Essays on Competition Law and Policy

by

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This is a compilation of articles written by Mr. Vinod Dhall, Member and acting Chairman, Competition Commission of India in the Indian financial press and professional journals with the view to increase public awareness and knowledge of Competition Law and Policy in India.

These are the unedited versions of the published articles. The articles are short pieces keeping in mind the limitations of space in the press.

The views expressed here are personal and do not necessarily reflect the views of the Competition Commission of India.

Readers’ comments are welcome.

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# Essays on Competition Law and Policy by Mr. Vinod Dhall

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Competition Law in India*

For years after independence, India followed the strategy of planned economic development. The broad policy objectives were achieving self-reliance and promoting social justice. Self-reliance, over time came to mean import substitution. There were government-imposed controls over entry and exit in the market. Plant and firm size were subject to statutory limitations, and imports and foreign investment were restricted. Government-owned businesses enjoyed protections and preferences and dominated the “commanding heights of the economy” in various sectors. These policies were reflected in many of the state’s economic policies, including its industrial, trade, labor, exchange controls, financial sector, and several other policies. In this system, there was little place for competition policy.

While the above economic strategy helped in many ways, including the growth of basic industries, in the 1980s it began to be realized that it was severely constraining entrepreneurial growth. Policy reform followed more particularly since 1991 with the liberalization of industrial and trade policies, foreign investment rules, exchange rates, capital controls, reducing the reservations for the public sector, and in many other areas.

The new economic policies progressively widened the space for market forces and reduced the role for government in business. It was recognised that a new competition law was also called for because the existing Monopolies & Restrictive Trade Practices Act, 1969 (MRTP Act) had become obsolete in certain respects and there was a need to shift the focus from curbing monopolies to promoting competition. A high level committee was appointed in 1999 to suggest a modern competition law in line with international developments to suit Indian conditions. The committee recommended enactment of a new competition law, called the Competition Act, and the establishment of a competition authority, the Competition Commission of India, along with the repealing of the MRTP Act and the winding up of the MRTP Commission. It also recommended further reforms in government policies as the foundation over which the edifice of the competition policy and law would be built.

The Competition Act, 2002 came into existence in January 2003 and the

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Competition Commission of India was established in October 2003. The Act states that "it shall be the duty of the Commission to eliminate practices having adverse effect on competition, to promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India." Thus, it gives the Commission a heavy mandate.

The Act prohibits anticompetitive agreements (section 3), abuse of dominant position (section 4) and regulates mergers, amalgamations and acquisitions (sections 5 & 6). The above provisions and several connected provisions of the Act have not yet been brought into force. This was due to a writ petition filed before the Supreme Court of India challenging certain provisions of the Act. After the disposal of the petition by the Supreme Court, the Government introduced certain amendments to the Act in the Competition (Amendment) Bill, 2006, which is currently under consideration in Parliament. As such, at this stage we do not have the benefit of case law which could help in interpreting or explaining the provisions of the Act. While some assistance could be had from foreign laws, ultimately it is the language of the Indian law that has to be construed and applied.

This article will describe and discuss the key provisions of the Competition Act.

**Anticompetitive Agreements**

Section 3 of the Act prohibits any agreement with respect to production, supply, distribution, storage, and acquisition or control of goods or services which causes or is likely to cause an appreciable adverse effect on competition within India. Under Section 3, any such agreement is considered void. The term "agreement" is broadly defined and includes any arrangement, understanding or concerted action, whether or not it is formal, in writing or intended to be enforceable by legal proceedings. Thus, the agreement does not necessarily have to be a formal one and may include even what is commonly called a “gentlemen's agreement.” This definition is similar to the broad meaning given to “agreement" in several other competition jurisdictions.

The term "appreciable adverse effect on competition" used in section 3, is not defined in the Act. However, the Act specifies a number of factors
which the Commission must take into account when determining whether an agreement has an appreciable adverse effect on competition, including whether the agreement creates barriers or forecloses competition by creating impediments to entry, or drives existing competitors out of the market. The Commission also must take into account the possible procompetitive effects of an agreement, viz, benefits to consumers, improvements in the production or distribution of goods or the provision of services, and the promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services. (Section 19(3)) Thus, a balanced assessment is required to be done of the beneficial and harmful effects on competition. This balancing approach is similar to the "rule of reason" that prevails in the competition laws of many countries.

