

## NEED FOR COMPETITION AND REGULATORY REFORM IN DEVELOPING COUNTRIES: CASE OF INDIAN COMPETITION LAW ENFORCEMENT

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### INTRODUCTION

The present competition law in India, i.e. the Competition Act of 2002 (“the Act”) has been brought into action on the recommendations of a High Level Committee<sup>1</sup>. The Committee had observed that the Monopolies and Restrictive Trade Practices Act of 1969 (“MRTP Act”) is limited in its sweep and in the present competitive milieu it fails to fulfill the needs of competition law<sup>3</sup>. There were two sets of arguments at the time of introduction of this Competition Bill in the Parliament – one which raised apprehensions of India losing its bargaining power at the WTO negotiations, hence suggestions to defer the enactment; Indian industry, both private and public required safeguards and protection; the Bill would allow MNCs to capture Indian industry and services sector, hence no hurry be shown in passing the Bill and that MRTP Act may be suitably amended to meet the requirements. However, the another shade of opinions favoured the passage of the Bill, one of the prime arguments being that MRTP Act is based on old economic theory which is no longer efficacious enough to check the onslaught of foreign companies against Indian companies<sup>3</sup>.

The philosophy on which the MRTP Act was based was ‘concentration of economic power’<sup>4</sup>. The Committee which recommended for the MRTP Act, observed “...in a large number of industries, a single undertaking is the only supplier or at least has to its credit a very large

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1. SVS Raghavan Committee vide Order dated October 25, 1999 issued by the Department of Company Affairs. Nine members High Level Committee submitted its Report in two volumes. Volume-I of the Report was on Competition Policy and Law; Volume-II contained the concept Bill on Competition policy christened as ‘Indian Competition Act–Draft Bill’.
2. Para 6.1, Report of the Department-Related Parliamentary Standing Committee on Home Affairs, 93rd Report on Competition Bill, 2001 (August 2002) INDIA.
3. *Id.* Para 7.22, 7.23 and 7.24.
4. Report of the Monopolies Enquiry Commission, 1965, Vol I & II. Terms of reference of the Committee which recommended for the MRTP Act was to enquire into the extent and effect of concentration of economic power in private hands and the prevalence of monopolistic and restrictive practices in important sectors of economic activity other than agriculture with special reference to (i) the factors responsible for such concentration and monopolistic and restrictive practices; (ii) their social and economic consequences, and the extent to which they might work to the common detriment; and to suggest legislative measures to cure the problem.

*portion of the market compared to its competitors.*<sup>5</sup>” It was more so driven by the sentiments of a common man, as noted by the MIC – “*in the eyes of the common man in India concentrated economic power is wholly evil.*”<sup>6</sup> This had also to do with our history of being ruled by *Company Sarkar*<sup>7</sup>. The things changed with the winds of liberalization, privatization and globalization in India, and the present competition law and policy is a result of gradual lifting of barriers in the markets of India<sup>8</sup>. However, the actual enforcement of the Act only began in 2009 (20th May) with all provisions, including combinations, being enforced only from June 2011. It is important to note this background to assess the regulatory reforms done so far and the need for more reforms and further an assessment as to how far they have been achieved.

#### **NEED FOR COMPETITION AND REGULATORY REFORM**

There is no doubt that a robust competition policy promotes economic development<sup>9</sup>. It not only contributes directly, but also pushes the other policies indirectly to perform and contribute to economic development<sup>10</sup>. The Financial Sector Legislative Reforms Commission (FSLRC) in India recognized that competition is a powerful tool for the protection of consumers<sup>11</sup>. The FSLRC report is important as it recognizes the importance of competition in public policy discourses (in this case the financial policy of unification of various financial regulators) and reiterates that the Competition Act enshrines a non-sectoral approach to competition policy envisaging a detailed mechanism for better co-operation between financial regulators and the Competition Commission through which there is greater harmony in the quest for greater competition. This raises an important question as to what is the ultimate goal of competition law and policy (discussed *infra*).<sup>12</sup>

Public perception is of critical importance in success of any reform agenda. The role played by politicians, policy makers, civil servants and regulatory institutions is equally important. India has witnessed a series of reforms post 1991; however, some of them have seen a lot of resistance

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5. *Id.* Chapter V: Monopolistic and Restrictive Practices.

6. *Id.* Chapter VI: Consequences of Concentration.

