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REFORMING SOES IN ASIA: LESSONS FROM COMPETITION LAW AND POLICY IN INDIA

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Abstract

India is one of the most significant countries of Asia, particularly in terms of its population and growing economy and markets. India has rapidly moved from a 'command and control' economy to free-market principles, and in this regard, one of the major reforms revamped the competition law. The new competition law introduced the principle of 'competitive neutrality' by bringing 'state-owned enterprises' (SOEs) under the purview of competition law regulation by virtue of defining 'enterprise' to include government departments engaged in economic activity. The Competition Commission of India (CCI) has penalized big SOEs like Coal India for violation of the Competition Act. However, looking from a reform perspective, generally there has been a bias toward state-owned enterprises by Governments in giving concessions, relaxing norms, and promoting finances. The biggest example is Air India – the national carrier. Other sectors would be railways, including container transport, state-owned banks, the health sector, and the energy sector. The objective of this paper is to examine the impact of competition law and policy on reforming SOEs in India. This will be done through looking at cases against SOEs in India and their impact on changing the behavior of SOEs vis-à-vis competition specifically and reforms generally.

Keywords: state-owned enterprises, competition law and policy, competitive neutrality, public procurement

JEL Classification: K210, K230, G3, G34

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1. INTRODUCTION

State-owned enterprises (SOEs) or public sector enterprises/undertakings (PSE/Us) form an inherent part of the growth story of countries around the world. As the name suggests, these entities are owned and/or controlled by the state and the very nature of their ownership structure differentiates them from private enterprises. Backing from the government gives them a unique positioning in the market, both on the demand side and on the supply side. While, on the one hand, these entities enjoy a special advantage in terms of confidence/trust from the consumers, on the other hand, being publicly owned, expectations are also high from these SOEs. For example, in India, the Life Insurance Corporation (LIC) enjoys dominance in the life insurance sector and is perceived as the preferred insurer, particularly in rural areas, over the private players. While this is good for the LIC, the Supreme Court of India has declared it as 'state' under the Constitution and hence subject to the writ jurisdiction of the country with stricter scrutiny than private enterprises. The philosophy behind this approach is that the government or its instrumentalities may not be allowed to act arbitrarily and have to confer benefits/largesse in accordance with the established norms and policies, which is primarily driven by the 'socialistic' approach of the Constitution.

Generally, we find that the SOEs in Asia, predominantly in India, have emerged from the colonial past, and the experiences of the East India Company are reflected in the policy making post-independence. The crucial economic and industrial activities were reserved for the public sector until liberalization when the markets were opened up under the requirements of the WTO. A review of literature on this subject clearly demarcates the virtues of reforming SOEs and the need to expand privatization, and promote good corporate governance and competitive neutrality. There is no doubt about the utility of these reform measures by the states in Asia, as is often reflected in their policy documents, but in actual practice some resistance to reforms is witnessed owing to the conditions of apartheid, the concerns of domestic industries, and sociopolitical pressures.

Article 19 of the Constitution guarantees to the citizens of India the six freedoms to be enjoyed by them in all parts of the territory of India, including the freedom to practice any profession, occupation, or trade or business. However, this right is not absolute or uncontrolled, as Clauses (2) to (6) of Article 19 recognize the power of the state to make laws imposing reasonable restrictions on these freedoms for the reasons to be provided in those laws. Broad powers have been conferred on the administrative authorities through statutes, rules, and regulations that operate via the techniques of licensing, price-fixing (administered pricing), requisitioning of stocks (e.g., the concept of a levy on sugar), regulating the movement of commodities (Essential Commodities Act).

It is a general rule under the Constitution that trade, commerce, and intercourse throughout the territory of India shall be free (Article 301). The idea of this provision is to have no barriers between the borders of the constituent state governments and to make the entire country one unit. This freedom applies to intra-state trade and commerce as well as inter-state trade and commerce. However, this freedom is subject to Articles 302–307, which impose some reasonable restrictions. The impact of these 'reasonable restrictions' on the freedom to trade is the subject matter of Article 19(6) and Article 304. Parliament is empowered to impose restrictions on the freedom of trade, commerce, and intercourse between one state and another or within any part of the territory of India, as may be necessary in the *public interest* (Article 302). However, no law can be made to give preference to one state over another except in cases of famine or scarcity of goods

in any part of India – Article 303(1). In India, a state is empowered to confer some benefit on a government enterprise over and above what it confers on private undertakings. This was recognized by the Supreme Court in *D.R. Venkatachalam v. Deputy Transport Commissioner* (AIR 1977 SC 842. Special status to Govt. Owned Transport Undertaking). However, a distinction between the monopoly created by a state in its own favor and in favor of a third party has to be made. While the former may be allowed, the latter would be subject to judicial review on the grounds of arbitrariness.

India's industrial policy experiences a serious impact from its colonial past and thus preferred state-owned enterprises in the majority of sectors initially. There was a strict regime of licensing and market regulation. Due to some studies conducted by the Government of India (Hazari Committee, Mahalonobis Committee, KC Dasgupta Committee, etc.) it became evident that the licensing regime was playing into the hands of a few industrial houses and the wealth was becoming concentrated in a few hands. Thus, bearing in mind the constitutional aspirations to strike upon the 'concentration of wealth leading to common detriment,' the Monopolies and Restrictive Trade Practices Act (MRTP) was passed in 1969. This was the first formal competition legislation in the country dealing with monopolies and restrictive trade practices. In 1984, unfair trade practices (UTPs) were also brought under the purview of the MRTP. The scenario changed in 1991 with liberalized industrial policy and subsequent developments at the WTO necessitated reforms, including the competition law.