The Competition Act does not use the words horizontal or vertical agreements. However, it treats more harshly certain kinds of horizontal agreements, including cartels, that: (i) directly or indirectly determine purchase or sales prices; (ii) limit or control production, supply, markets, technical development, investment or the provision of services; (iii) share the market or source of production or provision of services by way of allocation of the geographical area of the market, type of goods or services, or number of customers in the market or any other similar way; and (iv) directly or indirectly result in bid rigging or collusive bidding. Any such agreement "shall be presumed" to have an appreciable adverse effect on competition. (Section 3(3)). This approach is similar, but not necessarily identical to, the per se rule in the United States.

The principle of “shall be presumed” has been explained by the courts in India in numerous cases. In one such case, the court observed that “the words 'shall presume' have been used in the Indian judicial lore for over a century to convey that they lay down a rebuttable presumption in respect of matters with reference to which they are used and not laying down a rule of conclusive proof.

The stricter treatment given to certain horizontal agreements in section 3(3) also covers cartels, which are defined in the Act. The definition is inclusive and broad but is confined to collusion among producers, sellers, distributors, traders, or service providers. All agreements, other than those listed in section 3(3), are subject to the rule of reason analysis described in section 3(1), rather than to
the “shall be presumed rule.”. This includes five types of vertical agreements listed in section 3 (4): tying arrangements, exclusive supply agreements, exclusive distribution agreements, refusals to deal and resale price maintenance. Efficiency enhancing joint ventures are also governed by the more lenient rule of reason standard (Proviso to Section 3(3)) rather than the “shall be presumed” rule of section 3(3).

The Act gives due recognition to intellectual property rights, stating that the prohibition against anticompetitive agreements shall not restrict the right of any person to restrain any infringement of, or to impose reasonable conditions as may be necessary for protecting, any rights under the Copyright Act 1957, the Patents Act 1970 and certain other laws listed in section 3(5). Thus any agreement for the purpose of restraining infringement of such Intellectual Property Rights or for imposing reasonable conditions for protecting such rights shall not be subject to the prohibition against anticompetitive agreements. Similarly, exports enjoy exemptions from such prohibition, which shall not apply to the right of any person to export goods from India to the extent to which the agreement relates exclusively to the export of goods or services. (Section 3(5)).

**Abuse of Dominant Position**

The Act does not condemn firms for achieving a dominant position, only the abuse of that position. Dominant position is defined as "a position of strength, enjoyed by an enterprise in the relevant market in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or ii) affect its competitors or consumers or the relevant market in its favour.” (Explanation (a) below Section 4(c)). The definition is similar to those in the competition laws of several other jurisdictions, such as the European Union and the United Kingdom.

The determination of dominant position requires first a determination of the relevant market in which dominance is alleged. Under the Act, the relevant market may be determined with reference to the relevant geographic market or the relevant product market or both. The Act also specifies that the relevant geographic market is determined by considering the following factors: regulatory trade barriers;, local specification requirements;, national procurement policies;, adequate distribution
facilities;, transport costs; language; consumer preferences;, and the need for secure or regular supplies or rapid after-sales services. (Section 19(6)) The relevant product market is to be determined by considering: physical characteristics or end-use of goods; the price of goods or service; consumer preferences; exclusion of in-house production; the existence of specialized producers; and the classification of industrial products. (Section 19(7)). The possibility of exclusion of in-house (i.e. captive) production is also to be considered as a factor.

After the relevant market has been defined, the Act identifies a wide variety of factors that should be considered in determining whether a firm is dominant, including (i) market share of the enterprise; (ii) size and resources of the enterprise; (iii) size and importance of the competitors, (iv) economic power of the enterprise, including commercial advantages over competitors; (v) vertical integration of the enterprises or the sale or service network of such enterprises; (vi) dependence of consumers on the enterprise; (vii) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise; (viii) entry barriers, including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers; (ix) countervailing buying power; (x) market structure, and size of market; (xi) social obligations and social costs; (xii) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition; and (xiii) any other factor which the Commission may consider relevant. (Section 19(4)). Thus the Act prescribes a large number of economic, social, and other factors which should go into the determination of the dominant position. Several of these factors are similar to those considered in EU law and which have been elaborated by the courts in Hoffmann -La Roche,⁴ United Brands,⁵ and Akzo Chemie.⁶

For determining whether the enterprise has abused its dominant position, the Act gives an exhaustive, and not merely illustrative, list of abusive activities: (i) directly or indirectly imposing an unfair or discriminatory condition or price (including predatory pricing); (ii) limiting or restricting production of goods or provision of services or market or technical or scientific development; (iii) denying market access; (iv) imposing supplementary obligations having no connection with the subject of the contract; (v) or using dominance in one market to enter into or protect

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another relevant market. The abusive activities covered therefore include both exploitative abuses, such as unfair or discriminatory conditions or prices, as well as exclusionary abuses, such as denial of market access. The listed abuses are similar to those in Article 82 of the EC Treaty of Rome and reiterated by the courts in such cases as Hoffmann-LaRoche, United Brands, Tetra Pak, and Akzo Chemie.

