received from Shri Manoj Kumar Pandey (Adviser, CCI), Shri Manish Mohan Govil (Adviser, CCI), Shri Gaurav Kumar (Director, CCI), Shri Nandan Kumar (Joint Director, CCI) and Shri Yogesh Kumar Dubey (Deputy Director, CCI).

Shri Mukul Sharma (Deputy Director, CCI) and Ms. Richa Jain (Research Associate, CCI) brought the toolkit to its final shape.

Last but not the least, valuable inputs and continuous guidance from Shri Augustine Peter (Member, CCI) and Shri U.C. Nahata (Member, CCI) are gratefully acknowledged.

Sibani

Sibani Swain
Adviser,
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CHAPTER 1: INTRODUCTION

1.1 Competition is central to efficient market functioning. It is characterised by the principles of free entry to start a business, adoption of sustainable and responsible business practices, and free exit to close inefficient and unsustainable business. These principles of free market ensure and enforce allocative efficiency, productivity gain and dynamic efficiency in the market. Any interference to curtail these freedoms can lead to sub-optimal output and decline in consumers' wellbeing.

1.2 In a free market economy, Government, besides performing its sovereign function of protecting the nation from external aggression and maintaining internal security (law and order), puts in place a legislative, regulatory and institutional framework within which the market operates. The objective is to assure the businesses of protection of their property rights and enforcement of contracts so that various economic agents, while promoting their self-interest, do not impinge on the rights of others.

1.3 Perfect competition featured by free entry and free exit of firms, unlimited buyers and sellers, homogeneous products etc. remains a theoretical construct. In reality, free and fair play of the market forces often gets constrained due to market failures - which are caused by prevalence of information asymmetry, abuse of market power, occurrence of externalities in the production process, and nature of public goods. Market failure results in lower level of production and restricts consumer choices. Government intervention to address the concerns of market failure takes the form of legislative, regulatory and institutional reforms.

1.4 Markets function within a legislative framework, which define the rules of the game and shape the structure of the market and conduct therein. These legislations and policies evolve and have to remain abreast with the changing dynamics of the development strategy adopted by an economy. With the transition of India from command and control regime to a market-based economy in 1990s, a slew of legislative, policy and regulatory reforms took place to promote and facilitate efficient market functioning. The erstwhile Monopolies and Restrictive Trade Practices (MRTP) Act, 1969 outlived its utility.

Competition Act, 2002 (hereinafter referred to as the 'Act') was enacted and subsequently the MRTP Act, 1969 was repealed.

1.5 The Competition Commission of India (Commission/ CCI) was established under the Act to enforce the provisions of the Act with the objectives to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto. Establishment of the CCI was notified on 14 October 2003. Substantive provisions of the Act relating to competition law enforcement came into force on 20th May, 2009. The Act and the role of CCI are discussed in **Annexure A**.

1.6 The objective of CCI is to prevent anti-competitive practices that have an appreciable adverse effect on competition. It prohibits anti-competitive agreements between market players and abuse of dominance by a dominant player in the markets. It also regulates mergers and acquisition above the thresholds given in the Act, by market players as they may increase concentration in the market. Through these provisions, CCI aims to promote and sustain competition in the market.

1.7 Competition can also be inhibited by the legislations and policies governing the markets. Such legislations/policies may inadvertently carry certain provisions which may restrict or dilute competition in the market. Under Section 49 of the Act, CCI has been entrusted with the responsibility to give its non-binding opinion to the Central or State governments on formulation of any policy referred to by them. The CCI also has a mandate of taking suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues.

1.8 A number of new legislations have been enacted, policies formulated, rules/regulations notified and institutional mechanisms set up to facilitate free and fair play in market, during last three decades of reforms in India. However, there still exist certain legacy legislations enacted during a protectionist era which may contain provisions not conducive to free market functioning. Further, the legislations/ policies which are enacted as part of the reform process may also have certain elements which could raise competition concerns. The

Expert Group constituted by the Ministry of Commerce, Government of India to study the interaction between Trade and Competition Policy pointed out in its report that "*all Governmental policies will have to be viewed through the competition lens to ensure that consumer interest and welfare and economic efficiencies and development dimensions are not pejorated*"[1]

1.9 This is where Competition Assessment has a role to play. Competition Assessment has been defined by Organisation for Economic Co-operation and Development (OECD) as a process through which existing and proposed policies/regulations/rules are identified and assessed from a competition perspective. Once the provisions raising competition concerns are identified, they are redesigned in a manner that they do not inhibit competition in the market.

1.10 OECD has observed that assessment of legislations from competition perspective has benefited both developing and developed economies. Countries like Australia, Greece, Romania and Mexico have undergone a comprehensive competition assessment process which has resulted in substantial improvement in their GDP (OECD, 2016). A brief outline of the competition assessment carried out in Greece and Romania is provided in **Annexure B** of this document.

1.11 India has a plethora of legislations and policies that govern the functioning of the markets at national and sub-national level. These encompass both real sector (goods and services) and financial sector (money, banking, capital market, etc.). A comprehensive competition assessment exercise should ideally cover legislations and policies influencing numerous sectors of the economy. This would require enormous resources and capacity. There is a requirement of standardised Competition Assessment framework, which can provide a roadmap for facilitating this exercise by various stakeholders.

1.12 Promoting a competition culture in the economy would necessitate a comprehensive review of active laws and policies through a competition lens and bringing out necessary modifications if required. The CCI under its mandate of promoting and sustaining competition has initiated the process of creating an institutional framework for

[1] "Report of the Expert Group on Interaction Between Trade and Competition Policy" - Ministry of Commerce, Government of India, New Delhi, January, 1999

assessing select economic legislation and policies - both existing and upcoming -from a competition perspective and sharing the findings with the concerned stakeholders.

1.13 An attempt has been made to provide such a framework through this '*Competition Assessment Toolkit*'. This toolkit provides a standardised and simplified expression of principles that can be used for identifying competition concerns cutting across all sectors. It is relevant to note that these diagnostic tools are based on economic principles of market functioning reflected through market forces of demand and supply. Price mechanism plays an important role in bringing demand and supply to equilibrium. The toolkit simplifies these economic concepts with illustrations.

1.14 Competition Assessment involves several stages starting with identification of the sector to be taken up for assessment. The subsequent steps are: identification of relevant legislations and regulations; application of checklist to be applied to the selected legislations/regulations to find out provisions having competition concerns; finding alternatives to those provisions in consultation with concerned stakeholders, choosing the best alternative for modification; and carrying out post modification impact assessment.

1.15 Legislations and regulatory framework are usually designed in alignment with the prevailing development goals of the country. It is possible that a policy/legislation/regulation may be having market distorting impact while serving a larger public interest. Competition Assessment of many policies/legislations/regulations is required to be made in consultation with the relevant stakeholders before suggesting any modification/amendment from competition perspective. This is required to ensure that the primary policy objective does not get diluted.

1.16 The toolkit has been presented with the objective of sensitising policy makers towards competition concerns cutting across sectors and legislations, and promoting a competition culture by ways of non-enforcement mechanism. It is envisaged that availability of this toolkit would motivate to introspect at the level of policy formulation and drive competition assessment in India. It would also serve as an advocacy tool for the CCI.

1.17 The Competition Assessment toolkit is presented in five chapters. In the second chapter the importance of competition and its contribution to the economic growth and development in India has been highlighted.

The approach to competition assessment including the steps involved is discussed in the third chapter. The fourth chapter lists out the elements in the checklist for the competition assessment exercise. It also explains economic principles underlining each of the elements of the checklist. The last chapter concludes with a way forward for carrying out a competition assessment exercise in India.

USEFULNESS OF THE TOOLKIT

- Serves as a diagnostic tool for identifying competition concerns in various legislations in India
- Promotes a competition culture by way of non-enforcement mechanism.
- Sensitizes the policy-makers towards competition issues like Abuse of Dominance, Cartelization and anti-competitive agreements.
- Helps identify various competition concerns in diverse sectors of the Indian economy.
- Encourages introspection at the level of policy formulation
- Motivates sectoral regulators for introspection of their various policies/ laws/ regulations.
- Serves as a tool for building capacities of various institutions for Competition Assessment.
- Helps in creating a large pool of Resource Persons for Competition Assessment.
- Can be emulated by various emerging jurisdictions in competition law.

FOR WHOM IS THIS TOOLKIT USEFUL?

- Ministries/ Departments
  - Central Government
  - State Governments
  - Local Governments
- Sectoral Regulators
- Public Sector Undertakings
  - Central Public Sector Undertakings (CPSUs)
  - State Level Public Enterprises (SLPEs)
- Industry Associations
- Academic Institutions
- Think Tanks
- Researchers
- Others

WHAT IS TO BE ASSESSED?

At the level of Central, State and Local Governments-

- Policies
- Acts/Legislations
- Regulations
- Draft Bills
- Rules/ Subordinate legislations
- Guidelines/Orders
- Circulars/Notifications

CHAPTER 2 – COMPETITION AND INDIA'S ECONOMIC DEVELOPMENT

"In general, if any branch of trade, or any division of labour, be advantageous to the public, the freer and more general the competition, it will always be the more so".

- Adam Smith, The Wealth of Nations

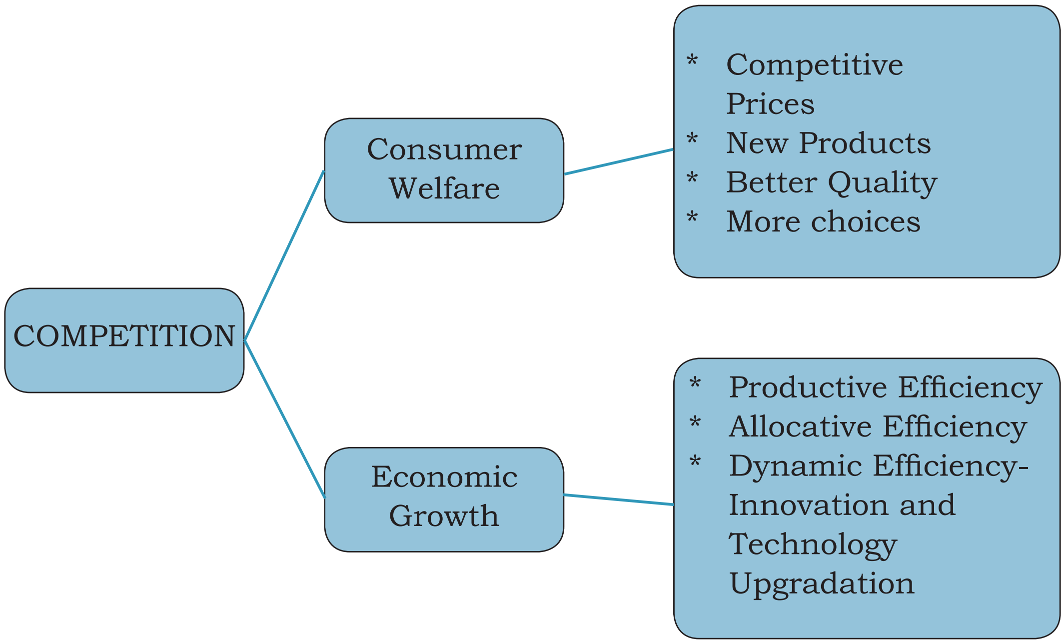
2.1 Competition is the default regulator of the market economy. The firms compete amongst each other to maximise sales and profits. While responding to demand for better products at affordable prices, competing producers, suppliers or service providers are motivated to innovate, lower their costs by reducing unemployed resources and increasing productivity. Though the motivation of economic agents is driven by self-interest, the benefits accrue to the society at large. The complementary forces of self-interest and competition guide the resources towards their most efficient use.

2.2 **Benefits of Competition:** Benefits of competition can be attributed as under:

- Makes better quality goods and services available at competitive prices. Not only it benefits consumers but also producers as they themselves are consumers of inputs.
- Motivates the firms to innovate for introducing new products and reducing costs.
- Ensures that more productive firms remain in the market and inefficient firms exit.
- Transfer the resources from the less productive sectors to the more productive sectors.

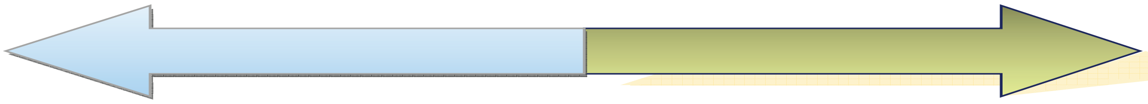
Thus, competition enables the economy to move to a higher production possibility frontier given the limited resources and leads to increase in output and income of the country. Also, higher level of output with more choices to consumers at affordable prices enhances consumer welfare.

Figure 1: Benefits of Competition



2.3 **Structure of Markets:** Economic theory lays down different types of market structures with varying degrees of competition. Any market structure whether it is for a product or service is characterised by the number of buyers and sellers. On one extreme is perfect competition. It has large number of buyers and sellers engaged in the purchase and sale of homogeneous product. It exhibits highest degree of competition and no barriers to entry. It is followed by monopolistic competition which has relatively less number of sellers and large numbers of buyers engaged in the sale of products which are differentiated (but close substitutes) in nature. The degree of competition is relatively less than that in perfect competition and has low barriers to entry. The third type of market structure is oligopoly. It has fewer sellers and many buyers and the products sold are very close substitutes. It has high barriers to entry and the degree of competition is usually lesser. The fourth type of market is duopoly which has only two sellers and the degree of completion is lowest. The fifth type of market structure is monopoly where there is only one seller and many buyers. It is characterized by absence of close substitutes, very high barriers to entry and therefore lack of competition. The following figure explains the different type of market structures and the degree of competition keeps on decreasing as one moves from left to right:

Figure 2: **Market structure and degree of competition**



Perfect Competition   Monopolistic Competition   Oligopoly   Duopoly   Monopoly

2.4 Perfect competition is a utopian concept. Economies across the globe, strive to attain effective and efficient competition which is considered as a goal of every competition authority. Realisation of this requires healthy market conditions. Removal of market imperfections through appropriate policies and regulations is one of the objectives of market reforms. Almost all economies across the globe have taken steps to move towards free market regime to reap the benefits of competition. India, too embarked upon the journey of big bang market based reforms in early 1990s. The next section highlights India's economic achievements in the post reform era.

2.5 **India's Economic Development and Competition:** Post-independence India's economic development can be described under three distinct phases i.e 1950-1980, 1981-1990, 1991- till present. From 1950s to 1980s, the Indian economy was characterised by the policy which weighed towards protectionism with a strong emphasis on import substitution, economic interventionism, large public sector, elaborate licensing and regulations over businesses, trade restriction and centralised planning. As a result of which the annual growth rate of national income, measured in terms of GDP during this period remained only around 3.5 per cent on an average. The process of liberating the business from licensing requirements was initiated during the late 1980s. Consequently, the growth in the 1980s increased to 5.3%. However, the economy remained largely under state control with capital flows and business in certain sectors managed by the government.

2.6 During the third phase (1991- present), major economic reforms in the form of Liberalisation, Privatisation and Globalisation (LPG) took place. They not only liberated the economy from the clutches of state control, but also opened up the economy to the private sector and foreign firms. This reform regime witnessed abolition of license raj, de-reservation of sectors from public monopoly, removal of trade restrictions both on imports and exports, ushering of financial sector reforms etc. This process resulted in increase in competitiveness, efficient allocation of resources and higher investment.

Table 1: Growth Rate (CAGR) of India's Gross Domestic Product (2004-05 Series)

Year	Growth Rate (%)*
1950-1980	3.6
1980-1990	5.6
1990-2000	5.7
2000-2010	6.7
2010-2018**	7.0

**avg. of annual growth rates.*
***Provisional estimate for 2016-17 and advanced estimates for 2017-18 have been used.*

2.7 The macro-economic scenario of India steadily improved putting India on a high growth trajectory post 1990s. Not only was this growth higher compared to its own past, it was also much faster than that achieved by a large number of countries. During 2000-2010, the growth rate increase to 6.7 per cent. The spill over effect of the 2007-2008 financial crisis resulted in the dip in the growth rate but the Indian economy quickly recovered due to resilient domestic demand and investment, strong presence of private corporate sector and stimulus packages of the government.

2.8 India's share in global GDP, (measured in terms of constant 2011 Purchasing Power Parity (PPP) international dollars) more than doubled from 3.24 per cent in 1990 to 7.24 per cent in 2016 (World Development Indicator, 2017). The per capita income (measured in PPP dollars) increased from $1130 in 1990 to $6490 in 2016 (World Bank Indicator, 2017). By 2016, India has become one of the largest recipients of foreign direct investment driven by a series of regulatory reforms undertaken by the government (Economic Survey, 2017). India's contribution to global growth in PPP terms increased from an average of 8.3 per cent during the period 2001 to 2007 to 14.4 per cent in 2014. During the 1990s, the US's contribution to the global GDP growth in PPP terms was, on an average, around 16 percentage points higher than India's. However, the picture changed in 2013 and 2014 when India's contribution was higher than that of the US by 2.2 and 2.7 percentage points respectively (Economic Survey, Volume II, Pg 3, 2015-2016).