7. See Vijay Kumar Singh, Competition Law and Policy in India: The Journey in a Decade, 4 NUJS Law Review, 523 (2011).

8. Several changes were made over a period of time, for e.g. FERA changing to FEMA (regulation to management).

9. Anderson & Muller, Competition Policy and Poverty Reduction: A Holistic Approach, Staff Working Paper ERSD-2013-02 WTO, (20 February, 2013).

10. UNCTAD, The Role of Competition Policy in promoting economic development: The appropriate design and effectiveness of competition law and policy, TD/RBP/CONF.7/3, (30th August 2010). Also see OECD note by Secretariat on Factsheet on Competition and Growth, DAF/COMP/WP2(2013)11, (18th September, 2013).

11. Report of FSLRC, Government of India, (March 2013), vol. 1.

12. Vijay Kumar Singh, Competition Policy and Financial Regulations - case of a Unified Competition Regulator, 2013 34 E.C.L.R., Issue 7, 376-385.

from politicians and policy makers, like FDI in multi-brand retail, land reforms, and GST. It is pertinent to note that at the bottom of many of these reforms the objective have been promotion of competition, as is evident from the recommendations of FSLRC so also other reports on sectoral regulators including the one on Market Infrastructure Institutions<sup>13</sup>. There is also a significant role played by civil servants in their role as regulators, and appropriately, the 2nd Administrative Reforms Commission in India recommended for a ‘code of ethics’ for Regulators and recommended for evolution of objective, transparent and fair decision making processes and enforcement mechanisms<sup>14</sup>.

### ULTIMATE GOAL OF COMPETITION POLICY

This is indeed a difficult topic to address, and is rightly referred to as “*antitrust consumer welfare paradox*”<sup>15</sup>. At the outset, people would say that competition law and policy promotes ‘consumer welfare’, which is a term of economics with specific meaning<sup>16</sup>. On the other hand, many would argue that the goal of antitrust laws should be maximization of the aggregate welfare in a market<sup>17</sup>, that is, the sum of consumer surplus and producer surplus, irrespective of the distribution of surplus between these groups<sup>18</sup>.

While it is a truism that competition and consumer protection share a common goal, i.e. the enhancement of consumer welfare through lower prices, more innovation, higher quality and greater choice<sup>19</sup>, there may be other objectives also behind a competition policy. For e.g. in EU, goals of competition law transcends also to market integration, the protection of small and medium-sized companies, aspects of industrial policy, efficiency, and integration with other Community policy objectives<sup>20</sup>. Not the least, even social and political reasons have been taken

13. Report of the Committee on ‘Review of Ownership and Governance of Market Infrastructure Institutions’, (November, 2010) SEBI.

14. Chapter 2.8, Fourth Report of Second Administrative Reforms Commission, “Ethics in Governance”, Government of India (January 2007).

15. Barak Y. Orbach, the Antitrust Consumer Welfare Paradox, Arizona Legal Studies Discussion Paper No. 10-(07, February 2011).

16. Means the benefits a buyer derives from the consumption of goods and services.

17. Total Welfare refers to the aggregate value that an economy produces, without regard for way that gains or losses are distributed. It is concerned with minimizing deadweight loss.

18. Dennis W. Carlton, “Does antitrust need to be Modernized?”. 21 J. Econ. Persp. 155, 156-59 (2007). Also see Jack Kirkwood, “The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency”, 84 Notre Dame Law Review, 191 (2008) – Demonstrating the Fundamental Goal of Antitrust Law is to Protect Consumers.

19. See OECD Policy Roundtable, The Interface Between Competition and Consumer Policies, DAF/COMP/GF(2008)10; also see Consumer Protection and Competition Policy, Planning Commission, Eleventh Five Year Plan, Chapter 11, available at [http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11\\_v1/11v1\\_ch11.pdf](http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11_v1/11v1_ch11.pdf)

20. Laura Parret, “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition Law and Policy”, European Competition Journal, (August 2010), 339, 359.

into account<sup>21</sup>. No doubt, the ultimate goal of competition law and policy is to promote consumer welfare (broader definition of the 'consumer' which even includes an intermediary in the supply chain distinguishing it from the definition in Consumer Protection Act) directly and indirectly, but in any case could not be to maintain inefficient business at the cost of taxpayers in the name of distributive justice<sup>22</sup>.

