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NEW INDIAN COMPETITION LAW ON THE ANVIL

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On the spirit of free enterprise and competition :

"This system maximizes production because it allows a man freedom of choice of his occupation, freedom in his choice of those for whom he works or who work for him, freedom in the choice of those with whom he associates and cooperates, and, above all, freedom to earn and to keep the fruits of his labour."

Henry Hazlitt

(Please see item 9 in the References)

NEW INDIAN COMPETITION LAW ON THE ANVIL

Dr. S. Chakravarthy[1]

This monograph addresses the reeently drafted Indian Competition Law christened "Concept Bill on Competition", in terms of its objectives, concepts and sweep and in the process deals with certain reservations expressed on it by interested parties, like Chambers of Industry and Commerce, Professional Institutes, Bar Associations, Consumer Organisations and Groups, Academicians and Experts.[2]

Before proceeding to address the Concept Bill on its main features, a treatment on the concept of competition and the interface between Competition policy and Trade policy, a narration of the changes in the economic scenario in India consequent on the 1991 reforms and a description of the extant competition law in the country may be in order to appreciate the contours of the new law on the anvil.

Section A: Competition

Competition means different things to different people. Prof. J. M. Clark in his paper on "Workable Competition" conceived competition as an amalgam of factors that stimulate economic rivalry. He referred to competition as a dynamic concept, as it attempts to

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2. There has been spate of seminars and conferences on the 'Concept Bill on Competition" and the suggestions and comments received by the Government are under its active consideration towards refining the draft law.

judge forms of industrial organisation and the policies of firms by reference to the extent to which they promote or hamper this rivalry, Competition, according to him, describes the kind of market pressure which must be exerted to penalise laggards and to reward the enterprising, and in this way to promote economic progress (Clark, 1940).

The expression 'Competition' refers to the process of rivalry among firms and market structures conducive to such rivalry. Competition policy ought to aim at preserving and promoting competition by enforcing competition law against restrictive business and trade practices and by influencing the formulation and/or implementation of Governmental policies or measures (State policies) affecting competition.

Competition Policy

Competition Policy is generally defined as 'those Government measures that directly affect the behaviour of enterprises and the structure of industry'. (Khemani, R. S. and Mark A. Dutz, 1996). In the formulation of competition policy, the poliey makers will be and have to be guided by the objectives of promoting efficiency and maximising welfare. Such a policy will inhere, essentially two elements. The first involves putting in place, a set of policies that enhance competition in local and national markets. These would include a liberalised trade policy, relaxed foreign investment and ownership requirements and economic deregulation. The second is legislation designed to prevent anti-competitive business practices and unnecessary Government intervention.

In other words, the second element is competition law. A well designed and effective competition policy is likely to promote the creation of a business environment which improves static and dynamic efficiencies and leads to efficient resource allocation and in which, the abuse of market power is prevented mainly through competition. Where this is not possible, it requires the creation of a suitable regulatory framework for achieving efficieney. In addition, eompetition law prevents artificial entry barriers and facilitates market access and complements other competition promoting activities.

Globalisation and Competition

It is common knowledge that in the last three decades, one of the dominant economic themes has been the process of globalisation and a progressive international economic integration of the world economy. The movement is towards widening of international flows of trade, finance and information in a single integrated global market. Globalisation has the fundamental attribute of increasing the degree of openness in most countries. As globalisation takes place and countries rely more on market forces, the question of ensuring competition and keeping markets functioning efficiently assumes critical importance. In a globalising and liberalising world economy, the number of actual or potential entrants into foreign markets increases, giving rise to greater potential for competition in markets regardless of their geographical scope. Many countries have taken to measures designed to open competition in strategic sectors such as telecommunications, airlines, electricity generation and distribution etc.

Liberalisation, privatisation and globalisation have characterised international activities in recent times. Consequently, at the micro level, for firms to remain competitive, they are now required to adopt global strategies. As the number, size and scope of activities of multinational firms (MNCs) increase, more and more of them are forging and operating strategic alliances and their commercial practices are having an increasing intemational dimension than ever before. These processes are resulting in increased cross-border trade and at times anti-competitive practices. Such practices tend to undermine the benefits of liberalisation. This is the reason why the Expert Group appointed by the Ministry of Commerce, Government of India strongly recommended that "while it is necessary to ensure that trade liberalisation, deregulation and globalisation lead to enhancement of competition, it is equally necessary to establish a mechanism that ensures a healthy competition in a globalised economy" (Expert Group, 1999).

Section B: Trade and Competition Policy Interface

The process of globalisation has to some extent obfuscated the distinction between trade and competition policies. Many countries and business houses have adopted global strategies, which are the cause of increasing economic inter-dependence. In order to regulate such business strategies, Governments of various countries have been working on the nature, scope and application of trade and competition policies.

Trade laws, which regulate trade policies and competition laws, which regulate competition policies, have a certain common core objective, namely, to maximise economic welfare by improving the environment for more efficient resources allocation. They are regarded to have complementary effects as well as contradictory effects with each other (Messerlin, 1996 and Iwata, 1997).

In a broad sense, competition policy can be said to refer to policies directly aimed at enhancing the scope for competition between firms. It is concerned with both Government interventions that have implications on the competitive environment and private sector anti-competitive practices. Competition policy is important because it fosters economic efficiency, encourages firms to offer consumers good price/quality options and increases the international competitiveness of downstream users. It seeks to promote the efficient allocation of resources by means of open and competitive markets.

Trade policy, on the other hand, primarily regulates competition amongst firms across national boundaries. "It is the complete framework of laws, regulations, international agreements and negotiating stances adopted by Governments to achieve legally binding market access for domestic firms".[3] A trade policy addresses two broad and interrelated issues. First, it seeks to create trading opportunities to ensure freer trade by removing tariff and non-tariff barriers. Second, it seeks to ensure fair trade by eliminating anti-competitive practices in international trade. This second objective is more difficult to define and achieve. Fair trade implies the creation of an equitable trading system where the competitive advantage of market players rather than the economic power and influence of Government govern the conduct of trade. A liberal trade policy is no

3. The Dictionary of Trade Policy Terms – Walter Goode – Centre for International Economic Studies, University of Adelaide.

longer restricted to the consideration of reduction of traditional border restrictions such as tariff and import licensing but the consideration of the reduction of non-tariff barriers including sanitary, phytosanitary measures and technical regulations which limit cross-border access. It aims to address domestic and export subsidies and other forms of assistance, which discriminate in favour of domestic producers.

Thus competition policy and liberal trade policy seek to achieve the same objective namely *economic efficiency.* In a manner of speaking, competition policy seeks to achieve economic efficiency by liberalising domestic markets and by having laws that protect and promote competition. A liberal trade policy seeks to achieve economic efficiency by liberalising markets by removing the barriers to trade at the border. Free trade and competitive behaviour are thus necessary conditions for efficiency.

There is recognition that competition laws have been an increasingly important driver of growth, efficiency and innovation in many market economies. Recognition of the central role of competition laws in advancing these objectives has spread dramatically in recent decades to all regions of the world with the result that today approximately 100 countries have competition laws, many of them formulated and brought into force during the past 5 or 6 years. As more and more countries embrace competition principles, they have also sought to deregulate markets where competition can be fostered.

The interest in the interactive and interface aspects of trade and competition policy stems from perhaps the following four factors. *First*, when barriers like tariffs are reduced or eliminated, there is a risk that private barriers to trade may replace them and nullify the benefits of trade liberalisation. As traditional barriers fall, the incentive for collusion and similar practices increases. For instance, OPEC is a very strong combine, which seeks to control the output of crude oil and prices from time to time. *Second*, Governments are equally concerned with the adverse impact that inappropriate or inefficient regulations have on economic performance. Weak enforcement of competition principles is likely not to lead to expansion of trade and investment opportunities and a more productive economy but on the other hand, the lurking danger of private anti-competitive conduct replacing public conduct may assume a real shape. *Third*, with the distinction between domestic and international markets getting more and more blurred through globalisation, many links exist between trade and competition policies in multiple jurisdictions. As enterprises globalise their operations to take advantage of the benefits of transportation and telecommunications, the current trade and competition policies may not be adequate to meet the challenges. *Fourth*, in a number of areas governed by WTO Rules like GATS, specific competition policy issues are emerging.

The interface between the two policy areas – Competition and Trade – has locomotion because of their common objective of economic efficiency. As both these policy areas seek to enhance welfare through economic efficiency and encourage competitive and market oriented directions, the International Chamber of Commerce issued a policy statement on October 22, 1996 thus:-

> *"..... the work ..... on convergence of competition laws and the interface between trade and competition policies is, and will continue to be, an important basis for the development of a consensus on minimum standards" (Quoted in Goldman et al, 1997).*

Irrespective of whether a country is developed, developing or an economy in transition, its international competitiveness is in part determined by the degree of competition or rivalry among domestic firms and therefore an effective competition policy is essential for the creation of globally competitive industries (Porter, 1990).

One of the significant issues arising in the interface between trade and competition policies is the use of competition laws to gain market access in countries where exist vertical and horizontal restraints, which create barriers to entry. It is lamented often that the barriers erected by dominant firms, sometimes with the acquiescence of their Governments impair the benefits that would otherwise be attained through liberalised trade. Goldman (1996) suggests that there is need for examination of such issues,

particularly competition-related. In other words, the extant legal milieu and executive policy decisions/instructions need to be examined to frame a catena of prerequisites before a competition policy is put in place.

Source of Tension

A source of tension in many countries, particularly the developing ones, is the priority attached to competition policy relative to the rank order assigned to other Governmental policies, including policies that have the support of statutes. Given the extensive interface, competition policy has with other Governmental policies, there are areas in which the respective objectives may be complementary such as in the case of initiatives directed at de-regulation and privatisation of State-owned corporations. However, in other areas such as trade, investment and regional development policies, conflicts may often arise. The extent of consistency, or its lack, in different Governmental policy measures, can support or thwart the objectives of competition policy.

If multiple objectives are allowed to rein in the competition policy, conflicts and inconsistent results may surface detriment to the consumers. For instance, promoting small businesses and maintaining employment could conflict with attaining economic efficiency. With this kind of small business objective, competitors rather than competition may be protected. In addition, such concerns as community breakdown, fairness, equity and pluralism cannot be quantified easily or even defined acceptably. These concerns have logic of their own and it cannot be gainsaid that they should be taken care of in Governmental policies. But it needs to be underscored that attempts to incorporate such concerns may result in inconsistent application and interpretation of competition policy, besides dilution of competition principles. Tbe peril is that the competitive process may be undermined, if too many objectives are built into the competition policy and too many exemptions/exceptions are laid down in dilution of competition principles.

Governmental policies that may support or adversely impinge on the application of the competition policy would include:

- Industrial policy
- Reservations for the small scale industrial sector
- Privatisation and regulatory reforms
- Trade policy, including tariffs, quotas, subsidies, anti-dumping action, domestic content regulations and export restraints (essentially WTO-related)
- State Monopolies policy
- Labour policy

In addition, there could be other sector-specific policies in environment, healthcare, and financial markets that may restrict rather than promote the objectives of competition policy. *The formulation and implementation of these and other policies need to be tuned to take into account competition principles*. Indeed, competition policy can be regarded as the fourth cornerstone of Governmental economic framework policies along with monetary, fiscal and trade policies.

Section C: Social and Economic Policies affecting Competition

In what follows, the policy framework broadly prevalent prior to 1991 and after 1991 has been traced with a brief analysis considered relevant to this monograph. Because of space constraint, the trace (which leans on tbe report of the High Level Committee, 2000) has been limited to those areas having a competition perspective.

1. Industrial Policy

Licensing Requirements

The Industrial (Development and Regulation) Act, 1951 (IDR Act), currently in force empowers the State to channel private investment through the extensive use of industrial licensing. Over the years, this gave the State comprehensive control over the direction and pattern of investment. With some exceptions, entry into all industries as well as the expansion of capacity was effectively regulated. In addition, product mix and technology were subject to control. The pattern of investment envisaged in the various five-year plans has been implemented in this manner. Additional criteria for

the issuing of industrial licenses were geographical location and the import content of the initial investment. The pattern of investment that was fostered emphasised the development of heavy industry and the capital goods sector. There was a noticeable re-allocation of resources away from the production of consumer goods towards the production of machine tools and capital goods.

The Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) and the Foreign Exchange Regulation Act, 1973 (FERA) placed additional barriers to entry. The so called MRTP firms were prohibited from entering and expanding in any sector except those listed in Appendix 1 of the IDR Act, for which they had to obtain MRTP clearances in addition to the usual industrial licences. For certain other, "priority" industries, only a capacity licence was required.

Public Sector

The "Commanding Heights" theory that there was a need for an active State in the process of development, resulted in the public sector being made responsible for the development of infrastructure and being given control over key sectors of the economy such as defence and defence equipment, iron and steel, energy, power, transportation and telecommunication. Public sector enterprises were not only protected from competition through reservation, but there were also policies that mandated that both Central Government departments and public sector enterprises apply price and purchase preference in favour of the public sector.