2.9 The FDI inflows in India were almost insignificant in the pre-reform period but started increasing after 1991 and escalated significantly during 2003- 2008 and further making India the largest recipient of FDI inflows in the world in 2016. India's trade to GDP ratio showed

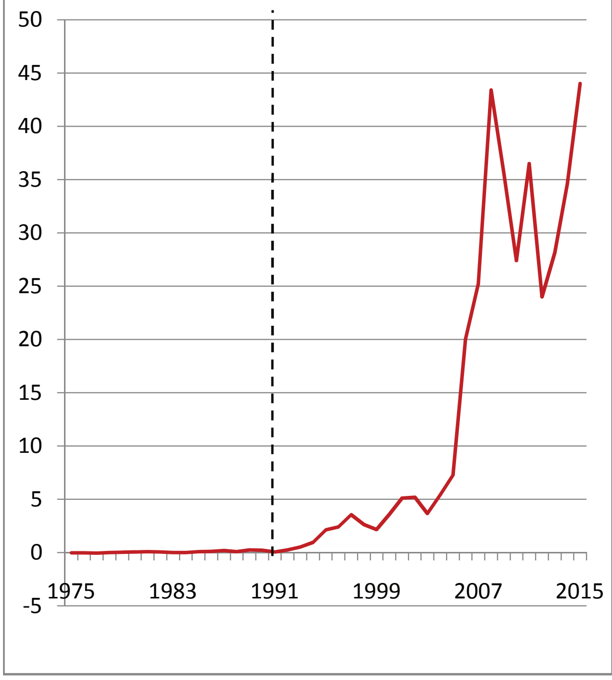


Figure 3: FDI Inflows (USD Billions)

Source: World Development Indicators, WorldBank, 2017

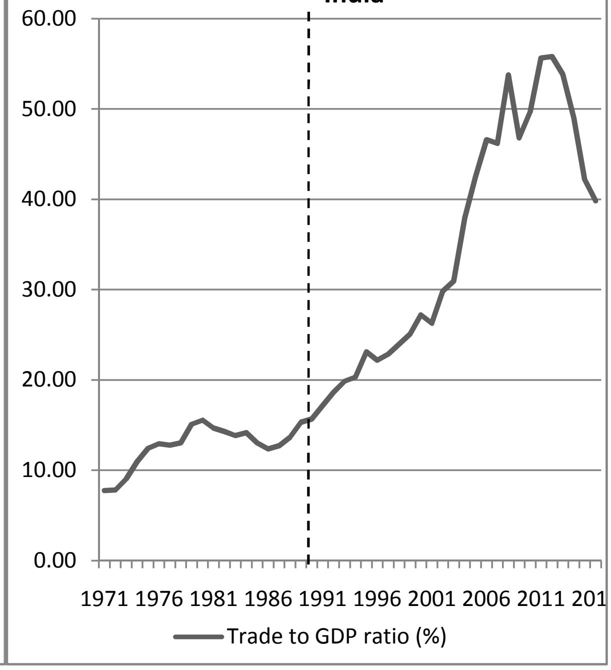


Figure 4: Trade to GDP ratio (%) in India

Source: World Development Indicators, WorldBank , 2017

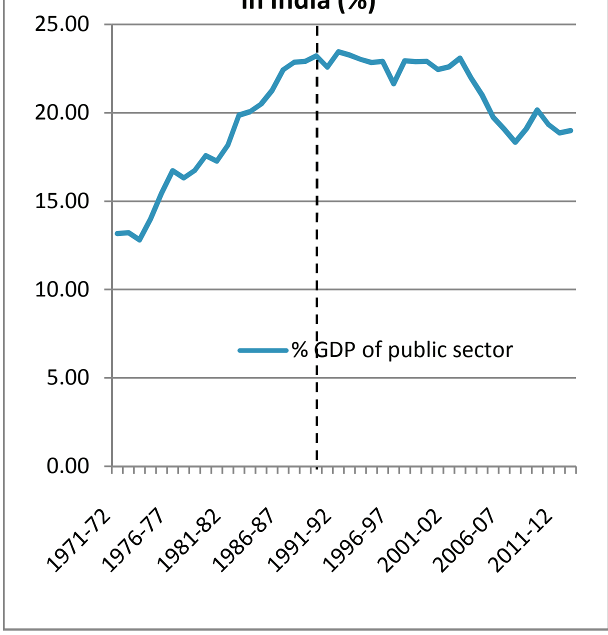


Figure 5: Share of Public Sector in GDP in India (%)

Source: Handbook of Statistics on the Indian Economy, RBI, 2017

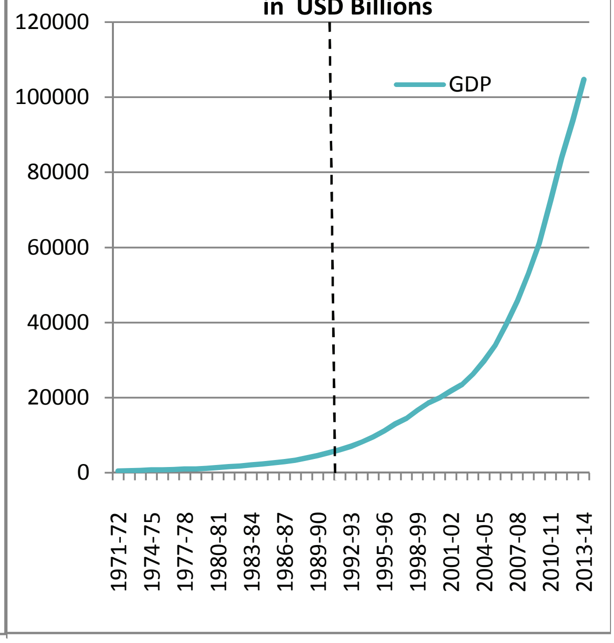


Figure 6: GDP at Factor Cost (2004-05) in USD Billions

Source: Handbook of Statistics on the Indian Economy, RBI, 2017 a gradual increasing trend between1960-1990's but remained below 16 per cent. However, in the post reform period, it accelerated significantly. The share of public sector in GDP kept increasing till the 1990s and in the post reform period exhibited a declining trend reflecting the increasing role of the markets.

2.10 At present the Indian economy, operates on a delicate balance of state control and free market principles. Nonetheless, the layers of state controls are gradually waning away, giving primacy to private players. Competition has been introduced in Indian markets and its benefits are visible in terms of higher growth, significantly enhanced FDI inflows, higher trade to GDP ratio, capital market buoyancy, more consumer choices, increase in tele-density, substantial increase in air mobility, etc. However fair play of market forces is not guaranteed. Economic agents are driven by self-interest and in their quest to maximise profit, they often indulge in such market practices which hamper the forces of competition in the economy. It is necessary therefore, to put legislations and regulations in place to prevent such anti-competitive behaviour.

> "Competition enables the economy to move to a higher production possibility frontier given the limited resources and leads to increase in output and income of the country. Also, higher level of output with more choices to consumers at affordable prices enhances consumer welfare"

CHAPTER 3 - COMPETITION ASSESSMENT

3.1 The term '*invisible hand*' was coined by Adam Smith in his book "An Inquiry into the Nature and Causes of the Wealth of Nations". Invisible hand is an outcome of two opposing but complementary forces which are self-interest and competition. It guides the forces of demand and supply in a free market towards their most efficient use. The producers and consumer act in their own interest but by doing so they benefit others or the society as a whole. This is like as if they are guided by an invisible hand to achieve equilibrium[2] outcome. In the words of Adam Smith

"by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention."

3.2 Since a free market economy is an outcome of self-interest and competition, a market economy is usually considered to be self-regulating. But in situations where market fails and competition becomes weak, the government intervenes by regulating economic activity.

3.3 As per the theory of public interest coined by Arthur Pigou - markets are fragile and operate inefficiently if left alone. Government intervention in a free market is needed only when there exist concerns or threat of market failure. The markets fail because of information asymmetry, abuse of market power, presence of externalities and the nature of public goods. The causes of market failure are discussed in the box below:

Box 3.1: Causes of Market failures

Public goods*: Public goods featured by principle of non - rivalrous (consumption by one person does not affect the amount available to others) and principle of non-exclusion (people cannot be prevented from consuming the good). Producers and consumers cannot capture the full benefits of services it provides and payments for them cannot be enforced. Consequently, public goods are likely to be under-provided by the private sector. Example: grazing ground, parks.*

Externalities*: Externalities in production arise when the actions of an individual or firm create a benefit or a cost for others who are*

[2] Market equilibrium is a market state where the supply in the market is equal to the demand in the market.

not a party to the transaction, and these impacts are not reflected in market prices. In case of positive externalities or presence of external benefits, tendency of private market will be to under produce; and in presence of external cost i.e. negative externalities, market tendency would be to overproduce. Example: pollution.

***Information asymmetry**: Information asymmetry arises where one of the parties knows more about key aspects of the transaction than the other. One possible consequence is `adverse selection' - a bias toward entering into lower quality or higher risk transactions. Another potential problem is `moral hazard', which occurs when a party modifies its behavior after the transaction to exploit any information advantage.*

***Market power**: Market power leads to a situation where the market has only one or a small number of firms that are able to restrict output and maintain prices above optimal levels. It can occur due to existence of either natural (for example due to high sunk cost or capital requirements) or statutory monopoly (state monopoly) or both.*

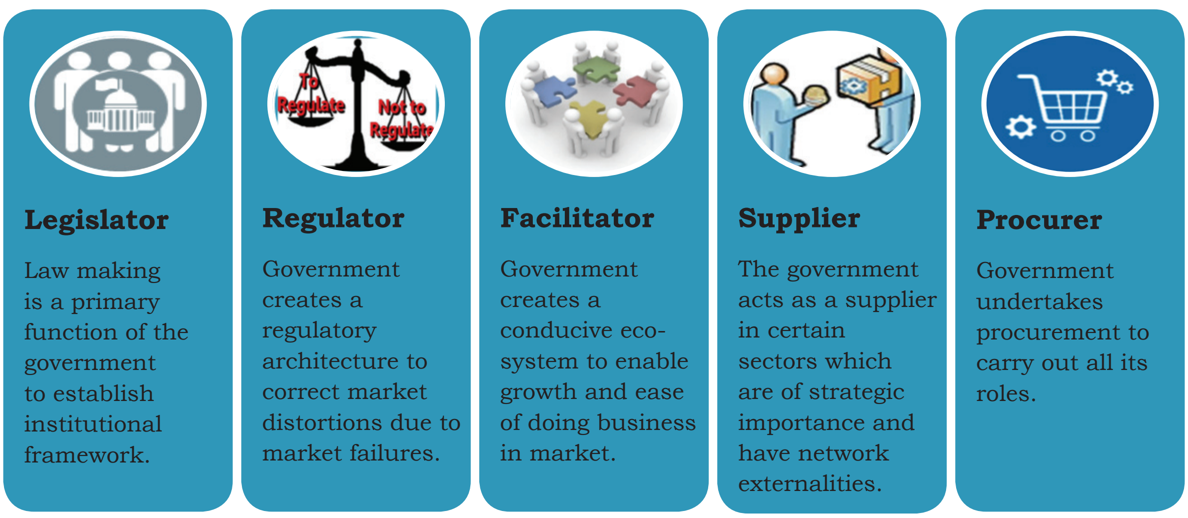
3.4 The state usually intervenes in the market to address these concerns through:

a. Enacting legislations and subordinate legislations that define the contours of the freedom of economic agents and their rights and obligations, and

b. Formulating economic policies relating to trade, commerce, industry, business, investment, disinvestment, fiscal measures, taxation, IPR, procurement, etc.

3.5 To correct for market failure, the government takes up the role of a legislator, regulator, facilitator, supplier and a procurer. Each of these roles of the government are discussed below:

Figure 7– Various roles of government



3.6 The role of government is thus, multi-pronged in nature. As long as these actions on the part of government provide due inputs required for a thriving business environment, there is no cause for concerns in the market. NITI Aayog's draft '*Three Year Action Agenda*' (GOI, 2017) outlines certain issues which are prevalent in many restrictive regulations in India leading to barriers to entry, price regulation, restricting competitive conduct etc. There is a need to curb and remove bottlenecks in regulatory institutions which will pave way for a sound competition policy and healthy competition.

3.7 It becomes imperative that a transparent, cleaner and more business friendly environment is created and the role of state institutions remain confined to being a "competition enabler" instead of being a "competition distorter". In this background, it becomes crucial to examine the government's policies and regulations via the lens of competition and competition assessment of legislations/policies is a tool to achieve this.

Long term Roadmap given by NITI Aayog for implementing pro-competition reforms:

1. *Reversing burden of proof in favour of Competition-Instead of current presumption of regulation, the default position should be favouring competition, unless a clear policy objective justifies regulatory intervention*
2. *Less restrictive regulations*
3. *Reforming traditional public monopoly sectors*
4. *Separating policymaking, regulation and operations*
5. *Competition neutrality between government-owned and privately owned enterprises*
6. *Dismantling restrictions on inter-state competition*

Source: Chapter 18, Pro-Competition Policies and Regulation, India's Three Year Action Agenda, NITI Aayog, 2017-18 to 2019-20.

3.8 **Competition Assessment: Importance and Need:** Legislations/ policies inadvertently carry certain provisions which may include impediments that can disturb the forces of demand and supply in the market by creating entry and exit barriers, imposing restrictions on business conduct, affecting the organisation and ownership of the firm and limiting the choices and information available to consumers.

Such provisions cause deadweight losses[3] and impede economic efficiency. These types of distortions hamper competition by affecting the supply in the market and further limits the productive efficiency of an enterprise resulting in diminished consumer's welfare. The extent of such losses depends on the elasticities of demand and supply.

3.9 In this background, Competition Assessment is defined as a process through which existing and proposed policies/regulations/rules are identified and assessed from competition law perspective. The objective of Competition Assessment is to identify those provisions of government's policies/legislations/rules which have potential to distort competition; and to suggest alternatives for carrying out desired modifications in consultation with stakeholders. The ultimate outcome expected is an enabling competition environment that is growth enhancing.

3.10 Many jurisdictions across the world have undertaken this exercise. For instance, Australia carried out assessment of its economic policies on a large scale during the mid-1990s and was able to identify competition impediments in about 1800 laws. Removal of such distortions boosted its GDP by around 2.5 per cent. Greece with the help of OECD reviewed four sectors, namely, retail, food processing, tourism and building materials, and identified 555 problematic regulations. This resulted in substantial improvement in its economic performance estimated at around EUR 5.2 billion annually, roughly 2.5% of GDP (OECD, 2016).

3.11 In view of foregoing and in sync with the increasing emphasis of the government on bringing in reforms for facilitating business in India, the CCI has commenced an exercise on Competition Assessment of Legislations/Policies. The CCI has framed the Competition Assessment Guidelines (under section 49 (1) and (3) of the Act) and has empanelled prominent academic institutions in pursuit of this endeavour. The objective of this exercise is to identify legislations/policies and scrutinise them through the competition lens with the help of these institutes.

3.12 The CCI seeks to collaborate with policymakers, government departments and statutory bodies to conduct competition assessment.

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[3]A deadweight loss is a cost to society created by market inefficiency caused by an inefficient allocation of resources. It occurs when the demand and supply forces are not in equilibrium

To build capacity and assist the policymakers for carrying out competition assessment, the CCI has designed this toolkit. The objective of the toolkit is to help the stakeholders including government in the evaluation of existing as well as new laws/regulations/policies from a competition perspective.

3.13 The aim of the toolkit is to make the policymakers familiar with the need of competition assessment, the steps involved in carrying it out, the factors which may inhibit competition in the market, the modalities of identifying provisions which may raise competition concerns and how to redesign them in a way that they do not inhibit competition.

3.14 The toolkit provides a checklist annexed in **ANNEXURE D** which entails factors that may inhibit competition by distorting the forces of demand and supply in the market. This approach would raise awareness among policymakers about the importance of competition and would help in assigning critical importance to competition alongside other public policy.

3.15 **Which policies require competition assessment?** Competition assessment is necessary for economic legislations and policies whether new or existing or whether enacted at the union level, state level or the local level. But such an exercise requires resources in terms of skills, time, manpower, money and political will. However, it is the most effective way of creating a competitive ecosystem.

3.16 **Approach to Competition Assessment**

The approach to competition assessment is multi-pronged in nature.

a. The first and foremost step involves identification of the sector of which the laws, regulation and policies are to be assessed in consultation with Ministries, Departments, NITI Aayog etc.

b. The second step involves identifying the relevant legislations and policies amongst the pool of laws, policy and regulations governing the sector.

c. After the legislations/policies/regulations have been identified for carrying out the assessment, the third step consists of initial screening of the provisions of the identified legislations/policies/regulations with the help of the checklist.

d. If it is found in the initial screening that some provisions may affect demand or supply conditions of a market by – (i) creating entry and exit barriers, (ii) imposing restrictions that affect business conduct, (iii) affecting the organisation and ownership of the firm and (iv) limiting the choices and information available to consumers - then stakeholders need to be consulted.

e. In order to address such concerns, alternatives have to be suggested.

f. Amongst the alternatives, the best alternative has to be chosen for implementation.

g. After it has been implemented, ex-post analysis needs to be carried out to assess the effect of policy changes on competition. The last step would help in estimating the impact of enhancing competition by comparing the ex-ante and ex-post situation before and after redesigning the concerned provision.

Capacity Building Initiative of CCI

In sync with the mandate of the CCI and the role of competition in economic development, the Commission has started an exercise to assess select legislation and policies (Acts, Bills, Rules, Regulations and Policies) from competition perspective and share the assessment with the associated stakeholders. The Commission has framed the competition assessment guidelines (under section 49 (1) and (3) of the Act) and has empanelled seven academic institutions during the first phase of this exercise i.e 2016-17 and four institutes during the second phase i.e 2017-18.

Phase I- 2016-17

The Commission has empanelled the following 7 institutions during Phase -1:

1. Indian Institute of Management, Ahmedabad
2. The National Law Institute University, Bhopal
3. National Institute of Public Finance and Policy, Delhi
4. National Law University, Delhi
5. CUTS International, Jaipur
6. Indian Institute of Management, Lucknow
7. Indira Gandhi Institute of Development Research, Mumbai

As per the exercise, one legislation was allotted to each Empanelled Institute (EI) and a team of two CCI officers based on their area of interest and expertise. Each legislation was, therefore, assessed by two teams simultaneously i.e. one team of EI and one of CCI officers. The name of legislations are as follows:

1. Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Bill, 2016
2. The Agriculture Produce and Marketing Committee Model Act, 2003
3. Public Procurement Bill, 2012
4. Civil Aviation Policy
5. The Payment and Settle Systems Act, 2007 and RBI regulations there under
6. The Patent Act, including Intellectual Patent Policy
7. The Drug Pricing Control Order (DPCO) list (under the Essential Commodities Act)

Further, each assessment was peer reviewed by two other teams. On the basis of the peer reviews, the assessments were revised by the teams and were subsequently sent to all other teams for comments.

