Competition Policy and Law

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Competition Policy

- Competition Policy encompasses all government regulations which impact economic activities
- Industrial policy, EXIM policy, fiscal policy, FDI policy, etc form part of competition policy
- Competition law is also an integral part

Competition Policy in India

- Planning Commission set up a Working Group on Competition Policy
- Report of the Working Group accepted
- Eleventh Five Year Plan document enunciates the competition policy intent of the government
- Chapter 11 states the outlines of a National Competition Policy

National Competition Policy -1

- Six broad objectives of the NCP:

i. to preserve the competitive process and to encourage competition in the domestic market so as to optimize efficiency,
ii. promote innovation and maximize consumer welfare,
iii. to promote, build and sustain strong competition culture;
iv. to achieve harmonization in policies, laws and procedures regarding competition dimensions at all levels of governance,
v. to ensure competition in regulated sectors, and
vi. to strive for a single national market.

National Competition Policy - 2

- In order to meet these objectives, the NCP should be based inter alia on the following principles:

i. effective control of anti-competitive conduct
ii. competitive neutrality
iii. rule bound, transparent, fair and non-discriminatory procedures
iv. institutional separation between policy making, operations and regulation
v. deviation from the principles of competition should be only to meet desirable social, environmental and developmental needs

NCP Action Points - 1

- Review of existing policies, statutes and regulations of the Central government which undermine competition needs to be undertaken with a view to remove or minimize their competition restricting effects.
- Competition impact assessment should also apply to proposed regulations.
- The objectives and principles of NCP have to be extended to all levels of governance.

NCP Action Points - 2

- Regulation may be justified or warranted in sectors which are natural monopolies or in network industries; more so where a universal service obligation exists.
- Sectors not exhibiting such features should ideally be left to the forces of competition.
- Even in sectors where regulation is warranted, it should become lighter over time. Therefore, a sunset clause based on finite timelines appropriate to the regulated sector may be considered in all economic regulatory laws so as to leave the industry to market forces once effective competition is achieved.

NCP Action Points - 3

- A formal mechanism for coordination between the Competition Commission and the sectoral regulators is of key importance.

Elements of the Competition Law

- Prohibits anti-competitive agreements
- Prohibits abuse of dominant position
- Regulates anti-competitive combinations
- Competition advocacy – education of stakeholders and influencing policy makers

Anti-competitive Agreements

- Agreement can be formal or informal, oral or in writing
- Need not be intended to be enforced in a court of law
- Very wide definition
- Distinction between horizontal and vertical agreements

Horizontal Agreements

- Presumptive rule applies – burden on the alleged offender
- Applies to agreements for price fixing, controlling output, market sharing, collusive bidding or bid rigging
- Such agreement presumed to cause <u>appreciable adverse effect on competition</u>

Cartel

- Presumptive rule against cartel
- Cartel is defined as agreement between producers to fix price or limit production
- Hard core cartel is regarded as the most pernicious form of horizontal agreement having no redeeming virtue
- Subjected to heavy fines and even criminal sanctions in many countries

Cartel – Landmark Case

- Lysine (amino acid) cartel is one of the landmark cases decided in the US-
  - Two Japanese, two South Korean and one US company agreed not to compete on price
  - Price of lysine rose on account of collusion from 68 cents per pound to 98 cents in 1990 and continued at that level until detection in 1995.
  - Evidence collected by DOJ with the assistance of FBI included documents/ transcripts of secretly recorded conversations.

Vertical Agreements

- **Rule of reason applied**
- **Inclusive list of vertical restraints**
  - tie-in arrangement
  - exclusive supply agreement
  - exclusive distribution agreement
  - refusal to deal
  - resale price maintenance

IPRs

- Agreement imposing reasonable restrictions to protect an IPR is permitted
- It follows that unreasonable restrictions are not accepted.
- Abuse of dominant position created as result of IPR is also prohibited

Abuse of dominant position

- It is not dominance but its **abuse** which is illegal
- A firm is in a dominant position if it has the ability to behave independently of its competitors, customers, suppliers and ultimately the final consumers
- First step is to establish dominance in the "relevant market"

Relevant Market

- Relevant product market
- Relevant geographic market
- Sometimes, a third dimension assumes importance – the relevant temporal market

Relevant Product Market

The Commission is required to consider:

- Physical characteristics or end-use of goods
- Price of goods or service
- Consumer preferences
- Exclusion of in-house production
- Existence of specialized producers
- Classification of industrial products

Relevant Geographic Market

The Commission is required to consider:

- Regulatory trade barriers
- Local specification requirements
- National procurement policies
- Adequate distribution facilities
- Transport costs
- Language
- Consumer preferences
- Need for secure or regular supplies or rapid after-sales services

Dominant Position -1

- Market share – no threshold in CA02
- In the EU, market share of 50% is taken to imply dominance except in exceptional circumstances [AZKO 1981]
- Even less than 40% market share can be regarded sufficient to establish dominance [Virgin/BA 1999]
- Size and resources of the enterprise - size - technological lead – capacity [Hoffman La Roche 1979]
- Size and importance of the competitors – relative size is important [A firm's market share is 46% and its next biggest rival's is about 22% - United Brands 1976]

Dominant Position - 2

- Economic power of the enterprise including commercial advantage over competitors – control over source of supply – brand value – distribution network - credit sales
- Vertical integration of the enterprise or sale or service network of such enterprise – network cannot be established in the short run – supply and/or distribution channels secured
- Dependence of consumers on the enterprise – habit – inertia - inelastic demand

Dominant Position -3

- Market structure – Structure-Conduct-Performance model
- Social obligation and social costs – cost benefit analysis
- Relative advantage of the dominant firm for economic development
- Any other factor – discretion of CCI – residual factors

Abuses

- Imposing unfair or discriminatory price or condition in purchase or sale – pro-competitive measures permitted
- Limiting production or scientific development to the prejudice of consumers
- Denial of market access in any manner – essential facilities
- Conclusion of contract subject to supplementary obligations
- Use of position in one relevant market to enter into or protect other relevant market

Other Unique Features

- Reference by/to statutory authorities
- Reference by Central/State government
- Competition Advocacy - education
- International co-operation
- Effects Doctrine
- Competitive neutrality

Scope

- Covers all economic agents – producers, service providers, traders, sellers, buyers, etc.
- All public sector enterprises, Central or State, are within its purview
- Even government departments engaged in commercial activities are within its purview

Compliance

- Non-compliance can have serious consequences – both monetary and non-monetary
- Behavioral as well as structural remedies - division of enterprise
- Penalties
- Compliance programme for each enterprise is necessary

Benefits of Competition Policy

- Competition reduces cost, improves quality, ensures adequate supply and spurs innovation
- Enhances total welfare
- Cross-country surveys indicate increase in GDP
- Contributes to economic development

Thank You

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