Competition Law in India goes far ahead of the developed jurisdictions in terms of providing for the principles of competition, as is evident from the definition of '*enterprise*' which is very broad and includes even the Government Department with an exclusion of Sovereign Functions<sup>23</sup>. The question remains on the effective enforcement of these provisions which will be discussed in the following paragraphs.

#### **The Public Interest Element**

The Department of Company Affairs (as it was then) had stated that public interest and consumer interest are not synonymous<sup>24</sup>. The Central Government in India is empowered to exempt any class of enterprises or any practice or agreement from the application of the Competition Act on the grounds of interest of security of the State or public interest, or treaty obligations, or sovereign functions<sup>25</sup>. In spite of lobbying from various quarters, like insurance, telecom, banking, etc., so far only exemptions granted have been in relation to agreements in shipping industry with a sunset clause of one year further limited to only some class of agreements<sup>26</sup>, banking sector from application of combination provisions that too in case of

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21. M. Motta, *Competition Policy: Theory and Practice*, Cambridge University Press, 2004, 30.

22. Herbert Hovenkamp, *Distributive Justice and Consumer Welfare in Antitrust*, (August 2011), available at [https://www.ucl.ac.uk/cles/research\\_initiatives/theory-history-comp-law/tabs/cycle\\_distributive\\_justice\\_hovenkamp\\_paper\\_13\\_july\\_2011](https://www.ucl.ac.uk/cles/research_initiatives/theory-history-comp-law/tabs/cycle_distributive_justice_hovenkamp_paper_13_july_2011).

23. Section 2(h) of the Competition Act, 2002 defines 'enterprise'. In this context a discussion in Minority opinion of CCI is worth noting, in which it was held that the activity of 'procurement of services for construction of roads and bridges by tendering' by a Public Works Department cannot be a sovereign function and thus covered under the definition of enterprise. Case 70 of 2014 (Rajat Verma against PWD Govt. of Haryana), dated 12.01.2015.

24. See, Para 7.16, Report, supra note 2 - Such protection will normally be for a limited period, to enable the particular sector to accept the challenge of competition, become competitive and compete domestically and globally.

The Competition Bill, in most of its provisions, gives consumer interest primacy and place of pride. But there could be occasions and circumstances, when public interest may have a larger relevance than consumer interest. For instance, global competition may extinguish the domestic industries in a particular sector, for various reasons. In such a circumstance, in terms of cost benefit analysis, if the damage to public interest, namely, the larger society, is very significant, Government should have the power to exempt that sector (a class of enterprises) from the operation of Competition Law (presently available under Section 54 of the Competition Act 2002).

25. Section 54 of the Competition Act, 2002.

26. Vessel Sharing Agreements (VSAs), see <http://pib.nic.in/newsite/PrintRelease.aspx?relid=118581>.

failing banks<sup>27</sup>, and for mergers in oil and gas sector<sup>28</sup>. While compulsory licensing<sup>29</sup> is not the topic to be discussed in this paper, it is an important area necessitating reforms<sup>30</sup>.

*Mr. Narayana Murthy* in his CCI Annual Day Lecture<sup>31</sup>, emphasized the role of the government beyond its interface with businesses in the following words:

“It should be minimum and is to defend the country against foreign invaders; law and order; monetary policy and taxation; judiciary; efficient allocation of public resources like land; and running common good institutions or public works that benefit the society as a whole like roads, dams, harbors, commons and other sectors where the investment by private parties is infeasible. Services like education, healthcare, nutrition, ports and airports should ideally be run by the private sector. There are two important principles in this. One, only those who use these services should pay for these services based on their usage, and, second, the government should provide direct subsidy in the form of vouchers to people with income below a certain level for availing of services that are basic like education, healthcare, transportation and nutrition and shelter”.

This underlines the need for prioritization of state efforts in sustaining the momentum of competition reforms. One of the significant challenges would be to show to the common man that how competition enforcement results in reduction in prices, better choices and enhanced consumer welfare rather than pushing inefficiencies by Government handling activities which they are not good at.

#### **IMPACT OF COMPETITION POLICY ON SUSTAINABLE DEVELOPMENT**

Achieving sustainable and inclusive growth and development requires a good policy mix that needs to take into consideration the specific economic, social and environmental circumstances

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27. Has exempted a banking company in respect of which the Central Government has issued a notification under Section 45 of the Banking Regulation Act, 1949 ('Banking Regulation Act'), from the application of the provisions of Sections 5 and 6 of the Competition Act for a period of five years. – see Ministry of Corporate Affairs notification S.O. 93 (E) dated 8th January, 2013.