The Act specifically lists predatory pricing as an abuse, and defines it as “the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.” The Commission is in the process of preparing the regulations that will set out how the “cost,” below which the price could be predatory, is to be determined.

Another abuse listed in the Act is denial of market access, which is usually most serious in the case of essential facilities. However, the Act does not specifically mention the essential facilities doctrine, which has been invoked by the courts in the European Union in a number of cases, such as Commercial Solvents and MCI, although in Trinko, the U.S. Supreme Court questioned the scope and viability of the doctrine.

There is no reference to "appreciable adverse effect on competition" in the "abuse of dominant position" section of the Act. This suggests that once it has been determined that an enterprise enjoys a dominant position (in the relevant market) and that it has engaged in any of the activities listed in section 4(2), the conclusion follows that it amounts to an abuse of a dominant position without a finding that it causes or is likely to cause an “appreciable adverse effect on competition.”

**Regulation of Combinations**

The Act includes provisions for the regulation of combinations, i.e., "merger control." A combination under the Act includes a merger or amalgamation, acquisition or acquisition of control. (Section 5) However, the Act sets a threshold below which a merger, acquisition or acquiring of control is not regarded as a combination and is therefore outside the merger regime of the Act. The threshold is fairly high and is defined in terms of assets or turnover. The threshold varies according to whether the combination is by an enterprise or by a group, and also varies according to whether...
enterprise or group has assets or turnover only in India or has these worldwide.

Parties are not required to mandatorily notify their transaction to the Commission. However, if notification is given, the Commission must review the combination within tight time limits or else the combination is deemed to have been approved. (Section 31(11)). The Commission also has the authority to review the combination at any time within one year after it has taken effect. Thus, an enterprise may have to consider seriously whether it would like to pre-notify the combination or would instead go ahead without pre-notification and take the risk of the combination being reviewed later by the Commission.

The Act prohibits a combination having “*appreciable adverse effect on competition within the relevant market in India.*” Therefore, the first step in the analysis of a combination is to determine the relevant market in India. This exercise is similar to that for determining the relevant market in the case of abuse of dominant position except that this analysis is forward looking and the main concern is whether the merger will cause the prices to rise above the prevailing level.

Once the relevant market has been defined, it would be necessary to determine whether the combination causes or is likely to cause an appreciable adverse effect in that relevant market. The factors to be considered are listed in considerable detail in the Act (Section 20(4): (i) actual and potential import competition, (ii) barriers to entry, (iii) the degree of market concentration; (iv) degree of countervailing power in the market; (v) the likelihood that the combination would allow the parties to significantly and sustainably increase prices or profit margins, (vi) the extent of likely effective competition (vii) the extent to which substitutes are available or likely to be available in the market; (viii) the market share, in the relevant market, of the persons or enterprises in a combination, individually and as a combination (ix) the likelihood that the combination would result in the removal of a vigorous and effective competitor in the market; (x) the nature and extent of vertical integration in the market; The analysis also includes consideration of whether one of the firms in the combination is a failing business and the nature and extent of innovation. In addition, the Commission must consider the possible benefits that might flow from the combination that would contribute to economic development and whether
the benefits outweigh the adverse impact of the combination, if any. These factors are an indication of a rule of reason approach.

The procedures and time limits for a Commission inquiry into a combination are set forth in detail in the Act. (Section 29 & 31). It also provides that the Commission may approve a combination, deny approval or approve it with modifications.