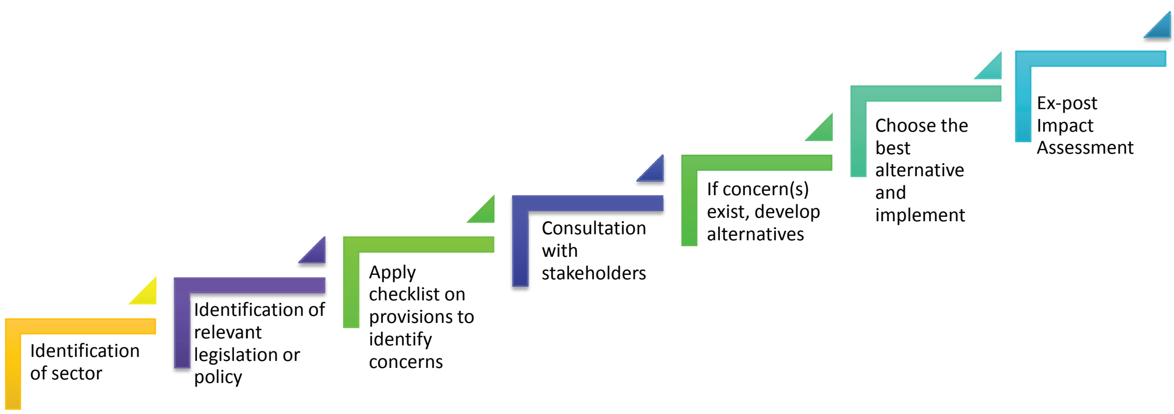
Phase II- 2017-18

In the second phase, the Commission has empanelled the following four institutes for competition assessment:

1. The West Bengal National University of Juridical Sciences, Kolkata
2. Symbiosis Law School, Pune
3. Institute of Management, NIRMA University, Ahmadabad
4. Tamil Nadu National Law School, Tiruchirappalli

In future also, CCI would continue to empanel Institutes for building their capacity in carrying out competition assessment.

Figure 3.1: Steps involved in a comprehensive Competition Assessment for an economy



3.17 **Identification of Sector:** An economy consists of many sectors. It becomes difficult to identify sectors which may contain anti-competitive elements in their structure or legislative/policy framework. The National Industrial Classification Code (2008) classifies Indian industries into 21 broad sectors. Each of the 21 sectors has many sub sectors within it and there can be instances where sub-sectors can be more important than the whole sector. So instead of looking into all the sectors simultaneously for competition concerns, it is considered appropriate to prioritise and identify them according to, *inter alia*:

- *Contribution of the sector to national/ sub-national economy*
- *Rate of expansion of the sector*
- *Number of market players*
- *Substitutability of the product*
- *Extent of backward and forward linkages*
- *Scope of innovation, productivity.*
- *Nature of economic activity and ownership*
- *Importance of the sector to consumer (buying capacity of consumers and essential goods)*
- *Price and income elasticity of demand for the product*
- *Number of cases received by competition authorities*
- *Flow of FDI in the sector/ investment levels.*
- *Impact of the sector on cost competitiveness of the economy, for example infrastructure.*
- *Number of mergers/ combinations in the sectors*

Some/all of the above discussed factors can be considered while identifying the sector. However, the list of factors is illustrative in nature. If a comprehensive competition assessment is to be planned for all legislations/policies, then identification and prioritization of the sectors may be done at the highest level of policymaking such as the Cabinet or the NITI Aayog in the Indian context.

3.18 **Identification of relevant legislation or policy:** Once the sector has been identified it is important to find out the important legislations and policies governing these sectors. To start with, this can be done by choosing the law or policy which applies to the entire sector, for example in case of banking sector, The Banking Regulation Act, 1949; The Reserve Bank of India Act, 1934 etc. It is also imperative to be aware of the laws which have been repealed and the amendments that have been made to legislations. Obsolete legislations and those which are administrative in nature need to be excluded and legislation and policies which have economic impact and which affect the market and enterprises therein need to be included.

3.19 It is important to highlight the primary objectives of the particular legislation/policy which have come under the radar of the competition assessment. This will help the assessor to identify the real cause of lack of competition such as whether the objective of the policy was to correct market failure, or to address any other environmental or social cause which would benefit the consumers while having market distorting impact.

3.20 **Apply Checklist to Provisions:** The checklist suggesting various factors through which competition may be impeded in any sector has been prepared. Before applying the checklist, the larger and noble policy objectives of the legislation/policy are to be looked into and kept in mind. The overall regulatory environment should also be considered. The checklist suggests various factors through which competition may be impeded in the sector. These factors can raise competition concerns in the market through their influence on demand and supply.

"Specific policy/legislation/regulation serves a larger public interest in alignmnet with development goals of the nation. They may have provisions that can cause competition concerns. Then, any proposal for modifocation /ammendment emerging from competition assessment is to be weighed against the larger public policy objecives. This would require a series of consultations and deliberations with the concerned stakeholders"

3.21 The checklist developed by OECD in its Competition Assessment Toolkit **(Annexure C)** includes factors which may limit the number of players, limit their ability and incentive to compete and restrict choices and information to consumers etc. causing market distortions.

3.22 The checklist suggested in this document enlists the factors and their influence on the market under the following two basic questions:

1. **How provisions of legislations/policies have the potential to influence supply in the market?**
2. **How provisions of legislations/policies have the potential to influence demand in the market?**

3.23 In the next chapter (Chapter 4) each element of the checklist has been analysed elaborately.

3.24 **Consultation with Concerned stakeholders:** Once the competition concerns are identified, in order to find alternatives, extensive consultation with the concerned stakeholders is required. It is necessary as it would help in understanding the rationale behind the provision and its impact on competition in the concerned market. Without prior consultation with the stakeholders, the competition assessment exercise would not be able to produce the desired results. Consultation is necessary to strike a balance between benefits of primary policy objective, which should be in sync with the prevailing development goals of the nation and the cost of market distortions resulting from such policy.

3.25 If a proposed or existing regulation/rule/policy has a competition concern, it does not necessarily mean that it is ill-conceived. However, if a negative effect on competition is identified, other alternatives that are less - restrictive on competition should be considered and analysed.

3.26 Before developing alternatives, the purpose of the policy and the overall regulatory environment should be kept in mind. Many policies are there to address some social objective. Once the competition concern has been identified, the policymaker through consultation would be apprised of the following:

- nature of the competition concern the provision is likely to raise,
- the market players which are likely to get affected
- whether the existence of such provision is necessary to achieve the policy objective or it can be modified to take care of likely competition concerns

3.27 **Development of Alternatives:** The alternative provisions arrived at after series of consultations should be able to:

i. achieve the policy objective

ii. reduce or eliminate the negative impact on competition

3.28 By keeping the above criteria in consideration, alternatives need to be suggested for the concerned provision. For example, in some cases, market failures can be addressed through regulatory or non-regulatory measures[4], such as:

[4]For details see Assessment of Regulatory Impact on Competition- Kenya Competition Impact Assessment (CAK), 2015

- Focused incentives (taxes/subsidies)
- Information and education campaigns
- Self-regulation (through trade associations)
- Co-regulation (self-regulation legally recognised, facilitated and enforced by Government).

3.29 The alternatives that are feasible may be designed on the basis of technical knowledge received from experts in the concerned industry. These experts can be ministry officers, industry experts, market players, regulators and competition law experts etc. The lesson can also be drawn from similar exercise conducted in other countries and also expertise of international organisations like the OECD, UNCTAD, World Bank etc. While suggesting alternatives, the policymaker must keep in consideration the changing industry environment and also the web of other related regulations (OECD, 2015).

3.30 **Choosing the Best Alternative and Implementing**

After finding the alternatives, it is necessary to choose the best possible alternative. This can be done by doing both the qualitative and quantitative analysis to list down benefits (both direct and indirect) and cost (direct and indirect) for each option. Qualitative analysis, while fast and easy to understand, may lead to the issue of subjectivity. On the other hand, quantitative analysis may bring in objectivity by giving a numerical range, but requires data which is usually difficult to find.

3.31 While choosing the alternative, the assessor must establish a baseline to compare alternatives, find out the potential to enhance competition by each alternative and the benefits and cost associated with each alternative. In case of qualitative analysis, the assessor must combine reasons, evidence, appropriate assumptions, strength and weaknesses for each conclusion. In case of quantitative analysis, the assessor must be aware of what is measured and how is the information collected. The analysis can be performed by making use of simple statistical and econometric tools to estimate cost and demand functions[5].

3.32 If the nodal ministry dealing with sectors is convinced about such competition assessment and is satisfied with the findings it will be easier to implement the corrections/modifications recommended through such assessment.

[5]For details see OECD (2015) "Competition Assessment Toolkit- Operational Manual"

3.33 Ex-post Impact Assessment

After the above steps, one may also carry out impact assessment to determine the impact of the modifications adopted in the policies/ legislations/regulations. This is known as Ex-post analysis and it plays a crucial role in competition assessment. It helps in determining whether the chosen alternative delivered the desired benefit. It highlights the importance of competition and the accuracy and significance of using competition assessment as a tool.

3.34 Ex-post analysis can involve survey of consumers, manufacturers, distributors, suppliers and other market players and asking them about the changes such as, *inter alia*, increase in growth and size of the sector, reduction in delivery time, rationalisation of prices, quality of goods and services, increase in consumer choice. witnessed after competition assessment.

Stages of Competition Assessment	To be done by
Identification of Sector	Inter-Ministerial Committee/ Niti Aayog/Cabinet
Identification of relevant legislation or policy	Inter-Ministerial Committee/ Niti Aayog/Cabinet
Apply Checklist to Provisions	Empanelled Institute / Ministry / Department in consultation with CCI
Consultation with Stakeholders	CCI / Empanelled Institute / Ministry/ Department/sector experts
Developing Alternatives	CCI / Empanelled Institutes / Ministry/ Department/sector experts
Choosing the Best Alternative and Implementing	Ministry/Department with Empanelled Institutes
Ex-post Impact Assessment	Framework to be developed

CHAPTER 4– CHECKLIST FOR COMPETITION ASSESSMENT

4.1 Checklist for competition assessment of government policies and legislations is based on the economic principles that govern the market forces of demand and supply. The checklist provided herewith revolves around two basic questions:

How provisions of legislations/policies have the potential to affect supply in the market?
How provisions of legislations/policies have the potential to affect demand in the market?

4.2 It is relevant to mention here that market distorting impact of government policy/legislation is transmitted through various determinants of demand and supply. Almost all possible determinants are covered in the checklist formulated by OECD. To that extent, the checklist suggested in this document draws significantly upon OECD toolkit.

4.3 Suppliers and Buyers in the market are defined as follows:

The supplier includes all players in the entire value chain of a product or services. It can include raw material provider, producer/ manufacturer, wholesaler, distributor, retailer, etc. The buyers are not always a distinct group. Final consumers of any product and services are always buyers. In addition, different players at different levels of the value chain can act as buyers of the intermediate products and services in the market.

PART I: MARKET DISTORTIONS THROUGH SUPPLY SIDE INTERVENTIONS

4.4 The government legislations/policies can adversely affect the supply side of the market and cause anti-competitive forces to distort market by: imposing entry and exit barriers; giving preferential treatment to one set of suppliers over others; increasing transparency of sensitive information; affecting cost and output etc. These reduce the supplier's ability and incentive to compete and thus affect their efficiency in the market. This in turn results in reduction in innovation, quality and the overall competitiveness of the sector.

The **supply side checklist** is as follows:

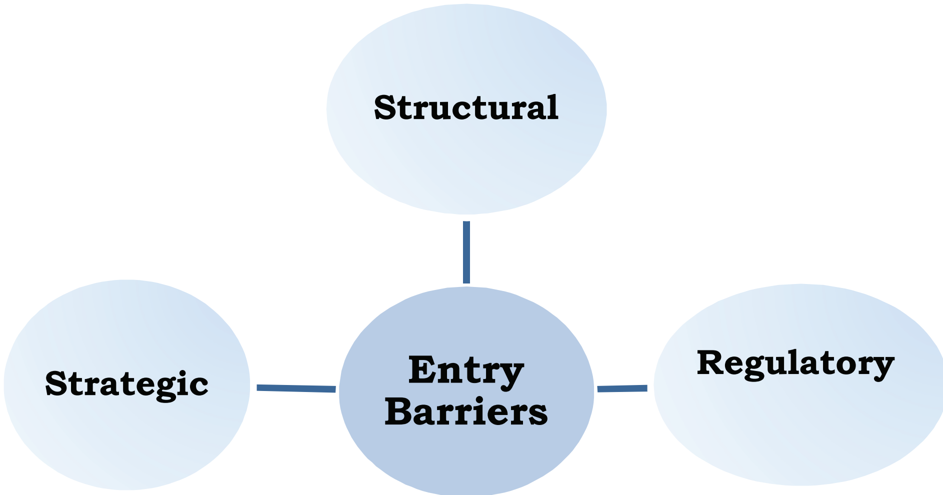
Supply Side checklist
Whether any provision(s) in policies /regulations / legislations- **A.** Create Barriers to Entry by: I. giving monopoly rights to a single enterprise for provisioning goods and services? II. protecting existing firms in a market? III. establishing excessive/unrelated minimum standards as a requirement for commencement of operation? IV. establishing Vertically Integrated Units? **B.** Creates barriers to exit? **C.** Gives advantage to one set of enterprises over the other? **D.** Affects the cost structure of the enterprise? **E.** Create actual/potential conflict of interest situation for a Regulator by **i.** Giving it a dual role **ii.** Overlapping Jurisdiction **F.** Encourages/requires publication of sensitive information? **G.** Fixes/restricts output of product/service? **H.** Has outlived its utility?

4.4.1 The checklist is just indicative in nature and is not exhaustive. The above factors are described briefly on the lines of the dimensions given below:

Introduction to the concept
Rationale of the policymaker
Competition concerns
Examples of provision(s) that raise(s) competition concern(s)
Alternatives that can be suggested in place of these provisions
Example(s) of provision(s) where the above concern(s) has/have been abolished or retained back (wherever possible)

4.5 A. Provisions that Creates Barriers to Entry

4.5.1 Barriers to entry can prevent a new firm to enter a market and reduce competition by limiting the number of players. A reduction in competition would in turn create a risk of creating market power and increasing concentration. This may lead to higher prices, lower quality and quantity and reduction in innovation and consumer choice. In other words, entry barriers can create a significant impediment to the natural functioning of te market and diminish its ability to keep market power in check.



4.5.2 The barriers to entry can be strategic, structural or regulatory. Structural barriers are created by the very nature of the industry whereas strategic barriers are due to the strategies practiced by incumbent to deter entry. The examples of structural barriers are high capital cost (sunk cost), economies of scale, economies of scope, network effects etc. The examples of strategic barriers include predatory pricing, limit pricing, product differentiation and advertising etc. (OECD, 2005). Apart from these, there exist regulatory barriers which can be both structural and strategic in nature.

4.5.3 **Why regulations may promote barriers to entry?**

Regulations are imposed to address market failures, provide consumer protection, achieve socially desirable objectives, maintain minimum standards, encourage investment, promote economies of scale, encourage small suppliers etc. However, at times it may inadvertently create barriers to entry.

4.5.4 While imposition of regulatory barriers could be explained by socially desirable values system of public policy, entry barriers could result in rent seeking behaviour by the protected firms, restrict supply and distort market forces. Hence, removing unjustified regulatory barrier to entry would have a significant positive impact on competition in the market.

4.5.5 The different types of entry barriers caused by regulations *inter alia* are as follows:

i. Giving monopoly rights to a single enterprise for provisioning of goods and services

ii. Protecting existing firms in a market

iii. Establishing excessive/unrelated minimum criteria as a requirement for commencement of operation

iv. Vertically Integrated Units

4.5.6 ***Giving monopoly rights to a single enterprise for provisioning of goods and services:*** When exclusive rights are granted to a supplier via a regulation, then it is usually a case of statutory monopoly. Such a situation can occur through natural monopoly when a single supplier can produce output more efficiently than two or more suppliers. With natural monopoly, economies of scale are reached only when the firm has become very large in relation to the market.

4.5.7 Rationale behind Granting of Monopoly Rights:

Competition is not a viable mechanism under situations of natural monopoly as it leads to loss of efficiency. It is mainly found in those industries where there exists high fixed cost to ensure supply. Such a situation mainly arises in case of public utilities which provide essential services to the consumer. For example, electricity, railways, gas pipelines etc. The policymakers grant exclusive rights to one supplier in such situation not only because it is more efficient but also to encourage high investment which may not occur when such incentives are not provided.

4.5.8 Competition Concerns in granting monopoly rights:

Granting monopoly rights can result in a situation where the supplier who enjoys a monopoly power engages in abusing its dominant position by charging excessive prices or indulges in other kind of abusive behaviour.

Box 4.5.1: Coal Sector

Examples of Provisions where Exclusive Rights Are Granted

The Coal India Limited was bestowed with the status of a statutory monopoly with the Coal India Nationalization Act, 1973 when all the existing coal blocks were nationalized. The preamble and Section 3 of the Coal India Nationalization Act, 1973 clearly highlights the monopoly status of the Company. However, with the increase in demand for coal, the company failed to meet the production challenges.

Further, governance challenges, inefficiency, allegations of corruption have also impacted Coal India's performance.

Source: Business Standard, 2014

What are the alternatives that can be suggested in place of these provisions?

Although, granting of such exclusive rights is necessary for creation of basic infrastructure, other options can also be considered. These rights can also be granted through a competitive bidding process. The other option can be that the duration of such monopoly rights can be pre-determined and the sector then can be opened up to competition on the completion of that duration. Otherwise, it may lead to loss of productive and dynamic efficiencies over time.

Box 4.5.2: Telecom Sector

Example of reforms when exclusive rights were removed

Before the 1990s the public sector retained the rights for provision of Telecom Services in India. Department of Telecom (DoT) was responsible for telecom services in the entire country until 1986 when Mahanagar Telephone Nigam Limited (MTNL) and *Videsh Sanchar Nigam Limited* (VSNL) were carved out of it to run the *telecom services in metro cities. However, in the 1990s, with the New Economic Reforms and The National Telecommunication Policy of 1994, the Telecom sector was liberalised to an extent and opened up for private sector participation. Also, equipment manufacturing which was a government monopoly was opened to private sector. Major international players entered the telecom market. Today there are many players in this business and competition in this segment has increased substantially.*

Source: V. Berg et al (2002) and Kohli (2006)

4.5.9 ***Protecting existing firms in a market:*** Sometimes, there are cases where regulations try to protect the interest of incumbents. Such regulations create asymmetric standards on incumbents and entrants and significantly raise barriers to entry (for instance, by raising the cost of entry) and introduce or reinforce Grandfather Clauses.

4.5.10 According to the Black's law dictionary, a grandfather clause is a "*statutory or regulatory clause which exempts a class of persons or transaction because of circumstances existing before the new rule or regulation takes effect*". In other words, it relates to situations where the existing businesses (incumbents) are allowed to continue operations under older rules whereas new entrants are subject to the newly-imposed rules and regulations (Competition Authority of Kenya, 2015). Those exempt from the new rule are said to have grandfather rights or acquired rights. Hence, it provides protection to existing firms from newly imposed regulations.