Small Scale Industry

An exception to the licensing requirement is the small-scale sector, which was promoted with a view to fostering labour intensive production in the consumer goods sector and to spread the impact of industrialisation to rural areas. Though the definition of small scale has been periodically revised upward, upto the early 1980's, these revisions merely kept pace with the rate of inflation. By the late 60's, during the Fourth 5-Year Plan (1969-74), policies for protecting the small-scale sector against competition from the large-scale sector were also put into place.

Foreign Investment and Technology Agreements

Equity of foreign companies in Indian companies was limited to 40 per cent as a result of the Foreign Exchange Regulation Act, 1973 (FERA). A large number of such companies had to divest their holdings and bring them down to 40 per cent. With a minority holding, the incentives for greater assistance (e.g. for capital and technology) from the foreign parent were lower. Till 1991, agreements to import technology had to be approved by the Government, which had the power to limit the maximum royalty that could be paid. Imports of technology were not approved, if the import content of the processes was considered to be too high. Prior approval was essential from the Ministry of Industry for the engagement of foreign technicians, and their terms of payment and tenure were restricted.

Exit Barriers

In addition to the various entry barriers described above, labour and bankruptcy laws created effective exit barriers. With a view to protecting labour and employment, closures and the retrenchment of labour are controlled by the Industrial Disputes Act, 1947. Under the Sick Industrial Companies Act, 1986, the Board of Industrial and Financial Reconstruction (BIFR) was set up in 1987. Its job is to review the viability of sick units and to recommend rehabilitation or closure.

Changes in the Industrial Policy Regime

Early reforms

In 1985, a number of products were freed from licensing requirements, the MRTP restrictions were relaxed and the definition of an MRTP firm was changed. Increase in capacity upto 49% was permitted for "modernization and renovation" and selected industries were allowed to expand up to a pre-determined Minimum Economic Size of production. To allow greater flexibility in the choice of product mix, licences in some industries were 'broadbanded' which meant that firms were permitted to produce related products using their installed plant and machinery. Some reform of the public sector was also initiated and steps were taken for the liberalisation and

development of capital markets. In the public sector, the thrust was on increasing both autonomy and accountability. No significant steps were taken towards the reduction of exit barriers.

Reforms Since 1991

The reforms initiated in 1991 were on a much wider scale. The Industrial Policy Statement issued by the Government of India on 24 July, 1991 stated:

> *"The attainment of technological dynamism and international competitiveness requires that enterprises must be enabled to swiftly respond to fast changing external conditions that have become characteristic of today's industrial world. Government policy and procedures must be geared to assisting entrepreneurs in their efforts. This can be done only if the role played by the Government were to be changed from that of only exercising control to one of providing help and guidance by making essential procedures fully transparent and by eliminating delays (italics added) (Industrial Policy, 1991)".*

Significant changes in policies relating to industrial licensing, foreign investment, technology imports, Government ownership of industry and special controls on very large private enterprises were brought into force as a consequence.

Delicensing

The Industrial Policy of 1991 abolished licensing in all but 18 industries, many of which were subsequently delicensed. At present only seven industries are subject to licensing. Although the sugar industry was delicensed in January 1999, it remains subject to a number of other controls.

Public Sector

In 1991, Government abolished the monopoly of the public sector industries except those where security and strategic concerns still dominated. These include arms and ammunition and allied defence equipment, atomic energy and nuclear minerals and railway transport.

Major industries including iron and steel, heavy electrical equipment, aircraft, air transport, shipbuilding, telecommunication equipment and electric power are now open for private sector investments. A large number of loss-making public enterprises were referred to the Board for Industrial and Financial Reconstruction (BIFR). Essentially two different types of reforms were envisaged: greater autonomy for public sector enterprises and greater private sector ownership.

The system of price preferences has been discontinued, although the practice of using private sector bids to request public sector units to submit a fresh bid continues. This system of "purchase preference" has recently been extended with some modifications to orders placed upto 31 March, 2002. Under this provision, a Government enterprise whose bid is within 10% of that of a large private unit is allowed to revise its price downward and is eligible for a parallel rate contract. Given the emphasis on privatisation and reform of the public sector, such purchase preferences are now an anachronism.

2. Trade and Commercial Policy

Through the use of quota restrictions, the focus of trade policy up to the 1970's, was on regulating the utilisation of foreign exchange. This implied licensing for all categories of imports. The import of consumer goods was virtually prohibited. The policy also conformed to the objective of across-the-board import substitution and protection of domestic industry. The two criteria for the allocation of licences were (i) the "essentiality" of the proposed import, and (ii) "indigenous non-availability" of the proposed import. The latter criterion implied that "if it could be shown that there was domestic production of the imports demanded, then the imports were not permitted (regardless of cost and quality considerations)" (Bhagwati and Srinivasan, 1975). The actual allocations, across industries and across firms within an industry, were essentially ad hoc, based on bureaucratic perceptions of "fairness" and "equity".

Price Controls

In addition to the fact that certain key raw materials were produced in the public sector, a number of commodities were subject

to price and quantity controls. Industries providing important commodities, such as edible oils, sugar, fertilizers, pharmaceuticals, aluminum, cement, steel, coal and petroleum products were subject to price controls and quantity controls of varying degrees. This implied that even in sectors where there was a private sector presence, conditions and outcomes were far from competitive. A complex system of excise and corporate taxes further distorted the incentives.

Financial Sector

The financial sector was no exception to the regime of Government intervention and control. As a result, the financial system too was characterised by an almost total lack of competition. With the nationalisation of 14 large commercial banks in 1969, about 85% of the assets of the banking system came under public control. The long term lending business had very few players. In addition, because they were all publicly owned, the term lending institutions generally acted as a consortium and had the characteristics of a lending cartel. Further, there was virtually no competition between the term lending institutions that concentrated on medium and long-term finance and the commercial banks with their emphasis on working capital finance.

In the equity market the main policy impediment was the entry barrier put up by the Controller of Capital Issues, who had to approve every issue, and in addition, set the issue price. A Company could only approach the financial markets to raise funds when its project had been approved by the Government. Thus, the number of new issues in any period was relatively small. Under pricing transferred wealth from existing to new shareholders and consequently, there was a strong incentive to prefer rights offerings, which protected the former group, over public offerings. This hindered the widening of the investor base. In addition, public sector financial institutions, dominated by the Unit Trust of India, the insurance companies and the Domestic Financial Institutions were all major players in the equity market giving the Government effective control over pricing. This dominance was compounded by the fact that there was no competition from foreign institutional investors (FII's).

Early Reforms

There was an increase in the number of capital goods, intermediates and raw materials included in the Open General Licence (OGL) list, reduction and rationalisation of the duty rates on select capital goods, intermediates and industrial raw materials and less stringent rules in the granting of licences for items that continued to be under discretionary control. Although there was an increase in tariffs, quantitative restrictions have been and are gradually replaced with tariffs.

Between 1971 and 1979, the rupee depreciated by 32 per cent in real terms against key currencies. This trend was reversed during 1979-81 and was followed by a corrective real depreciation of 7.6 per cent after which the real exchange stabilised. A flexible exchange rate policy after 1985 has been instrumental in having a positive impact on exports.

Reforms since 1991

Import Licensing and Tariffs

The Export and Import (EXIM) Policy (1990-93) was replaced by the EXIM Policy (1992-97) and then the EXIM Policy (1997-2001). The former contained a negative list on imports subject to licensing and almost all consumer goods were subject to import licensing. In the latter, the list of restricted consumer goods was pruned, the number of canalised items was reduced and the import of some restricted items was liberalised by permitting their imports through freely transferable Special Import Licences (SILs). As a result of WTO commitments, India will have to do away with the quantitative restriction regime by April 2001.

Tariffs are also being reduced in a phased manner. Prior to 1991, India's import tariff structure was among the highest in the world. The average applied tariff rate has been lowered from 125 per cent in 1990-91 to 35 per cent in 1997-98 and the peak rate of duty has declined from 335 per cent in 1990-91 to 40 per cent in 1999-2000.

Foreign Investment

The Industrial Policy announced in July 1991 (Industrial Policy, 1991) liberalised the existing industrial policy regime leading to the liberalisation of foreign direct investment, foreign technology agreements and compulsory industrial licensing. Automatic approval was permitted for investment upto 51 per cent equity in 34 industries. 100% foreign holding was permitted in Export Oriented Units. The Foreign Investment Promotion Board (FIPB) was set up to process applications for cases not covered by automatic approval. Several additional measures were undertaken during 1992-93 to encourage investment flows including foreign direct investment, portfolio investment, Non-Resident Indian investment and deposits and investment in global depository receipts. By 1994, subject to certain restrictions, foreign investment in the consumer goods and pharmaceutical sectors was permitted. The permissible upper limit on foreign holding was increased to 74% in 1996.

Financial Sector

Starting in 1988/89, a process of gradual de-regulation of the financial sector was begun. Although the entry has not been substantial, entry of domestic and private foreign banks has been permitted. Further rationalisation and mergers in this segment will help provide more effective competition to the public sector banks. As a result of liberalisation of regulatory controls on Non-Banking Financial Companies, these now provide some competition to traditional banks. Domestic Financial Institutions have also entered into more conventional banking activities (short term lending) providing some competition to the conventional banking sector. Conversely, the commercial banks have also increased their term lending activities, thus reducing the oligopolistic position of the Domestic Financial Institutions.

The office of the Controller of Capital Issues was abolished in 1992 leading to freer pricing of issues. Private sector mutual funds and Foreign Institutional Investors (FII's) were permitted to trade in equities, increasing competition on the buyer side of the equities market and reducing the importance of publicly owned FII's.

Competition in exchanges was introduced with the setting up of the National Stock Exchange.

3. Market/Competition and Analysis

Clearly, in certain areas, the changes in the policy environment have been far reaching. With the objective of modernising Indian industry and making it more competitive both domestically and internationally, the recent reforms have combined the liberalisation of imports with a relaxation of investment controls. On the industrial policy front, the reforms have led to the virtual abolition of industrial licensing requirements with a view to promoting domestic competition, encouraging entry and investment, achieving better capacity utilisation and economically viable scales of production. The trade policy reforms have two main objectives. The first is to introduce foreign competition through imports. The second is to make cheaper and better quality inputs available to Indian producers and to promote the import of embodied technology. Although these are two major areas where Government controls have been reduced and the economy has been allowed to move towards market-determined prices, there are a number of areas where controls and restrictions persist. The removal of these is essential for "getting prices right", achieving efficiency in resource use and maximising consumer welfare. In some cases a suitable regulatory framework needs to be established to ensure competitive, welfare maximising behaviour on the part of the producers. These are essential pre-requisites for creating a competitive business environment.

As noted earlier, the policy of reservation and preferential treatment for the small-scale industry continues. This clearly has important implications for efficiency. Connected to this is the fact that consumer goods continue to be subjeet to quota restrictions and are largely protected from foreign competition. A second area of concern is the public sector where privatisation and disinvestment have been negligible and the public sector continues to get preferential treatment in Government procurement. Public sector firms eontinue to dominate the market in a number of sectors. This too has significant implications for efficiency. Third, prices continue to be administered

for certain important commodities that include some petroleum products, fertilizers and sugar cane, distorting both production and consumption decisions in these important areas. Administered prices are also prevalent in sectors such as power and transport where the public sector dominates. Progress in introducing competition or effective regulation in the important infrastructure areas of power, transport and communications has been far from satisfactory. Due to changes in technology, a number of these do not remain natural monopolies and it is possible to introduce competition directly. Where private entry has been allowed, there is a need for setting up effective and independent regulatory agencies.

Reservation for Small Scale Industry

Small-scale industry reservation policies have not undergone any major change since 1991. In spite of the fact that some items have been removed from the reserved category of products, the total number of reserved items is 812. Although firms producing any of these items are protected from competition from "large" domestic firms, they are also restricted from growing. Quota restrictions on imports of consumer goods and relatively high tariffs on other goods reserved for the small-scale sector have also protected small-scale industry from (foreign) competition. Clearly, this situation is welfare reducing due to the higher prices that consumers have to pay.

This situation is not going to persist for long. Due to commitments to the World Trade Organisation (WTO), the quantitative restrictions will be removed and tariffs gradually reduced over the next few years. This implies that although firms in this sector will be protected from competition from large domestic firms, they will be subject to competition from abroad. Such asymmetric exposure to competition will have an adverse impact on domestic welfare as a result of profit shifting from domestic to foreign firms. Thus, over the long run, welfare is likely to be reduced in this way unless restrictions on domestic entry and on the growth of current incumbents are removed. The problem is compounded by the fact that a large amount of investment is going into this sector due to the relatively high protection, it currently enjoys.

The sector needs to be opened up for entry by large domestic firms. Although this may have some impact on income distribution, the efficiency gains that will arise from better technology and competition and efficient scales of production will lead to higher social welfare. In any case, if firms are not allowed to grow and entry is not free, current incumbents are unlikely to survive in the face of foreign competition. In these circumstances, it is far from efficient to restrict entry and growth of firms. Such a policy is anti-consumer and, what is worse, is not synonymous with helping small entrepreneurs. To fulfill such an objective, there should be a separate set of policies that help new entrepreneurs to enter and small firms to grow (Abid Hussain Committee Report, 1997).

