



“Need for National Competition Policy”

(MM Sharma)*

Recently, in news published in the Financial Express on 11th August 2010, the Competition Commission of India (CCI) is reported to have issued wide ranging recommendations to the Planning Commission for incorporation in the proposed National Competition Policy. The recommendations relating to the electricity sector, as reported, include, inter-alia, review on policies of imposition of import tariffs on power equipments and giving a right to consumers to choose Distribution Company from the two companies, NDPL and BSES, operating in Delhi, like Mumbai. The news has evoked response from all concerned and articles appearing in the media thereafter have highlighted the need for a competition policy for India. This paper attempts to trace the history of this important policy initiative which was started by the CCI earlier as apart of its competition advocacy efforts in which the author was also involved.

India’s economic reforms started in 1991, brought competition into the Indian markets and the benefits, both in terms of faster economic growth and

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consumer welfare, are clearly visible. For the first time since independence, the ordinary Indian consumer has become sovereign and enterprises have to compete for his patronage, particularly in some sectors like telecommunication, aviation, consumer electronics and automobiles etc. However, the situation is not the same for all sectors like power, ports, mining etc. and the benefits of competition are yet to reach to the consumers in these sectors.

One of the reasons for this is that there are still significant restrictions in some sectors of the economy which are induced by Government policies. CCI had commissioned a study on “The State of Competition in the Indian Manufacturing Sector” (Bhavani and Bhanumurthy, (2007) through the Institute of Economic Growth (IEG), Delhi. The report of the study points out numerous policies that still act as barriers to competition:

1. Import tariffs and use of non-trade barriers such as anti-dumping measures is one. It is known that resort to anti-dumping measures in India is amongst the highest in the world. In India, imports, although growing fast, have a long way to go the pose a real threat as they constitute a negligible part (less than 1 per cent) of the domestic Market.
2. FDI policies are still discriminatory and restrictive. Though rising, the level of FDI relative of GDP is low in India.
3. Reservations for small-scale industries (SSIs) still prevail, though at a considerably reduced level.
4. Complex and comprehensive labour laws are an exit barrier and consequently deter entry. There are a bewildering number of labour laws. In particular, the restrictions on closure of units under the Industrial Dispute Act and the ambiguous provisions of the Contract Labour (Regulation and Abolition) Act about continuation of contract labour and its absorption following abolition represent major concerns of investors.

Several studies highlight the persisting complexity of regulations affecting business in India. The World Bank survey, *Doing Business in south Asia, 2007* ranks India 134 out of a total of 175 countries, though this rank has risen to 120 in the 2008 survey. It states that it takes 35 days in India to start a business compared with an average of 17 days in the OECD countries and 02 days in Australia. The official cost to start a business is high at 74 per cent of per capita income compared with 9 per cent in China, 43 per cent on average in East Asia and 47 per cent on average in South Asia. On the ease of obtaining licenses to construct a warehouse, it ranks India 155th in the world. It notes that rigidity in labour laws imposed significant costs and India failed to create almost 3 million formal manufacturing jobs due to provisions in the Industrial Disputes Act. The disputes related laws creates incentives for adjudication rather than reconciliation and about 533,000 labour disputes are pending, 28,000 of them for more than 10 years. In the ease of registering property, India ranks 110th taking six procedures and 62 days compared with one day in Norway, 32 days in China and 47 days in Brazil. The costs of registration are high at 8 per cent of property value compared with 3 per cent in China and 5 per cent on average in South Asia.

Another study, published in the Financial Express on 24th March, 2010, by the World Bank on "Getting Electricity" as a pilot indicator to assess the problems in securing power across 140 economies, puts India somewhere in the middle range with each electricity connection demanding 7 procedures, 67 days and 505% of the average per capita income on an average as compared to 5 procedures, 48 days and 17% of the average per capita income as the cost on an average in the United States. Interestingly, a comparison with the BRIC countries shows India on a better side as compared to, say, China, where though the number of procedures are 04 but it takes 118 days to secure a commercial

connection and the costs are at a high of 836% of the national per capita income. The scenario is still worse in Pakistan and Sri Lanka. The study draws a major conclusion that though electricity reforms in most developing countries have helped to improve the efficiency of power utilities, yet the consumers are still to benefit in crucial areas like basic access to electricity connections. A recent article published in the Financial Express on 24th March, 2010 also highlights that the existence of geographical monopolies in power supply is still impeding competition in the electricity sector and except for the noticeable exception of Mumbai, consumers in no other Indian city are able to make a choice between distribution companies under the open access regime though mandated in the Electricity Act, 2003 as well as in the New Electricity Policy.