**Remedies**

The Act gives the Commission a wide range of remedies in case of an anticompetitive agreement or abuse of dominant position. The Commission may issue a "cease and desist" order and impose a penalty not exceeding 10 percent of the average turnover during the preceding three years. In the case of a cartel, the penalty could be 10 percent of the turnover or three times the amount of profit derived from the cartel agreement, whichever is higher. Further, the Commission can recommend to the government that the dominant enterprise be broken-up. It can also award compensation to any person who has suffered loss or damage as a result of a violation of the Act concerning anticompetitive agreements, abuse of dominant position, or regulation of combinations. The Commission may also give other orders or directions to the enterprise including payment of costs if any, and finally the Commission may also pass such other orders as it may deem fit which might include orders to entities other than the offending enterprise (Sections 27 & 34). No civil court has jurisdiction to entertain any suit or proceeding with respect to a matter which the Competition Commission is authorized to determine and no injunction can be granted by any court or other authority with respect to any action taken pursuant to any power conferred by or under the Act. (Section 61) Hence, no party can approach a civil court to allege a violation of the act or to seek relief thereunder.

In the case of a violation by a company, any person who, at the time of the violation, was in charge of the company, is liable to be proceeded against and punished unless that person can show that the violation was committed without his knowledge or that he had exercised all due diligence to prevent the violation (Section 48). Similarly every director, manager, secretary, or other officer of the company may be held liable if it is proved that the violation took place with his consent or connivance or is attributable to his
negligence. The Act makes no distinction between the penalty that can be imposed on a company and on an individual, unlike the laws in several other countries.

To enable effective investigation against cartels, the Act incorporates a leniency program (Section 46). If a party to a cartel makes a full and true disclosure concerning the alleged violations and such disclosure is vital, the party may be given a lesser penalty. Under the Act (as currently written), this leniency would be available only to the first party making such a disclosure, which must be made before the proceedings have been instituted or any investigation has been directed. Possible amendments to the Act could broaden the scope of the leniency program.

**Jurisdiction**

The Commission can take action with respect to conduct that has occurred outside India and with respect to parties located outside India provided that the conduct had an appreciable adverse effect on competition in the relevant market in India. (Section 32) This provision is similar to the “effects doctrine” in most other jurisdictions. In support of this provision, the Commission has the power to enter into a memorandum or arrangement with any agency of any foreign country with the prior approval of the Central Government. (Section 18)

The Commission’s jurisdiction extends to all sectors of the economy including sectors regulated by sector specific laws, such as telecommunications or electricity or petroleum. Thus, the Commission can inquire into an anticompetitive activity or combination in any such sector. The Act however contains a provision for consultation between the Commission and a statutory authority (including a sector regulator).

The Act covers enterprises irrespective of their ownership. Thus, private enterprises as well as government owned enterprises, and even government departments are covered by the Act. However, it excludes the sovereign functions of the government as well as activities carried out by the departments of the Central Government dealing with atomic energy, currency, defense, and space. (Section 2(h)) The Act does not elaborate on what constitutes sovereign functions, but there is a substantial body of case law in India on this subject. Functions such as
maintenance of law and order, defense of the country and administration of justice have been regarded as sovereign functions.

The Act also allows the Central Government, not the Commission, to notify three categories of exemptions, these being any class of enterprises in the interest of security of the state or public interest, any contracts or agreements arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention, and any enterprise that performs a sovereign function.

**Confidentiality**

The Act provides to enterprises the protection of confidentiality; it states that no information relating to any enterprise shall be disclosed without the prior written permission of the enterprise, except in compliance with or for the purposes of this Act or for any other law for the time being in force. (Section 57). Thus the law recognizes that information obtained by the Commission could be commercially sensitive and its disclosure could result in harm to the enterprise.

**Competition Advocacy**

The mandate given to the Commission includes competition advocacy. (Section 49) It provides that in formulating a policy on competition (including review of laws related to competition), the government may make a reference to the Commission for its opinion, though the opinion is not binding on government. Further, the Act requires that the Commission “shall take suitable measures, as may be prescribed, for the promotion of competition advocacy, creating awareness and imparting training about the competition issues.” In a country where the competition culture is relatively weak, competition advocacy acquires a great significance in creating general awareness about the benefits of competition and the role of competition law, as well as in influencing government policy in a more procompetition direction.

**Present Status of the Competition Act and the Competition Commission**

Although the Competition Commission of India was established in October, 2003 it has had only one Member and a small complement of staff. As noted above, the provisions of the Act which relate to enforcement work...
i.e., prohibition of anticompetitive agreements, prohibition of abuse of dominant position and regulation of combinations have not yet been notified by the Government and have not come into force. The Competition (Amendment) Bill 2006 introduced by Government is presently being considered by Parliament.