28. See MCA notification dated 22nd November 2017 (exemption for 5 years), available [https://www.mca.gov.in/Ministry/pdf/Notification\\_27112017.pdf](https://www.mca.gov.in/Ministry/pdf/Notification_27112017.pdf)

29. See Naval S. Chopra and DinooMuthappa, “The Curious Case of Compulsory Licensing in India”, *Competition Law International*, Vol 8 No. 2. (August 2012).

30. For example, see the Draft National IPR Policy submitted by IPR think tank (Justice Prabha Sridevan – Chairperson), (19th December 2014), available at [http://dipp.nic.in/English/Schemes/Intellectual\\_Property\\_Rights/IPR\\_Policy\\_24December2014.pdf](http://dipp.nic.in/English/Schemes/Intellectual_Property_Rights/IPR_Policy_24December2014.pdf)

31. On the 6th Annual Day Lecture of CCI, available at <http://www.cci.gov.in/May2011/Advocacy/anmay2015.pdf>.

of a country<sup>32</sup>. Competition policy is one of the tools which can complement sustainable development along with the other policies.

### **Competition Policy and Industrial Policy interface**

One policy that can appear to conflict with competition is industrial policy<sup>33</sup>, which includes micro-industrial Government policies like reservation for the small scale industrial sector, privatization and regulatory reform, trade policy including tariffs, quotas, subsidies, anti-dumping action etc., state monopolies policy, and labour policy<sup>34</sup>.

Ensuring fair competition and protection of Small and Medium Sized Enterprises (SMEs) is the most common example of policy conflict. In India, the Parliamentary Committee examining the subject of Competition noted that:

Small-scale sector is also not proving beneficial to the consumers because of high cost of its products which is largely due to poor economy of scale as well as technological obsolescence. Therefore, small-scale sector, too, should be exposed to competition. This exposure of Indian industry to competition will herald the transition of an old economy to a new economy based on the new economic doctrine being pursued in the country for over last one decade. This transition will not only help Indian economy to adapt itself to changing environment but will also produce wealth and employment<sup>35</sup>.

The competition law of India does not allow any exemption to SMEs from application of the Act and accordingly in many instances they have been penalized (for cartelizing – bid-rigging in public procurement). The latest call of government regarding ‘Aatmanirbhar Bharat’ would need a relook on the support to be provided to the MSMEs at the same time balancing the competitive neutrality principles.

### **ROLE OF COMPETITION REGULATOR AND SECTORAL OVERLAPS**

There is a tendency to associate regulation with the post-privatization control of the utilities, however, language and practice of regulation has a much longer history<sup>36</sup>. One of the prominent rationales for regulating is monopolies and natural monopolies coupled with other factors like information asymmetry, unequal bargaining power, anticompetitive behaviour and predatory

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32. The Role of Competition Policy in Promoting Sustainable and Inclusive Growth, Note by UNCTAD Secretariat, (27th April, 2015), TD/RBP/CONF.8/6.

33. Peter Freeman, “Is Competition Everything?”, (2208) Comp Law, 214, 220.

34. Para 2.1, SVS Raghavan Committee Report, supra note 1.

35. Para 7.24, see Report at supra note 2.

36. Robert Baldwin, Martin Cave, Martin Lodge, Understanding Regulation: Theory, Strategy and Practice, 2nd Edn, Oxford (2012) p.4.



pricing, etc.<sup>37</sup> While reforms have been in the key areas of public utilities, like Electricity, Telecommunication and internet, Broadcasting and Cable TV, posts, airports, railways, coal, etc., the focus of reform have been opening up of markets to private sector, either wholly or through Private-Partnership (PPP) mode, so as to allocate resources thereby improving general economic efficiency<sup>38</sup>. Given this thrust, it is not surprising that competition agencies are vitally interested in and affected by the reforms worldwide<sup>39</sup>. This has further led to conflicts between CCI and sectoral regulators due to legislative ambiguity or potential jurisdictional overlap or legislative omission<sup>40</sup>. In this context, the draft National Competition Policy had also recommended for appropriate coordination mechanism between CCI and sectoral regulators<sup>41</sup>. Be as it may, one of the key roles of Competition Regulators is to build “competition culture” by way of its enforcement actions and advocacy measures. Let us see how, CCI has made its mark.