A Working Group of the Planning Commission, in its report in February 2007 on Competition Policy had noted that cross country experience has suggested that there is a positive association between competition and GDP growth. It has observed that economic reforms undertaken by the Government have generally being on a sector by sector basis and progress across sectors has not being uniform while some sectors have successfully imbibed the competition culture, relatively weak competitive pressure exists in a number of others. The report had suggested that an overarching and cross-sectoral "National Competition Policy" (NCP) be adopted by the Government, to generate and promote a culture of competition in the domestic markets; to enhance the role of competition and competitive markets in Government policy making and to suggest an institutional mechanism for synergized relationship between sectoral regulators and the Competition Commission of India (CCI). The report even suggested the following principles for the proposed NCP:

- i. There should be effective control of anti-competitive conduct in markets in India i.e. an effective enforcement of the Competition Act by the CCI.
- ii. There should be competitive neutrality or a level playing field among all players, whether private enterprises or public sector enterprises or government departments engaged in non-sovereign commercial activities.
- iii. Procedures should rule-bound, transparent, fair and non-discriminatory.
- iv. There should institutional separation between policy making, operations and regulation
- v. Whenever a separate regulatory arrangement is set up, it should be consistent with principles of competition.
- vi. Third party access to essential facilities on fair terms should be available.
- vii. Any deviation from the principles of the competition should only be to meet the desirable social, environmental, developmental or other national objectives which are clearly defined, transparent, non- discriminatory, rule based and have the least competition restricting effect.
- viii. These principles of competition should be applicable across all sectors of the economy and be incorporated in the policies which govern them.

Thus, substantive efforts in the direction of creating a consensus for adoption of a National Competition Policy has already been put in by the CCI under the auspices of the Planning Commission and concrete suggestions were been made to the Government.

The successful implementation of such a National Competition Policy has been demonstrated particularly in **Australia** where the Council of Australian Governments (CoAG) in 1995 adopted a National Competition Policy. The Council comprised of both the Federal and Provincial governments. The policy

was based on a report of independent committee of enquiry into a national competition policy for Australia, headed by Prof. Fred Hilmer which was commissioned by the CoAG in 1991. Apart from Australia, competition policy has also been adopted by UK, Denmark, Italy, Turkey, Mexico, Hong-Kong, Malawi and Botswana. In India, the **Raghavan Committee** in its report, in the year 2000, which led to the enactment of a Competition Act, 2002 and dissolution of the MRTPC, also emphasized that the formulation and implementation of government policies should take into account competition principles. Even the Planning Commission had also, in the Ninth Five Year Plan recommended the urgent need for regulating a national competition policy in India. The National Common Minimum Programme of 2004 of the UPA Government stated that the Government desires to strengthen all regulatory institutions to ensure that competition is free and fair. The Finance Minister in his last budget speech for the year 2009-10 had this to say:

“The benefits of competition should now come to more sectors and their users and consumers. Now is the time for us to work on these aspects to eliminate bottlenecks, enhance productivity, reduce costs and may conclude all goods and services supplied to consumers”.

It is interesting to note that the complex inter-relationship between Competition policy and other public economic policies which has a direct bearing on the extent to which competition policy objectives can be pursued without being constrained by or conflicting with other public policies' objectives, has also been examined in the report of the Working Group on Competition Policy by the Planning Commission mentioned above. The Report even devotes a full Chapter on the objectives of such a National Competition Policy and the

principles of the Policy as well as specific steps or initiatives required to be taken not only at the Central and State Governments levels but also at the sub-state or municipal levels in India.

However, the fate of this important Report of the Planning Commission and where it is presently pending in the Government is not known. It is understood that the need for adoption and implementation of such a National Competition Policy has also been acknowledged in the Approach Paper to the 11th Five Year Plan by the Planning Commission.