4.5.11 Rationale behind protecting Existing Competitors/ Grandfather Clause:

The policy rationale behind protecting existing competitors is cost considerations which exempt existing entities to immediately conform to new regulations or to provide them with a transitional period to get accustomed to new rules and regulations. Grandfather clauses are usually enacted with the intention of not upsetting a well-established logistical or political situation.

4.5.12 Competition Concerns in case of Protecting Existing Competitors:

Protecting existing competitors through grandfather clauses significantly affects entry as it imposes asymmetric standards on older versus newer competitors. It considerably imposes greater cost on entrants and impairs their access to resources. Such clauses should contain a 'sunset clause' which will encourage the incumbents to innovate and would not unnecessarily exempt them from new rules, ensuring a level playing field over a given period of time.

Box 4.5.3: Civil Aviation

Example of Provision where Grandfather Clause is allocated

In India, slots allocation is done as per the International Air Transport Association (IATA) worldwide slot guidelines. As per this, an incumbent airline is entitled to retain a group of slots based on historic precedence. This occurs if the concerned slots have been utilized at least 80% of the time in the preceding season. The guidelines also state that slots may not be withdrawn from a carrier in order to accommodate new entrants and from the pool of available slots the new entrants have access up to only 50% of the slots.

These rules protect the incumbents and create barriers of entry for the new entrants resulting in limiting the number of players in the civil aviation sector.

Source: Report of the Committee Constituted for examination of the recommendations made in the Study Report on Competitive Framework of Civil Aviation Sector in India, Government of India, 2012

What are the alternatives that can be suggested in place of these provisions?

The current system of slot allocation may be revised and this may put airlines on more equal footing when competing for slot. This may be done with the help of competitive bidding.

4.5.13 ***Establishing excessive / unrelated minimum standards as a requirement for commencement of operation:*** There exist various types of sector specific regulations imposed by government to maintain minimum standards as a requirement for starting operations. These standards are set to maintain the quality of a good or service. The minimum standards can take the form of Licensing requirements and minimum qualification requirements which can include:

- Number of years of experience
- Technical criteria: standards related to nature and quality of the product or service
- Financial criteria: Net worth of the firm, average annual turnover, average net cash accrual etc.

These requirements can pose a significant barrier to entry.

4.5.14 Rationale behind establishing minimum standards:

The policy objective behind establishment of minimum criteria is to provide for consumer protection with respect to those goods which create significant information problems. The standards are also there to avoid opportunistic behaviour. If standards are not defined and monitored effectively, then it may lead to the reduction in quality of goods and services (Bruzzone, 2001).

4.5.15 Competition Concerns with Establishment of Minimum Standards:

Imposition of minimum criteria restricts entry in the industry and the number of competitors. It also leads to protection of incumbents against entry and proves as an obstacle for worthy entrants. Such requirements, if very strict, can reduce consumer choice and create artificial scarcity in the market. Such requirements often benefit large players over small players.

4.5.16 Hence it becomes necessary to establish a guiding principle to ensure that minimum requirement should be there only when it is necessary. These requirements must be listed along with the rationale behind them.

Box 4.5.4: Retail Sector

Examples of provisions where minimum requirements are established.

Clause 5.2.15.4(1)(iii) *of FDI Policy, 2017 requires that for FDI investment in multi-brand retailing, 50% of the investment should be made in backend infrastructure within a period of three years. The investment has to be a Greenfield investment.*

This requirement can pose as a significant entry barrier, particularly for those investments which don't require much spending in backend infrastructure. It may thus make the multi-brand retail sector unattractive for investment. Further, requirement of greenfield investment may result in significant impediments as foreign firms may not be able to make full use of existing backend infrastructure.

What are the alternatives that can be suggested in place of these provisions?

A cost-benefit analysis can be done and depending on the outcome, it can be decided whether there should be a need of backend infrastructure or this requirement can be done away with or it may be reduced from the present stipulation of 50%.

Box 4.5.5: Companies Act, 2013

Examples of the provision where minimum standards have been abolished

In Companies Act, 2013, in order to incorporate a public or private company, the minimum paid-up share capital requirement was INR 100,000 (in case of a private company) and INR 500,000 (in case of a public company). As per Companies Amendment Act, 2015, this has been done away with and at present there is no minimum capital requirement for incorporation.

Accordingly, no minimum paid-up capital requirements will now apply for incorporating private as well as public companies in India. Also, the requirement to obtain a certificate to commence business operations has been eliminated. This has led to the removal of a significant barrier to entry for companies.

Source: Gazette of India, 2015

4.5.17 *Establishing Vertically Integrated Units*

Businesses use vertical integration as a method to gain control of different stages in a supply chain. Vertical integration can be both forward and backward. In forward integration, a firm gains ownership of its distributor and in backward integration a firm gains ownership of its supplier or vendors.

4.5.18 Rationale behind Promotion of Vertically Integrated Units:

Firms adopt vertical integration as it reduces their cost and increases their efficiency and quality and hence increases their competitiveness. It would result in greater process control, increase market share and increased supply chain coordination. The regulations promote vertical integration as it leads to substantial reduction in cost, increase in efficiency and requires relatively less bureaucratic control compared to a situation when there are many firms.

4.5.19 Competition Concerns in case of Vertical Integration:

Vertical integration leads to increase in market share of a single firm and limits competitiveness. If a single firm has a control over the supply chain then it has the power to behave like a monopoly and may abuse its position. A vertically integrated firm may also violate the essential facilities doctrine by not giving access to essential facilities/input to downstream/upstream firms, given that the access of the facility in question is essential for effective competition in a downstream or upstream market.

Box 4.5.6: Electricity Sector

Example of provisions that promote vertical integration

Section 14 of the Electricity Act, 2003 (Grant of license):

The Appropriate Commission may, on an application made to it under

section 15, grant a license to any person -

(a) to transmit electricity as a transmission licensee; or

(b) to distribute electricity as a distribution licensee; or

(c) to undertake trading in electricity as an electricity trader,

in any area as may be specified in the license:

……………………………Provided also that the Appropriate Commission may grant a license to two or more persons for distribution of electricity through their own distribution system within the same area…………. trading in electricity

Here the Electricity Act, although encourages competition but does not demarcate the carriage and content segment. As per this section, each distribution licensee who wants to provide electricity has to invest in its own network of distribution. This may lead to replication of network and may push up tariffs for the end consumers, instead of promoting competition, it may hinder competition.

What are the alternatives that can be suggested in place of these provisions?

The government can consider the option of introducing multiple licensing by separating the carriage and content segment. The 'separation of carriage and content' would mean that while a distribution company will bring electricity to the end consumer, the supply and revenue collection would be done by multiple suppliers. This is likely to encourage competition in the supply segment and enhance the choice for the end consumer, given the multiple supply entities in the market.

Example of provision where vertical integration of units has been done away with.

Box 4.5.7: Unbundling of Electricity Segments

As part of power sector reforms, unbundling of State Electricity Boards (SEBs) was made mandatory by the Electricity Act of 2003 as most of them were functioning as loss-making entities with high outstanding dues. It was envisaged that restructuring them would promote greater efficiency by streamlining operations of distribution, transmission, generation and trading, while also promoting transparency and accountability. The Electricity Act of 2003 prohibits SEBs from functioning as integrated power utilities by mandating it to divide them into separate entities for handling transmission, generation, distribution and trading functions

4.6 B. Provisions that Create Barriers to Exit

"India has made great strides in removing the barriers to the entry of firms, talent, and technology into the Indian economy. Less progress has been made in relation to exit. Thus, over the course of six decades, the Indian economy moved from 'socialism with limited entry to "marketism" without exit"- Economic Survey, 2015-16

4.6.1 Free exit is an important characteristic of a free market. It is a situation in which an enterprise is free to exit the market without facing any barrier. If exit is difficult and expensive in a market, firms would think twice before entering it. The regulatory barriers to exit include labour market regulations, bankruptcy regulations, contractual obligations, subsidies (bailouts), etc. At times governments may also bailout inefficient enterprises and do not let them exit keeping in view short-term consequences such as loss of employment etc. Barriers to exit lead to dragging of inefficient firms which leads to wastage of resources and raises economic and fiscal cost. Needless to say that it also hinders freeing up of resources for alternative efficient uses.

4.6.2 Rationale behind regulatory Barriers to exit:

The policymakers impose exit barriers in order to protect the interest of the groups associated with the outgoing firm(s). They may include; consumers of essential products, employees of the firm, its creditors, tax authorities, auditors, and the parties with which it has contractual obligations etc.

4.6.3 Competition Concerns in case of Exit Barriers:

When the procedures to exit become long and costly, then a lot of failed firms would remain in the market. The credit worthiness of such an industry would get significantly reduced with lenders apprehensive in providing any more credit (Hylton, 2010). This would reduce the overall competiveness of the industry. Difficulty to exit would further deter entry and reduce competition in the market. Further, the presence of barriers to exit also affects the behaviour of the incumbents in the industry. They are more likely to deter potential entry in order to save their existing position in the market by resorting to anti-competitive practices like predatory pricing etc.

Box 4.6.1: Exit Barriers

Examples of Exit Barriers

Para 21(2) of Drug Pricing Control Order (DPCO) 2013 states that "Any manufacturer of scheduled formulation, intending to discontinue any scheduled formulation from the market shall issue a public notice and also intimate the Government in Form-IV of schedule-II of this order in this regard at least six month prior to the intended date of discontinuation and the Government may, in public interest, direct the manufacturer of the scheduled formulation to continue with required level of production or import for a period not exceeding one year, from the intended date of such discontinuation within a period of sixty days of receipt of such intimation.".

This exit barrier is imposed with the intent to protect the larger public interest of the policy. As per the internal assessment of the DPCO conducted by IIM, Ahmedabad and CCI, this provision makes it difficult for the manufacturers of scheduled formulations to exit the market if it becomes non-profitable for them. In such situation there could be sub-optimal supply of products in the market either in terms of quality or quantity.

What are the alternatives that can be suggested in place of these provisions?

The government may consider encouragement of Research and Development in the same drug.

Box 4.6.2: Insolvency and Bankruptcy Code, 2016

Example of Steps taken by government to reduce exit barriers

The Insolvency and Bankruptcy Code came into force in 2016. It provides for resolving corporate insolvency applications within 180 days, with an option of extending it by 90 days. It also has a clause to provide for insolvency professionals, who will specialize in helping sick firms. The code seeks to reduce the time for resolving an insolvency process to less than a year as against an average time taken of more than four years earlier. India for the first time made into the top 100 in the World Bank's Ease of Doing Business global rankings 2018. As per the report "India made resolving insolvency easier by adopting a new insolvency and bankruptcy code that introduced a reorganization procedure for corporate debtors and facilitated continuation of the debtor's business during insolvency proceedings".

Source: World Bank Doing Business Report, 2017 & 2018

4.7 C. Provisions that give advantage to one set of enterprises over the other

4.7.1 Sometimes policies are designed in such a way that they give preferential treatment to a supplier/group of suppliers compared to other suppliers. This means that all the players in a market do not play as per the same rules and thus do not have an equal chance of success. This violates the level playing field principle of competition policy.

4.7.2 An example of the principle of level playing field getting violated is when government regulations put private companies at a disadvantageous position compared to state controlled or state owned firms. Government ownership automatically confers benefits such as government guaranteed support, lenient view by regulatory authorities, guaranteed public sector customers as well as costs (Planning Commission, 2009). Therefore, ensuring a level playing field is a key element for achieving competitive neutrality[6].

[6]Competitive neutrality requires that a class of enterprises (such as government business entities by virtue of public sector ownership) should not enjoy competitive advantage over another class of enterprises (such as private sector competitors).

4.7.3 Rationale for Giving Advantage to one set of supplier over another:

The main rationale behind such regulations is to achieve a public policy objective, industrial policy objective, protecting fiscal revenues and/or to prevent market failure. Such rights are also conferred when the policymaker wants to protect an enterprise because of pressure from interest groups or from the general public. It usually happens in network industries which are engaged in the provision of public services.

4.7.4 Competition Concerns in case of violation of level playing field:

If there is lack of level playing field, the resources don't get efficiently allocated as the prices charged by firms who enjoy preferential treatment do not reflect the actual cost of the resources. This in turn impacts the competitive process and affects the decisions related to production and consumption.

4.7.5 Firms enjoying regulatory privileges like huge subsidies may indulge in anti-competitive behaviour like predatory strategies to drive out their competitors, significantly increase the cost of its rivals and can resort to cross subsidization. Conferring privileges on state owned firms can put private firms in a disadvantageous position and can distort investment in the sector.

Box 4.7: Civil Aviation

Example of Provisions which violate Level Playing field

Section 19(a) of National Civil Aviation Policy (NCAP), 2016 states that "The airport operator will ensure that there will be three Ground Handling Agencies (GHA) including Air India's subsidiary/JV at all major airports as defined in AERA Act 2008 to ensure fair competition".

Major Airport Operators have been directed to ensure that there will be three ground handling agencies including Air India's subsidiary/JV. As per the Competition Assessment of NCAP, 2016 carried out by NLU, Delhi and CCI, this appears to be the minimum number of ground handlers allowed in the airport, it is unclear whether it is the maximum limit. In case of limitation of the ground handlers to 3 in number, the preference given to Air-India is contrary to the principles of competition. Policy preferences could at times promote inefficient and high cost ground handling services (GHS) even though new low *cost service providers could do the same job more effectively. This affects the level playing in the market of ground hauling services.*

What are the alternatives that can be suggested in place of these provisions?

Keeping in consideration the benefits of competition, any player may not be given any privilege relative to other players in the market. The spirit of competition instead should be promoted. Even though Air India is a state owned enterprise, it should compete with other GHAs for getting GHS. The suggestion for a fixed number of GHAs (3 GHAs) may also be removed as long as there is adequate infrastructure and there are no safety/ operational concerns for allowing more GHAs.

4.8. D. Provisions that Affect the cost structure of the Enterprise

4.8.1 Ronald Coase, the Nobel Prize winner in Economics, quoted "*Business men in deciding on their ways of doing business and on what to produce take into account transaction costs. If the costs of making an exchange are greater than the gains which that exchange would bring, that exchange would not take place and the greater production that would flow from specialisation would not be realized*" (Coase, 1992). Product market regulations influence the cost an enterprise incurs when expanding their production capacity and regulatory reforms lower cost which in turn affect entry and the extent of investment (Alesina et al, 2005). Regulations usually affect the cost structure of the firm either by

- Lowering the cost of the firm
- Increasing the cost of the firm

4.8.2 ***Lowering the cost of the firm:*** Regulations confer preferential treatments to enterprises like financial assistance to sustain commercial operations, favourable tax regimes, tax exemptions, making available land at below market prices etc. Such advantages granted to them are not because of their performance, efficiency, technology or market skills but mainly because of the type of ownership or the type of industry. These advantages artificially lower the cost of the enterprise relative to its rivals who have to bear the full cost.

4.8.3 In cases where favourable credit treatment is given to a sector, it may increase the borrowing cost for other sectors and thus decrease their competitiveness. Preferential treatment is usually given to the state owned enterprises in order to fulfil industrial or public policy objective. Such advantages have a negative impact on competitiveness as it hampers the ability of the competitors to compete. Preferential treatment may also prevent entry of the new firms in the industry. Public Sector Enterprises may have an incentive for resorting to anti-competitive practices like predation without fear of loses as it is protected by the government.

4.8.4 ***Increasing the cost of the Firm:*** Excessive regulations and regulatory procedures increase the cost of the firm in terms of both money and time. A business in order to operate in a market has to follow a lot of administrative and regulatory procedures. This may deter entry into the market if it increases the cost of the firms significantly. According to World Bank (2014), regulatory impediments to the movement of goods across state borders raise transit times by as much as one quarter, and put Indian enterprises at a significant disadvantage vis-à-vis international competitors.

4.8.5 Introduction of new regulations may make it cumbersome for the firms to follow as they have to change their business setting accordingly. For instance: Introduction of caps on carbon emission may increase the cost of production of the enterprise as it would have to make changes in its technique of production. This adds to the cost of business. Some examples of the regulations that increase the cost of the business are:

(a) **Changes in regulations** related to taxation, auditing requirements, environment, insolvency, product standards can add to the cost of the existing business

(b) **Licensing Requirement:** This may deter entry in the market

(c) **Substantive compliance costs,** which encompass those investments and expenses that are faced by businesses in order to comply with substantive obligations or requirements contained in a legal rule.

(d) **Administrative burdens** are those costs borne by businesses for administrative activities performed to comply with information obligations included in legal rules.

(e) **Opportunity cost of Time**: It includes cost of waiting and delays.

Box 4.8.1: Dealing with Construction Permits

Example of Provisions which significantly increases cost

As per the World Bank Ease of Doing Business Report, 2018, India ranks 181 out of 190 countries in dealing with construction permits. The report tracks the procedures, time and cost to build a warehouse - including obtaining necessary licenses and permits, submitting all required notifications, requesting and receiving all necessary inspections and obtaining utility connections. In addition, the 'Dealing with Construction Permits Indicator' measures the building quality control index, evaluating the quality of building regulations, the strength of quality control and safety mechanisms, liability and insurance regimes, and professional certification requirements. In Mumbai and Delhi, in order to build a warehouse, 37 procedures are to be followed in Mumbai and in Delhi 26 procedures are to be followed. Also, it takes around 157 days in Delhi and 128 days in Mumbai to get the construction permit.

Source: World Bank Doing Business Report, 2018

What are the alternatives that can be suggested in place of these provisions?

The number of bureaucratic levels needs to be reduced and e-approvals should be brought in wherever possible.

Box 4.8.2: GST Regime for Reducing Cost

Example of provision where the problem of increasing cost have been attempted to be resolved

The GST offers a unique opportunity to rationalise and re-engineer logistics networks in India, given the inherent inefficiencies with taxes based on the crossing of the administrative boundaries. The GST will free up decisions on warehousing and distribution from tax considerations so that operational and logistics efficiency determines the location and movement of goods. Freight and logistics network will realign according to the location of production and consumption activities, creating the hub-and- spoke models that are needed to improve freight and logistics performance. Removal of delays due to road blocks, toll and other stoppages cut freight times by some 20-30 percent and logistics cost by an even higher 30-40 percent.