#### **ENFORCEMENT ACTIONS BY CCI**

Competition Commission of India (CCI) has been termed one of the most effective regulators in India (another one being the Insolvency and Bankruptcy Board of India – IBBI) and this is so because of its prompt enforcement actions, enormous advocacy, focus on learning from mistakes and capacity building of its officers. However, still much needs to be done in terms of linking competition reforms agenda with various government agendas. This can be possible only with aggressive enforcement by more suo motu cases (igniting the active role) and pursuing its cases before higher courts consistently. An aggressive enforcement could only bring in reforms, which in turn would create competitive markets. Some of the important decisions by CCI which has contributed towards reform in some key sectors in India may be highlighted as follows:

**Real Estate** – CCI gave one of its significant orders in the DLF Case, imposing a penalty of INR

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37. *Id.* at p. 24.

38. See the Draft Regulatory Reform Bill 2013, available at

<http://www.prsindia.org/uploads/media/draft/Draft%20Regulatory%20Reform%20Bill.pdf>

39. OECD, “Relationship Between Regulators And Competition Authorities”, DAF/CLP (99) 8

40. Working Group on Competition Policy (2007) Chapter VII, para 7.2.5

41. Draft National Competition Policy of the Government of India (version July 27, 2011) available at [http://www.mca.gov.in/Ministry/pdf/DraftNationalCompetitionPolicyForIndia-28th\\_July2011.pdf](http://www.mca.gov.in/Ministry/pdf/DraftNationalCompetitionPolicyForIndia-28th_July2011.pdf) (Last visited on August 15, 2011). This draft is submitted by a Committee under the Chairmanship of Shri Dhanendra Kumar, former Chairman, CCI constituted by MCA vide its order F. No. 5/15/2005/IGC/CS dated June 8, 2011, available at <http://www.taxmann.com/taxmannflashes/whatsnew.aspx?styp=1&sid=6091> (Last visited on August 15, 2011). Version II of the Draft National Competition Policy 2011 was put up on the website of MCA for comments until September 19, 2011, available at [http://www.mca.gov.in/Ministry/pdf/Draft\\_National\\_Competition\\_Policy.pdf](http://www.mca.gov.in/Ministry/pdf/Draft_National_Competition_Policy.pdf) (Last visited on October 8, 2011).

630 crores by which ripples were created in the real estate sector<sup>42</sup>. The Commission further recognized the need of a sectoral regulator in this area<sup>43</sup> and also provided for a model agreement (subject matter of abuse) on the directions of the Competition Appellate Tribunal (COMPAT)<sup>44</sup>, though not considered by Appellate Court at the later stage. The matter is presently pending before Hon'ble Supreme Court of India<sup>45</sup>. While DLF case has been important, similarly situated other real estate cases were closed by the Commission on the ground of finding no dominance in relevant market, even against the same DLF which was penalized in the aforesaid case<sup>46</sup>. The question is why not the theory of 'locked-in customers' was applied in these cases too, which has been later applied subsequently by the Commission in *Car Case*<sup>47</sup>.

**Insurance:** Both life insurance and general insurance business in India were dominated by the public sector enterprises<sup>48</sup>. Post introduction of regulatory reforms in the Insurance Sector and coming up of Insurance Regulator (IRDA), the services in the insurance sector has definitely improved, for example there is now a 14-day cooling off period available to the insured to cancel the policy if not satisfied, mandatory training and code of conduct for insurance agents, tap on deceptive advertising, etc. Recently, CCI found the four public sector insurance companies blatantly engaging into bid-rigging in response to the tenders issued by the Government of Kerala for implementation of RSBY/ CHIS schemes, and accordingly imposed penalties

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42. Order of CCI in Case No. 19 of 2010 (Belaire Owner's Association v. DLF) dated 12.08.2011.

43. *Id.* Para 12.114...."The responsibility of such authorities assumes even greater importance in view of the fact that these consumers are normally not in a position to organize or act meaningfully for redressal of their grievances, or the protection of their interests, even though often their life-savings may be at stake. The absence of any single sectoral regulator to regulate the real estate sector in totality, so as to ensure adoption of transparent & ethical business practices and protect the consumers, has only made the situation in the real estate sector worse."