Public Sector

To a large extent, the imperative for privatisation of the public sector has arisen from fiscal considerations. From the point of view of economic efficiency and competition policy, it is important that the public sector does not enjoy monopoly power and is subject to market disciplines through competition. Most of the sectors where the public sector operates have in recent years been opened up to entry by private sector firms. However, as noted earlier, the public sector is given preferential treatment in Government procurement. Public sector should be exposed to competition and not given any preferential treatment.

Second, in regulated sectors, the regulator should not make any distinction between public and private companies and, more important, any public sector entity that is itself a service provider should not have any regulatory functions or authority.

Third, for historical reasons, public sector firms are often large and dominant in the industry. In addition to the problems caused by Government patronage, they could distort the dynamics of competition in the sector in which they operate because of their size, inefficiency, soft budget constraints and ill-defined objective functions. Without significant privatisation, these barriers to efficiency will remain.

Exit Policies

Along with free entry, a necessary condition for efficiency is free exit. Although entry barriers have been reduced considerably in recent years, there has been no change in exit restrictions. This is a serious source of inefficiency in Indian industry. Exit is difficult in Indian industry because of the labour and bankruptcy laws.

Closures and retrenchment of labour are governed by the Industrial Disputes Act, 1947 and related statutes. These statutes have evolved over a period of time, the balance generally being in furthering and protecting the interest and welfare of organised labour. As a result of this set of legislations, firms cannot lay off labour during low periods and firms desiring to exit cannot do so easily. Exit barriers in the form in which they exist today, i.e. requiring prior Government approvals for lay-offs, retrenchments and closure, were brought into the Industrial Disputes Act as a part of measures initiated in mid 70s. Retention of these measures deserves to be carefully examined, as these restrictive provisions on exit barriers actually apply to no more than 3% of the working population in India. A question often asked is that if 97% of the working population can exist without such protection, why is it so critical to provide a high level of protection for a nominal 3% of the top end population amongst the working class. Possibly, the logic is not economical or social, but the political power of the trade unions in the organised sector.

Clearly these laws have an adverse impact on employment by distorting the relative price of labour and capital and, at best, end up protecting those that are already employed rather than promoting employment. In view of this, the Industrial Disputes Act, 1947 and connected statutes need to be amended to allow easy exit. While seeking "easy exit", it is not proposed to have "cheap exit". As a country where social security measures are limited, the Government may be perfectly justified – in fact has the obligation to provide for exit payment to workers at reasonable rates.

For medium and large firms, exit is also subject to the provisions of the Sick Industrial Companies Act and the decisions of the Board of Industrial and Financial Reconstruction (BIFR) set up under this Act. Restructuring and closure of "sick" firms is subject to the decision of BIFR. Cases referred to BIFR often take years before a final decision is reached. In the interim, "sick" and unviable units continue to function. In addition, BIFR advises on financial restructuring - a matter that should ideally be left to market driven financial entities - which leads to the misallocation of scarce financial resources. Another problem is that BIFR deals with cases on a firm-by-firm basis and does not deal with industrial sickness as a whole.

State Monopolies, Privatisation and Regnlation

In a number of important infrastructure industries such as transport, communications and power, State monopolies persist. In certain cases, limited privatisation has taken place but a suitable regulatory framework is still evolving. In areas that were traditionally considered natural monopolies, one solution was to have State run monopolies on the assumption that these set the right prices and maximised welfare. The other option was to have regulated private participants, where the regulators' job was to set prices that mimicked a competitive market and thus maximised welfare. In certain cases, changes in technology have made competition possible in areas that were hitherto considered natural monopolies. There is considerable scope for introducing regulated competition into most of these areas.

The railways in India continue to be a State owned monopoly with administered prices and very limited competition from other modes of transport. In civil aviation, some competition has been allowed but restrictions on entry continue. The State owned domestic airline continues to play a major role and is a market leader in setting prices. Most States have State owned road transport corporations with an administered fare structure and limited competition.

With a few exceptions, the generation, transmission and distribution of power continue to be through State owned (Central and State Government) monopolies. Prices are administered, costs are high and quality is generally poor and unreliable. Welfare maximisation requires that competition be introduced in this sector. A pre-requisite for this is the unbundling of the monolithic State

owned enterprises and the setting up of effective and independent regulatory authorities.

Although some competition has been permitted in the area of telecommunication, a lot more needs to be done. The only area where some competition exists is mobile telephony. Basic and long distance telephony is virtually a State monopoly. The situation is still evolving and the role and authority of the regulator and the status of the State owned monopolies are still not clearly established.

Section D: Substantive Provisions, Objectives, Scope and Coverage of Competition Laws in the World

There are roughly 100 competition laws currently in force around the world providing different models of legislative drafting. Nearly all these laws include, in some form, four basic substantive elements; provisions dealing with agreements between and among competitors (horizontal agreements); agreements between producers and distributors (vertical restraints); abuse of dominance/unlawful monopolisation; and anti-competitive mergers.[4] It is however, risky to view this commonalty in substantive elements as convergence because the commonality conceals a wide range of significantly divergent views among nations concerning the proper objectives of their competition laws.

For instance, the Mexican competition law identifies a single objective of protecting the process of competition and free market participation through the prevention and elimination of monopolies, monopolistic practices and other restraints on the efficient operation of goods and services markets.[5] In the United States, the statutes on competition law provide merely the broad objectives that enable the anti-trust agencies and courts to enunciate appropriate enforcement policies and statutory interpretations over time. For instance, the US

4. There are exceptions to this menu of substantive elements. For example, Peruvian competition law does not prohibit anti-competitive merges as such and Mexican competition law does not have a provision on abuse of dominance. See, e.g., WTO Annual Report for 1997, Special Study on Trade and Competition Policy.

5. Article 2 of the Mexican Federal Law of Economic Competition.

anti-trust agencies' 1995 Anti-trust Enforcement Guidelines for International Operations state: "For more than a century, the US anti trust laws have stood as the ultimate protector of the competitive process that underlies our free market economy. Through this process, which enhances consumer choice and promotes competitive prices, society as a whole benefits from the best possible allocation of resources".

The nature of competition law objective in different countries was examined by the WTO Secretariat in 1997 which noted that "at the most basic level, a core objective of competition policy in most countries...is to maintain a healthy degree of rivalry among firms in markets for goods and services" and also identified ten other wider objectives that appear in some of the competition laws ranging from "promoting trade and integration within an economic union or free-trade area" to "protecting opportunities for small and medium-sized businesses". (WTO Annual Report, 1997 and Ignacio de Leon, 1998). The South African Competition Act 1998 seeks to "provide all South Africans equal opportunity to participate fairly in the national economy".

The scope and coverage of competition laws are also different in different countries. In the United States, for example, the laws apply to private conduct unless a particular economic sector or particular type of business conduct has been specifically exempted. There are exemptions in the US laws where their application is deemed inappropriate, like for instance, certain activities of professional baseball and the business of insurance. The laws of certain countries provide for exemptions to particular transactions, on either an individual or a block basis. Competition laws of some countries, seek to ensure that they are effective competitive safeguards in today's global economy (Mario Monti, 2000). Of late, some countries have amended their competition laws to reflect the new economic scenario bringing them in conformity with those of the neighbouring states (Pittman, 1998). Some countries like the United Kingdom, South Africa and Netherlands have substantially or entirely replaced their competition laws with new ones.

Section E: Extant Competition Law in India

Monopolies and Restrictive Trade Practices Act (MRTP Act)

In line with the anti-trust legislation being an integral part of the economic life in many countries, India has a law known as the Monopolies and restrictive trade practices act, 1969 (mrtp act), drawing its inspiration from the mandate enshrined in the Directive Principles of State Policy in the Indian Constitution. The MRTP Act is regarded as the competition law of India, because it defines a *restrictive trade practice* to mean a *trade practice, which has, or may have the effect of preventing, distorting or restricting competition in any manner*. But the extant MRTP Act, in comparison with competition laws of many countries, is inadequate for fostering competition in the market and trade and for reducing, if not eliminating, anti-competitive practices in the country's domestic and international trade.

The genesis of the MRTP Act is traceable to Articles 38 and 39 of the Constitution of India. The Directive Principles of State Policy in those Articles lay down, inter-alia that the State shall strive to promote the welfare of the people by securing and protecting as effectively, as it may, a social order in which justice – social, economic and political- shall inform all the institutions of the national life, and the State shall, in particular, direct its policy towards securing:

- that the ownership and control of material resources of the community are so distributed as best to subserve the common good; and
- that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The thrust of the MRTP Act is directed towards:

a. prevention of concentration of economic power to the common detriment
b. control of monopolies
c. prohibition of monopolistic trade practices

d. prohibition of restrictive trade practices and

e. prohibition of unfair trade practices.

Major amendments were effected to the MRTP Act in 1991. Provisions relating to concentration of economic power and pre-entry restrictions with regard to prior approval of the Central Government for establishing a new undertaking, expanding an existing undertaking, amalgamations, mergers and take-overs of undertakings *were all deleted from the statute through the amendments*. The causal thinking in support of the 1991 amendments is contained in the Statement of Objects and Reasons appended to the 1991 amendment bill in the Parliament, extract in part of which, runs as follows:

"With the growing complexity of industrial structure and the need for achieving economies of scale for ensuring higher productivity and competitive advantage in the international market, the thrust of the industrial policy has shifted to controlling and regulating the monopolistic, restrictive and unfair trade practices rather than making it necessary for certain undertakings to obtain prior approval of the Central Government for expansion, establishment of new undertakings, merger, amalgamation, take over and appointment of Directors. It has been the experience of the Government that pre-entry restriction under the MRTP Act on the investment decision of the corporate sector has outlived its utility and has become a hindrance to the speedy implementation of industrial projects. By eliminating the requirement of time-consuming procedures and prior approval of the Government, it would be possible for all productive sections of the society to participate in efforts for maximisation of production. ....

The criteria for determining dominance, ... is proposed to be determined only on the basis of market share of 25% of the total goods produced, supplied, distributed or services rendered in India or substantial part thereof."

With the restructuring of the MRTP Act through the 1991 amendments, *the thrust of the Act is on curbing monopolistic, restrictive and unfair trade practices with a view to preserving*

competition in the economy and safeguarding the interest of consumers by providing them protection against false or misleading advertisements and/or deceptive trade practices. Size as a factor, to discourage concentration of economic power, has been, in a manner of speaking, given up.

B. Doctrine Guiding The MRTP Act

Behavioural and reformist doctrines inform the MRTP Act. In terms of the behavioural doctrine, the conduct of the entities, undertakings and bodies which indulge in trade practices in such a manner as to be detrimental to public interest is examined with reference to whether the said practices constitute any monopolistic, restrictive or unfair trade practice. In terms of the reformist doctrine, the provisions of the Act provide that if the MRTP Commission (established as a regulatory Authority under the MRTP Act), on enquiry comes to a conclusion that an errant undertaking has indulged either in restrictive or unfair trade practice, it can direct such undertakings to discontinue or not to repeat the undesirable trade practice. The Act also provides for the acceptance of an assurance from an errant undertaking that it has taken steps to ensure that prejudicial effect of trade practice no more exists. The veneer of the Act is essentially based on an advisory or reformist approach as mere deterrence by punishment approach has not been regarded by the lawmakers as a desirable way to make an errant undertaking to behave.

C. Ambit and coverage of MRTP Act

The Indian Statute, as most competition laws in the world, encompasses within its ambit, essentially three types of prohibited trade practices, namely, Restrictive (RTP), Unfair (UTP) and Monopolistic (MTP). Very briefly, the core of such practices is enumerated below.

Restrictive Trade Practice (RTP)

A restrictive trade practice is generally one, which has the effect of preventing, distorting or restricting *competition*. In particular, a practice, which tends to obstruct the flow of capital or resources into the stream of production, is an RTP. Likewise manipulation of prices, conditions of delivery or flow of supply in the market which may have the effect of imposing on the consumer, unjustified costs or restrictions is regarded as restrictive trade practice. But competition is not always a necessary touchstone on which a trade practice is judged if it is an RTP. Certain common types of restrictive trade practices listed in the MRTP Act are:-

- Refusal to deal
- Tie-up sales
- Full line forcing
- Exclusive dealings
- Concert or collusion-cartel
- Price discrimination
- Re-sale price maintenance
- Area restriction
- Predatory pricing.

All restrictive trade practices under the Act *are deemed legally to be prejudicial to public interest.* Onus is therefore, on the entity, body or undertaking charged with the perpetration of the restrictive trace practice to plead for gateways provided in the Act itself to avoid being indicted.

If the gateways are satisfactory to the MRTP Commission and if it is further satisfied that the restriction is not unreasonable having regard to the balance between those circumstances and any detriment to the public interest or consumers likely to result from the operation of the restriction, the Commission may arrive at the conclusion that the RTP is not prejudicial to public interest and discharge the enquiry against the charged party.

Furthermore, if a trade practice is expressly authorised by any law for the time being in force, the MRTP Commission is barred from passing any order against the charged party.

Unfair Trade Practice (UTP)

Essentially unfair trade practices fall under the following categories in the Indian law:-

- Misleading advertisement and false representation.
- Bargain sale, bait and switch selling.
- Offering of gifts or prizes with the intention of not providing them and conducting promotional contests.
- Product safety standards.
- Hoarding or destruction of goods.