The Competition Act 2002 in India was a watershed development, though it was resisted by a few on the grounds that Indian markets were not yet ready for a complete free-market system. The competition law brought the state-owned enterprises on a par with the private players in terms of the applicability of the competition law. The rules of the game were now the same for both. However, it took some time for this law to actually be enforced due to resistance to the legislation from some quarters and a challenge to its constitutionality, which was only settled in 2009 when the working provisions of the Competition Act in India (Section 3 dealing with anti-competitive agreements and Section 4 dealing with the abuse of dominance) were notified. It still took another two years, i.e. until 2011, before the regulation of combinations (merger regulations) was notified.

In a decade of its enforcement, however, the competition law in India has not spared the state-owned enterprises from its application, just because it has state affiliation. Nevertheless, a softer approach toward SOEs is evident from analyzing the decisions of the Commission. This paper will try to test this hypothesis by examining cases decided by the CCI against SOEs and its approach in handling them.

This paper will begin by introducing the concept of state-owned enterprises and the need for competitive neutrality. The main part of this paper will discuss important cases concerning state-owned enterprises in India under competition law and takeaways from the treatment meted out to these. In the conclusion and recommendations section, a summary of the key findings from the analysis carried out in the paper will be provided, along with some policy recommendations.

2. THE CONCEPT OF 'STATE-OWNED ENTERPRISES' IN INDIA

State-owned enterprises (SOEs)/public sector undertakings (PSUs) in India are widespread at all three levels of administration, i.e. central, state, and local, influencing the lives of millions of people across the length and breadth of the country. Be it public transport, railways, health, education, the public distribution system, banking, or insurance, to name but a few, SOEs/PSUs are at the nerve center. However, discussions on SOEs in India primarily revolve around central public sector undertakings (CPSEs) as there is a department at the central level that looks into them. At the state level, PSUs comprise primarily transport undertakings, tourism development corporations, developmental authorities, universities/schools, electricity corporations, water undertakings, agriculture processing units, mining units, financial enterprises, etc. and operate within the jurisdiction of each state. The references to SOEs in this chapter relate primarily to CPSEs.

SOEs take different forms in India, depending upon their structure and sponsor/promoter. Some of the main forms may be categorized as follows (Ram 2009):

- *Government companies* – based on the ownership structure, and they are companies formed under the Companies Act with 51% of the share capital being held by the central or state government, e.g., the Gas Authority of India Limited (GAIL).
- *Public corporations* – statutory corporations set up under a specific enactment by the central or state government, e.g., the Food Corporation of India Limited.
- *Departmental enterprises* – (quasi-corporations) set up by the central or state government to carry out an economic activity controlled by the ministry itself, e.g., railways.
- *Public sector banks/financial institutions* – dealt with under a separate framework in India, e.g., the State Bank of India and the Small Industries Development Bank of India (SIDBI).
- *Cooperative societies* – entities established pursuant to some policy objective and involved in business in India, e.g., the National Cooperative Consumers' Federation of India Limited (NCCF) under the Department of Consumer Affairs.
- *Autonomous bodies* – set up as societies under various ministries to promote designated objectives, e.g., the Indian Institute of Corporate Affairs (IICA).
- *Trusts* – an SOE holding assets of the central or state government in public trusts, e.g., the Indian Port Trusts Act 1908 covers many major and minor ports.

While we may have provided for the aforementioned major types of SOEs, there are many economic entities that do not come under a strict definition of SOEs but are part of the public sector, involved in commercial activities, and impact on competition (Gouri 2010). We also see a number of innovations in terms of the structure of these SOEs: for example, the Goods and Service Tax Network (GSTN) was a special-purpose vehicle where the central and the state government held only 24.5% of equity shares with strategic control; however, later it was converted into a fully owned government company. It is interesting to note that the reversal from private governance to a fully owned government company was made by the GST Council on the grounds of the nature of a 'state' function being performed by the GSTN and its strategic role.

The overall reforms scenario in India is toward introducing corporatization in functions of the government with clear accountability and a result-oriented approach. This is quite evident from the performance/outcome-based policies being attempted and practiced in all spheres of governance, including SOEs.

2.1 Reforms in 'State-owned Enterprises'

In the 1990s, as the policy of liberalization and deregulation gathered pace, along with policies to promote increasing integration of the Indian economy with the global economy, SOEs took a back seat (Khanna 2012). The new industrial policy of 1991 opened up the doors for private investment, which was previously reserved for the public enterprises. With the shift in the public policy toward liberalization and deregulation, the business environment of Indian SOEs underwent a radical change. There was a general perception that SOEs were 'inefficient,' and thus bringing in private control and management would change the way the public sector operated. At the root of this thinking was the essence of 'competition,' which would create pressure on SOEs to 'perform or perish.' The performance of SOEs was initiated with the French performance contracting system adopted on the basis of the *Arjun Sengupta* Committee Report (1984), which recommended a memorandum of understanding (MOU) between administrative (line) ministries and SOE managers. This system has seen a lot of transformation over the years, particularly in the last five years during which the concept of 'cooperative fiscal federalism' has driven the reforms. NITI Aayog has now replaced the Planning Commission. It has no role in allocating finances to states but has three primary tasks to perform, i.e., promoting cooperative, competitive federalism; assisting the central government in policy making; and serving as the government's think tank.

2.2 Change in Governance – Toward Autonomy

The reforms in 1991 brought a focus on cutting the flab and complacency in the governance of SOEs. The Department of Public Enterprises (DPE) under the Ministry of Heavy Industries and Public Enterprises (known as the Bureau of Public Enterprises before 1991) is the nodal department for all central public sector enterprises (CPSEs) and formulates policy pertaining to CPSEs. These policies also serve as a reference point for the SOEs in states, i.e., state-level public enterprises, especially in light of the drive on 'ease of doing business rankings' for states since 2015. In 1997, the government recognized the comparative advantage of CPSEs by granting them more autonomy by declaring some of them as *nav ratnas* (new jewels) and 'mini ratnas.' In 2009, '*Maha Ratna*' status was introduced. One of the prime goals of this categorization was to give these entities greater autonomy to compete in the global market and also to support them in becoming global giants.