The Amendment Bill seeks no major changes in the substantive provisions of the Act relating to prohibition of anticompetitive agreements, prohibition of abuse of dominant position, and regulation of combinations. The main changes sought to be made by the Competition (Amendment) Bill are: (i) under section 21, a statutory authority (including a sector regulator) will be able to *suo motu* make a reference to the Commission for its opinion and not only if an issue is raised by a party to a proceeding before the authority; further, after receiving the opinion of the Commission, the statutory authority, while giving its finding, must record the reasons for the same, and not merely pass such order “as it deems fit”; (ii) under section 28, the Commission itself would have the power to direct the break-up of a dominant enterprise, instead of merely sending a recommendation to this effect to the Central Government under section 27; (iii) under section 42, the leniency treatment would not be confined to only the first party to a cartel providing disclosure, but would be available to subsequent parties as well, and the stage until which such disclosure can be made will be extended to the point when the investigation report has been received from the Director General; (iv) under section 49, even a State Government will be able to make a reference to the Commission for its opinion on a policy on competition.

Further, the Bill provides for the establishment of a Competition Appellate Tribunal to hear and dispose appeals against any direction issued or decision made or order passed by the Commission and to decide on claims for compensation that may arise from the findings of the Commission; compensation claims would not be decided by the Commission.

The Amendment Bill was referred to the Parliamentary Standing Committee on Finance for examination and report thereon. The Committee, after due consideration, presented its report on the Amendment Bill in December 2006, in which it has made a number of observations and recommendations. The main observations or recommendations of the Committee concerning those provisions of the Act discussed above in this article are: (i) section 6(2) should provide for mandatory pre-notification of combinations instead of the pre-notification
being optional; (ii) section 46 relating to the leniency provision may be amended in such a way as to guarantee complete amnesty to the first firm that gives enough evidence to commence an investigation by the Commission and reduced penalties for those giving useful information subsequently, provided they continue to collaborate in investigations against the remaining cartelists; (iii) in the proposed amendments relating to the setting up of the Competition Appellate Tribunal it should be ensured that a party is able to approach the Appellate Tribunal (for compensation) only after the Commission has determined in a proceeding before it that a violation of the Act has taken place. With respect to section 49 relating to competition advocacy, the Committee expect that the Commission would make sincere efforts to use its expertise to pinpoint policies of the Government which are inconsistent with the principles of competition. The report of the Committee is to be considered by the Government, which may then move notices for such amendments as it may consider appropriate in this Bill, which would thereafter be taken up for consideration by the Parliament.

After it was established, the Commission has been undertaking work relating to competition advocacy and institutional building. In the advocacy work, the Commission has undertaken awareness programs with industry chambers and other bodies and has interacted or intervened with the Central and State Governments relating to competition issues in the Government’s policies and laws. The Commission has also brought out competition advocacy literature for wide distribution. It has initiated competition assessment studies through reputed institutions in various areas of the economy. The Commission has arranged training programs for its staff and other stakeholders within and outside the country. It has been interacting with academic institutions for inclusion of study of competition policy and law in the curriculum for law, economics, and management courses. It has also prepared draft regulations for the conduct of its business and undertaken, with the help of experts, preparation of “reference literature” on the enforcement provisions of the Act. It is expected that the Commission’s enforcement work will begin once the amendments to the Act have been carried out and the concerned sections of the Act have been notified and brought into force.

For a more detailed treatment of the subject, readers may see the chapter on the Indian Competition Act in Competition Law Today, Vinod Dhall ed. (Oxford University Press India, New Delhi, forthcoming 2007).

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Two recent books have underlined the power of competition in driving economic growth and consumer prosperity. William Lewis, in ‘The Power of Productivity’ and economist Paul London in ‘The Competition Solution’ in carefully researched analyses of the resurgent prosperity of the late 1990s in the United States, have concluded that more than technology or tax cuts or budget policies, more than any other factor, the element that has counted the most has been competition. Competitive pressures have helped suppress inflation, raise living standards, and pushed manufacturing productivity up by 4% a year. It has brought down real air fares, telephone rates and lot of other costs. Jobs lost in one industry were more than compensated by jobs created in more efficient industries.

An Australian Productivity Commission study estimates that average Australian household annual income was A$ 7,000 higher on account of competition policy. Nicholas and Scarpetta (2001) have argued that pro-competition policy in New Zealand and the UK added around 2.5% to their employment rate over 1978-1998.