Making false or misleading representation of facts disparaging the goods, services or trade of another person is also a prohibited trade practice under the Indian law.

Monopolistic Trade Practice (MTP)

This came into the statute by an amendment to the Act in 1984.

MTP is a trade practice which has or is likely to have the effect of:-

i) maintaining the prices of goods or charges for the services at an unreasonable level by limiting, reducing or otherwise controlling the production, supply or distribution of goods or the supply of any services or in any other manner;

ii) unreasonably preventing or lessening competition in the production, supply or distribution of any goods or in the supply of any services;

iii) limiting technical development or capital investment to the common detriment or allowing the quality of any goods produced, supplied or distributed, or any services rendered, in India to deteriorate;

iv) increasing unreasonably:-

   a) the cost of production of any goods; or

   b) charges for the provision, or maintenance, of any services;

v) increasing unreasonably:-

a) the prices at which goods are, or may be, sold or re-sold, or the charges at which the services are, or may be, provided; or

b) the profits which are, or may be, derived by the production, supply or distribution (including the sale or purchase of any goods or in the provision or maintenance of any goods or by the provision of any services;

vi) preventing or lessening competition in the production, supply or distribution of any goods or in the provision or maintenance of any services by the adoption of unfair methods or unfair or deceptive practices.

Dominance

In the Indian law, the basis of determining dominance is whether an undertaking has a share of one-fourth or more in the production, supply distribution or control of goods or services. But after the 1991 amendments to the MRTP Act, there is no specific provision in the law that connects dominance with any offence.

D. Applicability of The MRTP Act

During the year 1991, a notification was issued by the Government that the *MRTP Act shall apply to public sector undertakings* whether owned by the Government or by Government companies, statutory corporations, undertakings under the Management of various controllers appointed under any law, *cooperative societies and financial institutions*. Thus, there is no distinction now between the public sector undertakings and private sector companies in the matter of monopolistic, restrictive and unfair trade practices. *Indian Airlines, Nationalised Banks, Indian Railways, Post and Telegraphs and Tele-Communications Undertakings, Housing and Urban Development Authorities are all accountable if they indulge in monopolistic, restrictive or unfair trade practices (MTP, RTP or UTP).* There are, of course, a few entities like Defence undertakings, which are still outside the ambit of the Act. It may also be mentioned

here that after the amendment to the definition of "service", it includes the business of builders and real estate operators. This has brought a large number of buildings activity operators under the mischief of the Act. *An important provision in the MRTP Act is its extra-territorial reach in respect of prohibited trade practices, a part of which is perpetrated within India.*

E. MRTP Commission

Under the MRTP Act, a Commission has been established, the Chairman of which, is always a person who is or has been or is qualified to be a judge of the Supreme Court or High Court (of a State). The Members of the Commission are persons of ability, integrity and standing who have adequate knowledge or experience of, or have shown capacity in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration. The Commission has in addition to the Chairman not less than 2 and not more than 8 Members. *It is the Government that makes the appointment of the Chairman and Members. Often evidence suggests that retirees in the Judiciary and the Executive (Government officials) are selected for these appointments.* The Commission is assisted by the Director General of Investigation and Registration (DG) for carrying out investigations, for maintaining register of agreements and for undertaking carriage of proceedings during the enquiry before the MRTP Commission. The powers of the Commission include the power vested in a Civil Court and include further power:-

- to direct an errant undertaking to discontinue a trade practice and not to repeat the same;
- to pass a cease and desist order;
- to grant temporary injunction, restraining an errant undertaking from continuing an alleged trade practice;
- to award compensation for loss suffered or injury sustained on account of RTP, UTP or MTP;
- to direct parties to agreements containing restrictive clauses to modify the same;
- to direct parties to issue corrective advertisement;

- to recommend to the Central Government, division of undertakings or severance of inter-connection between undertakings, if their working is prejudicial to public interest or has led or is leading to MTP or RTP.

The investigative and adjudicatory functions are sometimes separate and sometimes not. When the DG investigates on his own, the functions are separate. When he investigates at the instance of the Commission or the Commission itself undertakes investigation through its own officials, the functions are not separate and are in the same hand.

The budgetary subventions are sanctioned by the Government and powers of appointment of the officials (administrative, accounts and others) rest by and large with the Government.

The orders of the Commission are appealable only to the Supreme Court, which is the highest judicial court in India.

Section F: Experience in the last three decades

During the administration of the MRTP Act over the last 30 years, there has been a large number of binding rulings of the Supreme Court of India and also Bench decisions of the MRTP Commission. These decisions have interpreted the various provisions of the MRTP Act from time to time and have constituted precedents for the future. Thus, where the wording of the existing law has been considered inadequate by judicial pronouncements, it may necessary to redraft the law to inhere the spirit of the law and the intention of the lawmakers.

A perusal of the MRTP Act will show that there is neither definition nor even a mention of certain offending trade practices which are restrictive in character. Some illustrations of these are:

- Abuse of Dominance
- Cartels, Collusion and Price Fixing
- Bid Rigging
- Boycotts and Refusal to Deal
- Predatory pricing

Often an argument has been advanced that one particular general provision [Section 2(o)] of the MRTP Act may cover all anti-competition practices, as it defines an RTP as a trade practice which prevents, distorts or restricts competition. While complaints relating to anti-competition practices can be tried under the generic definition of restrictive trade practice (which prevents, distorts or restricts competition), the absence of specification of identifiable anti-competition practices always gives room to different interpretations by different courts of law, with the result that the spirit of the law may sometimes escape being captured and enforced. While a generic definition may be necessary and may form the substantive foundation of the law, it is necessary to identify specific anti-competition practices and define them so that the scope for a *valve or opening on technical grounds* for the offending parties to escape indictment may not obtain.

Some of the anti-competition practices like cartels, predatory pricing, bid rigging etc. are not specifically mentioned in the MRTP Act but the MRTP Commission, over the years, has attempted to fit such offences under one or more of its sections by way of interpretation of the language used therein.

Another dimension to be kept in view is the dynamic context of International trade and market as well as the domestic trade and market. When the MRTP Act was drafted in 1969, the economic and trade milieu prevalent at that time constituted the premise for its various provisions. There has been subsequently a sea change in the milieu with considerable movement towards liberalisation, privatisation and globalisation. The law has to yield to the changed and changing scenario on the economic and trade front. This is one important reason why a new competition law may have to be framed or alternatively the existing MRTP Act may have to be amended extensively. Many countries like the U.K., Canada, Australia and the European Community have, in line with this thinking, enacted new competition laws and repealed their earlier laws governing fair-trading, etc.

Section G: World Trade Organisatiou Obligations

A. WTO Agreements

After the entry into the World Trade Organisation (WTO), India is a signatory to various multi-lateral agreements. WTO is the only international body dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations. These documents provide the legal ground rules for international commerce. They are essentially contracts, binding Governments to keep their trade policies within agreed limits.

The WTO Agreements are lengthy or complex because they are legal texts covering a wide range of activities. They deal with Agriculture, Textiles and Clothing, Banking, Telecommunications, Government Purchases, Industrial Standards, Intellectual Property, Sanitary and Phytosanitary Measures and much more.

B. Promoting Fair Competition

The WTO is sometimes described as a "free trade" institution. It has laid down a system of rules dedicated to *open, fair and undistorted competition*. Many WTO agreements aim to support fair competition: in Agriculture, Intellectual Property, Services, for example. The agreement on Government procurement (a plurilateral agreement because it is signed by only a few WTO members) extends competition rules to purchases by thousands of Government entities in many countries.

The 1996 Singapore Ministerial Conference decided to set up inter-alia, a Working Group to study issues relating to the interaction between Trade and Competition Policy, including anti-competitive practices.

Section H: Expert Group

The Ministry of Commerce, Government of India, in its turn set up an Expert Group[6] on interaction between Trade and Competition

6. The author was the Chairman of the Expert Group.

policy, as an offshoot of the Singapore Ministerial Declaration of 1996. The Expert Group presented its report to the Ministry of Commerce in January, 1999. (The Working Group set up consequent on the Singapore Ministerial Declaration has also presented its report to the General Council of the WTO). The Expert Group's report and recommendations have been circulated and discussed in a number of fora, conferences and seminars, since January, 1999. The Expert Group has addressed competition issues qua

- Mergers, Amalgamations, Acquisitions and Take-overs
- Intellectual Property Rights
- Foreign Investment
- Anti-Dumping Measures, Subsidies and Countervailing Measures and Safeguard Measures
- State Monopolies, Exclusive Rights and Regulatory Policies
- Sanitary and Phytosanitory Measures
- Technical Barriers to Trade
- Professional Services
- Government Procurement
- WTO Provisions.

The common thread that runs through the Expert Group's report and recommendations is that there should be a regulatory agency to control and eliminate anti-competition practices that may surface during the operation of international trade and during the implementation of the WTO agreements.

For instance, the owner of a copyright, patent or other forms of Intellectual Property Right may issue a licence for someone else to produce or copy the protected invention, design, work, trademark, etc., and in the process the terms of the licensing contract may restrict competition or impede technology transfer. There should be in place a law to take action to prevent anti-competitive licensing that abuses Intellectual Property Rights.

Competition law or policy, similarly, is an essential complement to investment liberalisation. A sound competition policy and law can contribute to securing an attractive environment for foreign investment, particularly foreign direct investment by providing stable and transparent legal framework and signaling a commitment to market institutions and mechanisms. The competition law should be capable of providing safeguards against possible abuses of market power by foreign investors.

Thus there is a need for an appropriate competition law to protect fair competition and to control, if not, eliminate anti-competition practices in the trade and market. As noted earlier, many anti-competition practices may surface during the operation and implementation of WTO agreements. It is in this context, that a sound and effective competition law and a Competition Law Authority have become the need of the hour.

The Expert Group, in para 1.5.1. of its report, has suggested that "a new Competition Law may be designed and drafted incorporating the suggestions made" in the report and that the "new Competition Law should declare the competition principles and should be an effective instrument for engendering and protecting competition in the market in the interests of the consumers and the general public" (Expert Group, 1999).

Section I: High Level Committee on Competition Policy and Law

In October, 1999, the Government of India appointed a *High Level Committee on Competition Policy and Competition Law* to advise a modern Competition Law for the country in line with international developments and to suggest a legislative framework which may entail a new law or appropriate amendments to the MRTP Act. The Committee presented its Competition Policy report to the Government in May, 2000. The Competition Law has been drafted and presented to the Government in November, 2000.

Section J: Rubric of the New Draft Competition Law

There are three areas of enforcement that provide the foeus for most competition laws in the world today.[7]

7. Although it does not directly form a part of competition law, legislation regarding various regulatory authorities falls under the larger ambit of competition policy

- Agreements among enterprises
- Abuse of dominance
- Mergers or, more generally, combinations among enterprises

There are, however, differences in emphasis and interpretations across countries and over time within countries. The above mentioned three areas are not mutually exclusive and there is considerable overlap between them. A number of actions that constitute abuse of dominance could infringe the law regarding agreements among enterprises. The actions are similar though the causes might be different. In one case, it may be the joint action of one or more undertakings that is in question, whereas in another, it may be the action of one dominant undertaking that is the driving force. The concern with mergers is ultimately a concern with market power and the possible abuse of that market power by the merged entity. In spite of this, most laws deal with this separately. *One reason for this is that it might be difficult to deal with the situation after the fact.* In spite of the inevitable duplication that follows from this classification, it provides a useful taxonomy for organising the thinking about competition law.

The rubric of the new draft competition law (hereinafter draft law, for brief) has essentially four compartments:

- Anti - Competition Agreements
- Abuse of Dominance
- Combinations Regulation
- Competition Advocacy

These four compartments are described in the narrative that follows:

Section K: Anti-Competition Agreements

Firms enter into agreements, which may have the potential of restricting competition. A scan of the competition laws in the world will show that they make a distinction between "horizontal" and "vertical" agreements between firms. The former, namely the horizontal agreements are those among competitors and the latter, namely the vertical agreements are those relating to an actual or potential relationship of purchasing or selling to each other. A particularly pernicious type of horizontal agreements is the cartel. Vertical agreements are pernicious, if they are between firms in a position of dominance. Most competition laws view vertical agreements generally more leniently than horizontal agreements, as, *prima facie,* horizontal agreements are more likely to reduce competition than agreements between firms in a purcbaser – seller relationship.

Horizontal Agreements

Agreements between two or more enterprises that are at the same stage of the production chain and in the same market constitute the horizontal variety. An obvious example that comes to mind is an agreement between enterprises dealing in the same product or products. But the market for the product(s) is critical to the question, if the agreement trenches the law. The draft competition law has taken care to define the *relevant market.*[8] To attract the provision of law, the products must be substitutes. If parties to the agreement are both producers or retailers (or wholesalers), they will be deemed to be at the same stage of the production chain.