The categorization of CPSEs is based upon a rating obtained by each one on their performance under the MOU system in the last three out of five years. A composite score is arrived at to rate them as excellent, very good, good, etc. taking into consideration six factors, namely net profit, net worth, manpower cost, production cost, earning per share, and intersectoral performance (DPE 2011). For example, a CPSE has to fulfill the following criteria to obtain Maha Ratna status:

- Must have Nav Ratna status
- Average annual turnover during the last three years must be more than Rs. 25,000 crore ($3 billion $515 million)

- Average annual net profit after tax during the last three years must be more than Rs. 5,000 crore ($751 million)
- Average annual net worth during the last three years must be more than Rs. 15,000 crore ($2 billion 108 million)
- Must be listed on an Indian Stock Exchange as per Securities and Exchange Board of India (SEBI) regulations
- Must have significant presence globally

The progress of CPSEs from one category to another creates an incentive to compete and introduce best practices available globally. Based on their performance, as of June 2019, the following is the categorization of performing CPSEs in India:

- Maha Ratna – 8
- Nav Ratna – 16
- Mini Ratna Category I – 61
- Mini Ratna Category II – 12

CPSEs are also categorized into four schedules, i.e. schedule A (65), schedule B (66), schedule C (44), and schedule D (5). This categorization impacts the organizational structure and board-level salary of respective CPSEs. The categorization is proposed by the administrative department/ministry to the DPE, which examines it in consultation with the Public Enterprises Selection Board. The proposal contains the performance of the CPSEs on parameters like investment, capital employed, capacity addition, profits, etc. from the last five years. The proposal for categorization also includes information on complexities of problems being faced by the company, its national importance, its level of technology, its prospects of diversification, and competition from other sectors. The result of this exercise has a financial implication and hence the financial exchequer needs to be kept in the loop (Ministry of Heavy Industries & Public Enterprises 2012).

According to the DPE, there are 339 CPSEs as of 31 March 2018. Out of these 339 CPSEs, 257 were in operation and 82 were nonoperational during the period 2017–18. Out of the operating 257 CPSEs, 184 were profit making, 71 loss making and two CPSEs made no profit no loss. The major sectors in which the CPSEs operate are defense, oil production and exploration, oil refineries, power equipment, steel, and fertilizers (Economic Survey 2018–19).

2.3 The Disinvestment Phase

The government is focused on strategic disinvestment of its equity in SOEs through the Department (2004)/Ministry (2009) of Disinvestment. In April 2016, the Ministry of Disinvestment was christened the Department of Investment and Public Asset Management (DIPAM). The major disinvestments in CPSEs were carried out between 1999 and 2004. The government is reviewing the role of SOEs in economic development. As a result, a significant disinvestment can be seen in the hotels maintained by the government-owned Indian Tourism Development Corporation (ITDC). The government is of the view that “running and managing hotels on professional lines is not the work of the government or its entities.”

The Present Status

Despite raucous demands from many economists and multilateral institutions, the Indian government has found it difficult to carry out any further privatization or strategic sale of SOEs (Khanna 2012). Bringing reforms into SOEs is sometimes a politically aligned decision, and despite its economic reasoning, decisions have to be taken to the contrary. The present status of reforms in India indicates an indirect approach of pushing SOEs to compete with the private players, which is possible based on pure 'competitive neutrality' principles rather than protectionist measures.

Divestment of Air India

The government of India has been questioned regarding its support in bailing out the national flag carrier airline Air India on the grounds of competitive neutrality. In March 2018, the government offered to strategically divest 76% of its share in Air India; however, it could not get a buyer, allegedly due to proposed rights to be retained by the government with a 24% stake in the carrier, along with other reasons such as high debt, a track record of losses, and changes in the airline sector. The government has now changed its stance by offering to sell its full stake in Air India.

Privatization of Airports and Railway Stations

Delhi and Mumbai airports in India were privatized in 2006 under a public–private partnership (PPP) model with the majority stake held by private players (GVK and GMR). Twelve years after that development, the government has now decided to privatize another six airports, with private players holding more than a 75% stake. This development is being replicated with other transport, including railways, which has not yet seen divestment. However, it should be noted that several services, such as sanitation, vendors, etc., are already being dealt with by private agencies.

3. INTRODUCING 'COMPETITIVE NEUTRALITY'

Competitive neutrality implies that no business entity is advantaged (or disadvantaged) solely because of its ownership (Capobianco and Christiansen 2011). Competitive neutrality requires governments not to use their legislative or fiscal powers to advantage their own businesses over the private sector. If this occurred, it would distort the competitive process and reduce efficiency. Efficiency is related more to the degree of competition rather than to ownership (Jones et al. 1990). The modern competition law in India is an outcome of the SVS Raghavan Committee Report in 2000, which observed: "It is well accepted that competition is a key to improving the performance of state monopolies and public enterprises." The oft-noted inefficiency of government enterprises stems from their isolation from effective competition (Aharoni 1986).

Taking cues from the global framework and pushing toward reforming SOEs, the Government of India went ahead to include a broad definition of 'enterprise' under Section 2(h) of the Competition Act, 2002 so as to include government departments engaged in commercial activities, with the exception of government activity related to sovereign functions (all activities carried out by departments of the central government dealing with atomic energy, currency, defense, and space). This definition provided a formal introduction to 'competitive neutrality' in India (Gaur 2012).

The aggrieved private enterprises could now approach the Competition Commission of India (CCI) – an expert body established with the objective of promoting and sustaining competition in markets in India. However, the question still remains as to whether this introduction to 'competitive neutrality' has created the required 'competitive neutrality framework (CNF).' A CNF focuses on reforming the environment that public and private entities compete in. Introducing a CNF involves a systematic review of the legislative and administrative landscape in which SOEs operate, and a reform of that landscape so that the conditions in which SOEs operate are as closely matched to those faced by private sector competitors as possible (Capobianco and Christiansen 2011).