India has a history of competitive markets. However, the license and control regime, which continued beyond when it might have been justified, severely stunted economic development. The economic crisis that confronted the country led to the reforms beginning 1991. The liberalization and competition that followed have been reflected in higher GDP growth, expansion of employment opportunities, and a dramatic rise in the availability and choice of goods and services for the consumer; the benefits have been more visible in sectors such as airlines, telecom, automobiles, consumer electronics and durables. Competition has been helping the Indian consumer and industry in ways that could not have been visualized before.

However, a market economy has its own drawbacks; and governments have legitimate social concerns, especially for the poor and the deprived. Market failures do take place, and unscrupulous players can undermine the benefits through anti-competitive practices. Lamenting the propensity of businesses to exploit the market for individual gain, Adam Smith wrote of the “wretched spirit of monopoly” in which “the oppression of the poor must establish the monopoly of the rich”. The potential for market failure or abuse has led almost a hundred countries to enact modern competition law.

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laws and to set up competition authorities to watch the market practices in this area.

Anti-competitive practices include formation of cartels where enterprises collude to determine prices or carve up markets, and abuse of dominance through predatory pricing or erection of entry barriers. The history of the free markets is replete with such abuses. The famous vitamins cartel continued for almost a decade till it was detected and penalized in excess of US $ 1 billion in the US alone. The global graphite electrodes cartel operated for about five years increasing prices by about 60%; in the US, six corporations were fined over US $ 300 million. The alleged abuse of its dominant position by Microsoft has embroiled it in anti-trust litigation for years. Recently, in the EU, it was subjected to a stiff penalty of Euro 497 million. Developing countries are often hit hard by such market manipulation originating in big western economies.

India has not been free of suspicions or allegations of cartelization or abuse of dominance in major industries. Some months back, a press report suggested that numerous companies producing Copper-T (a birth control device) including, allegedly, a public sector company formed a cartel in supply of the item to Government. These instances underline the early need for a functional competition authority.

The earliest attempts, starting in the 1890s, to underpin the competitive market through legal measures were in Canada and the U.S. In the US, the Sherman Act, Clayton Act and the Federal Trade Commission Act, collectively prohibited conspiracies in restraint of trade, monopolization, and mergers and acquisitions which would ‘substantially lessen competition or tend to create a monopoly in any line of business’. The Federal Trade Commission (along with the Department of Justice) has made a significant contribution towards ensuring competitive markets in the US. In the European Union, competition is enshrined in the very Treaty of Rome, akin to a ‘constitution’ for the European Union; Articles 85 and 86 have as their objective that the European market (while being integrated into a common economic market) is governed by effective competition.

In India, the MRTP Act was enacted in 1969; however, its focus was more on the control of monopolies and prohibition of monopolistic and restrictive trade practices, not on promoting competition, which was the requirement in the new economic order. This realization led to the enactment of a new

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**Competition and the Indian Market**

India enacted a new competition law in January, 2003 viz The Competition Act, 2002. In line with the international developments in this field the new Act is a modern competition legislation, and it covers four main areas:-

1) It prohibits anti-competitive agreements (including cartels) which determine prices, limit or control or share markets, or resort to bid rigging, etc.

2) It prohibits abuse of dominant position through unfair or discriminatory prices or conditions (including predatory pricing), limiting or restricting production or development, denying market access, etc.,

3) It regulates combinations, (i.e., mergers, acquisitions, etc.) that cause or are likely to cause an appreciable adverse effect on competition.

4) In addition, the Act gives the Commission the responsibility of undertaking competition advocacy, awareness and training about competition issues.

The Competition Act mandates the Competition Commission of India (CCI) to prevent anti-competitive practices, promote competition, protect the interests of consumers and ensure freedom of trade. The Act punishes the behaviour of an enterprise, not its size. It clearly defines and penalizes cartels, regarded as the most pernicious form of violation; the CCI can impose penalties; it has ‘extra-territorial jurisdiction’ and can also enter into arrangements with overseas competition authorities. In order to help detect and investigate cartels, there is a leniency provision whereby a party cooperating in accordance with the Act can expect a ‘lesser penalty’, a provision that has significantly aided competition authorities to track down cartels. It has fewer deeming provisions, relying more on the rule of reason. It is a progressive, business friendly and consumer protective legislation. It differs from the MRTP Act not only in individual provisions but also in its thrust and tenor.