44. Order in Appeal nos. 20 of 2011, 22 of 2011, 23 of 2011, 12 of 2012, 19 of 2012, 20 of 2012, 8 of 2013, 9 of 2013, 11 of 2013 and 29 of 2013 dated 19.05.2014.

45. See Civil Appeal no. 6328 of 2014 (DLF v. CCI) and batch of related appeals.

46. For e.g. see Case 29 of 2012 (DGCOM Buyers & Owners Association, Chennai against DLF), decided on 27.11.2012; Case 10 of 2011 (M/s Rajarhat Welfare Association & Anr. against DLF Commercial Complexes) decided on 25.05.2011 – [DLF enjoying a dominant position in developing commercial space in Kolkata has neither been established by the informant nor it has been substantiated from the information available in public domain].

47. Order of CCI in Case 3 of 2011 (Shamsher Kataria and Honda Siel and Ors.) dated 25.08.2014 and 27.07.2015  
Thus, in the opinion of the Commission, a purchaser of a product in the primary market is to a great extent locked in with the primary product and the feasibility of switching to another primary product to avoid a price increase in the secondary market of spare parts or repair services is greatly limited.

48. LIC of India in Life Insurance and the four Public Sector Insurance Companies in General Insurance, i.e. M/s National Insurance Co. Ltd., New India Assurance Co. Ltd., Oriental Insurance Co. Ltd. and United India Insurance Co. Ltd.



ranging from 100 crores to 250 crores<sup>49</sup>. This decision must have sent out a strong signal to PSUs that their natural monopoly background would not help in taking an exemption from the applicability of Competition Law in India.

**Electricity:** The Electricity Act, 2003 opened up the power market in India to competition with introduction of “open access”, identification of ‘electricity trade’ as a distinct activity, protection of interest of electricity consumers, etc.<sup>51</sup>. Recently, Hon’ble Supreme Court of India held that a distribution licensee (BEST) in an area cannot stop another distribution licensee (TPC) to lay down its network and supply electricity to willing consumers, in spite of the fact that other distribution licensee (BEST) has been recognized as ‘Local Authority’<sup>52</sup>. A case on this issue was also brought before CCI, which got covered through the aforesaid decision of the Apex Court. The Apex Court of India has already given due recognition of the objective to promote competition through Electricity Act, 2003.

**Transportation:** An exemption into the shipping industry has already been noted supra. There are issues surrounding the Airlines sector including the allegations of cartelization in hiking of prices during festivals and peak seasons<sup>53</sup>, some regulatory barriers like 5/20 rule<sup>54</sup>. Air India, the public sector airline, has opposed relaxation of this rule recently<sup>55</sup>. In another case relating to Railways<sup>56</sup>, CCI highlighted the larger issue of policy design for incentivizing private participation in container transport and advised the Ministry of Railways to overcome the issue of frequent changes in haulage charges which acts as disincentive. Further, “the Commission noted that there is a conflict of interest in as much as Railway Board / IR exercise multiple roles as a licensor and operator, apart from owning the railway network. In view of this, it is desirable

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49. Suo Motu Case 02 of 2014 (In Re: Cartelization by public sector insurance companies in rigging the bids submitted in response to the tenders floated by the Government of Kerala for selecting insurance service provider for RashtriyaSwasthyaBimaYojna / Comprehensive Health Insurance Scheme) dated 10.07.2015 available at <http://www.cci.gov.in/May2011/OrderOfCommission/27/022014S.pdf>

50. [http://www.ixindia.com/Uploads/Reports/14\\_01\\_2015IEX\\_India\\_IPM\\_Report.pdf](http://www.ixindia.com/Uploads/Reports/14_01_2015IEX_India_IPM_Report.pdf)

51. Brihanmumbai Electric Supply and Transport (BEST) Undertaking v. Maharashtra Electricity Regulatory Commission (MERC) and Ors., AIR2015SC1224.

52. Case 43 of 2014 (Anila Gupta v. BEST Undertaking) and Case 06 of 2010 (Anila Gupta).

53. See Ref. Case 01 of 2011 (In Re: Domestic Airlines). Also see the news report <http://timesofindia.indiatimes.com/business/india-business/CCI-probes-airfares-Govt-says-carriers-free-to-fix-price/articleshow/46215144.cms>.