It seems that the Government has satisfied itself by setting up the Competition Commission of India and is, perhaps, not keen to take the policy initiative further, which is unfortunate. The Competition Commission of India has its own limitations because of its primary enforcement oriented role. Moreover, *suo-motu* review of the Government policies is clearly beyond its mandate though, as per section 49 of the Competition Act, dealing with competition advocacy, both the Central and State Governments, while formulating a policy on competition (including review of laws related to competition) may make a reference to the CCI for its opinion on possible effects of such policy on competition. We do not know whether, at any level of the Government, any such exercise has been undertaken to review the policies or laws related to competition which may require a reference to the CCI for its opinion. Needless to say that opinion of the CCI is not binding on the Governments in formulating such policies.

Thus, there is an apparent statutory backing in the form of section 49 of the Competition Act for the review of the existing and future policies and laws related to competition by the Government in consultation with the CCI which

may form the legislative background for adoption of a national competition policy also.

Let us, now, see the way the “screening” of the Government policies, from competition angle, is done in some developed countries.

In Denmark, the Competition Authority regularly screens markets to identify its dysfunctional ones. The authority, after consultation with the relative sectors in the ministries, publishes detailed recommendations on some selected markets, on how regulation could be better designed to enhance competition.

In UK, under instruction from the Cabinet Office, all government offices are obliged to assess the impact of proposed laws on competition. Alongwith the Office for Fair Trading (OFT), the Cabinet Office provides to regulators and ministries advice on how to avoid restrictions of competition. The process of 'Regulatory Impact Analysis' (RIA) includes applying a 'competition filter'; where a proposed law fails the initial 'simple assessment' it is subjected to undergo a 'detailed assessment'.

In the United States, the Federal Trade Commission (FTC), under an active advocacy programme, intervenes in a number of regulated sectors such as airlines, rail, telecommunication, electricity and financial services. The Office of Budget and Management of the US Government has published guidance on regulatory analysis which brings out the risk of unintended harms and side-effects which might impede marked efficiencies.

In Australia, under its National Competition Policy introduced in 1995 it is mandatory for government departments and other authorities to prepare a 'Regulatory Impact Statement' for existing and proposed regulations which, inter alia, seeks to move towards 'best practice' regulatory design that incorporates the principles of competition. It must be established that the benefits to the community outweigh the costs and that the government's objectives can be achieved only by restricting competition. The government has brought out 'A Guide to Regulation' for this purpose.

In Turkey, under the competition law, *the* competition authority is 'empowered to provide its opinion on competition aspects of law and regulation. A communique issued by the Prime Minister in 1998, urges government ministries and agencies to consult the competition authority in advance about proposed regulations and decisions that may have implications for competition.

The European Court of Justice has encouraged national competition authorities in the European Union to critically examine legislation which frustrated the objective of the European competition rules. The European Commission's own 'Impact Assessment Guidelines' include a specific test to assess, the competition impact of new EC legislation. In terms of these guidelines, it must be examined whether the proposed legislation could create any restrictions on competition, directly or indirectly, and whether the legislative objective can be achieved through less restrictive means.

The OECD and International Competition Network have both done considerable work on the advocacy role of competition authorities. The OECD's 'Guiding Principles on Regulatory Policy and Performance' recommend that new and existing regulation should be reviewed with reference to competition, and

'Regulatory Impact Analysis' should be used in this respect. It further suggests that the competition authority should be empowered to advocate pro-competition reform. Similarly, UNCTAD's Model Law on Competition recommends that proposed economic legislation and regulation should be subject to *ex ante* screening by the competition authority.

There is, therefore, an urgent need for a similar “competition screening” of the existing Government policies and laws in India also if the benefits of competition are to be made available for the consumers in the other remaining sectors of our economy. The report of the Planning Commission on the proposed NCP, for which new recommendations has been reportedly sent by the newly reconstituted CCI under its new Chairman, Mr. Dhanendra Kumar, provides sufficient guidelines for the same and a decision is now to be taken by the Government of India. This “screening” could be undertaken either as a part of the overall National Competition Policy framework or independently by both the Central and the State Governments in consultation with the CCI.

Head-Note

Though India has enacted and enforced a modern competition act since last year, yet the spirit of free market economy guided by fair competition has yet to reach all sectors of our economy. The author, who was earlier a part of CCI, traces the initiatives taken by the Competition Commission of India (CCI) in advocating the need for a broad based national competition policy to the Planning Commission, including some lessons drawn from other jurisdictions where such policy has been successfully implemented with noticeable results. The article also refers to the idea of “competition screening” of existing and future policies as an essential component of the proposed national competition policy as has been the case in the European Union and OECD countries.