> *This would tantamount to a gain in competitiveness of some 3-4 percent of net sales for key manufacturing sectors, helping India return to high growth path and enabling large scale job creation.*
>
> *Source: World Bank, 2014*

4.9 E. Provisions that Create actual/potential conflict of interest situation for a Regulator

4.9.1 ***Giving it a Dual role:*** In certain sectors, markets do not work efficiently if left on their own. The structure of these industries is usually oligopolistic or monopolistic in nature and hence these sectors are more prone to anti-competitive activities. In order to prevent market failure, regulation of such sectors becomes imperative.

4.9.2 However, government intervention in these sectors has proven to be ineffective. With this realization, there emerged a new form of economic governance which is characterized by the setting up of specialized agencies to perform the regulatory functions. Sectoral regulators are bestowed with the responsibility of ensuring competitive outcomes by making decisions in a transparent, consultative and participatory manner. Their main functions are setting quality standards and monitoring performance; health and safety regulations and monitoring/ enforcement; use of natural resources; setting entry and exit requirements; creating level playing field, setting tariff levels and structures; monitoring costs of operation; etc. However, there exist certain regulatory barriers which may result in failure to achieve a competitive outcome which are elucidated below.

4.9.3 **Regulator performs the dual role of a Regulator as well as an Operator:**

There are certain sectors where the regulator acts both as a market player as well as a regulator. This leads to conflict of interest. Since a regulator has to regulate the players in the market and if it acts as one of the players then its officials may be tempted to frame regulation according to its requirements as a player, thus, giving itself competitive advantage over other players in the industry and violating the principle of maintaining competitive neutrality.

Box 4.9.1: Banking Sector

Example of Provision which gives dual role to the Regulator

RBI has been designated as the authority for regulation and supervision of any payment systems under section 4(1) of the Payment and Settlement System Act, 2007. However, it is essential to note that RBI not only functions as the regulator of these payment systems but it also operates two payment systems on its own viz. Real Time Gross Settlement (RTGS) and National Electronics Funds Transfer (NEFT). In this context, it performs a dual role which might be conflicting in nature. This will have a likely influence on the level playing field in the relevant market.

What are the alternatives that can be suggested in place of these provisions?

The regulations may provide clearly that under which circumstances RBI would act as a regulator and as a player in the relevant market.

Source: Competition Assessment of Payment and Settlement Act, 2007 carried out by NIPFP and CCI.

4.10 F. Provisions that Encourage/Require Publication of Sensitive Information

4.10.1 Transparency is required to maintain industry safeguards and also because at times ramifications of a business conduct may be far more widespread. However, too much transparency can have a negative impact on competition. Certain regulations mandate market participants to publish sensitive information on their prices, output levels or other information to increase transparency in their operations. So there is a need to maintain adequate balance between openness of processes, financial performance, and decision-making vs. the secrecy required for competitive advantage, to protect intellectual and invested capital, and strategic planning (Leadership Acumen, 2003).

4.10.2 Rationale behind Increasing Transparency:

The main objective of the policymakers behind increasing transparency is to improve accountability of the businesses, increase information to consumers, safeguard industry standards and increase efficiency of the market.

4.10.3 Competition Concerns in case of Increased Transparency:

If transparency requires strategic information of the businesses to be published, then it may at times facilitate collusion (cartelization) among enterprises by making the monitoring of cartel members easier. The enterprises may collude to increase prices or restrict output, thus creating artificial scarcity in the market. This would lead to determination of output and prices by the market players, instead of being determined by the free market forces i.e demand and supply.

Box 4.10: Agriculture Marketing

Example of Provision that increases Transparency

Section 27 of the Model APMC Act, 2003 says "to publish and circulate from time to time the data of arrivals and rates of agricultural produces standard wise brought into the market area for sale as prescribed"

Complete transparency is not always good especially if market is conducive for cartelisation. Therefore, publishing and circulating data on arrivals and rates of agricultural produces brought into the market may lead to an environment conducive for collusion. In other words, this would affect the competitive bidding process for price realisation.

What are the alternatives that can be suggested in place of these provisions?

The government can consider the option of reducing the level of transparency in case of strategic variables or it may think of giving exclusive access (access to regulatory authorities, research bodies etc) for such information. This would help in reducing the risk of cartelisation.

4.11 G. Provisions that Fix/restrict output of product/service

4.11.1 Production quotas are set by government or regulator to limit the supply of a product and regulate the volume of trade in the industry. Sometimes quotas are set to limit the sale of the commodity. It is mainly used in cases of essential goods and environmental goods.

4.11.2 Quotas also assign a share of the supply to each supplier. These quotas or permits are distributed to each supplier on the basis of a formula. This method of distribution determines which party would gain from trade and by how much when there is cost attached to the permits. In most cases the permits remain transferable, that is they can be bought or sold by the suppliers from/to their competitors.

4.11.3 Rationale behind assigning Production/Sales Quotas:

Production quotas are assigned by policymakers mostly in case of environmental goods to protect natural resources which are usually non-renewable in nature. It is also assigned to protect the environment from pollution to the level where it is environmentally sustainable. Quotas are also assigned to meet some public policy objective like to remove inequality in land distribution or to make available a certain quantity of the essential goods such as food grains, medicines etc. at lower prices for certain sections of the society**.** Sales quotas exist to prevent the dominance of a firm.

4.11.4 Competition Concerns in case of Production Quotas:

Fixing Quotas can prove contrary to the determination of output by market forces. It affects the competitiveness of the industry and distorts price also. It may also reduce the incentive of the supplier to compete with each other. Production Quotas may result in increase in price of the commodity and can force the consumer to look for alternative products. This may prove detrimental to the consumer if switching cost is high.

Box 4.11.1: E-commerce Sector

Example of Provision that Restricts Output

Section 5.2.15.2.4(v) of FDI policy, 2017 says "An e-commerce entity will not permit more than 25% of the sales value on financial year basis affected through its marketplace from one vendor or their group companies"

The above clause puts a restriction on the amount of sales from one vendor or their group companies and thus restricts the freedom of players to compete on the basis of sales.

Source: FDI policy, 2017.

What are the alternatives that can be suggested in place of these provisions?

The government may consider the option of not determining the sales quotas unless necessary. And if it does, it may inform about the rationale behind putting a quota, to the stakeholders.

Box 4.11.2: Deregulation of Sugar

Example of provision where the restriction on output has been reduced

Earlier the government followed a policy of partial control and dual pricing of sugar. As per the sugarcane pricing policy, a certain percentage of sugar produced by sugar factories used to be requisitioned by the Government as compulsory levy at a price fixed by the Central Government. Further, the non-levy sugar was allowed to be sold as per the quantity released by Government under the regulated release mechanism. This has a significant effect on the ability of sugar supplier to compete on the basis of output.

However, following the recommendation of the Committee headed by Dr. C Rangarajan, the Government of India partially deregulated the sugar industry in June 2013 by eliminating the monthly release mechanism of non-levy sugar and by removing the compulsory supply of 10% of mill's production as levy sugar at subsidised rate.

Source: Rangarajan Committee, 2012

4.12 H. Whether there exists any legislation/policy or a provision in legislation/policy that has outlived its utility?

4.12.1 Policies/legislations and the provisions therein have to keep pace with the path of development taken by the economy. If the economy is geared towards growth through encouragement of competition and free markets, policies should not reflect the opposite and thus become counter-productive. They should facilitate rather than be a hindrance to the smooth functioning of businesses. They should strike a fine balance between the primary objective that they are trying to achieve and their impact on competition in the markets that they deal with. In India, there exist many legislations and policies both at the union and state level that have inadvertently become counterproductive to the idea of fostering competition in markets.

4.12.2 The Ramanujam Committee was set up in 2014 to review the repeal of obsolete laws. The committee had identified a total number of 1,741 Acts for repeal. Of the total 1741 laws recommended for repeal, 777 were Central Acts; 624 were Central Appropriation Acts up to the year 2010; 257 were Central Appropriation Acts in respect of States and 83 related to State subjects. The Law Commission also had in its four separate reports on obsolete laws recommended repeal of 72, 113, 74 and 30 obsolete Acts, respectively.

4.12.3 The obsolete economic laws increase the cost of doing business in India by increasing the cost of compliance to business unnecessarily. Some laws are completely bizarre in nature given the present times. For instance, Delhi Hotels Act, 1949 require Delhi hotels to reserve at least 20% of their rooms for government guests. Thus limiting the supply of rooms and taking away the freedom of the hotel management to compete on the basis of sales.

4.12.4 It is not necessary that laws have to be repealed in entirety, but instead there can be instances where laws can be retained but some sections scrapped. Also, there can be cases where consolidation and harmonisation exercise is required or repeal can be matched with new legislations to plug the gap (Debroy, 2015)

Box 4.12.1: Labour Laws in India

Example of Legislations which have outlived their utility

Indian labour laws are considered to be rigid in nature. As a result of which it fails to create enough good quality employment opportunities. There are over 200 different labour laws in India. As per RBI's estimates India's employment elasticity which is a measure of the percentage change in employment for a one percent change in GDP, has hovered around 0.2 in the post-reform period. This means that as the real GDP increases by ten percent, employment will only rise by two percent. This low employment elasticity is because of the rigidity in labour laws in India.

And the most burdensome of them is the Industrial Disputes Act (IDA) of 1947, which makes it almost impossible for businesses with 100 or more workers to fire anyone. In order to do that, the firms require permission from the labour department to lay anyone off and such permissions are rarely given even if the firm is unprofitable. This increases the cost of the firm and puts a limit on its expansion. This law has proved to be highly burdensome on manufacturing firms. As a result of this law many firms resort to hiring on contract basis. Such labour laws act as a hindrance on the firm's ability to reap economies of scale.

Labour laws need to be made more flexible and instead of adding to the cost of the firms they should instead provide incentive to the firm for creating employment. The firms should be able to fire workers if they prove unproductive or indulge in illegal activities. However, the law should also enable the employee to represent its case.

Source: Business Standard, 2017

Box 4.12.2: Competition Regime in India

Example of Provisions which have been changed with the changing economic conditions.

In India, Monopolies and Restrictive Trade Practices Act (MRTP Act) was enacted to ensure that the economic system didn't result in concentration of economic power, to provide for control of monopolies and to prohibit monopolistic and restrictive trade practices. As India moved steadily on the path of reforms comprising of Liberalisation, Privatisation and Globalisation, it did away with the MRTP Act,1969 as it was realised that the Act had outlived its utility and control of monopoly was no longer appropriate. Indeed, need was felt to promote and sustain competition in the market place. The then Finance Minister (Shri. Yashwant Sinha) in the budget speech in 1999 had announced:

"The Monopolies and Restrictive Trade Practices Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition"

Consequently, the MRTP Act was replaced by competition Act, 2002. The new Act didn't curb monopolies but instead promoted competition by prohibiting practices that have a negative impact on competition in the country.

4.13 PART II: MARKET DISTORTIONS THROUGH DEMAND SIDE INTERVENTIONS

4.13.1 The market demand for a product is the sum of the demand of individual consumers. The factors in **demand side checklist** are given below:

Demand Side Checklist
Whether any provision(s) in policies/regulations/legislations- A. Causes interference in the pricing of goods/service via: I. Price controls? II. Subsidies? III. Tax policies? B. Limit the ability of consumers to switch between suppliers? C. Restrict flow of information to consumers?

4.13.2 It is important to note that all these factors have an impact on the supply side as well. Detailed discussion on each of the above mentioned government interventions are made along the following dimensions.

Introduction to the concept and Rationale of the policymaker
Competition concerns
Examples of provision that raises competition concern
Alternatives that can be suggested in place of these provisions
Example of provision where the above concern has been abolished or retained back (wherever possible)

4.14 A. Provisions that Cause interference in the pricing of goods/services

4.14.1 Government can influence pricing strategies of the enterprise in three ways:

- By imposing price controls
- By providing subsidies
- By imposing taxes

4.14.2 ***Price controls***: Dynamic interaction of demand and supply produces an equilibrium market price. But when government policies and regulations adopt a price control mechanism, it defines the market price of a product and forces all, or a large percentage, of transactions to take place at that price instead of the equilibrium price set through market forces of demand and supply. As a part of public policy, the government controls price in two ways:

i) Imposing maximum price also known as price ceiling and

ii) Imposing Minimum price known as price floors.

4.14.3 Government fixes price ceiling in order to protect consumers from high prices. Price ceiling can be problematic when it is set below the equilibrium market price as there will be excess demand and supply shortage (figure 4.1). This is caused due to exit of firms who would not be able to sell at such low prices due to their cost structure. Thus, consumers may be forced to consume less and some consumers may not get the goods at all. Normally in this situation, governments resort to rationing of goods which also increase administrative cost.

4.14.4 Besides limiting the consumer demand, price ceiling imposed by government policy can lead to hoarding and black marketing. An example of price ceiling is the price ceiling on scheduled drugs fixed under Drug Pricing Control Order (DPCO).

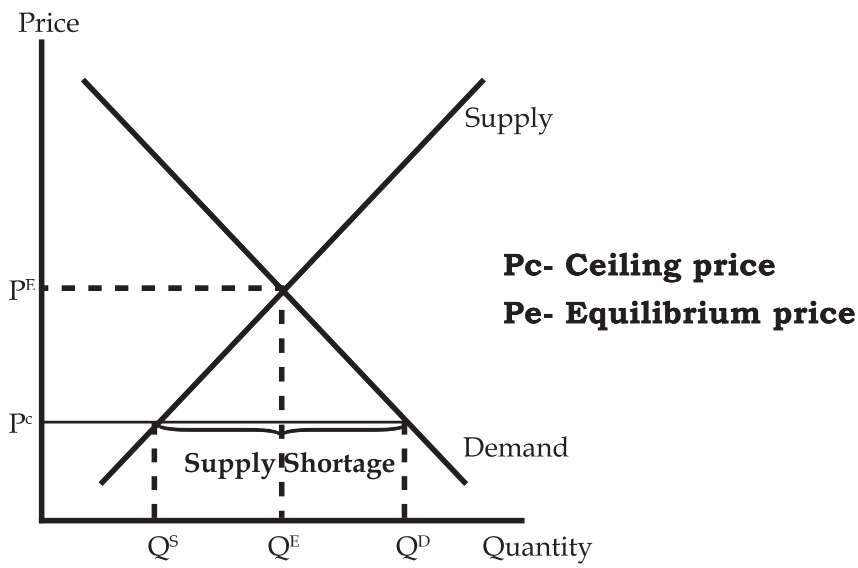


Figure 4.1: Price Ceiling

4.14.5 Government policy fixes price floors to support producers to meet their cost with the aim to pass on the benefit to the consumer. It is mainly set in case of essential goods. When price floors are set above the equilibrium market price (Figure 4.2), it can lead to excess supply, resulting in a large inventory of unsold goods. Consumers would lose because the quality may get reduced as inefficient producers would also enter the market. Examples of price floors in India are minimum support prices (MSP) imposed by government for procuring specific agricultural produce from the farmers. This is the price at which the government procures the good from the market and creates a buffer stock. Buffer stock is created and disposed of in the market through fair price shops and at a much lesser price.

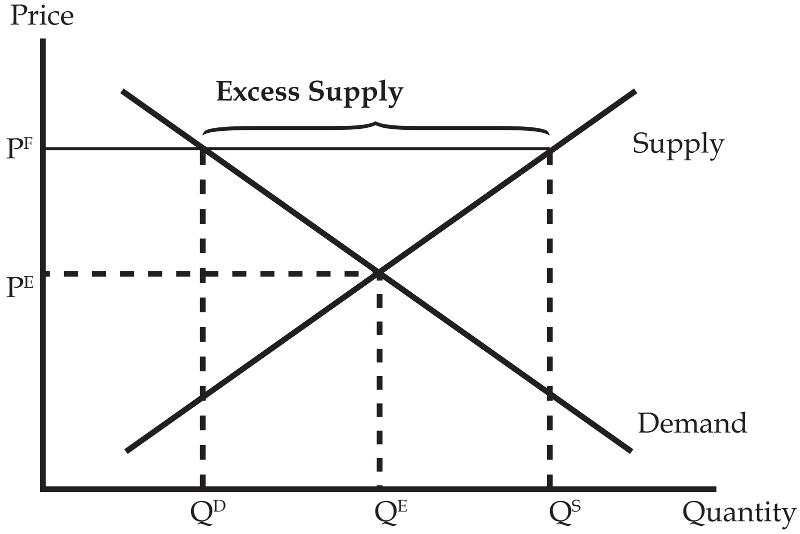


FIGURE 4.2: PRICE FLOOR

4.14.6 Competition Concerns arising from Price Control:

Controls on the prices at which goods are sold directly impinge the operation of normal market forces and disciplines. When floor prices are set, efficiency in production is not rewarded and most efficient producer/seller gets dis-incentivised compared to other players in the market. This kills the spirit of innovation and consumers are forced to compromise with the quality of the product. Similarly, where maximum prices exist, incentives to innovate by providing new and/ or high-quality products are substantially reduced. In either case, the dynamic ability of the market to respond to consumer preferences gets substantially limited. Minimum price laws also have the additional deficiency of reducing overall economic efficiency by encouraging inefficient producers to remain in the market, thus preventing the redeployment of resources to alternative, more productive uses.

4.14.7 Many researchers have found that price controls reduce entry and investment in the long run[7]. The controls can also reduce quality, create black markets, and stimulate costly rationing. In the case of pharmaceuticals, the most damaging area is likely to be the reduction in innovation, which may harm future generations of patients.

[7]Carranza, Clark and Houde(2015), Price Controls and Market Structure: Evidence From Gasoline Retail Markets, Business Economics and Public Policy Papers, University of Pensylvannia Scholarly Commons. They have demonstrated that price floor regulations can have important long-run effects on the structure of markets by crowding them and creating endogenous barriers to entry for low- cost retailers.

Examples of Price Control policies of Government

Box 4.14.1: Drug Pricing Control Order, 2013

Price control over drugs was first introduced in the country with the promulgation of the Drugs (Display of Prices) Order, 1962 and the Drugs (Control of Prices) Order, 1963. The Drug Price Control Order, DPCO-2013 was notified by the Government on 15th March, 2013 in supersession of DPCO, 1995. Price controls are applicable to what is generally known as "Scheduled drugs" or "Scheduled formulations".