The adoption of competitive neutrality principles in domestic legislations has not been uniform, and broadly we may categorize the jurisdictions into two groups, i.e., one, which has a precise definition of SOEs according to their legislation establishing clear 'competitive neutrality' principles and another in which this precision is lacking (Moroccan ICN 2014). Further, in terms of reforms in SOEs, there are jurisdictions that are pretty aggressive while others explore softer ways and means to introduce reforms giving priority to their SOEs. Convergence in the application of competitive neutrality principles for reforming SOEs is very important, and in this world, with more than 130 competition law jurisdictions, the nurturing of common norms is an essential step in the process of nudging the world toward greater economic coherence (Fox and Healey 2014).

India has witnessed a significant transformation in its economy due to liberalization, privatization, and globalization, including its efforts in reforming the SOEs. There is a significant change from 'regulation to management,' '*License Raj* to open markets,' 'multiple approvals to single-window clearances,' and many more (Ram 2014). Charting out reforms in each of the sectors in which SOEs operate in India may not be possible in this paper; however, discussion on some of these will provide us with a policy framework and direction of reforms for SOEs in India.

4. ENERGY SECTOR REFORMS

One of the major sectors that have been catered to by the SOEs has been the energy sector, and naturally so, bearing in mind its strategic importance in terms of energy security and linkages with all forms of economic development. Post liberalization, there have been several efforts made by the government to resolve the underlying policy, institutional, and regulatory impediments in the energy sector, but private participation and investment did not foresee the expected results (TERI 2007). The energy sector in India primarily comprises coal, oil and gas, and electricity. Renewable energy is a new entrant in terms of focus. Each of these subsectors has its own competition issues and challenges in reforming the SOEs dealing with them.

4.1 Coal

As a fossil fuel, coal contributes towards the majority share in the energy mix. The coal sector in India was nationalized in 1973 with a view to checking the issues relating to unscientific mining, labor exploitation, and the need for energy security. Coal India Limited (CIL), with its seven subsidiaries, emerged as a natural monopoly in the coal sector with more than an 84% market share in the production of coal in India. However, in the absence of a coal regulator and 'competition,' over a period inefficiencies crept into the system, resulting in coal-block allocation issues (Supreme Court 2014) and alleged abuse of dominance by CIL. The tide changed and a need was felt to bring private participation into coal production, and accordingly the Government of India came

up with the Coal Mines (Special Provisions) Act, 2015. Opening up the coal sector to encourage commercial mining and move toward market-determined prices can only succeed if decision-making is at arm's length. This makes the need for an independent statutory coal regulator even more acute. The NITI Aayog think tank stated that the government must appoint an independent coal regulator for healthy and comprehensive development of this sector as soon as possible (NITI Aayog 2017).

4.1.1 Coal India Case

Competitive neutrality issues emerged in a batch of cases against Coal India and its group subsidiaries regarding alleged abuse of dominance in imposing discriminatory conditions in Fuel Supply Agreements (FSAs). The informants, namely power sector companies (some of them being SOEs themselves), approached the CCI against CIL and its subsidiaries. On finding that CIL had abused its dominant position, the CCI imposed a penalty of Rs. 1,773 crores on CIL (later revised on remand from COMPAT to Rs. 591 crores).

While concluding this order, CCI echoed the various anti-competitive factors identified in the coal sector, which creates a systemic risk, and emphasized "an imperative need to carry forward this reform momentum further by restructuring the sector by introducing more players so that it can reduce the dominance of any one player and can facilitate competition. Bringing the coal sector under the independent regulatory oversight would only help if there are enough players in the market" (Coal India Case 2013, 2017). In its subsequent order, while considering the penalties, the CCI noted that CIL is constrained in its autonomy, being subject to instructions from different government ministries/departments, but still "it has sufficient flexibility and functional independence in carrying out its commercial and contractual affairs and such factors do not detract from CIL and its subsidiaries operating independently of market forces and enjoying undisputed dominance in the relevant market."

4.2 Oil and Gas

The oil and gas sector is increasing its share in the energy mix in India. Also referred to as the hydrocarbon sector, it is broadly divided into (i) Exploration and Production (E&P), (ii) Oil Refining and Marketing, (iii) Gas Transportation and Marketing, and (iv) Crude Oil and Petroleum Product Pipelines (TERI 2007). It may also be categorized into upstream, midstream, and downstream activities. Six national oil and gas companies (two upstream, one midstream, and three downstream) dominate the three segments of the Indian oil and gas industry in market sales. With the introduction of the New Exploration Licensing Policy (NELP) in 1999, the oil and gas exploration sector saw the entry of private domestic and foreign firms. However, the oil and gas sector is still dominated by public sector companies. There is no independent regulatory oversight in the upstream segment. The government has progressively dismantled the Administered Pricing Mechanism completely over a period, including the public distribution system outlays, which are now being dealt with through direct benefit transfers (DBTs). Currently, the Petroleum and Natural Gas Regulatory Board (PNGRB) regulates some aspects of downstream business in oil and gas. The Directorate General of Hydrocarbons (DGH) is the technical arm of the Ministry of Petroleum and Natural Gas and manages petroleum resources as well as monitoring production sharing contracts. The government is of the view that the sector still requires government support and thus has ruled out any independent statutory regulator as of now.