The US jurisprudence suggests a clear distinction between horizontal and vertical agreements and this distinction is being adopted by many other countries as well. Based on the US law, agreements are considered illegal only, if they result in unreasonable restriction on competition. The US law provides for adjudication on such illegality on the "rule of reason" basis. It is also mandated by the US law, that parties to the agreement should be engaged in rival or potentially rival activities to fall within its ambit. A potential rival is one who could be capable of engaging in the same type of activity. Firms under common ownership or control are generally not regarded as rival or potentially rival firms. Under the UK law, an agreement infringes the law only, if it has as its object or effect an appreciable prevention, restriction or distortion of competition.

8. Relevant market is discussed in the narrative under "abuse of dominance".

A specific goal of competition policy/law is and needs to be the prevention of economic agents from distorting the competitive process either through agreements with other companies or through unilateral actions designed to exclude actual or potential competitors. It needs to control agreements among competing enterprises (horizontal agreements) on prices or other important aspects of their competitive interaction. Likewise agreements between firms at different levels of the manufacturing or distribution processes (vertical agreements, for example between a manufacturer and wholesaler) which are likely to harm competition (albeit less harmful than horizontal agreements) need to be addressed in the competition policy/law. The foremost constituent of any competition policy/law is obviously the objective to foster competition and its obverse is the need to deal effectively against practices and conduct that subvert competition.

In general the "rule of reason" test is required for establishing that an agreement is illegal. However, for certain kinds of agreements, the presumption is generally that they cannot serve any useful or pro–competitive purpose. Because of this presumption, the lawmakers do not subject such agreements to the "rule of reason" test. They place such agreements in the *per se* illegal category (see next paragraph). The draft law presumes that the following four types of agreements between enterprises, involved in the same or similar manufacturing or trading of goods or provision of services as having an appreciable adverse effect on competition

- Agreements regarding prices. These include all agreements that directly or indirectly fix the purchase or sale price.
- Agreements regarding quantities. These include agreements aimed at limiting or controlling production, supply, markets, technical development or investment.
- Agreements regarding bids (collusive tendering). These include tenders submitted as a result of any joint activity or agreement.
- Agreements regarding market sharing. These include agreements for sharing of markets or sources of production/supply by territory, type, size of customer or any other way.

Such horizontal agreements, which include membership of cartels, are presumed to lead to unreasonable restrictions of competition and are therefore presumed to have an appreciable adverse effect on competition. In other words, they are *per se* illegal. This provision of *per se* illegality is rooted in the provisions of the US law and has a parallel in most legislations on the subject. The Australian law prohibits price fixing arrangements, boycotts and some forms of exclusive dealing. The new UK competition law endorses certain agreements to have an appreciable effect on competition (presumtion is however rebuttable). A *per se* illegality would mean that there would be very limited scope for discretion and interpretation on the part of the prosecuting and adjudicating authorities. The underlying principle in such presumption of illegality is that the agreements in question have an appreciable anti-competitive effect. Barring the aforesaid four types of agreements, all the others will be subject to the "rule of reason" test in the draft law.

Vertical Agreements

By and large, as noted earlier, vertical agreements will not be subjected to the rigours of competition law. However, where a vertical agreement has the character of distorting or preventing competition, it will be placed under the surveillance of the law.

For instance, the following types of agreements, inter alia, will be subjected to the "rule of reason" test.

- Tie – in arrangement;
- Exclusive supply agreement
- Exclusive distribution agreement;
- Refusal to deal;
- Resale price maintenance.

The draft law lists the following factors to be taken into account for adjudicatory purposes to determine whether an agreement or a practice has an appreciable adverse effect on competition, namely, if it

a) results in creation of barriers to new entry, or,

b) results in forcing existing competitors out of the market, or,

c) results in foreclosing competition by hindering entry into a market

d) results in any consumer benefit or pro-competitive impact

e) contributes to the improvement of production and distribution and promotes technical and economic progress, while allowing consumers a fair share of the benefits.

Exceptions

The provisions relating to anti-competition agreements will not restrict the right of any person to restrain any infringement of intellectual property rights granted in India or to impose such *reasonable conditions* as may be necessary for the purposes of protecting or exploiting such intellectual property rights. The rationale for this exception is that the bundle of rights that are subsumed in intellectual property rights should not be disturbed in the interests of creativity and intellectual/innovative power of the human mind. No doubt, this bundle of rights essays an anti-competition character, even bordering on monopoly power. But without protecting such rights, there will be no incentive for innovation, new technology and enhancement in the quality of products and services. However, it may be noted, that the draft law does not permit any *unreasonable condition* forming a part of protection or exploitation of intellectual property rights. In other words, licensing arrangements likely to affect adversely the prices, quantities, quality or varieties of goods and services will fall within the contours of competition law as long as they are not in reasonable juxtaposition with the bundle of rights that go with intellectual property rights.

For example, a licensing arrangement may include restraints that adversely affect competition in goods markets by dividing the markets among firms that would have competed using different technologies. Similarly, an arrangement that effectively merges the research and development activities of two of only a few entities that could plausibly engage in research and development in the relevant field might harm competition for development of new goods and services. Exclusive licensing is another category of possible unreasonable condition. Examples of arrangements involving exclusive licensing that may give rise to anti-competition concerns include cross licensing by parties collectively possessing market power, grantbacks and acquisitions of intellectual property rights.

Yet another exception to tbe applicability of the provisions relating to anti-competition agreements is the right of any person to export goods from India, to the extent to which, an agreement, decision or concerted action relates exclusively to the production, supply, distribution or control of goods or provision of services for such export. In a manner of speaking, export cartels are outside the purview of competition law. In most jurisdictions, export cartels are exempted from the application of competition law. A justification for this exemption is that most countries do not desire any shackles on their export effort in the interest of balance of trade and/or balance of payments. Holistically, however, exemption of export cartels is against the concept of free competition.

Section L: Abuse of Dominance

"Dominance" and "Dominant Undertaking" have been appropriately defined in the draft law in terms of "the position of strength enjoyed by an undertaking which enables it to operate independently of competitive pressure in the relevant market and also to appreciably affect the relevant market, competitors and consumers by its actions". This definition may perhaps appear to be somewhat ambiguous and to be capable of different interpretations by different judicial authorities. But then, this ambiguity has a justification having regard to the fact that even a firm with a low market share of just 20% with the remaining 80% diffusedly held by a large number of competitors may be in a position to abuse its dominance, while a firm with say 60% market share with the remaining 40% held by a competitor may not be in a position to abuse its dominance because of the key rivalry in the market. *Specifying a threshold or an arithmetical figure for defining dominance may*

either allow real offenders to escape (like in the first example above) or result in unnecessary litigation (like in the second example above). Hence, in a dynamic changing economic environment, a static arithmetical figure to define "dominance" may, perhaps, be an aberration. With this suggested broad definition, the regulatory authority will have the freedom to fix errant undertakings and encourage competitive market practices, even if there is a large player around. Abuse of dominance is key for the competition policy/law.

It is important to note that the draft law has been designed in such a way that its provisions on this count only take effect, if dominance is clearly established. As already stated, there is no single objective market share criterion that can be blindly used as a test of dominance. The law seeks to ensure that only when dominance is clearly established, can abuse of dominance be alleged. Any ambiguity on this count could endanger large efficient firms. The more recently legislated laws of the Central and Eastern European countries are based on the relevant Articles of the Treaty of Rome and are more interventionist in design. They rely exclusively on market shares to establish dominance. The U.S. law requires the additional criterion of entry barriers.

Before assessing whether an undertaking is dominant, it is important, as in the case of horizontal agreement, to determine what the relevant market is. There are two dimensions to this – the product market and the geographical market. On the demand side, the relevant product market includes all such substitutes that the consumer would switch to, if the price of the product relevant to the investigation were to increase. From the supply side, this would include all producers who could, with their existing facilities, switch to the production of such substitute goods. The geographical boundaries of the relevant market can be similarly defined. Geographic dimension involves identification of the geographical area within which competition takes place. Relevant geographic markets could be local, national, international or occasionally even global, depending upon the facts in each case. Some factors relevant to geographic dimension are consumption and shipment patterns, transportation costs, perishability and existence of barriers to the shipment of products between adjoining geographic areas. For example, in view of the high transportation costs in cement, the relevant geographical market may be the region close to the manufacturing facility.

To be considered dominant, a firm must be in a position of such economic strength that it can behave, to an appreciable extent, independently of its competitors and customers. Therefore, to assess dominance it is important to consider the constraints that an enterprise faces on its ability to act independently. The current market share is a necessary but insufficient pre-requisite for dominance. In spite of having a large market share a firm may be constrained by the threat of competition from potential entrants and by the purchasing power of its own customers. Entry barriers could result from absolute advantages such as patents (legal) and access to certain inputs. These could also result from strategic first-mover advantages. High sunk cost could make markets incontestable. Exclusionary practices could increase the strategic advantages of the first mover. Lastly, factors other than existing or potential competition need to be considered. For example, strong purchasing power – if customers are powerful relative to the enterprise – can also constrain the behaviour of the firm.

Abuse

In general, actions that are considered anti-competitive and illegal in the context of agreements are also illegal, if undertaken by a dominant firm. These would include charging or paying unfair prices, restriction of quantities, markets and technical development. Discriminatory behaviour and any other exercise of market power leading to the prevention, restriction or distortion of competition would obviously be included. It needs to be clarified that there is a fine distinction between defending one's market position or market share which is perfectly legal and legitimate and may involve certain level of aggressive competitive behaviour and exclusionary and anti competitive behaviour. However, as noted above, a greater threat to competition is from the action(s) of dominant firms that are inimical to future competition. These would include the following:

- ❖ Predatory Pricing / disciplining existing rivals
- ❖ Actions that make it difficult for potential entrants to enter (exclusionary/anti-competitive behaviour)

Key questions for adjudication on abuse of dominance could include:

- How will the practice harm competition?
- Will it deter or prevent entry?
- Will it reduce incentives of the firm and its rivals to compete aggressively?
- Will it provide the dominant firm with an additional capacity to raise prices?
- Will it prevent investments in research and innovation?
- Do consumers benefit from lower prices and/or greater product and service availability?

Predatory Pricing

Predatory pricing is defined as the situation where a firm with market power prices below cost so as to drive competitors out of the market and, in this way, acquire or maintain a position of dominance. Here again there is a danger of confusing pro-competitive pricing with predatory behaviour. In reality, predation is only established after the fact i.e. once the rival has left the market and the predator has acquired a monopoly position in the market. However, any law to prevent is meaningful, only if it takes effect before the fact i.e. before the competitor has left the market.

An important issue, therefore, is the identification of predatory pricing. According to theory, a price below marginal cost is indicative of predatory pricing. A practical alternative is to use the average variable cost as a substitute since marginal costs are not generally available. In some cases, as in a judgement of the US Supreme Court (UTAH PIE case), a price below the full cost was taken to be predatory. The problem is that if this were the only criterion, any firm making losses could potentially be accused of predation. In fact the case is only made, once tbe firm has recouped its first period losses and in the second period, when it functions as a monopolist. If it does not, then there may well be a gain in social welfare through the lower prices charged by the firm. It is in this context that an alternative two-stage test is desirable, where, in the first instance, the market structure should be analysed and it must be established that the market is one where predation can be successful, before a comparison of price and cost is made at the second stage. Thus if it is clear ex ante that the market is one where predation cannot be successful as a result of new entry, re-entry, foreign competition or some other factor, then even if a firm is charging "predatory" prices in current period, it is not a cause for concern.

In view of the difficulties, the issue of predatory pricing is best left to the Competition Commission of India (suggested as the Competition Regulatory Authority in the draft law and referred to hereinafter as CCI, for brief) itself which can draw its own regulations and also revise it from time to time based on its own experience.

Distinguishing predatory behaviour from legitimate competition is difficult. The distinction between low prices, which result from predatory behaviour and low prices, which result from legitimate competitive behaviour is often very thin and not easily ascertainable.

Indeed, it is sometimes argued that predatory behaviour is a necessary concomitant of competition. To quote Professor Jagdish Bhagwati from his book "A stream of Windows"

"Clyde Prestowitz, former US trade negotiator and an ally of Mr. Fallows in the angst over Japan is doubly wrong when he asserts that 'Japan plays a different game' and that therefore the United States cannot have a beneficial trade with it under a rules-based multilateral trading regime ,,,,,

What then about the view, often ascribed to Chalmers Johnson, Professor at the University of California at San Diego, that Japanese Companies believe in "predatory" competition?

The notion that American Companies, by contrast, compete in a benign fashion is faintly romantic and fully foolish. What the

Cambridge economist Joan Robinson used to call the "animal spirits" of capitalist entrepreneurs surely are manifest in both countries. The successful always appear more predatory. This was exactly the stereotype of British entrepreneurs during the nineteenth century and of the ugly American in the 1950s and 1960s. With success, one gets one's share of envy and resentment" (Bhagwati, Jagdish, 1999).

When does abuse of dominance attract the law?

To attract the provision of the law, it needs to be established whether the restraints create a barrier to new entry or force existing competitors out of the market. The key issue is the extent to which these arrangements foreclose the market to manufacturers (inter-brand rivalry) or retailers (intra-brand rivalry) and the extent to which these raise rivals' costs and/or dampen existing competition. The costs of such arrangements need to be weighed against the benefits. For example, some of these restraints help to overcome the free-rider problem and allow for the exploitation of scale economies in retailing.