In common with prevailing international experience, the issues that are likely to come up before the Commission will involve complex economic

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theory based on modern industrial organization economics, and application of economic principles and techniques to the available empirical data of specific markets. For example, to prove “abuse of dominant position” under section 4, dominance of the respondent enterprise will have to be established for which economic/commercial criteria are set out in the Act:

Dominance depends on the determination of the relevant product market and the relevant geographical market, which is basic to effective enforcement of competition laws, and is usually the necessary first step in the analysis of any conduct, in essence a determination of how substitutable or interchangeable goods are perceived to be by buyers. This determination essentially requires derivation of the residual demand curve facing the firm, the elasticity of demand and an analysis of the time series data on prices of the relevant product. Econometric modeling and statistical tools have been traditionally used by established competition authorities the world over for their calculations. In the U.S. and European Union, competition authorities have relied heavily on such analysis in their work.

The Competition Commission was established in October 2003. However, some of the provisions of the Act have not yet been notified; also writ petitions were pending before the hon’ble Supreme Court challenging certain provisions of the Act. The main petition has been disposed of recently by the hon’ble Court while making certain important observations. It is in the realm of the Government to consider appropriate action in the light of the judgement. This article does not intend to comment on any of the issues that were before the hon’ble Court or are now before the Government.

In view inter alia of the above facts, the Commission has not commenced regulatory and adjudicatory work so far. However, the Commission has been undertaking intensive foundational and preparatory work essential to equip the Commission for its full responsibilities. This includes administrative and the establishment work such as setting up offices and services, designing an appropriate organizational structure, assembling a core team, and undertaking capacity building.

Equally significant is the preparatory professional work undertaken by the Commission. The Commission has set up several expert committees for professional advice in specific areas, for example separate expert committees to advise about: Competition Advocacy, Market Studies and Research Projects, Economic Information, Predatory Pricing, the

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Commission’s Regulations, and Academic Course Curriculum. These expert committees comprise of economists, legal experts, consumer organizations, industry chambers, academia, media experts and other professionals. In this way, the Commission, even with its present small team of officials, has been able to benefit from the knowledge and advice of eminent professionals in the field of competition economics and law.

The Commission has set up a Competition Forum, to which it invites eminent experts for talks/ discussions on competition issues. International competition experts, economists, legal professionals, consumer representatives, industry representatives and organizational experts have participated in the Forum in about 26 sittings. The Competition Forum has become an invaluable platform for capacity building of the Commission and its officers as well as for Competition Advocacy and interactive communication between the Commission and stakeholders. This has helped the Commission in understanding the economic theories and econometric tools necessary for enforcement of competition law.

The Commission has been studying the regulations and procedures of other competition authorities with the view to know about prevailing best practices. It has also consulted with an expert advisory committee on this subject. The intention is to take on board, at the appropriate time, the best practices and innovative features so long as these are consistent with the Act and regulatory and adjudicatory principles and practices in the country.

An important initiative has been to commence the process for undertaking economic and market research projects. Some of these projects are proposed in specific sectors eg trucking industry, passenger transport, telecommunications and food retailing, while some projects relate to broad horizontal concentration in the manufacturing industry. The studies will underpin the Commission’s Competition Advocacy work, and will also help generate Public Awareness about the adverse effects of anti-competitive practices on economic growth and consumer welfare. Such studies are meant also to give the Commission a better insight into the structure of a sector, market behaviour of major players, and the potential for anti-competitive practices. This will help the Commission apply professional analysis to its regulatory and adjudicatory work. These studies are proposed to be undertaken through reputed academic and research institutions in the country. An expert advisory group of eminent

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economists is steering these studies, while assessing their rationale and usefulness.

The CCI has been undertaking low key Competition Advocacy and Public Awareness work. It has participated in, or arranged, several seminars with professional institutes, trade associations and other bodies. The Commission has also been interacting with academic institutions for inclusion of Competition Law and Policy in their curriculum; many such bodies have already done so. The Commission has prepared curriculum suitable for universities and institutes in India, which has been sent to nearly 140 institutions. The Commission has developed and is upgrading its web-site, which will inter alia promote transparency in the Commission’s work and assist in Advocacy and Public Awareness.

All this work has laid a sound, professional foundation for the Commission’s regulatory and adjudicatory work, as and when that begins at the appropriate time, which hopefully will be soon, as India is one of the few major economies in the world today without a functional, modern competition authority.

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Public-Private Partnerships in Infrastructure: 
Competition Issues*

The infrastructure deficit presents perhaps the most critical constraint in achieving ‘miracle growth rates’ in the Indian economy. Financial resources as well as technical expertise in management and execution constitute the major gaps. The total investment required in infrastructure in India until the end of the XI Plan has been estimated at over US $ 350 billion. Government will not be in a position to find resources on this scale. Besides, the comparative efficiencies of the government and private sector to manage infrastructure services differ. This has led to the greater recognition of the importance of Public Private Partnership (PPP) in infrastructure development.