The Department of Pharmaceuticals notified the New First Schedule of DPCO, 2013 based on National List of Essential Medicines (2015) on 10th March, 2016. The NLEM 2015 contains a total of 799 formulations under 30 therapeutic groups. As on date, scheduled formulations are under direct price control. Price control orders are aimed to ensure that essential medicines are available in the market and that too at an affordable price. Under the provisions of the DPCO, 2013, the prices of scheduled formulations are to be fixed based on market based data. Selling any scheduled drug / formulation at a price higher than the ceiling price fixed by NPPA/ Government is not permitted.

The Indian Pharmaceutical Industry suffers from information asymmetry and cartelisation amongst retailers/ wholesalers which have necessitated the regulation of prices of drugs, particularly the essential medicines. However, price controls can have adverse effect on competition as it may result in Manufacturers launching alternate versions of scheduled formulations that do not fall under the price list (combination medicines).

If difference in prices is because of quality, then imposing a price ceiling could be counter-productive as manufacturers with superior quality product may withdraw from market.

Box 4.14.2: Agriculture Sector Price Control

The government has formulated a price policy for agricultural produce that aims at securing remunerative prices to farmers in order to encourage them to invest more in agricultural production. Keeping this in mind, the government announces minimum support prices (MSP) for major agricultural products every year. These prices are fixed after taking into account the recommendations of the Commission for Agricultural Costs and Prices (CACP). CACP while recommending prices takes into account important factors, such as cost of production, *changes in input prices, input/output price parity, trends in market prices etc. Such policy exists in order to ensure food security and to take care of structural rigidities present due to high dependence on agriculture.*

Source: Commission for Agricultural Costs and Prices (CACP), 2017

Such price control can incentive agriculturists to divert their resources to crops on which the MSP is higher. This can distort resource allocation and can hurt efficiency in the market.

Box 4.14.3: Interest Rate Deregulation in Banking Sector

Example of provisions where controls has been removed

In financial sector interest rate of both lending and deposit was regulated by the RBI. Following the Narsimham Committee I, 1991 recommendations the interest rate on lending in excess of Rs. 200,000 was deregulated in October 1994 and the interest rate on fixed deposit was deregulated in 1997. But RBI continued to fix the interest rate on savings deposit till 2011. The saving rate was fixed at 3.5 per cent since 2003 up till 2011 when it was deregulated. It was felt that fixing saving rate would create unnecessary distortions and would decrease savings in the economy and thus investment. Market based interest rate would attract savings, bring in product innovation and improve the monetary transmission.

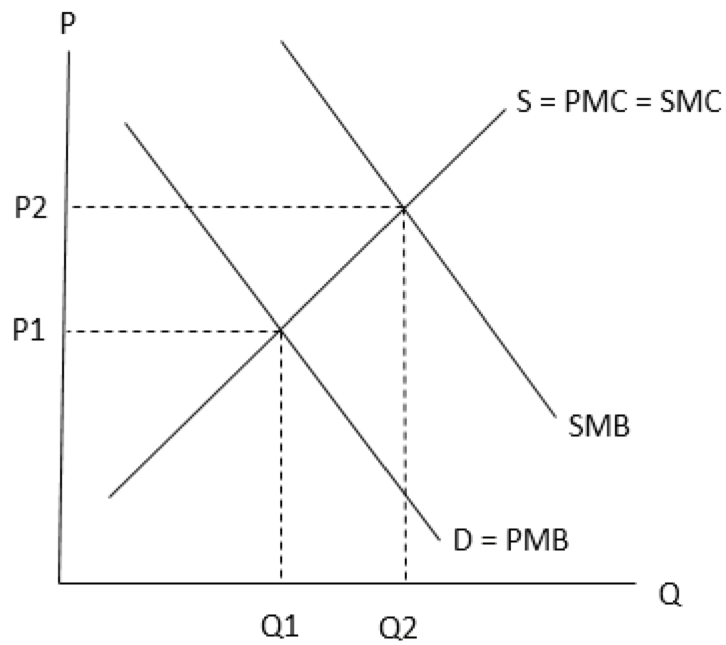
Source: RBI, 2011

4.14.8 ***Subsidies:*** Subsidies are a benefit given by the government to producers/suppliers to cover a part of the cost of production. This can be in the form of monetary benefit or reduced user charges. It is typically given to remove some type of economic burden and is considered to be in the interest of the public. Usually, government subsidies are expensive solutions. In a democracy, subsidy once extended becomes a politically sensitive issue and governments suffer huge political risk if they phase out such subsidies.

4.14.9 Rationale for imposing subsidies :

Subsidies are frequently rationalised as an instrument to tackle market failures. It aims at uplifting the deprived groups and sectors to ensure that the benefits of growth get trickle down in a balanced way as much as possible. Subsidy is provided to those sectors of production, which have positive externalities or in those sectors where the social benefit is much larger than private benefit (Example Education, Health care, Agriculture etc.)

Figure 4.3: Economic rationale for subsidies



4.14.10 In the figure above, the free market equilibrium is at Q1 as supply (S) equals demand (D). People maximize their welfare where private marginal benefit (PMB) equals private marginal cost (PMC). But social efficiency occurs at Q2 (where Social Marginal Benefit (SMB) equals Social Marginal Cost (SMC). SMB does not get reflected in the private equilibrium since the nature of goods/services are merit good or public good featured by principles of non-exclusion and non-rival consumption. Society would benefit from increasing output until Q2, which is a socially desirable output. To increase consumption and production, the government can offer a subsidy to reduce the price and increase quantity.

4.14.11 Overtime, new subsidies are extended which pile up on older ones and they soon consume scarce revenue resources of government. This takes a heavy toll on other expenditure of the government. Economic theory states that once instituted, subsidies tend to weaken the subsidized market participants' incentive to cut costs.

These subsidies are difficult to eliminate, because those benefitting from government subsidies would lobby against elimination of those sources of income (William, 1996).

4.14.12 Competition Concerns:

Subsidies may cause inefficiencies and distort competition in one way or the other. It results from the fact that subsidies interfere with market signals, usually creating various kinds of distortions and decreasing productive and allocative efficiencies. For instance, in electricity, the distortion is clearly seen through State governments 'grant of free or highly subsidised power' to rural areas and agriculture. The demand is distorted, since consumer choice is not revealed through market operations and there is a tendency for over-consumption at the cost of wastage. The benefits from subsidies usually accrue to the richer section relative to the poorer section of the society because of distributional inefficiency.

Examples of government led subsidies causing distortions in market

Box 4.14.4: Fertiliser Subsidy

The government budgeted Rs. 73,000 Crores—about 0.5 per cent of GDP—on fertiliser subsidies in 2015-16. Of this, 70 percent was allocated to urea, which is the most commonly used fertiliser. This has led to severe distortions in urea production and consumption. This has led to multiple regulations resulting in diversion of subsidy to inefficient urea producers, non-agricultural uses and for consumption by rich farmers. Only 35 per cent of subsidy reaches the intended beneficiaries i.e. small and marginal farmers. Also, subsidising of urea, relative to other fertilisers, especially Phosphorous (P) & Potassium (K), leads to overuse, which has led to depletion of soil quality. Further multiple distortions like price and movement controls, manufacturer subsidies, import restriction makes it difficult to reallocate resources within the sector to more efficient uses.

Source: Economic Survey, 2015-16, GOI

Box 4.14.5: Agricultural Finance (Interest Rate Subsidy)

As per the Priority Sector Lending Policy of the Reserve Bank of India, farmers are entitled to pre- harvest loan at subsidised interest rate. They are allowed further subvention in case of timely payment. Farmers can also take loan for post-harvest time against negotiable warehouse receipt.

Economic survey 2015-16, notes three concerns in case of this subsidy. Firstly, trend indicates that subsidies are going in favour of rich farmers. Secondly, extension of subsidized credit is concentrated in last three months of the financial year indicating that banks who are unable to meet priority sector lending targets disburse loans at the end only. Thirdly, agriculture credit is concentrated on peripheries of urban areas, signifying that credit is being diverted to non-agricultural use.

Source: Economic Survey, 2015-2016, GOI

What are the alternatives that can be suggested in case of regulations affecting pricing strategy?

4.14.13 The government may include a sunset clause in the sectors affected by price controls highlighting time until which the price control is applicable. Moreover, it may try to find other avenues like direct transfer to the beneficiaries account instead of imposing price control and affecting the natural functioning of market.

Box 4.14.6: Petroleum And Natural Gas Sector

Examples of provisions where the subsidies have been removed

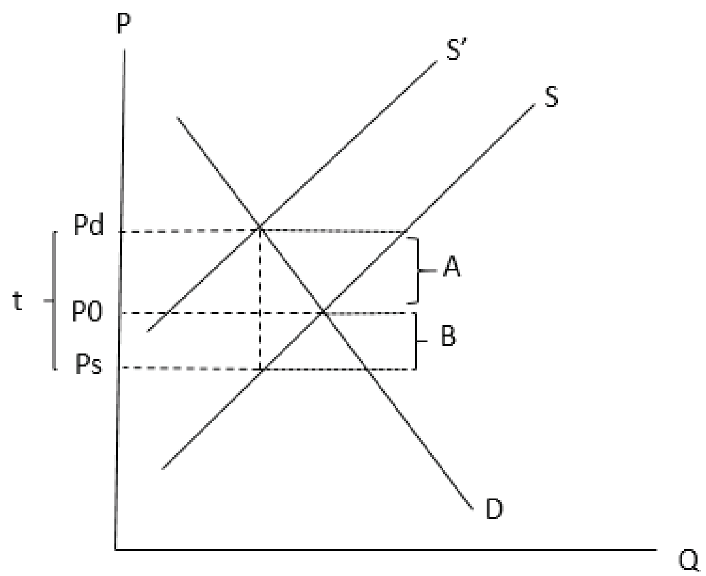
In the petroleum and natural gas sector, the prices of petroleum products were administered by the State and thus heavily subsidised. Although oil marketing companies were compensated for their losses by the government and government-run upstream firms, there was uncertainty in timing and amount of disbursement of subsidy, which adversely affected their finances. Fixing of prices by the state was causing heavy losses to oil companies and was burden on state exchequer. The government freed prices of aviation turbine fuel (ATF) in 2002, petrol in 2010 and diesel in 2014 leaving kerosene and LPG under the control of the state. Diesel alone contributed to 58.6 per cent, 57.2 per cent and 44.9 per cent of total under-recoveries during 2011–12, 2012–13 and

2013–14 respectively (Ministry of Petroleum & Natural Gas, 2015). Deregulation led to significant improvement in the finances of oil marketing companies and also provided a level playing field to private players who were otherwise not in a position to sell at regulated prices (no compensation from the Government was available to them). With deregulation, they can invest and expand their network of retail outlets to sell petrol and diesel without compromising on their profits.

Source: The Hindu, 2014

4.14.14 Taxes: In the cases of Demerit goods, the Social Marginal Cost is greater than the Private Marginal Cost (PMC), and the social cost includes hidden cost. In this case, taxes are imposed by the government. In the short run, both consumers and producers will suffer from the tax imposed. A new tax (t) increases the price of goods. Let's say this tax is imposed on firms, which increase their prices in order to cover their losses. In this case, as shown in the figure, supply **will shift to the left, decreasing the quantity being produced, which increases its prices since** demand **remains unchanged: the new equilibrium price will be** P_d(if the tax was to be imposed on consumers, there would be a shift in demand instead).

Figure 4.4: effect of tax on market



There are also instances where inverted tax structure inadvertently causes market distortions. This typically happens in cases where raw materials are taxed higher than the finished products.

Box 4.14.7: Example of Inverted duty structure creating market distortions

An inverted duty structure emerges when import duties on finished products are lower than those on parts/raw materials, effectively incentivising imports of goods rather than imports of parts and inputs for local manufacturing. Such an inverted levy is distortionary and results in tax inefficiencies as the manufacturer builds up unused credits. The impact of an inverted duty structure is that imports of the final products become cheaper, which adversely affects the competitiveness and sustainability of the domestic manufacturing industry.

For example in rubber industry, while the import duty on finished rubber products is between 0 and 10%, it is 5% to 70% on rubber industry raw materials. high import duty on raw materials has eroded the competitiveness of the domestic rubber industry. On the other hand, lower taxation and export incentivisation policies of countries such as China have helped manufacturers of those countries flood Indian markets with cheaper products.

4.15 B. Provisions that Limit the ability of consumer to switch between suppliers

4.15.1 Consumers often have to incur costs when they switch from one supplier to another of the same product. Regulations can impact the consumer's willingness to shift by imposing or supporting high switching costs. The switching cost arises because of long term contract between the supplier and consumer or tying of an asset in such a way that makes switching highly inconvenient. It results from the consumer's desire of compatibility between his current purchase and previous investment. Switching cost can be high not only in monetary terms, but also in terms of time, administrative hurdles etc. The switching cost can be categorised into: (a) those caused by need for compatibility with existing equipment; (b) transaction costs of switching suppliers; (c) costs of learning to use new brand; (d) uncertainty about the quality of untested brand; (e) discount coupons; (f) psychological costs of switching; or (g) non-economic cost like brand loyalty (Klemperer, 1995)

4.15.2 Competition Concerns:

High switching costs leads to reduction in choices available to consumers. Consumer gets locked in to single service provider or supplier. The supplier usually has an incentive of creating high switching costs in order to dissuade its consumers from shifting to its competitors. Once the supplier locks in the consumer, he can artificially raise the prices as the consumer would be unable to shift without incurring high switching cost. In economic terms, switching costs decrease the price-elasticity of demand; it becomes harder to substitute one service for another, which reduces the consumers' sensitivity to price increases. High substitution cost affects supply side also, by giving market power to incumbents over new entrants. These switching cost not only affects demand, but supply also gets impacted through entry barrier for competitors.

Box 4.15.1: Banking Sector

Examples of High Switching Cost

In moving from one bank to another, consumers incur costs associated with the physical change of accounts, transfers of bill payments or lack of information. Switching costs and asymmetric information: Banks provide long and short term credit to customers, some of which can be called back at short notice at the discretion of the banks. When a customer shifts to one bank from another for new services the first bank can make matters difficult for the customer. Customers may find it difficult to transfer their accounts of different types- thereby leaving the consumer with significant switching costs. Incumbent banks have several reputational and informational advantages over the new entrant and incumbents may not share credit risks with new entrants.

The pro-competitive impact of reducing or eliminating switching costs can be large, and policymakers should seek to avoid policies that raise switching costs for consumers. Where there is a clear risk of switching costs being imposed, the inclusion of provisions in the regulatory structure that will limit or prohibit their use may be advisable. Due care should be taken to ensure that legitimate costs of consumer switching are considered.

What are the alternatives that can be suggested in case of regulations affecting pricing strategy?

It is proposed that the switching cost can be reduced in banking sector by introducing Bank account number portability. This will *enable the customers to shift their banking relations to other banks without any inconvenience and costs. As per the "Central Utility Model" suggested by UK Financial Conduct Authority Report, March 2015, banks should have "know your customer" database to store customer details for identification. The idea is for providers to continue offering competing products and services to customers, whilst using a "shared banking platform".*

Source: Indian Express, 2015

Box 4.15.2: Insignificant switching costs in Mobile Network Portability (MNP)

Example of provisions where switching cost has been reduced

The Telecom Regulatory Authority of India (TRAI) has on 25th Feb, 2015 issued 6thAmendment to the Telecommunication Mobile Number Portability Regulation, 2009 which facilitated Full MNP (PAN India Portability) in the country w.e.f. 3rdMay, 2015.

Earlier, the high switching costs in changing the mobile network used to reduce market competition leading to higher prices, lower product and service quality, and lower customer welfare. Given their negative consequences, national regulatory authorities have designed policies aimed at reducing switching costs and fostering competition. One of the most important of these, in the mobile communications industry, is mobile number portability (MNP).

MNP or mobile number portability, allows the customer to switch his mobile phone operator from one mobile phone network provider to another mobile phone provider while maintaining his/her existing mobile phone number.

Source: Bhargava et al, 2015

4.16 C. Provisions that Restrict flow of information to consumers

4.16.1 Information asymmetry affects both the sides of the market, the supply side as discussed in the earlier sections as well as the demand side. Information asymmetry is one of the major factors leading to failure of the end consumer in making a prudent choice for availing a product or service. Markets are driven by information. Much of the microeconomics models in economics are developed based on the crucial assumption of having perfect information. But the real world is not represented by complete information symmetry.

4.16.2 Government agencies can facilitate information flow which enables the consumers to choose from the concerned suppliers/ sellers. Advertisement plays a very important role in today's age of competition. It enhances market performance by providing useful information to consumers and by enabling firms to promote the attributes of their products and services and, thereby, to compete better with each other.

4.16.3 Competition Concerns arising from Information Asymmetry:

At times certain regulations exist which limits the information available to consumers and leads to poor decision making on the part of the consumer. Due to information asymmetry the consumer loses his or her ability to make an informed choice about the product or service which undermines the demand of the product in the market. Certain regulations have the ability to reduce the information flow and affect consumer welfare. Regulations can also create barriers for the incumbents and reduce their ability to create brand awareness and knowledge base for their products/services. Also, sometimes lack of regulation can encourage information asymmetry.

Examples of information asymmetry and reduction of it by provisions in regulations/laws

Box 4.16.1: Tobacco companies not informing the true health risk due to tobacco chewing or smoking

The tobacco companies try to woo the prospective young and impressionable consumers to increase their sales and profits. They conceal or do not inform about the true health risks to the public. This may lead in large section of population falling in tobacco consumption trap without having full information about the risks. This is because tobacco companies have more information while usually the large section of populace does not have the same. Public health experts and research studies claim that pictorial health warnings on tobacco products are the most cost-effective tool for educating on the health risks of tobacco use. The pictorial warning also transcends the language and illiteracy barriers. The Cigarette and other Tobacco Products (Packaging and Labelling) Amendment Rules, 2014 effective from April 2016 mandates pictorial warnings on both sides of packages of cigarettes, bidis and all forms of chewing tobacco products.

Source: Mint, Dec 18, 2017.

Box 4.16.2: Mis-selling of financial products, real estate etc.