4.2.1 Oil PSU Cartel

The CCI received its first case from the oil and gas sector for alleged cartelization between the three state oil marketing companies – the Indian Oil Corporation (IOC), the Bharat Petroleum Corporation (BPCL), and the Hindustan Petroleum Corporation (HPCL), collectively referred to as Oil Marketing Companies (OMCs) – on an information filed by Reliance concerning the supply of aviation turbine fuel (ATF). The CCI had ordered an investigation into this matter; however, the Delhi High Court stayed the investigation by the CCI on the grounds of a lack of jurisdiction and the matter being within the purview of the PNGRB. In a subsequent *suo motu* case taken up by the CCI, it questioned the conduct of OMCs in simultaneously increasing petrol prices even when there was no administered price mechanism in vogue. This case was also stayed by the Delhi High Court. The matters are still pending before the High Court; however, in a subsequent information received against the OMCs for jointly floating a tender and engaging in a 'buyers' cartel,' the CCI rejected the contention that the PNGRB had exclusive jurisdiction in this case to the exclusion of the commission (XYZ 2018).

4.2.2 Gas Supply Agreements

Similarly to CIL cases, in a batch of cases, gas sale agreement (GSA) clauses produced by the publicly owned GAIL (India) Ltd. were challenged before the CCI for being anti-competitive. It was alleged that due to its dominant position in the relevant market, GAIL was able to impose onerous conditions on consumers leading to abuse of its dominant position. The cases are under investigation by the Director General of the CCI (GAIL Case 2016). In a similar set of facts, a private player, Adani Gas, has been penalized for abuse of its dominant position in prescribing abusive GSA clauses. It would be interesting to track the developments in this matter for a comparative perspective.

4.2.3 Exemption from Merger Regulations

The government of India exempted all the CPSEs in the oil and gas sector from applying combination provisions of the Competition Act to allow smooth consolidation and stake purchases among state-owned oil and gas companies. The government wants to create a big energy company to compete globally. While this step is lauded for creating a national champion, it dilutes the government's push toward 'competitive neutrality,' a balance that is always difficult to establish.

4.3 Electricity

Also referred to as the power sector, the electricity sector has seen a significant transformation over the years, in particular since the Electricity Act, 2003, which brought about far-reaching reforms in the electricity sector, including the unpacking of erstwhile electricity boards into generation, transmission, and distribution companies and the advent of the Central Electricity Regulatory Commission (CERC) at the central level and SERC at the state level (NITI Aayog 2017). Thus, power sector reform has usually involved some combination of product market competition, privatization, and regulation. However, private participation has largely been confined to generation. Delhi and Mumbai have seen some privatization in the distribution segment and needs more reforms. One of the critical issues in distribution has been the sharing of bottleneck facilities, i.e., transmission lines other than the issue of statutory market allocation.

4.3.1 Discoms and Competition

The CCI had its first brush with interaction in this sector with the transferred pending cases under the old Monopolies and Restrictive Practices (MRTP) Law (the *suo motu* case taken up by the Director General – Investigation and Regulation (DGIR) under the MRTP Act), wherein the power Discoms of Delhi (Discoms) were alleged to have engaged in anti-competitive practices. This was supplemented by an information under the Competition Act against the three Discoms concerning engaging in abuse of their dominant position by selling 'fast-running meters.' The matter was referred to the DG-CCI for investigation, which found that the Discoms were abusing their dominant position. However, the Commission held that the issue of 'fast-running meters' has no bearing on competition in this sector and such issues may be looked at by the consumer forum or ombudsman established under the Electricity Act (Discoms Case 2011).

4.3.2 Interoperability

Interoperability issues in the electricity distribution sector in India were brought before the CCI by one of the consumers from Mumbai wherein the actions of the state electricity utility, the Brihanmumbai Electric Supply & Transport Undertaking (BEST), in not allowing changeover to another supplier, Tata Power, were challenged. As the informant had also preferred another case before the State Electricity Regulator (MERC), the CCI closed the case to wait for the outcome of the decision from the MERC. The matter went to the Supreme Court and it was found that there was no obligation on the state utility to grant open access in view of the exemption granted under the Electricity Act (BEST Undertaking Case 2010, 2014).

Along similar lines to the CIL and GAIL cases, Tata Power filed an information alleging abuse of dominance by the National Thermal Power Corporation (NTPC) in imposing onerous conditions in power purchase agreements (PPAs), including the absence of an exit clause in very long-term contracts. The CCI closed this case on the grounds that the informant had the option of going to the Ministry of Power to get the reallocation done to some other party (NTPC 2017).

4.3.3 Sectoral Overlap

Just like the oil and gas sector, the electricity sector also saw a tussle between the electricity regulator CERC and the CCI when CERC came up with its own draft regulations in 2012 to tackle the adverse effect on competition in the energy sector (CERC 2012). The CCI objected to this regulation as usurping its jurisdiction and later the draft regulations were not implemented.

On the issue of sectoral overlap, there is also a case pending in the Madras High Court challenging the jurisdiction of the CCI to deal with cases in the electricity sector. However, in 2014, the Delhi High Court left it to the CCI to decide that the Maharashtra State Power Generation Co. (Mahagenco) had abused its dominance by refusing to provide open access to the other independent power producers. Recently, the CCI has clarified its position on exercising jurisdiction in the electricity sector in a matter relating to abuse of their dominant position by the state electricity utilities in restricting open access (HPCL-Mittal 2018).

5. TELECOMMUNICATION SECTOR

The telecommunication sector has witnessed the fastest reform measures, beginning even before liberalization, i.e. in the 1980s. The telecommunication sector includes primarily telephony (landline and mobile), the Internet and broadband services, and radio/television broadcasting. Reforms in this sector have been witnessed to a great extent by the common consumer with modern handsets, cheaper call rates, and the Internet and broadband. From 1997, the Telecom Regulatory Authority of India (TRAI) played a very significant role in regulating and giving direction to these reforms by way of robust policies and timely tariff interventions whenever required. In 2000, the constitution of the Telecom Dispute Settlement and Appellate Tribunal (TDSAT) further liberalized the sector by providing a separate body for adjudication and dispute settlement.