Before proceeding to the next compartment a summary from the draft law as to what constitutes "dominance" and as to what constitutes "abuse of dominance" has been attempted herein below.

Dominance is determined by taking into account one or more of the following factors:

- Market share
- Size and resources of the enterprise
- Size and importance of the competitors
- Economic power of the enterprise including commercial advantages
- Technical advantages enjoyed by the enterprise with reference to patents, copyright, know-how ete.
- Dependence of consumers
- Monopoly status or dominance acquired as a result of any statute (like public sector undertakings)

- Entry barriers
- Countervailing buying powers
- Market structure and size of the market

Abuse of dominance having an appreciable adverse effect on competition occurs when an enterprise,

- Directly or indirectly imposes unfair purchase or selling prices including predatory prices
- Limits production, markets or technical development to the prejudice of consumers
- Indulges in action resulting in denial of market access
- Makes contracts with obligations which have no connection with the subject of such contracts.
- Uses dominance in one market to move into or protect other markets.

It may therefore be seen that the draft law does not frown upon dominance as such but frowns upon abuse of dominance.

Section M: Combinations Regulation

This compartment is one of the most debated ones among the four compartments in the draft law. It is therefore necessary to give this compartment a detailed treatment. Further, there are differences between the recommendations of the High Level Committee (2000) and what has been provided in the draft law. Before proceeding to discuss the draft law on combinations regulation, a brief theoretical analysis of mergers has been attempted besides a reference to the recommendations of the High Level Committee.

Combinations include mergers, amalgamations, acquisitions etc, but for the purposes of the discussion that follows, mergers regulation has been reckoned. As in the case of agreements, mergers are typically classified into horizontal and vertical mergers. In addition, merger between enterprises operating in different markets are called conglomerate mergers. Mergers are a legitimate means by which

firms can grow and are generally as much part of the natural process of industrial evolution and restructuring as new entry, growth and exit. From the point of view of competition policy, it is horizontal mergers that are generally the focus of attention. As in the case of horizontal agreements, such mergers have a potential for reducing competition. In rare cases, where an enterprise in a dominant position makes a vertical merger with another firm in a (vertically) adjacent market to further entrench its position of dominance, the merger may provide cause for concern. Conglomerate mergers should generally be beyond the purview of any law on mergers.

A merger leads to a "bad" outcome only if it creates a dominant enterprise that subsequently abuses its dominance. To some extent, the issue is analogous to that of agreements among enterprises and also overlaps with the issue of dominance and its abuse discussed earlier. Viewed in this way, there is probably no need to have a separate law on mergers. The reason that such a provision exists in most laws is to pre-empt the potential abuse of dominance where it is probable, as subsequent unbundling can be both difficult and socially costly.

Thus, the general principle, in keeping with the overall goal, is that mergers should be challenged only if they reduce or harm competition and adversely affect welfare.

Horizontal Mergers

The following issues need to be considered, while assessing the permissibility of horizontal mergers.

- First, as in the case of horizontal agreements, it must first be established as to what the relevant market is. This requires a focus on the demand side to establish whether the products are close enough substitutes or not. On the supply side, it is important to identify the market shares of the firms. Clearly, it is not enough to go on current market shares. It is important to assess how the relevant market is likely to evolve in the near future. This would depend on whether entry is easy and whether there are potential entrants that could easily enter, if profitability in the sector increases, how foreign competition is likely to evolve and the growth (or decline) of other incumbent firms.

- The second important step is to establish whether the higher concentration in the market resulting from the merger will increase the possibility of collusive or unilaterally harmful behaviour. Collusion is more likely in industries producing relatively homogeneous products and characterised by small and frequent transactions, the terms of which cannot be kept secret. The merger is likely to be unilaterally harmful when the two merging firms produce similar products in a concentrated differentiated product market.

- The third issue is regarding potential contestability. Even if no potential entrants are immediately visible, a large enough price increase (or high enough profitability) could encourage entry. So, it needs to be established, how high the expected price increase is likely to be. Following this, it is important to consider, whether entry is really likely, how quick it will be and whether it will be sufficient enough to make up for the reduced competition resulting from the merger.

- Fourth, the case can be made that even mergers that lead to an uncompetitive outcome could result in certain "efficiencies" that more than make up for the welfare loss resulting from this. The Russian law has such a provision. The US law has generally been balanced in favour of competition. However, the "failing firm" defence has, at times, been accepted by courts. If a firm is, indeed failing and likely to go out of business, it is not clear what social welfare loss would occur, if this firm's assets were taken over by another firm.

The question to be asked here is what rules should the law evolve such that monopolies may be prevented and competition is preserved. Obviously, merely choosing market shares for the purposes of deciding the cut off point is fraught with problems.

One can consider two extreme examples to clarify this point. Suppose that two firms each having a significant market share of say 5% each merge, the law cannot suppose that the firms have the objective of monopoly profits in mind. Such mergers can only improve

efficiency and, as such need not be struck down. On the other hand, if two larger firms merge, there is the possibility of this having an adverse affect on competition and this justifies investigation. It is obvious that as the composite market share increases, the issue of the tradeoff between welfare and efficiency becomes more relevant and depends on other market conditions. The analytical foundations for the rules should be derived from the market conditions.

Vertical Mergers

Competition law must not normally have any objections to vertical mergers. Vertical mergers are measures for improving production and distribution efficiencies. The process internalises the benefits of supply chain management and, as such cannot be perceived as injurious to competition. Vertical mergers can be treated, as a process by which there is a transmission of a good or a service across departments such that the commodity can be sold in the market without much adaptation. This implies that firms choose to bypass market transaction in favour of internal control.

For the purposes of competition law, integration ought to imply only that administrative direction rather than a market transaction forms the basis of the cooperation between two or more individuals engaged in productive or distributive activity. The firm chooses, on the basis of relative costs, whether to perform the activity by itself, subcontract it to others, or to sell a finished or semi finished product to other firms who in turn sell it to the market with or without further processing, as the case may be. The law should understand that the definition of a firm should imply that the entity constitutes the area of operations within which administration rather than market process coordinates work.

Conglomerate Mergers

A conglomerate merger is a merger that is neither horizontal nor vertical. For example, a merger between a car manufacturer and a textile firm is a conglomerate merger. The theories for "restraining" vertical and horizontal mergers are well formulated. There however is no clear mechanism for similar restraints on conglomerate mergers except those that are based on folklore. There is sufficient evidence to suggest that conglomerate mergers do not pose any threat to competition.

Pre-Notification

One important issue with regard to mergers that needs to be addressed is regarding the requirements for prior notification. There are two possibilities. The first is that approval or disapproval of the merger may be obtained (possibly within a specified time) before going ahead with the merger. This could be subject to a threshold requirement based on assets, market share or turnover. The second option is that no notification of permission is required and that the threat of action in case of a violation should generally enforce legal behaviour. Although both the US and EU laws require prior approval for mergers above certain thresholds, they also impose a timeliness requirement on the relevant Authority, with delays being subject to limitation. There is no pre-notification requirement in the existing U.K. law.

Prior approval is likely to lead to delays and unjustified bureaucratic interventions. This is likely to hamper the vital process of industrial evolution and restructuring and some argue against prior approvals. They further argue that, in any case, all mergers in India, have to be approved by the High Court under the Companies Act, 1956 and shareholders' interests are protected in this way. But the complete absence of a pre-notification requirement may lead to post-merger unscrambling with high social costs. For this reason, a pre-notification requirement for *mergers above a certain threshold level* may be desirable. The High Level Committee has been of the view that the threshold limit may be fixed on the basis of assets rather than market share, as the latter may not be an appropriate barometer to determine affectation adversely of competition. For instance, a firm with a high market share of 60% may not be in a position to affect competition, if the remaining 40% is held by a competitor. The Committee has further suggested that the threshold limit may be fixed at the asset value of the merged entity of Rs.500 crores or more or, the asset value of the group to which the merged entity belongs

of Rs.2000 crores or more, both linked to Wholesale Price Index and that the expression "group" as presently defined in the MRTP Act, 1969 may be adopted for the purposes of merger. (High Level Committee, 2000).

The Committee has also recommended that if no reasoned order is received within a time limit, say of 90 days, prohibiting the merger, the merger should be deemed to have been approved.

Any concern about merger stems from a concern for the possible adverse effects that this could have on competition and welfare as a result of the merged entity abusing its position of dominance. It could, therefore, be argued that the law should ignore mergers and focus only on abuse of dominance if and when this arises. In spite of this, the competition laws of most countries have a provision for notification and investigation of mergers. The reason for this is that scope for post-merger actions may be limited and the cost of unscrambling may be socially high. In view of this, it is extremely important that the law regarding mergers be very carefully framed and the provisions regarding prohibition of mergers be used very sparingly. *This is particularly important at the current stage of India's corporate development. Relative to the size of major international companies, Indian firms are still small. With the opening of trade and Foreign Direct Investment, Indian firms need to go through a period of consolidation in order to be competitive.* Any law on merger regulation must take account of this reality.

Time Frame

Taking the above overall aspects into consideration, the High Level Committee has recommended that the Government may consider a suitable time frame after which merger regulation may be implemented and that the time period may be utilised to assemble a suitably qualified expert staff and for their training (High Level Committee, 2000).

Draft Law on Combinations Regulation

The draft law makes it mandatory for the parties to notify their proposed agreement or combinations to the Mergers Commission, if the aggregate assets of the combining parties have a value in excess of Rs. 500 crores or turnover in excess of Rs. 1500 crores. The combination as defined by the draft law includes mergers, amalgamations, joint ventures, and acquisitions of shares, voting rights or assets. If one of the merging parties belongs to a group which controls it, the threshold limits are Rs. 2000 crores in terms of assets and Rs. 6000 crores in terms of turnover. For this purpose a group means two or more enterprises which directly or indirectly have:

- The ability to exercise 26% or more of the voting rights in the other enterprise; or
- The ability to appoint more than half the members of the Board of Directors in the other enterprise; or
- The ability to control the affairs of the other enterprise.

The threshold limits of assets would be revised every two years on the basis of the Wholesale Price Index.

The draft law has listed the following factors to be taken into account for the purpose of determining whether the combination would have the effect of or be likely to have an appreciable adverse effect on competition.

- ❖ The actual and potential level of competition through imports in the market;
- ❖ The extent of barriers to entry to the market;
- ❖ The level of combination in the market;
- ❖ The degree of countervailing power in the market;
- ❖ The likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
- ❖ The extent of effective competition remaining in the market;
- ❖ The extent to which substitutes are available in the market or are likely to be available in the market;

- ❖ The market share of the parties involved in the combination, individually and as a combination;
- ❖ The likelihood that the combination would result in the removal from the market of a vigorous and effective competitor;
- ❖ The nature and extent of vertical integration in the market;
- ❖ The possibility of a failing business;
- ❖ The nature and extent of innovation;
- ❖ Whether the benefits of the combination outweigh the adverse impact of the combination, if any.

After the draft law was placed on the website, a number of suggestions have been received particularly, on the provisions relating to combinations regulation. Many economists, experts and officials in the Government are of the view that at the present level of India's economic development, combinations control should not lead to the shying away of foreign direct investment and participation by major international companies in economic activities through the route of mergers and acquisitions. They suggest that combination approvals (above the specified threshold limits) may not be made mandatory. Notification of combinations may on the other hand be made voluntary, albeit with the risk of the discovery of anti-competitive mergers at a later date with the concomitant cost of demergers etc. Another suggestion is to increase the threshold limit by doubling the existing limits in the draft law. All these suggestions are under the active consideration of the Government before the draft law will be placed before the Parliament. The trigger cause in the aforesaid suggestions is the felt need for companies in India to grow in size in order to become globally competitive.

The regulatory authority, namely, the Mergers Bench of the Competition Commission of India is mandated to adjudicate on mergers by weighing potential efficiency losses against potential gains.

In order that the Competition Commission of India (Mergers Bench) should not delay its adjudication on whether a merger may pass through or may be stopped because of its anti-competitive nature, the draft law admonishes the regulatory Authority to hand in its adjudicatory decision within 90 working days, lest the merger will be deemed to have been approved. The draft law also provides for limiting the regulatory Authority's power to ask for information from the merging parties within a time frame of 15 working days with a corresponding obligation on the merging parties to furnish the information within a further 15 days. Thus by law, the sequencing of the adjudicatory exercise has been set within specific time-frames, so that possible delays are avoided and dilatory tactics on the part of the interested parties are prevented. Furthermore, mergers have to be approved by the State High Courts under the Companies Act, 1956. Such approvals take about 6 months to one year or even more and the 90 working days time limit for the Mergers Bench will be subsumed in that period.