Many of the banks agents and employees resort to mis-selling financial products such as mutual funds, insurance policies, pension schemes, etc. to augment their 'fee-based income'. These products are usually third party products and the banks earn lucrative commissions (fees) on sale of these products. In a notification on June 23, 2017 the RBI said that customers who are mis-sold third-party products by banks can now go directly to the banking ombudsman. In the notification, RBI has said that it has widened the scope of its Banking Ombudsman Scheme 2006, to include deficiencies arising out of selling insurance, mutual fund, and other third-party products by banks. Similarly, as per clauses in the RERA, not only will developers have to play fair but brokers also need to be aware of what they are selling and may face penalty for mis-selling to consumers as consumers usually have lesser information.

As evident from above examples, lack of information flow is not always governed by flawed policy. Rather it is the absence of a suitable policy which can restrict adequate information flow and thereby consumer choices.

"Policies/legislations and the provisions therein have to keep pace with the development strategies adopted in the economy. If the economy is geared towards growth through encouragement of competition and free markets, policies should not reflect the opposite and thus become counter-productive. They should facilitate rather than be a hindrance to the smooth functioning of businesses"

CHAPTER 5 – WAY FORWARD

5.1 Free market economy is pervasive across globe and competition is the accepted norm for successful functioning of the free play in the market. The governance framework is gradually gearing up towards pro-competitive legislations and policies cutting across sectors. With the objective to maximising the benefits of competition, many countries have carried out a comprehensive competition assessment of their legislations and policies. **Australia** is the pioneer in going through the competition assessment process. The benefits of competition assessment for Australia in terms of GDP growth has been widely quoted by OECD and others.

5.2 Apart from Australia, there are many competition regimes around the world which have initiated this program to carry out the assessment of their legislations and policies from the competition perspective. In 2008, **Mexico** launched a multi-year project in cooperation with the OECD to review the existing regulations and policies and improve the competitiveness of the Mexican economy. New regulations were subject to review by Commission Federal de Mejora Regulatoria (COFEMER), the regulatory review body, which was to consult the competition authority. The Mexican government has launched a project in collaboration with the OECD to improve its competitiveness by reforming and modifying the regulatory and institutional framework on the same pattern.

5.3 The **Canadian** Competition Bureau performs competition assessment as a part of its advocacy mandate. Through its submissions to different regulators, the bureau advocates that governments and decisionmakers should consider the effects that regulations have on competition.[8]

[8] During the winter of 2013 2014, propane prices in some areas of Canada skyrocketed. The Ministers of Natural Resources and Industry asked the Bureau and the National Energy Board to investigate the causes of the exceptionally high prices. Some industry observers called for governments to regulate propane pricing to protect consumers from high heating costs. The Bureau opposed such measures in its joint report with the National Energy Board, noting that short term price spikes can incentivize producers to bring additional supplies to market. If regulators had imposed price controls, then this important market mechanism could not have functioned. Ultimately, prices returned down to normal levels.

5.4 The **South Africa's** Commission engages with Government departments via written submissions, meetings with policy makers, combined workshops or seminars or the publication of position papers on policy matters. The legislator in **Spain** is mandated by the law to carry out competition assessment while drafting a policy.

5.5 In the Indian context, requirement for reviewing policies/legislations/statutes through competition lens is recognised, so that remedial action(s) can be taken to remove or minimize the effect of the competition concerns (11th Five-year plan 2007-12). CCI has initiated the process of building capacity for competition assessment by reviewing select legislations/policies. The findings of this assessment has been conveyed to the sector specific Ministries/Departments for carrying out necessary modifications/corrections. The objective of the above exercise is to create capacity of institutions/agencies/academia for carrying out competition assessment in India. In the two phases of this exercise, the CCI has empanelled fourteen institutions of repute which have developed the expertise in competition assessment. To take this forward and extend the outreach of competition assessment to a larger resource pool, the competition assessment toolkit would prove to be beneficial.

5.6 With the toolkit, CCI intends to build expertise in the area of competition assessment. The basic aim of the toolkit is to make the policymakers familiar with the need of competition assessment, the steps in carrying it out, the factors which may inhibit competition in the market, provisions which may raise competition concerns and to redesign them in a way that does not inhibit competition. This toolkit is based on economic principles of demand and supply which can be applied to all sectors of the economy. However, the sector policy objectives need to be kept in mind, while applying this toolkit.

5.7 Competition assessment in India is certainly a step forward in achieving faster economic growth. With the help of the toolkit, CCI strives to raise awareness among policymakers about the importance of competition and elevate it as an important element alongside other public policy goals. A comprehensive competition assessment framework for a nation requires to be supported by the highest decision making body. This would in turn require large amount of financial resources and human capital. Involvement of a competition regulator as well as a sector regulator would be important to make this assessment meaningful.

5.8 A sound competition assessment programme would not only help in building a robust competition culture but would also help in the improvement of competitiveness of the economy. It could only be achieved if CCI and other government bodies work in tandem in carrying out competition assessment of both existing and new legislations/policies. This would help in strengthening the market forces, bring in competitive neutrality and would go a long way towards attracting investment by easing up doing business in India.

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“If a proposed or existing regulation/rule/policy has a competition concern, it does not necessarily mean that it is ill-conceived. However, if a negative effect on competition is identified, other alternatives that are less - restrictive on competition should be considered and analysed.”

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GLOSSARY[9]

Barriers to Entry - Barriers to entry are factors which prevent or deter the entry of new firms into an industry even when incumbent firms are earning excess profits.

Bid Rigging - Bid rigging is a particular form of collusive price-fixing behaviour by which firms coordinate their bids on procurement or project contracts.

Cartels - A cartel is an agreement among firms in a market. Cartel members may agree on such matters as prices, total industry output, market shares, allocation of customers, allocation of territories, bid-rigging, establishment of common sales agencies, and the division of profits or combination of these.

Competition Assessment - defined by OECD as a process through which existing and proposed policies/regulations/rules are identified and assessed from competition perspective.

Competitive neutrality - requires that a class of enterprises (such as government business entities by virtue of public sector ownership) should not enjoy competitive advantage over another class of enterprises (such as private sector competitors). This is essential to use resources effectively within the economy and thus achieve growth and development. Therefore, the principle of competitive neutrality is gaining wide support around the world.

Deadweight loss - The deadweight loss is a measure of value of economic welfare lost due to a market distortion such as price ceilings or floors, externalities, monopoly pricing and subsidies or taxes etc. It gives rise to excess burden or allocative inefficiency i.e. inefficient allocation of resources.

Deregulation - refers to the relaxation or removal of regulatory constraints on firms or individuals. Deregulation has become increasingly equated with promoting competition and market-oriented approaches toward pricing, output, entry and other related economic decisions.

Economies of Scale - Refers to the phenomenon where the average costs per unit of output decrease with the increase in the scale or magnitude of the output being produced by a firm. Similarly, the opposite phenomenon, diseconomies of scale, occurs when the average unit costs of production increase beyond a certain level of output.

Efficiencies - It relates to the most effective manner of utilizing scarce resources. There are three types of efficiencies – allocative, productive and dynamic.

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[9]GLOSSARY OF INDUSTRIAL ORGANISATION ECONOMICS AND COMPETITION LAW, OECD

Externalities - Externalities refers to situations when the effect of production or consumption of goods and services imposes costs or benefits on others which are not reflected in the prices charged for the goods and services being provided. Pollution is an obvious example of a negative externality, also termed an external diseconomy.

Market Failure - A general term describing situations in which market outcomes are not Pareto efficient. Market failures provide a rationale for government intervention. There are a number of sources of market failure such as externalities, public goods, information asymmetry and abuse of market power etc. For the purposes of competition policy, the most relevant of these is the existence and abuse of market power.

Market Power - The ability of a firm (or group of firms) to raise and maintain price above the level that would prevail under competition is referred to as market or monopoly power. The exercise of market power leads to reduced output and loss of economic welfare.

Mergers - An amalgamation or joining of two or more firms into an existing firm or to form a new firm. A merger is a method by which firms can increase their size and expand into existing or new economic activities and markets.

Monopoly - Monopoly is a situation where there is a single seller in a market. In conventional economic analysis, the monopoly case is taken as the polar opposite of perfect competition.

Monopolistic Competition - Monopolistic competition describes an industry structure combining elements of both monopoly and perfect competition having many sellers of a differentiated product

Monopsony - A monopsony consists of a market with a single buyer. When there are only a few buyers, the market is defined as an oligopsony. In general, when buyers have some influence over the price of their inputs they are said to have monopsony power.

Natural Monopoly - A natural monopoly exists in a particular market if a single firm can serve that market at lower cost than any combination of two or more firms. Natural monopoly arises out of the properties of productive technology, often in association with market demand, and not from the activities of governments or rivals

Oligopoly - An oligopoly is a market characterized by a small number of firms who realize they are interdependent in their pricing and output policies. The number of firms is small enough to give each firm some market power.

Opportunity Costs (or Alternative Costs) - An essential concept in economics whereby the cost of using a resource in one activity is measured in terms of its best alternative use. The opportunity or alternative cost of producing one unit of commodity Y is what must be sacrificed by employing resources to produce it rather than something else.

Perfect Competition - Perfect competition is usually defined by four conditions: a) there is such a large number of buyers and sellers that none can individually affect the market price. This means that the demand curve facing an individual firm is perfectly elastic. b) In the long run, resources must be freely mobile, meaning that there are no barriers to entry and exit. c) All market participants (buyers and sellers) must have full access to the knowledge relevant to their production and consumption decisions. d) The product should be homogenous

Predatory Pricing - A deliberate strategy, usually by a dominant firm, of driving competitors out of the market by setting very low prices or selling below the firm's marginal cost of producing the output (often equated for practical purposes with average variable costs).

Price Elasticity of Demand - The price elasticity of demand measures the responsiveness of demand to variations in price. It is defined as the percentage change in quantity demanded divided by the percentage change in price. The price elasticity of demand is determined by a number of factors, including the degree to which substitute products exist.

Sunk Costs - Sunk costs are costs which, once committed, cannot be recovered. Sunk costs arise because some activities require specialized assets that cannot readily be diverted to other uses.

Switching cost - are the costs that a consumer incurs as a result of changing brands, suppliers or products. Although most prevalent switching costs are monetary in nature, there are also psychological, effort- and time-based switching costs.

Vertical Integration - Describes the ownership or control by a firm of different stages of the production process, e.g., petroleum refining firms owning "downstream" the terminal storage and retail gasoline distribution facilities and "upstream" the crude oil field wells and transportation pipelines.

Annexure A

OVERVIEW OF COMPETITION LAW IN INDIA

The command and control regime of pre 1990s reforms witnessed enactment of the Monopoly and Restrictive Trade Practices (MRTP) Act, 1969. The objective was *inter alia* to prevent concentration of economic power, restrict monopolies and protect consumer interest. The Act could not support the growth aspirations of the nation in the LPG regime, which encouraged firms to innovate, upgrade technologies, and grow in size to reap the economies of scale. Promoting competition, rather than restricting size of the firm was considered an economic virtue in the neo liberal economic regime.

As emphasized in the budget speech of 1999 (Union budget 1999-2000) *"The Monopolies and Restrictive Trade Practices Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition."*

The Act was enacted as a modern economic law on January 13, 2003 with the assent of the President. The MRTP Act, 1969 was repealed with effect from September 01, 2009, after the substantive provisions of the Act came into force.

MRTP Act, 1969	Competition Act, 2002
Objective • Prevention of concentration of economic power • Prohibition of monopolistic, restrictive and unfair trade practices. **Goal** To Control Monopolies	**Objective** • Eliminate practices having adverse effect on competition, • Promote and sustain competition, • Protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India. **Goal** To Promote Competition
Enterprises or groups having more than certain market shares or asset sizes needed to register under the MRTP Act	No provision for registration required

Prior approval of Govt. required for appointment of directors, expansions, M&A etc. for enterprises/groups having more than certain market shares or asset sizes	No such prior approval of Govt. required.
Prohibition of – • Monopolistic, Restrictive, and Unfair trade practices and were considered illegal per se	**Prohibition of-** • Anti-competitive agreements and Abuse of dominant position
Frowns upon dominance	**Acts upon abuse of dominance**
No provision for regulation of mergers and acquisitions	Regulations of mergers & acquisitions (Combinations)
No provisions for penalties to be imposed.	Specific provisions for imposition of penalties for violations under the Act.
No provision for seeking opinion from any Govt./statutory bodies by the MRTPC regarding cases.	Provisions for seeking opinion from Govt. /statutory bodies by CCI regarding cases.
Specified agreements were required to be registered with the Registrar of Restrictive Trade Practices	No provision for requirement of agreements to be registered
Lacked extra-territorial approach for cases	Provision for Extra-territorial reach extended if effect of any such behaviour/conduct of enterprise has AAEC in India
The size of the firm is the factor for determining dominance	Dominance was determined by market conditions and position of enterprise and not on the size factor.
No Advocacy provisions for Monopolies and Restrictive Trade Practices Commission (MRTPC)	Advocacy provisions for Competition Commission of India (CCI) -State Govt. can make reference to CCI for availing opinion on effect of policy(s) on competition in India.

The Act empowers the Commission to carry out the following objectives of the Act:

i) eliminate practices having adverse effect on competition,

ii) promote and sustain competition,

iii) protect the interests of consumers and

iv) ensure freedom of trade carried on by other participants, in markets in India.

The Commission pursues its objectives through two sets of instruments, namely enforcement and competition advocacy. The Act focuses on the following four areas:

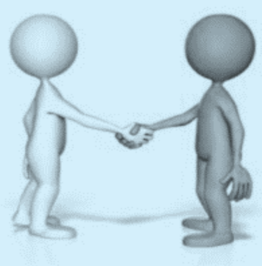
- Anti-competitive Agreement (Section 3)
- Abuse of Dominance (Section 4)
- Regulation of Combinations (Section 5 & 6)
- Competition Advocacy and Reference (Section 49, 21 and 21A)

Provisions relating to anti-competitive agreements and abuse of dominance as contained in Section 3 and 4 respectively of the Act came into force on May 20, 2009. Provisions regarding regulation of combination as contained in Section 5 and 6 came into force with effect from June 04, 2011

Prohibition of Anti-Competitive Agreements (Section 3)

The Act prohibits anti-competitive agreements between enterprises or association of enterprises or person or association of person in respect of production, distribution, supply, storage etc. that is likely to have caused an Appreciable Adverse Effect on Competition (AAEC). Agreements can be horizontal that include agreements where enterprises engaged in identical or similar trade of goods or services at the same level of the supply chain. This is primarily an agreement between competitors and can be in the form of cartel and bid rigging. Agreements can be vertical, which are those agreements which are entered into by enterprises at different levels of the value chain.

ANTI-COMPETITIVE AGREEMENTS (SECTION 3)



Agreements can be-

Horizontal- where enterprises engaged in identical or similar trade of goods or services collude amongst each other to distort competition in the markets by:

a. Directly or indirectly determine purchase or sale prices;

b. Limit or control output, technical development, services etc.;

c. Share or divide markets.

d. Directly or indirectly indulging in bid-rigging or collusive bidding.

Vertical- those agreements which are entered into by enterprises at different levels of production, distribution, supply, storage etc. Such vertical restrains include:

a. tie-in arrangement;
b. exclusive supply arrangement;
c. exclusive distribution arrangement;
d. refusal to deal;
e. resale price maintenance.

It is to be noted that Section 3(5) recognizes and protects intellectual property rights, permitting imposition of reasonable restrictions by their owners. Also agreements relating to exports to the extent to which they relate exclusively to the production, supply, distribution or control of goods or provision of services for such exports are exempted.

Prohibition of Abuse of Dominant Position

Abuse of Dominance under the Act prohibits a dominant player from abusing its market power by either restricting competition or by imposing unfair terms and conditions on its customers. An enterprise has a dominant position if it enjoys a position of economic strength (and market power) to behave independently of its competitors, customers, and consumers to an appreciable extent. Having a dominant position in itself is not illegal, however, abuse of dominance is.

ABUSE OF DOMINANT POSITION (SECTION-4)

Dominance refers to a position of strength which enables an enterprise to operate independently of competitive forces in the market to affect its competitors or consumers in its favour.

Dominance of an enterprise is determined by the Commission in the relevant market which includes relevant product market and relevant geographic market. Abuse of dominance can be exclusionary and exploitative in nature. Abuse of dominant position covers:

a. imposing unfair conditions or price, including predatory pricing;
b. limiting production/market or technical or scientific development,
c. denying market access,
d. using dominant position in one relevant market to gain advantages in another relevant market.

Regulation of Combinations

Combinations under the Act mean mergers, amalgamations of companies or acquisitions of control, shares, voting rights or assets of one company by another company or group if the combining parties exceed the threshold in terms of the assets or turnover prescribed under the Act in India and abroad. Such combinations may lead to reduction in competition and make the market more concentrated in nature. While a particular combination may lead to enhanced efficiencies, increase in market power of the merging firms may lead to a possibility of increase in prices or decrease in quality of product/ services, post-combination. The Act provides for ex-ante combination review by the Commission.

COMBINATIONS (SECTION 5 & 6)

Broadly, combination under the Act means (i) acquisition of control, shares, voting rights or assets of one enterprise by another; (ii) acquisition of control by a person over an enterprise where such person has direct or indirect control over another enterprise engaged in competing businesses; and (iii) mergers and amalgamations between or amongst enterprises, provided **the combining parties exceed the thresholds set in the Act**. The thresholds are specified in the Act in terms of assets or turnover in India and abroad.

Any transaction leading to combination is required to be notified to the CCI. If a combination causes or is likely to cause an Appreciable Adverse Effect on Competition (AAEC) within the relevant market in India, it can be prohibited/modified by the CCI after an inquiry. If the CCI doesn't issue direction or pass order within the prescribed time limit as given in the Act, the combination shall be deemed to have been approved.

Competition Advocacy (Section 49) and Reference (Section 21 and 21A)

Section 49 of the Act enjoins the CCI to take suitable measures to for the promotion of competition culture and impart training for competition awareness. Competition advocacy has two dimensions. **First,** by sensitizing stakeholders about the nuances of competition law in India, creating awareness about the benefits of competition in an economy, and developing an eco-system for competition compliance culture. And the **second** is, about the advisory role of the CCI, which advocates to the government in promoting such legislation and policies that follows the fair market principle and do not impinge on the Competition (Section 49(1)). A similar mandate of sending a reference and, providing an opinion on a reference received to/from a statutory authority (other regulatory institutions) has been enjoined through Section 21 and Section 21 A respectively.