While there are no issues as regards the operation of SOEs in this sector, there have been conflicts between the telecom regulator and the CCI on certain issues, in particular the following:

- The TRAI's recommendation on Intra Circle merger and acquisitions guidelines in the telecom sector (2012)
- Consultation paper on monopoly/market dominance in cable TV services (2013)
- Consultation paper on net neutrality (2017)
- Predatory pricing tariff rule – barring telecom operators with over 30% of the market share from offering services at a price that is below the average cost of the service with the intention of reducing competition or eliminating competitors (2018). The Telecom Appellate Authority has dismissed some clauses of this rule and the TRAI has approached the Supreme Court on this.

While the CCI has been writing to the TRAI about its jurisdiction in matters exclusively relating to competition concerns, the TRAI has not acceded to this argument and continues to argue for its jurisdiction to deal with matters on competition in the telecom sector. The Supreme Court of India has recently clarified the position of the CCI vis-à-vis the TRAI in a matter involving alleged cartelization by Airtel, Vodafone, and Idea (collectively called IDOs) and the Cellular Operators Association of India (COAI). In the case of an information filed by Reliance Jio, the CCI ordered an investigation into the alleged cartelization. This order was challenged by IDOs before the Bombay High Court wherein the order of the CCI was stayed and the matter went to the Supreme Court. The Supreme Court settled a long-pending issue regarding the jurisdictional conflict and held that the order by the CCI was premature in terms of the absence of adjudication on the technical issue of interconnection by the TRAI (Telecom Cartel Case – SC 2018).

6. GENERAL INSURANCE SECTOR

The insurance sector in India has experienced a 360-degree journey over a period of more than a hundred years. Its transition from an open competitive sector to nationalization (*life insurance in 1956 and general insurance in 1973*) and then back to a liberalized market in the 90s characterizes this phenomenon (Bhattacharya and Rane 2003). The Insurance Regulatory and Development Authority (IRDA) has changed the way the insurance sector used to work, bringing in significant reforms. Foreign investment in the insurance industry in India is limited to 49% under the automatic route and hence there exists a potential for reform in this sector. Publicly owned general

insurance companies (collectively referred to as Public Sector General Insurance Companies [PSGICs]) hold about 60% of the market share in the health insurance business.

6.1 Bid Rigging

The insurance sector in India got the attention of the CCI through a case of a bid-rigging cartel entered into between the four Public Sector General Insurance Companies (PSGICs). The cartel was to bid for a tender floated by the state government of Kerala to select insurance service providers to run a government-sponsored general insurance scheme. The CCI received an anonymous information and investigated this matter on its own, finding that the senior officials of the four PSGICs had met "to discuss about sharing of business and submission of a quotation for the above business" and recorded the minutes signed by its officials "to share the business among the four PSUs with United India as the leader with 70% and other companies with 10% each…" The CCI imposed a penalty on the PSGICs, which was also upheld by the appellate authority – the Competition Appellate Tribunal (Cartelization by PSGIC 2015).

6.2 Third Party Administrators Case

In a subsequent case, the conduct by the PSGICs again came under the scrutiny of the CCI wherein the informants alleged that the PSGICs were conducting their activities in an anti-competitive manner under the banner of the General Insurers (Public Sector) Association of India (GIPSA). The informant in this case alleged that the formation of Health Insurance TPA India Ltd. (HITPA) by PSGICs was an attempt to foreclose the market to prevent both existing and potential TPAs from entering the TPA market. TPAs generally handle the claims management process and act as a conduit between the insured and the insurer. While the formation of HITPA per se could not have been a serious concern in view of the "efficiency of JV" defense available in Section 3 of the Competition Act, the following direction from the administrative department of the public general insurance companies raised eyebrows:

No Public Sector General Insurance Company shall obtain the business of stand-alone group health insurance from any of the other public sector companies without the prior written and explicit 'No Objection' from the concerned CMD of the other company. All PSU insurers shall necessarily share the data concerning premium, claims etc. with regard to major accounts and ensure that *there is no competition between them in any corporate/group account*. Any deviation from this instruction will be viewed seriously (DFS Circular 2012).

In an overall analysis of this case, the Commission was of the opinion that the formation of HITPA would bring efficiency and is not anti-competitive, especially in view of the fact that HITPA was not engaged in any commercial activity as such.

The Commission disapproved the issuance of the aforesaid directions by any person, body, or government department that may hinder fair play in the market. This case is important as the CCI distinguished the role of ministries/departments in issuing policy directions as a 'sovereign function' and not qualifying as an 'entrepreneurial act' to trigger competition law. In this case, the DFS was considered to be an extension of the government and acting on behalf of the President of India to monitor the overall performance and functioning of PSGICs to achieve their objectives (ATPA and GIPSA 2016).

The aforementioned two cases brought forward a significant concern regarding fair play among the SOEs. Their common parent being the government, there is a natural affinity to favor and collude rather than compete. This is further strengthened by the absence of a 'competition culture' amongst the SOEs. What is required is a top-down approach in these situations. The aforementioned two cases in this sector definitely impacted the way these companies used to function toward better governance and a competitive spirit.

7. TRANSPORT SECTOR

The movement of goods and people plays a very important role in the development of a country. Sustained competition in the transport sector contributes to consumer welfare by reducing prices and the quality of goods. In India, transport is mainly covered by railways, road, air, and water. We have already dealt with the air transport sector. Water transport is not very well developed in India; however, new policies are making rapid strides toward its development. Strong competition may be seen in the road transport sector. With the promulgation of e-waybills under the Goods and Services Tax (GST), things have improved.

7.1 Railways

Indian Railways (IR) is the fourth-largest network in the world and plays a significant role in the development and growth of the country. It operates directly under the Ministry of Railways and importantly has its own central budget. However, from the budget year 2017–18, in continuation of the reforms, the railway budget was merged with the union budget. Indian Railways came under the examination of the CCI in cases brought by the private container operators Arshiya Rail and KRIBHCO challenging the abuse of dominance by IR and the publicly owned Container Corporation of India (CONCOR). This case is important as the Delhi High Court in this case clearly distinguished between the 'sovereign functions' and 'commercial activities' performed by the railways and held railways to be subject to the jurisdiction of the CCI (Arshiya Rail Case 2010). Railways are up for a number of reforms, including reforming the functioning of SOEs and establishing a railway regulator (Debroy 2015); however, privatization of the railways seems to be a distant agenda for the government, bearing in mind its strategic and political importance.