Section N: Competition Advocacy

In line witb the High Level Committee's recommendation, the draft law extends the mandate of tbe Competition Commission of India beyond merely enforcing the law (High Level Committee, 2000). Competition advocacy creates a culture of competition. There are many possible valuable roles for competition advocacy, depending on a country's legal and economic circumstances. A recent OECD Report noted as follows:

"In virtually every member country where significant reform efforts have been undertaken, the competition agencies have been active participants in the reform process. This "advocacy" ... can include persuasion offered behind the scenes, as well as publicity outside of formal proceedings. Some competition agencies have the power, at least in theory, to bring formal challenges against anti-competitive actions by other agencies or official or quasi-official bodies. More indirect, but still visible, is formal participation in another agency's public hearings and deliberations. What is appropriate depends on the particular institutional setting." (OECD, 1997)

The Competition Commission of India needs to participate in the formulation of the country's economic policies, which may

adversely affect competitive market structure, business conduct and economic performance. It therefore needs to assume the role of competition advocate, acting pro-actively to bring about Government policies that lower barriers to entry, that promote deregulation and trade liberalisation and that promote competition in the market place. The draft law seeks to bring about a direct relationship between competition advocacy and enforcement of competition law. One of the main objectives of competition advocacy is to foster conditions that lead to a more competitive market structure and business behaviour without the direct penalty loaded intervention of the Competition Commission of India (CCI). The High Level Committee has viewed successful competition advocacy in terms of the following (High Level Committee, 2000):

1. CCI must develop relationship with the Ministries and Departments of the Government, regulatory agencies and other bodies that formulate and administer policies affecting demand and supply positions in various markets. Such relationships will facilitate communication and a search for alternatives that are less harmful to competition and consumer welfare.

2. CCI should encourage debate on competition and promote a better and more informed economic decision-making.

3. Competition advocacy must be open and transparent to safeguard the integrity and capability of the CCI. When confidentiality is required, CCI should publish news releases explaining why.

4. Competition advocacy can be enhanced by the CCI establishing good media relations and explaining the role and importance of competition policy/law as an integral part of the Government's economic framework.

The draft law empowers tbe Government to make a reference to the CCI for its opinion on possible effects of a law or policy under formulation on competition. The CCI is required to give its opinion to the Government within 60 days. The opinion thus given will constitute an important input for the Government to finalise the law or policy.

In order to promote competition advocacy and create awareness about competition issues and also to accord training to the Chairperson and Members of the CCI and its officials, the draft law enjoins the establishment of a fund christened the *Competition Fund*. The Fund will be credited with the fees received for filing complaints and applications under the law, costs levied on the parties, grants and donations from the Central Government, State Governments etc. and the interest accrued thereon.

At first glance, the advocacy role of the CCI might seem somewhat of a luxury, especially for a developing country like India, which faces numerous competing priorities in implementing competition disciplines. However it cannot be gainsaid that competition policy advocacy has the potential for a significant impact upon general economic development. There is no doubt that competition advocacy involves certain expenditures to the CCI but this investment is bound to bear fruit in the long term by reducing the challenges to competition like in the case of a market foreclosure by a dominant entity. Recognising this, the draft law provides for statutory grounding of the advocacy role of the CCI, while at the same time providing for adequate resource support.

The four main compartments having been discussed above, a description of how the CCI is designed, follows, which is also an important part of the draft law.

Section O: Competition Commission of India

Administration and enforcement of the competition law requires an administrative set up. This administrative set up should be more proactive than reactive for the administration of the competition policy. This is not a mere law enforcement agency. This administrative set up should take a proactive stand to be specified and adopted to promote competition by not only proceeding against those who violate the provisions of the competition law, but also by proceeding against institutional arrangements and public policies that interfere with the fair and free functioning of the markets. It is in this context that the CCI in the draft law has been entrusted with the following two basic functions:

a) Administration and enforcement of competition law and competition policy to foster economic efficiency and consumer welfare.

b) Involvement proactively in Governmental policy formulation to ensure that markets remain fair, free, open, flexible and adaptable.

Specialised Courts

In many countries, enforcement of competition law is entrusted to the judiciary. The Competition Law Authority makes an application to the appropriate law courts seeking orders to implement its decisions. In most statutes, appeals against the Competition Law Authority's decisions may lie to the judicial courts at the highest or near highest level. The parties involved will have the right for preferring such appeals. In many competition laws, private parties and victims of prohibited trade practices have the right to institute competition cases before the Competition Law Authority or a law court.

In many developing countries and economies in transition, the judiciary therein may be inexperienced in dealing with free market problems. Such problems relating to free and fair trade and relating to restrictive and other prohibited trade practices like abuse of dominance, require a certain level of specialised knowledge in economics, trade and the relevant law for adjudication. Even if the judiciary has the reputation and exposure to commerce and market-related matters, the competition law administration will be better handled, if a specialised agency is set up for the purpose. With due respect to the judiciary around the world and in particular India, it needs to be underscored that, in the era of specialisation, competition law would be better administered and consumer welfare better subserved, if placed in the hands of a specialised agency.

The High Level Committee has recommended that for the administration and enforcement of competition law in India, a Specialised Court/Tribunal which can be christened "COMPETITION COMMISSION OF INDIA" may be established. The Competition Commission of India (CCI) will hear competition cases and also play the role of competition advocacy. The composition of the CCI needs to be tailored to the requirements of the competition policy and the competition law. *CCI should be empowered to adopt procedures and rules of evidence specifically suited to competition cases* (High Level Committee, 2000).

Principles Governing Competition Law and Authority

The High Level Committee has further listed the principles governing the law and the CCI (High Level Committee, 2000):

a) CCI should be a multi-member body comprised of eminent and erudite persons of integrity and objectivity from the fields of Judiciary, Economics, Law, International Trade, Commerce, Industry, Accountancy, Public Affairs and Administration.

b) CCI should be independent and insulated from political and budgetary controls of the Government. The independent functioning of the CCI members needs to be ensured by having appropriate provision for their removal, only with the concurrence of the Supreme Court.

c) CCI should separate the investigative, prosecutorial and adjudicative functions.

d) Tbe proceedings of CCI should be transparent, non-discriminatory and rule-bound.

e) CCI should have a positive advocacy role in shaping policies affecting competition.

To ensure the above, competition law should:

i) provide a system of checks and balances by ensuring due process of law with provisions for appeal and review.

ii) have extra-territorial reach.

iii) have punitive provisions for punishing the offenders besides other remedial methods (reformatory).

Investigation, Prosecntion, Adjudication, Mergers Commission and Competition Advocacy

Investigation and Prosecution

Prosecutorial wing has been separated from the investigative wing in the draft law. At the apex level of the investigative and prosecutorial wings however, there is only one official who has been designated as Director General. The Director General will not have suo motu powers of investigation. He will only look into the complaints received from the CCI and submit his findings to it. But the two wings under this functionary will be independent so that each wing is not burdened with the functions and responsibilities of the other wing. For instance, investigators will be solely responsible for making enquiries, for examining documents, for making investigations into complaints and for effecting interface with other investigative agencies of the Government including Ministries and Departments. The investigators will not be burdened with prosecuting the cases in the CCI after investigation, which means attending the Tribunal's hearings, constructing pleadings, counter pleadings etc. and advancing arguments before the Benches of the CCI. Likewise, the prosecuting agency will be solely responsible for conducting prosecutions in the CCI, which implies court work and attending the Tribunal's hearings.

The investigation staff need to be chosen from among those, who have expertise in investigation and who have deductive and exploratory skills and are known for their integrity and objectivity. They should not be drawn routinely from those working in the Department of Company Affairs. The prosecutorial wing, similarly, should comprise of advocates, chartered accountants, cost accountants and company secretaries who are well experienced in Competition Law matters and International Trade and who are known for their integrity and objectivity. The prosecutorial wing will not be a permanent staff based unit but will consist of a panel of prosecutors drawn as mentioned above. As and when cases come up for prosecution, the prosecutors will be assigned briefs. The Director General, by virtue of his unified command, can very well co-ordinate the functioning of the two wings.

Depending on the load, the High Level Committee has recommended that the Government should create Deputy Director Generals in all the cities where Benches of CCI are situated. They will investigate the cases referred to them from the regional Benches and submit their findings to the regional Benches direct without necessarily routing it through Director General at Headquarters (High Level Committee, 2000).

It is desirable to prepare guidance manuals spelling out the nature, scope and manner of investigation. By and large, the investigation staff should follow these manuals and any departure therefrom must have the prior approval of the Director General. This is to ensure that there are no "fishing and rowing" enquiries designed to threaten and harass corporates.

Adjudication

Central to effective implementation and enforcement of competition policy and competition law is an appropriate competent and effective adjudicative body, in the instant case, the Competition Commission of India. CCI, according to the draft law will be a quasi-judicial body with autonomy and administrative powers.

CCI will be a multi-member body with its Chairperson and Members chosen for their expertise, knowledge and experience in Judiciary, Economics, Law, International Trade, Commerce, Industry, Accountancy, Publie Affairs and Administration.

Each Bench will have a judicial member, as it will have the power of imposing sentences of imprisonment, in addition to levying fines.

Mergers Bench

For the cases of mergers, amalgamations etc. which need to be examined on the touchstone of competition, the draft law proposes to have a separate *Mergers Bench, which will be a part of the Competition Commission of India*. This is to ensure that there is no avoidable delay in dealing with such scrutiny, as delays can prevent bodies corporate from being competitive globally. An important rider

in the merger provisions as noted earlier is that, if the Mergers Bench does not finally decide against a merger within a stipulated period of ninety working days, it would be deemed that approval has been accorded.

Selection of Chairperson and Members of CCI

In order to ensure competent and effective implementation of competition policy and competition law, it is important and imperative to select suitable persons, suitability having been described in the earlier paragraphs. Stress has been made of the need for the CCI to be free of political control. While, it is practically difficult to eliminate political favouritism, it can be minimised to a great extent by resorting to what may be described as a "Collegium Selection Process". With this in view, the draft law suggests a Collegium, which will collectively undertake and discharge the task and responsibility of choosing a suitable person for the posts of Chairperson and Members of the CCI.

The Collegium for choosing the Chairperson and Members, according to the draft law, consists of the following:

1. Chief Justice of India or his nominee
2. Union Finance Minister
3. Concerned Minister (of the administrative Ministry dealing with CCI)
4. Governor of the Reserve Bank of India
5. Cabinet Secretary

Status of the Chairperson & Members of CCI

The Chairperson of CCI will hold the rank and be entitled to the pay and perquisites of a Judge of the Supreme Court. Similarly, the Members of the CCI will hold the rank and be entitled to the pay and perquisites of a Judge of the High Court. The term of the Chairperson and Members of CCI will be five years at a time. For the Chairperson, the maximum age limit is fixed at 70 years and for the Members, at 65 years. The

Chairperson of the CCI can be from any of the fields/disciplines listed earlier, as the competition law is a socio-economic legislation and is not just a judicial body to try adversarial cases. In other words, it is not mandatory that the Chairperson should be only from the judiciary. As the Chairperson should be one who has considerable exposure and knowledge in International Trade, Commerce and complicated issues relating to Trade, the net needs to be cast very wide in order that an appropriate person is selected for this post.

The President of India may remove the Chairperson and Members of the CCI from office only after an enquiry by a judge of the Supreme Court, on the ground of proven misbehaviour or incapacity. The President of India may also remove the Chairperson or Member from his office, if he/she

a) is adjudged an insolvent

b) is convicted of an offence involving moral turpitude

c) engages in any paid employment outside the duties of his/her office

d) is unfit to continue in office by reason of infirmity of body or mind.

A code of ethics has been suggested by the High Level Committee for observance by the Chairperson and the Members of the CCI on lines similar to the one that governs the higher judieiary (High Level Committee, 2000).

The trial before the CCI will be summary in nature. This is to help speedy decisions and justice. All evidence will be by way of affidavits unless, in exceptional cases, the CCI will like cross examination of the witnesses by the other side or will like to seek clarifications from those who have sworn the affidavits. By and large, the Code of Civil Procedure, 1908 will not be made applicable and the procedure to be followed may be made by the CCI itself through Regulations. CCI will have the power to co-opt experts, where it deems fit.

Section P: WTO fallout obligations and extra-territorial reach

The High Level Committee has suggested that competition policy/law needs to have necessary provisions and teeth to examine and adjudicate upon anti-competition practices that may accompany or follow developments arising out of the implementation of WTO Agreements. In particular, agreements relating to foreign investment, intellectual property rights, subsidies, countervailing duties, anti-dumping measures, sanitary and phytosanitary measures, technical barriers to trade and Government procurement need to be reckoned in the competition policy/law with a view to dealing with anti-competition practices. The competition law should have extra-territorial reach (High Level Committee, 2000).

Some anti-competitive practices may have extra-territorial origin or extra-territorial impact. For instance, some mergers and acquisitions may have significant effects beyond the borders of the country in which the merging parties are based or have production facilities. In such matters, the concept of "relevant market" for competition law purposes will come into play.

The applicability of domestic competition law to arrangements entered into outside a country's borders, so long as such conduct has significant effects in the country, is important to the control of anti-competitive practices. However, it needs to be noted that extra-territorial application of national laws entails some potential for conflicts between jurisdictions. International co-operation and, in particular, agreements incorporating principles of "positive comity" can be useful in minimising the actual extent of such conflicts between countries participating in such arrangements. A caveat which has justification is that, if a country wants to have extra-territorial reach of its competition law, it should allow other countries to have extra-territorial reach of their competition laws in its soil.