Government as an Enterprise

"Enterprise" is the primary economic agent whose economic behaviour is subject to competition regulation. 'Enterprise' has been defined under Section 2(h)[10] of the Act and brings within its ambit any firm or person or department of government engaged in activities relating to production, storage, supply, distribution, and acquisition etc. of goods and services. In its simplest form, an 'enterprise' is any entity engaged in an economic activity.

The activities of the Government relating to sovereign functions are excluded from the purview of the Act. Sovereign functions include activities covered under with atomic energy, currency, defence and space. In the above definition, "person" includes—

(i) an individual;

(ii) a Hindu undivided family;

(iii) a company;

(iv) a firm;

(v) an association of persons or a body of individuals, whether incorporated or not, in India or outside India; or

(vi) any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956);

(vii) anybody corporate incorporated by or under the laws of a country outside India;

(viii) a co-operative society registered under any law relating to cooperative societies;

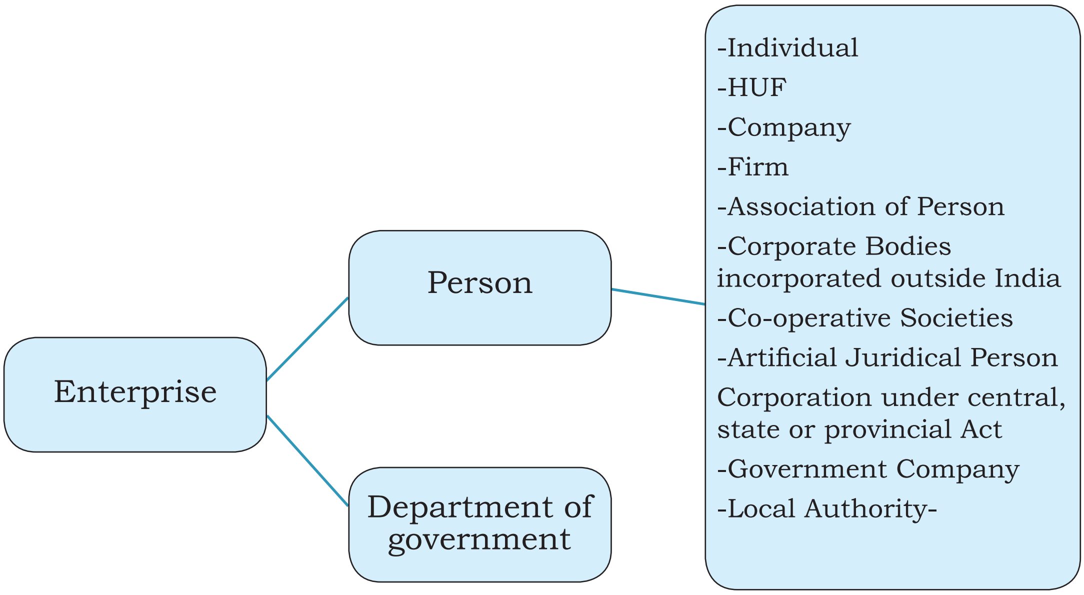
(ix) a local authority;

(x) every artificial juridical person, not falling within any of the preceding sub-clauses.

A Government, represented through its Ministries and departments, will also qualify as enterprises under the Act, so long as they are engaged in any activity relating to provision of service or goods. It is therefore essential for government bodies and departments to comply with the Competition laws of the land. Further Central Government, by notification, is empowered to exempt any class of enterprise, or any enterprise from the purview of the Act

[10]"Section 2(h) of the Competition Act, 2002 defines anenterprise.

for a specific period as it may deem fit. As on date, the Ministry of Corporate Affairs, Government of India has granted exemption to Vessels Sharing Agreements (VSA) of Liner Shipping Industry from the provisions of Section 3 of the Act. Nationalised banks and RRBs and Oil & Gas CPSEs have been exempted from application of section 5 and 6 of the Act from such date of notification for specified periods.



To harness the full potential of competition and imbibing **competitive neutrality,** it is essential that government policy and rules do not distort the level playing field between Government enterprises vis-à-vis private sector enterprises. Therefore, no antitrust exemptions are applicable to State owned enterprises (SoEs) including price or purchase preferences. All the economic activities of the government, excluding the sovereign function, come under the purview of the Act.

Procedural provisions of the Act

The Procedural provisions of the Act deal with the procedures followed by the CCI in cases of violations of Section 3, 4, 5 & 6 of the Act. The procedure for inquiry are laid down under Section 19 where CCI may initiate an inquiry-

- On its own or on the basis of information and knowledge in its possession, or
- On receipt of an information, or
- On receipt of a reference from the Central Government or a State Government or a statutory authority.

In cases of anti-competitive agreement or abuse of dominant position- The CCI on its own, or on receipt of information or reference, form an opinion as to whether there is a *prima facie* case. If so, the CCI directs the Director General ('DG'), appointed under the Act, to investigate the matter and submit its findings to the CCI within a specified time frame. On receipt of the investigation report from the DG, the CCI determines whether the behaviour under inquiry is anti-competitive after hearing the concerned parties and pass appropriate orders. (Section 26/27)

In cases of combinations- An enterprise or person proposing to enter into a combination, may notify the CCI in the specified form disclosing the details of the proposed combination. In case a notifiable merger is not notified by the parties to the CCI, the CCI can inquire into it within one year from the date on which such combination has taken effect.

If the CCI is of the prima facie opinion that a combination has caused or is likely to cause appreciable adverse effect on competition, it shall issue a show cause to the parties as to why investigation in respect of such combination should not be conducted. On receipt of the response, if CCI is of the *prima facie* opinion that the combination has or is likely to have AAEC, it shall direct publication of details, invite objections from the public and persons affected or likely to be affected by such combination. If considered appropriate, the CCI may invite any person, likely to be affected by the combination, to file his objections. After receipt of all information, the CCI shall proceed to deal with the case in accordance with the provisions of the Act. (Section 29, 30 & 31)

During its inquiry, the CCI looks into various factors given under section 19 (3), (4). (6), (7) and Section 20(4). The alleged contraventions of the provisions are factored in the above sections which provide assistance to the CCI in determining the contraventions. Factors like market size, shares, vertical integration, dependence of consumers, entry and exit barriers play a role in determining whether certain agreements, tacit collusions or abuse of dominance are having an appreciable adverse effect on competition.

Penalty Provisions under the Competition Act, 2002

Some of the important penalty provisions in the Act have been summarized below:

(a) **For contravention under Section 3 (anti-competitive agreements and Section 4 (abuse of dominance):** Under Section 27 of the Act, the Commission can:-

(i) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in an anti-competitive agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;

(ii) impose such penalty, as it may deem fit which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:

[*Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in the cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of the continuance of such agreement, whichever is higher.*]

(iii) direct that the agreement shall stand modified to the extent and in the manner as may be specified in the order by the Commission.

(iv) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;

(v) pass such other order [or issue such directions] as it may deem fit.

(b) **Contravention of orders of Commission:** CCI under Section 42(2) is empowered to impose a penalty on any person who fails to comply with the orders or directions of the Commission (without any reasonable cause) issued under sections 27, 28, 31, 32, 33, 42A and 43A of the Act. Such penalty may extend to INR1 lakh for each day during which such non-compliance occurs, subject to a maximum of INR10 crore.

If any person fails to comply with the orders or fails to pay the fine imposed under Section 42(2), the Commission may make a complaint to the Chief Metropolitan Magistrate, who may, under Section 42(3) of the Act give a punishment in the form of imprisonment for a term which may extend to three years, or impose a fine which may extend to INR25 crore, or both.

(c) **For failure to comply with directions of Commission or Director General:** CCI under Section 43 of the Act is empowered to impose penalty on a person who fails to comply (without reasonable cause) with a direction given by the Commission under Section36(2) and Section 36(4) or by the Director General under Section 41(2). Such a penalty may extend to INR 1 lakh for each day during which such failure continues subject to a maximum of INR 1 crore.

(d) **For failure to notify a 'combination'[11]**: CCI under Section 43A of the Act is empowered to impose a penalty on a person or enterprise who fails to notify a combination under Section 6(2) of the Act. Such penalty can extend to oneper cent of the total turnover or the assets of the combination, whichever is higher.

(e) **For making false statement or omission to furnish material information in a 'combination'**: Under section 44 of the Act, the Commission can penalise a person being a party to the combination for making a false statement or for knowing the statement to be false or for omitting to furnish a material information. The amount of penalty can vary between INR 50 lakhs and 1 crore.

(f) **For making false statement or omission to furnish material information to be provided under any section of the Act:** Section 45(1) empowers Commission to penalise a person with a fine up to INR 1 crore for making a false statement/furnishing a false document, omitting to state any material fact, wilfully altering/suppressing/destroying any document which is required to be furnished.

Appellate Authority

Section 53A of the Act constituted Competition Appellate Tribunal (COMPAT) as the appellate body to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under sub-sections (2) and (6) of section 26, section 27, section 28, section 31, section32, section 33, section 38, section 39, section 43, section 43A, section 44, section 45 or section 46 of the Act. However, post an amendment in the Finance Act, 2017, the COMPAT has ceased to exist and the appellate authority on such matters is with the National Company Law Appellate Tribunal (NCLAT) with effect from May 26, 2017.

[11] A combination is any merger/acquisition to be notified to the Commission under Section 6(2) of the Act.

ANNEXURE B

COMPETITION ASSESSMENT OF GREECE AND ROMANIA-OECD: A SUMMARY

Competition Assessment of Greece by OECD

The competition assessment of the Greek economy identifies distortions to competition in four key areas of the Greek economy namely: food processing, retail trade, building materials and tourism, with additional investigation of cross-cutting legislation that concerns these four areas. The 555 regulatory restrictions that were identified were analyzed and 329 specific recommendations were made. If the particular restrictions that have been identified during the project are lifted, the OECD has calculated a conservative positive effect for the Greek economy of around EUR 5.2 billion.

The abovementioned four sectors represented 21 per cent of GDP by output in 2011, and had a combined turnover of EUR 44.26 billion. These four sectors represented more than 1.1 million jobs or 24.8 per cent of total employment in Greece in 2011. Lifting the restrictions to competition in these sectors was therefore likely to have a significant positive economic impact, both in the short term and in the long term.

Identified Barriers to Entry

Several barriers to entry of various kinds were identified across the four sectors. Some of them are outlined here:

1. requirements to obtain a license to trade asphalt (minimum share capital of EUR 500 000; minimum available storage capacity of 2 000 m2);
2. olive oils blended with other vegetable virgin oils cannot be produced and sold by Greek producers for the domestic market (but can be sold for export);
3. Greek legislation defines “fresh” milk as having a shelf life of no more than five days;
4. numerous barriers to entry were identified in the tourism sector, many of those resulting from strict requirements in order to obtain building permits or licences for certain facilities, such as:
    - ❖ special requirements for investment in various tourist activities such as car racing tracks, entertainment theme parks, centres of athletic and coaching tourism;

- ❖ a requirement for three-star or more accommodation to already be available in nearby locations before granting permits; or
- ❖ an obligation for certain types of facilities to be located close to an airport.

In the case of clear-cut barriers to entry such as those outlined, it was recommended that the regulatory barriers identified above be abolished.

Price Distortions

Numerous examples of price distorting regulations were found in the Greek legislation that were analysed. These include:

1. Setting of minimum prices by the relevant ministers and other interventions in price setting.
2. Requirements to submit prices to trade associations.
3. Requirements to maintain prices for long periods (widespread in the tourism sector for instance, where many sports activities have to keep their prices unchanged for 12 months at a time).
4. Specific provisions referring to price approvals and to submission of prices for several different tourist activities such as tourist accommodation (hotels, furnished apartments, villas, rooms to let), "therapeutic" tourism (springs, spas), mountain shelters, sea leisure activities, marinas and recreational vessels.

It was recommended that any requirement to seek price approval or to submit prices to the authorities or to trade and industry associations should be abolished for all tourist activities. Removing such price distorting regulation should increase market and operational efficiency across tourist sectors and tourist businesses, correct market distortions and intensify competition. It should also eliminate possible collusive equilibrium outcomes among tourism businesses.

Other type of distortions include:

1. Narrow product definitions in the dairy sector lead to restricted choice for Greek consumers. The narrow definitions of some types of dairy products such as yoghurts, dessert cream and traditional rice puddings currently limit producers' ability to market their products, for instance as low-fat alternatives to these well-known products. These restrictions should be relaxed, but new regulations should take into account modern European and national rules for the labelling of contents and ingredient

2. Sunday trading remains restricted. Some deregulation of Sunday trading restrictions has taken place, although mainly for small businesses; shopping malls and retail shops above 250 m2 are only allowed to open for seven Sundays a year. Such partial liberalisation will not reap the benefits from employment creation and projected rising expenditure that full liberalisation would yield. Fully liberalise Sunday trading, including for stores above 250 m^2, shopping malls and outlets.

Competition Assessment of Romania by OECD

This assessment identifies distortions to competition in Romanian legislation in three key areas of the Romanian economy: construction, freight transport and food processing. The 227 potential regulatory restrictions that were identified were analysed and 152 specific recommendations were made. If the particular restrictions that have been quantified are lifted and the expected effects are realised, the OECD has calculated a positive effect for the Romanian economy of around EUR 434 million.

Some of the distortions identified are as under:

Construction

1. Maximum prices for gravel and sand are set by the Ministry of Finance for each individual producer and are adjusted yearly based on a consumer price index. It was recommended to abolish the maximum price for sand and gravel as it might lead to horizontal effects of producers aligning to the maximum price.

2. Construction works for placing stalls, without foundations or platforms and which only need to be supplied with electricity, for the distribution and trading of newspapers, books and flowers are exempted from the obligation to obtain a building permit. Restricting the products that vendors are allowed to sell in stalls may potentially limit the development of businesses and consumer choice. Extending the exemption to all such stalls independently of their purpose was recommended.

Freight Transport

1. Local taxes: Local authorities impose additional taxes for the use of national roads that cross municipalities and for the use of local and county roads they manage. These taxes generally lack transparency. Also, it is difficult for road freight transporters to pay such taxes, as currently there does not seem to be an efficient tax payment system in place. It was recommended to introduce an appropriate legal framework

in order to ensure the transparency and efficiency of the payment system for local road taxes. A good measure might be the publication of all road taxes on the websites of the Ministry of Transport and Ministry of Regional Development and Public Administration. Furthermore, an online payment system of taxes or a system which involves payment with mobile phones should be introduced.

2. Road transport operators must obtain a copy of the transport licence for each vehicle in their fleet, which must be renewed annually. It was recommended that the provisions should be modified and the copy be issued for the same period of time as the duration of the licence to which it refers, i.e., 10 years

Food Processing

1. Various provisions in Romanian law and regulations limiting the production or sale of food products. For example, bakery products must be sold in specially designated, separated areas of stores that, as regards bread, must be at a minimum 10 m^2. Such restrictions impose costs on market participants and can create entry barriers for new players. Amending existing rules to grant operators greater flexibility with respect to selling conditions, so long as food safety can be ensured is recommended.

2. Romanian law imposes training and examination requirements for all staff handling food products. Staff qualifications must be attested by a certificate issued after completion of a training course and passing of an exam. The course and exam, which costs approximately EUR 20 per person, must be repeated every three years. These rules impose costs on market participants including not only the fees for course and examination but also the costs of absent personnel that go beyond what appears necessary to attain the legitimate policy goals of ensuring a high level of food safety. It is recommended that the rules be applied in a more targeted fashion only to those employees that could in fact pose risks to food safety because they come into direct contact with foodstuffs.

3. Romanian laws related to the testing of animal feeds impose higher costs on importers than on domestic producers. This situation results in discrimination of certain market players and could be an entry barrier for foreign producers. Eliminating such discrimination of importers of animal feed products is recommended.

Annexure C

OECD'S COMPETITION ASSESSMENT CHECKLIST

Limit the number or range of sellers?

For example, does the proposed policy:

1. Grant exclusive rights to a seller for the provision of a product (for example, divestment of government-owned assets)?
2. Involve procurement from a single or restricted group of sellers?
3. Create a form of licensing scheme for sellers?
4. Significantly raise the cost of entry or exit for a seller?

Limit the ability of sellers to compete?

For example, does the proposed policy:

1. Control or substantially influence product price, quality or choice, for example,
   * Issue a schedule to standardise product price, quality or choice across sellers?
   * Set product or quality standards that (i) advantage some sellers over others or (ii) are unnecessarily high relative to consumers' needs?
   * limit ability of sellers to introduce new products or supply existing products in new ways?
   * limit the geographic area in which a seller can operate or types of customers it can serve?
2. Limit the freedom to advertise or market products?
3. Raise the costs of some sellers relative to others?

Reduce the incentive of sellers Reduce the incentive of sellers to compete?

For example, does the proposed policy:

1. Facilitate market players to set rules or engage in practices that reduce the need for them to compete under the pretext of self-regulation?
2. Require or encourage the exchange of commercially sensitive information between sellers (for example, prices, output, sales or cost) which may facilitate collusion?
3. Facilitate the sharing of resources between sellers that constitute a key cost component of their businesses?
4. Restrict the ability of sellers to grow the size of their business?

Limit the choices and information available to consumers?

For example, does the proposed policy:

1. limit the ability of consumers to decide which seller to purchase from?
2. Increase the cost (or inconvenience) of switching sellers for consumers?
3. Reduce or limit information important for consumers to make purchase decisions effectively?

Annexure D

COMPETITION COMMISSION OF INDIA'S CHECKLIST

Supply Side checklist
Whether any provision(s) in policies /regulations / legislations- A. Create Barriers to Entry by: i. Giving monopoly rights to a single enterprise for provision of goods and services? ii. Protecting existing firms in a market? iii. Establishing excessive/unrelated minimum standards as a requirement for commencement of operation? IV. Establishing Vertically Integrated Units? B. Creates barriers to exit? C. Gives advantage to one set of enterprises over the other? D. Affects the cost structure of the enterprise? E. Create actual/potential conflict of interest situation for a Regulator by i. Giving it a dual role ii. Overlapping Jurisdiction F. Encourages/requires publication of sensitive information? G. Fixes/restricts output of product/service? H. Whether there exist any legislation/policy or a provision in legislation/policy that has outlived its utility?
Demand Side checklist
Whether any provision(s) in policies/regulations/legislations - A. Causes interference in the pricing of goods/service via: I. Price controls? II. Subsidies? B. Limit the ability of consumers to switch between suppliers? C. Restrict flow of information to consumers?

Fair Competition
For Greater Good

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