7.2 Road Transport

While goods transport is primarily dominated by private truck operators, passenger transport is generally dominated by public transport departments. Every state has its own state transport undertakings and they enjoy some monopoly rights as to the routes, timings, and services they operate (CIRC-CUTS n.a.). The CCI dismissed a case filed against the North West Karnataka Road Transport Corporation (NWKRTC) for alleged abuse of its dominant position, observing that the "Motor Vehicles Act, 1988 empowers the state governments to regulate the road transport services in their respective states… In the public interest, a state government may not allow private players to operate on certain routes." However, the CCI asked the Karnataka government to take a fresh view on the flexible rates charged by the transport corporation. Interpretation of the term "public interest" is crucial in this case, and this was not carried out as such in the prima facie closure of the case.

8. REAL ESTATE SECTOR

In India, there are many public authorities under the state governments that are involved in the development of real estate. The CCI, in one of its first cases, made headlines by penalizing DLF Ltd., one of the prominent private builders in India for abuse of its dominant position by imposing unfair conditions on consumers. This case revolutionized the consumer protection regime in the real estate sector in India. In fact, the evolution of the Real Estate Regulatory Authority Act (RERA) in India may be attributed to this decision. The CCI has given equal treatment to state authorities like the Delhi Development Authority (DDA) and the Ghaziabad Development Authority (GDA) by imposing a penalty on them for anti-competitive conduct in unilaterally raising prices and imposing onerous conditions on locked-in consumers.

9. PUBLIC PROCUREMENT AND SOEs

Public procurement refers to the procurement of goods and services by the public sector and becomes crucial because of the public money involved. The objective of public procurement is to achieve maximum economic efficiency through the competitive process of bidding. However, despite the economic transformation that the various countries in Asia have undergone, serious weaknesses have persisted in the area of public procurement. These include fragmented procurement procedures; the lack of professional procurement expertise; the absence of open, competitive tendering, especially for foreign suppliers; widespread corruption; and the lack of transparency (Jones 2007).

The participation of SOEs in the tendering process further complicates the issues, especially in view of the perceived transparency and fairness issues in ensuring a level playing field between SOEs and private bidders. These issues emerge from three main factors: (i) privileged access to information; (ii) potential conflict of interest through the state's direct/indirect control of ownership; and (iii) SOEs' enjoyment of grants, subsidies, relief, etc. (ADBI 2018).

In India, the public procurements have always been under the scrutiny of the Supreme Court of the country in view of Article 299 of the Constitution of India, which deals with government contracts. Through its several decisions, the Supreme Court of India has laid down the principle of public procurement that the government should be fair in its dealing, on the one hand, and with freedom of choice for the procurer as a consumer, on the other. In a number of the cases before the CCI, it has clearly recognized the 'freedom of choice' of the procurer to frame the terms and conditions of the tender document (Mahagenco Case 2017).

In order to detect and prevent anti-competitive practices in public procurement, it is necessary to evaluate the market structure upfront and have robust tender conditions. Red flags arising out of these assessments would help the procurement agencies to increase the effectiveness of procurement competitively. In terms of process, India has made several changes to public procurement norms, one of the significant ones being the practice of performing e-procurement. This has plugged a lot of loopholes in the system. Though beyond the scope of this paper, another important element that comes up in public procurement issues coupled with the anti-competitive setup is 'corruption,' which has come to the forefront in a number of bid-rigging cases before the CCI. Moreover, pro-competitive procurement rules in SOEs and competitive neutrality principles can reduce the risk of corruption as the competitors would be watchful of any such behavior.

In terms of public procurement, the CCI has got plenty of cases of bid-rigging, beginning with the first case against Indian Railways and SAIL. Preference in the procurement of rails for Steel Authority of India Limited (SAIL) by Indian Railways was challenged by Jindal Steels in one of the first cases before the CCI, which went to the Supreme Court on jurisdictional issues. However, the CCI did not find any anti-competitive issue in this procurement, respecting the 'choice of the buyer' and the flexibility available in the contract not leading to any foreclosure (CCI-SAIL Case 2010).

However, there have been other cases in relation to bid-rigging in railways tendering wherein the CCI has made an observation on the entry barriers being created due to unreasonable conditions in the tender document. The CCI observed that a lower number of vendors approved by the standard-setting authority – the Research Designs & Standards Organization (RDSO) – creates a sort of entry barrier and restricts competition.

Similarly, in the Sugar Mills case (2011), the CCI was of the view that the sugar industry is not free from control and is at present highly controlled and regulated. The CCI advised the government to consider framing a policy in this sector that allows the market and competitive forces to play a bigger role in the sector and ultimately benefit the consumers.

MSEs and Public Procurement

In India, there is a requirement for the PSUs to procure 20% of their requirements from micro and small enterprises (MSEs) (2012 order). There are 358 items that are exclusively reserved to be procured from MSEs. While this policy is to promote MSEs, the policy rests on the core principle of competitiveness, and procurement is done through transparent procurement norms.

10. CONCLUSION AND POLICY RECOMMENDATIONS

'Competition' as an agenda was formally dropped from the WTO working group agenda, and the movement of 'divergence to convergence' on basic principles of competition law and policy is now being taken care of by the bilateral, multilateral, and regional framework (Singh 2014). Internationally, UNCTAD, the OECD and the World Bank have highlighted the need to promote a 'competitive neutrality' framework so as to provide a level playing field for enterprises.