The draft law has provided for dealing with anti-competition practices that may surface on the implementation of some WTO agreements like, trips. It is however to be noted that WTO agreements are not mentioned in the law specifically. nonetheless, in the case of intellectual property rights during the implementation of an agreement if unreasonable conditions are attached they will fall in the ambit of the law. Intellectual property rights carry with them a bundle of rights accompanied by a set of reasonable conditions necessary for the purpose of protecting or exploiting such rights. These will not attract the law but any unreasonable conditions will.

By and large, however, when the law was drafted it was felt that cluttering of the law with a large number of provisions to deal with WTO fallout obligations might not be necessary at the present point of time, when the WTO regime is yet to unfold itself fully.

Section Q: New wine in a new bottle

After the draft law was placed on the web-site and came into public domain, a question asked often is whether it is not the old law itself in substance although not in form. A clear answer to this question is in the title of this section. The draft law is a new wine in a new bottle. The differences between the old law (extant law, namely the MRTP Act) and the new draft law may perhaps be best captured in the form of a table displayed below:

	MRTP Act, 1969	New Draft Competition Law
1	Based on the pre-reforms scenario	Based on the post-reforms scenario
2	Based on size as a factor	Based on structure as a factor
3	Competition offences implicit or not Defined	Competition offences explicit and defined
4	Complex in arrangement and language	Simple in arrangement and language and easily comprehensible
5	14 *per se* offences negating the principles of natural justice	4 *per se* offences, all the rest subjected to *rule of reason.*
6	Frowns upon dominance	Frowns upon abuse of dominance
7	Registration of agreements compulsory	No requirement of registration of agreements
8	No combinations regulation	Combinations regulated beyond a high threshold limit.
9	CCI appointed by the Government	CCI selected by a Collegium
10	Very little administrative and financial autonomy for the CCI	Relatively more autonomy for the CCI
11	No competition advocacy role for the CCI	CCI has competition advocacy role
12	No penalties for offences	Penalties for offences
13	Reactive and rigid	Proactive and flexible
14	Unfair trade practices covered	Unfair trade practices omitted (consumer fora will deal with them)

The draft law is therefore a new wine in a new bottle. Wine gets better as it ages. The extant MRTP Act 1969 has aged for more than three decades and has given birth to the draft law in line with the changed and changing economic scenario in India and rest of the world and in line with the current economic thinking comprising liberalisation, privatisation and globalisation.

Section R: Concerns and reservations on draft law

After the draft law was placed on the web-site, a number of suggestions and comments have been made by different Chambers of Industry and Commerce, Professional Institutes, Consumer Groups, different Ministries of the Government, Academicians and Experts. A spate of conferences and seminars on the draft law and in general "competition" has been held which too have thrown up concerns and suggestions.[9] They are discussed below under separate captions for convenience.

Combinations Regulation

Most of the reservations and concerns relate to the provisions on combinations regulation. Earlier, in this monograph the rationale for combinations regulation or mergers regulation has been spelt out. Essentially the following dimensions will inform combinations regulation:

1. Indian corporate sector requires consolidation with a view to bringing about reasonably sized companies and players to effectively compete in the domestic and international market. In other words, mergers will not be discouraged unless they are anti-competitive in nature and in particular are detrimental to consumer interest.

2. The threshold limits asset-wise and turnover-wise will be high enough so that most mergers will be outside the ambit of combinations regulation (the suggestions to further enhance the threshold limits in the draft law are under consideration of the Government).

9. The author has attended a large number of such conferences and seminars, securing the benefit of discussions, suggestions and comments from the participants therein.

3. Beyond the threshold limits there is a mandatory pre-merger notification obligation by the parties. (the suggestion to make this a voluntary obligation is under consideration of the Government)
4. The draft law defines combinations to include "joint ventures". Suggestions have been received to exclude them and they are under consideration by the Government.
5. The "group" concept is included in the provisions relating to combinations regulation. Here again there is a suggestion to exclude it on the ground that a possible and likely bureaucratic approach may lead to connecting unconnected undertakings. This may result in derailing many mergers on the sword of an undertaking being perceived as belonging to some group. This suggestion is also receiving attention.
6. The 90 working days limit fixed for the adjudication exercise by the CCI, with checks on calling for further information by the CCI and on receiving the same from the parties is worthy of note. Furthermore the draft law provides for a deemed approval in case the CCI does not give its verdict within the said 90 working days limit.
7. CCI in its adjudicatory effort is mandated to keep in view the benefits of a combination as to whether they outweigh its adverse impact on competition.
8. There is a suggestion under consideration that a detailed Mergers Manual will be prepared as a guidance for the CCI for the Industry and Service renderers.

Super Regulator

Concern has been voiced that CCI will become a Super Regulator in view of Section 19 of the draft law which empowers any statutory Authority regulating any utility or service to make a reference to the CCI, if an issue is raised that any decision of that Authority is or would be contrary to the provisions of the draft law. As the draft law stands, the statutory Authority is mandated to make a reference to

the CCI, if an issue with a competition perspective is raised by any party. A suggestion has been made that there need not be any such mandate but it should be left to the discretion of the statutory Authority to make a reference to the CCI, if it considers fit to do so. This suggestion is also receiving attention. What is important is that the opinion of the CCI is not binding on the statutory Authority and this should take care of the concern expressed above.

Per se illegality

An argument has been advanced that in the interest of principles of natural justice there should be no offence under the *per se* illegal category. No doubt, the principles of natural justice constitute the core of justice, fair play and equality of opportunity to the contesting parties. In an offence, which is declared *per se* illegal, the offending party has no opportunity to rebut the said presumption, as the legal presumption shuts it out from even making out a case that it has not trenched competition or for that matter any provision of competition law. But a perusal of competition laws across the world will show that, by and large, pernicious offences prejudicial to competition and consumer interest are by a legal fiction declared *per se* illegal. In the extant MRTP Act, 14 offences stand declared as *per se* illegal. The draft law declares only 4 offences as *per se* illegal. All other offences have to be adjudicated on the *rule of reason* basis.

CCI will be a behemoth

The title suggests that there is a reservation among some people that the CCI will be a new monster and that the corporate sector will have to bow down to one more regulator in the country. There is a section in the draft law, which says that its provisions shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. It has to be emphasised that the draft law is not another law supplementing the existing MRTP Act. On the other hand, it will supplant the MRTP Act. As explained in the table supra, highlighting the differences between the MRTP Act and draft law, the new law will be simpler, more flexible and more liberal than its would be predecessor.

CCI likely to be bureaucratic

Some industrialists and experts cite the past experiences in India on the nature and approach of regulators. They fear that retired judges and civil servants may be appointed to the CCI with the result they will bring their mindset and bureaucratic approach ingrained in them over their service along more than three decades and thus render the CCI one more bureaucratic body not in tune with the modern times. Tbere cannot be any answer to this fear except to underline the collegium process of selection of the Chairperson and Members and to hope that this process will throw up appropriate persons with good grounding in competition related matters to man the CCI. After all from the same Indian society have sprung judges, civil servants, lawyers, chartered accountants and economists. It would be taking a pessimistic view, if the suggested collegium process is condemned even before it is born. Furthermore, proper training in and exposure to competition and related matters for the Chairperson, Members and the officers of the CCI should be able to obviate any bureaucratic approach and mindset on the part of the CCI, as apprehended.

Injury to domestic industries

While the need for a competition policy including competition law as a complement to and reinforcement for trade policy and trade law is generally welcomed by the developed and the developing countries, there are many who have voiced their apprehensions whether the introduction of the competition policy and the competition law may visit tbe developing countries with *consequences of an adverse nature like injury to the domestic industry, producers and suppliers.* Representatives of Chambers of Commerce, the Bar Associations and experts, with whom the High Level Committee (2000) had discussions, echoed the apprehension. They contend that while entry barriers need to be removed, they should be done *over a period of time and not suddenly*. In removing the barriers, they suggest that the Government should as far as possible accurately determine the supply and demand of products and services in the relevant market and also identify the existence of competition. Industrial policies, according

to them, should be *harmonised* with competition policies, in order *to strengthen competitiveness.* They caution that tangible effects of economic development should become noticeable before competition law and policy are implemented aggressively. They advise that it is desirable *to give sufficient time to educate and persuade* the businesses and consumers of the need for competition in the market, particularly international competition. Strengthening the enforcement of competition laws, after going through such process of public education, will help to successfully establish a competition regime.

Brusick (1997) suggests that discussions on competition "should take into account the need for specific treatment for developing countries……"

While there may be some force in the concern voiced by the domestic industries, it will be perhaps a short-sighted approach to protect domestic industries merely to help them survive against international competition.

While competition policy/law is a desirable objective and instrument for subserving consumer interest and consumer welfare, there is a need to bring about this competition environment gradually than in one stroke. In other words, till the domestic producers and suppliers get educated and exposed to competition and thereby address themselves towards enhanced efficiency, economies of scale and subserving of the consumer interest (in the broadest sense of the term), the competition policy/law should be *gradually* strengthened and implemented. For this purpose, *it is desirable to have a transition period during which the implementation of competition policy/law is steadily but in a step by step manner strengthened, in its application to the market.*

It is also essential that in areas like food security and defence, the Government should have enough flexibility to apply competition policy/law in a limited manner. This is grounded on the fact that in India, there is a large section of vulnerable people who have to be provided food and other essential commodities for their survival by Governmental agencies. Such sections of people should not be placed at the risk of competitive forces in action as the net result may be no food and thus no survival. It may be argued that the public distribution system is inefficient, corrupt and some times does not permit reaching every member of the weak and vulnerable section of society. But yet, despite the deficiencies in the system, it has served a purpose and cannot be eliminated from the policy package in the name of competition. What this implies is that *competition policy/law should not only be phased in its introduction and in its implementation but also inhere adequate flexibility to cater to the specific needs of the country*. Defence is one such need.

An example in support of the suggested flexibility is the welfare need of the small-scale industrial sector. While one could accept the theory that inefficient firms even in the small scale industrial sector should exit from tbe market, they should be given an opportunity to face the challenge of competition and improve their performance and efficiency over a transition period after which no special consideration need be given to them. To put them on notice and to give them this transition period is a desirable caveat to govern competition policy/law. This recommendation is made despite the fact that this tantamounts to some dilution of the spirit and concept of competition, but yet unbridled competition may prove disastrous in India, wherein certain sections of people and sectors of industry, need the umbrella of Governmental protection. Such protection, *in selected areas and sectors should be operational for a limited span of time of say 7 to 10 years, which may be called the transition period.*

Even this suggested flexibility and transition period should be applied only if serious adverse effects are noticed in the domestic economy (resulting from application of competition policy/law). Otherwise the *enforcement of competition policy/law should be immediate and effective.*

The draft law provides therefore for the Government to bring into force its different provisions on different dates by a notification. Furthermore, it empowers the Central Government by notification to exempt from the application of the law or any part thereof for such period, as it deems fit,

(a) any class of enterprises in the interest of national security or public interest;

(b) any practice or agreement under any treaty or International agreement; and

(c) any enterprise performing a sovereign function on behalf of the Government.

The aforesaid provisions in the draft law should enable the Government to take care of the country's goals, objectives and needs. The draft law is thus very flexible.

Draft law is draconian

The criticism that the draft law is draconian stems from a misconception that this is yet another law in addition to the MRTP Act. It also stems from another misconception that certain provisions of the MRTP Act which were omitted by the 1991 amendments to it are sought to be reintroduced by the draft law.

It has been stated earlier that the draft law supplants the MRTP Act and does not supplement it. The draft law provides for repealing of the MRTP Act and dissolution of the MRTP Commission. Thus a new law will take the place of the existing law.

The 1991 amendments to the MRTP Act deleted certain provisions thereof relating to expansion of undertakings or setting up of new undertakings by companies or entities beyond a particular size (Rs. 100 crores). These do not find place in the draft law. Thus the criticism of a backdoor entry of those omitted provisions through the enactment of a new law has absolutely no basis. Having said this, it requires to be noted that combinations (mergers) regulation which were in the MRTP Act prior to the 1991 amendments now figures in the new draft law. The justification for the inclusion has already been given earlier in this monograph. What now figures in the draft law is a considerably diluted version of the earlier merger control provisions in the MRTP Act prior to the 1991 amendments. If the suggestion that pre-merger notification should be voluntary is accepted by the Government, it will constitute further dilution of the control provisions.

Generally the MRTP Act is regarded as draconian. The new draft law is a liberal, flexible and easy to comprehend legislation. It can hardly be called draconian. If the new law is not allowed to be born, the country has to live with the present law, the MRTP Act. Opting for the new law can only lessen the evil and not enhance it.

Section S: Effective enforcement

The gains sought through competition law can only be realised with effective enforcement. Weak enforcement of competition law is perhaps worse than the absence of competition law. Weak enforcement often reflects a number of factors such as inadequate funding of the enforcement authority. The Government should provide the required infrastructure and funds to make the CCI an effective Tribunal to prevent, if not eliminate anti-competition practices and also to play its role of competition advocacy.

Section T: Opening The Lid

India is on the anvil of giving birth to a modern competition law to suit its specific needs goals and aspirations. In other words, it is sought to be designed to enfold the trade and the market with competition ambience and to subserve consumer interest and consumer welfare. A pre-condition for the successful permeation of competition ambience is a strong political will.

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