54. Requirement to have at least 5 years of flying record and a fleet of 20 aircrafts, before being permitted to fly abroad has been causing impediments for airlines like Vistara and Air Asia to expand..

55. [http://www.moneycontrol.com/news/special/air-india-asks-government-to-reconsider-easing520-rule\\_1552241.html](http://www.moneycontrol.com/news/special/air-india-asks-government-to-reconsider-easing520-rule_1552241.html).

56. Para 21.1, Arshiya Rail Infrastructure Limited (ARIL) v. Ministry of Railways (MoR) through the Chairman, Railway Board (KB) and Container Corporation of India Limited (CONCOR), [2013]112CLA297(CCI).

that these functions be delegated to independent entities”<sup>57</sup>.

### **CONCLUSION**

India, in its last six years of competition law enforcement, has shown the need for competition and regulatory reform, which is quite evident from the four sample cases discussed aforesaid. The aforesaid discussion shows that competition law and policy can greatly contribute to the development of economy and in turn create jobs and employment for youth in the country. However, this momentum of reforms needs to be sustained over a period. It has to be done both at the policy level and the enforcement level.

*Tony Posner* identified the legislative mandate, accountability, due process, expertise and efficiency as the five criteria for good regulation<sup>58</sup>. Applying these criterion in India, one can find that while the mandate of competition law and policy in India had been pan India, the enforcement pattern shows a skewed enforcement in only northern part of the country (near to the seat of the Commission i.e. New Delhi). No doubt that the Commission under its mandate of advocacy has worked exceptionally to build awareness about this law and tried to instill ‘competition culture’, a lot still needs to be done. Till now, the Commission’s enforcement priorities have been to address the information received (the passive role). There needs to be done a lot on the front of “promoting and sustaining competition in markets” in India (the active role). The cases decided by the Commission have been appreciated by the stakeholders, but the procedural issues under appeal and time consumed by the same are taking away the sheen from these deterrent orders in the long run. There is a strong message needs to be given to the fear among some that the Commission will not turn into another MRTP Commission over time.

There is a need to assess the impact of competition enforcement, the competition agency must rate itself on the basis of its work carried out both in terms of enforcement and advocacy. Good agency performance consists of using superior administrative techniques to achieve good substantive results, including establishment of effective internal quality control mechanism and a commitment to seek continuing improvements in its operations and in its substantive programs<sup>59</sup>. For example, it needs to be assessed whether penalty in cement cartelization case

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57. Id.

58. Tony Posner, *Law and the Regulators*, Clarendon Press, Oxford (1997). 26.

59. William E. Kovacic, “Rating the Competition Agencies: What Constitutes Good Performance”, *Geo. Mason L. Rev.*, Vol 16: 4 (2009) 903.

deterred the cartelist and consumers were benefited, whether the decisions of the Commission makes impact on policy changes or not (for example, real estate sector discussed above, Coal India case, etc.).

To achieve consistency, it is important that the cases under Competition Act are decided fast even by appellate courts. Matters when linger in Higher Courts just waiting for final interpretation of a term, the actual implementation of the policy suffers. For example, the issue whether CCI may impose penalty on the basis of 'relevant turnover' or just 'turnover' was pending before the Hon'ble Supreme Court of India for a long time due to which a number of cases awaited its final disposal. There has been a long-felt need for having a penalty guidelines. Such issues cannot be kept waiting for its usual turn in the litigation, which would require 5-6 years for a policy to settle. Comparatively, setting of jurisprudence under IBC has been very quick both at the regulator's level as well as at the judicial level.

There is another important requirement of capacity building and knowledge management. Jean Tirole (Noble Prize winner of 2014) highlighted how it is important in competition analysis that the regulators "benchmark the firm's performance with similar firms", and an action otherwise would lead to poor regulation. That's the reason he advocates for "*information light policies*", i.e. which does not require too many specialist enquiries to regulate. Two sectors cannot be treated with same set of competition assessment, for e.g. the nature of two-sided markets (search engines) may not be similar to a normal market. Another significant impediment is authentic data. It has been observed in all sectors that a significant chunk is thriving in unorganized platform, but why? Reason is absence of proper policy framework. People fear to enter the system formally which puts them into unnecessary regulatory compliances.

The aforesaid discussion points out that Government can use the competition law and policy tool to promote sustainable economic growth and removing inefficiencies in the system to the benefit of poor and downtrodden. The task is to prioritize, converge, and implement.