Governments have entered into free trade agreements in which negotiation on a 'competition' chapter has been one of the important issues. A multilateral negotiation took pace for the Trans-Pacific Partnership (TPP) among 12 Asia-Pacific regions. One of the chapters of the TPP specifically dealt with SOEs, as the issue of SOEs was considered problematic in the international trade context for several reasons, the most prominent one being the issue of competitive neutrality (Kim 2017). While the 'competitive neutrality' argument has been made to usher in reforms in SOEs, creating a climate for them to compete with the private players, the drive has not been out of criticism. Many of these SOEs have been champions of addressing various social and political roles and also facing 'reverse competitive neutrality,' a term used to refer to the onerous conditions SOEs face because of their position as publicly funded bodies. Further, one cannot lose sight of the fact that SOEs have become tools for some countries to better position themselves for the future in the global economy, given the increased global competition for finances, talent, and resources (PWC 2015). Thus, a balance needs to be made between privatization and progressive reforms of SOEs, with one of the solutions being maintaining a clear distinction between the social and

commercial functions of SOEs. A smudging of roles leads to inefficiencies in their operation and free-riding issues.

The Indian experience of reforms carried out for SOEs has been remarkable so far, the prominent one being the applicability of Competition Law to SOEs, making no distinction from a private enterprise. The competition regulator in India has been bold enough to bring actions against some big SOEs and suggest measures for ensuring competitive neutrality, including ‘competition impact assessments’ of sectors and changes in legislations and policies. Although the advisory functions of the CCI are recommendatory in nature and government is not bound to follow the same, the CCI has been pretty active in its advocacy function in bringing in a ‘competition culture’ among SOEs through workshops, seminars, and conferences.

Examples from the different sectors in India wherein these SOEs operate clearly show a pattern of functioning: for example, both the dominant SOEs in the coal sector and the oil and gas sector have been alleged to abuse their dominant position while negotiating fuel supply agreements with their clients, even when, in some cases, the clients themselves were another SOE. One of the reasons for such abuse could be the perceived notion of being close to the government.

A comparative analysis of the functioning of SOEs in some prominent countries of Asia demonstrates that competition law forms an important element in bringing reforms to SOEs. Bringing changes to the corporate governance framework of these SOEs to increase their accountability, efficiency, and competitive spirit to a level similar to private enterprises is another important element. Governments are focusing on consolidating the smaller SOEs into bigger ones to compete globally. In India, we are seeing this trend in the financial sector involving the merger of banks, and in the oil and gas sector. Interestingly, India has exempted these sectors from the applicability of combination regulations so as to remove any scrutiny from the competition regulator. This contrasts with the focus on promoting ‘competitive neutrality’ principles under the competition law and brings forward the question of whether a competition regulator is the right body to deal with the issue or whether one should follow the Australian model in which a separate body (Productivity Commission) handles the matter.

In India, one of the greatest challenges for enforcement of the competition law against SOEs has been the regulatory overlap between the sectoral regulators and the generic competition regulator. There have been jurisdictional challenges pending in the various constitutional courts of the country. While recently the Supreme Court of India has clarified the position in the telecom case, there are still cases pending in courts. This issue needs to be addressed as a priority, and it is suggested that in cases involving the interpretation of key provisions of the competition law, specifically involving jurisdictional overlaps, the courts should accord priority and interpret the final principles of engagement. A lot of other cases are dependent on these interpretations.

While the competition law of India provides for consultation between regulators (Sections 21 and 21A), the outcome is not mandatory. It was advocated that these provisions should be made mandatory; however, the attempt did not succeed. A good coordination between the competition regulator and sectoral regulators would help greatly in establishing a competitive neutrality framework. Moreover, politicization of these issues in India creates several concerns and impedes reforms: for example, recently the performance of Hindustan Aeronautics Limited (HAL) – a defense sector SOE – has been receiving sharp criticism from parliamentary standing committees and it has been projected by the opposition as favoring private players over the national champion.

In conclusion, one can raise the following points of reference for reforming SOEs through effective competition law and policy:

- A definition of 'enterprise,' including government departments except those departments engaged in sovereign functions, provides clarity for SOEs that they are subject to enforcement of competition law.
- The aforesaid definition, however, does not set the 'competition culture' amongst SOEs. This is attempted to be instilled by way of focused advocacy efforts on the part of competition agencies and the government.
- In terms of enforcement, the competition regulator has fined many SOEs; however, at times it has appeared to give leeway due to existing policies and practices with some suggestions for improving their way of functioning (e.g., the Coal India case).
- The government is making efforts to withdraw itself from less important sectors like running hotels; however, it has found it difficult to convince itself to lose complete control of important sectors like 'commercial airlines,' railways, etc.
- Differentiating between 'commercial activities' and 'social obligations' of SOEs requires attention. In certain situations, *de jure* differentiation doesn't help de facto reforms.
- Collaboration between the competition regulator and sectoral regulators is very important. A mandatory consultation mechanism under the competition law may help.
- Corporatization of the functioning of SOEs would help reform SOEs. There are incentives for performing SOEs in different parameters, including 'good corporate governance'; including 'competition compliance' as a parameter may prove useful.
- The judiciary shall accord priority to cases that require the setting of ground rules for operation of these SOEs. A delay in resolution may be harmful to the markets and the economy, and ultimately the citizens of the country.
- Political perceptions and interventions shall be minimized in dealing with the issue of reforms. Education and advocacy in these matters would be very useful.

India's competition law and policy plays an important role in reforming SOEs by keeping a check and balance and providing operational ground rules. Anti-competitive behavior is reprimanded and advocacy efforts are carried out to instill a competition culture. India may not be a perfect example to follow, due to differences in national markets and its priorities, but its experiences could be a good learning point for Asian economies. While significant work has been done in terms of reforming SOEs, a lot still remains to be done in keeping this subject alive for discussion in the coming years with a focus on international convergence, beginning with convergence in principles and practices for reforming SOEs in Asia.

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