In the past, infrastructure services were under government control and were operating without significant competition either from the public sector or from the private sector. This has added to the perception that competition is inherently infeasible in these sectors. However, a number of infrastructure services presently treated as natural monopolies are no longer so. Unbundling of generation, transmission and distribution in the electricity sector, for example, has made competition possible in that sector. There are other areas like telecom, where there is an emerging view that competition policy and law can be applied, now that the regulated development of the sector has proceeded to the extent that has happened, for example, in India.

When competition is inherently infeasible, as in a natural monopoly, the next best option available is to allocate the right to supply a specified market, known as a concession, through a competitive process. A concession grants the concessionaire party the right to operate a defined infrastructure service and to receive revenues generated; the ownership of assets remains with the government. However, concessions create a private monopoly or extreme dominance, with consequent market power, which is prone to be abused. This makes the design of the concession agreement important so that it does not have anticompetitive effect. There is a view that rather than rely on ex-post law enforcement alone it is better to reduce ex-ante the incentive for, or ability to, engage in anti-

* Edited version published in Economic Times, New Delhi, 6 February, 2007 under the title ‘Ensure PPP concessions don’t mar competition’

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competitive behaviour. All the areas where competition will not prevail will have to be specified in advance; in the other areas competition law provisions should apply.

Vertical integration where the concessionaire, might have monopoly position in two or more integrated or interconnected areas, could generate considerable market power, that might be abused by exclusionary or exploitative behaviour by the part of the concessionaire. Exclusionary behaviour includes predatory pricing, denial of market access, or use of dominant position in one market to access another market. Exploitative behaviour is manifested in excessive or discriminatory price or conditions for provision of service. Mergers, amalgamations or acquisitions or amalgamations among concessionaires or their parents could also result in added market power, with likelihood of abuse.

Competitive bidding is a preferable way of allocating concessions. The more the bidders, in general, the more competitive the auction is likely to be. The auction should aim at identifying the most efficient service provider. However, the scope for re-negotiation is inherent in concession contracts, given the long period of concession and the uncertainties involved regarding demand growth, price and related variables. Re-negotiation could also be opportunistic. Competition law enforcement is the best way to deter collusion. Collusive bidding is almost universally recognized as hard core cartelization and is visited by heavy fines besides being treated as a criminal offence in a growing number of jurisdictions. According to one estimate, rigged bids have cost the Indian Government US $ 20 million in 2000. The Competition Act, 2002 treats bid rigging and collusive bidding as serious violations. The Act defines cartel as inclusive of “association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services”(Section 2(c)). The Competition Commission of India can levy a penalty of higher of either three times the profit made out of cartelization or ten percent of last three years average turnover (Section 27(b)).

Oversight of the concession agreement and its implementation is generally by the government or an agency under governmental authority. It has to be recognized that legal entry barriers provided by the concession agreement make anti-competitive practices all the more easy for the concessionaire. This points to the need for allowing new/parallel facilities
to come up when demand for the service crosses a pre-determined point defined in terms of production/supply capacity of the concessionaire. When such additional capacity is created, for example in the form of additional lanes or an altogether new road parallel to the existing one, the incumbent concessionaire might need to be restrained from predatory behaviour i.e. pricing below cost with a view to eliminating the competitor or competition. The argument that government is a party to the concession cannot place the concessionaire outside the purview of the competition law. The Competition Act, 2002 brings under its scope practices of government departments, except when in the discharge of sovereign functions. Enforcement of competition law can ensure that the legal monopoly created through concession does not militate against efficiency or consumer welfare.

Re-negotiation can nullify the benefits of the competitive allocation mechanism. It is necessary to take steps at the stage of auction design and auction allocation to eliminate chances of opportunistic re-negotiations. The existence of a regulatory authority has been noticed to help minimize the chance of re-negotiation. Re-negotiations have been noticed to result in higher tariffs, decrease in investment obligations and decrease in the annual fee paid by the concessionaire to the government. A good way to address the issue of opportunistic behaviour is to envisage repeated contest. However, repeated contest may not be feasible or may turn out to be very costly. Performance bonds and 'step-in-rights' on the part of government can reduce incentives to re-negotiate. It is advisable that concession contracts include the obligation to continue providing services until a new concessionaire has been chosen.

The efficiency gains arising out of concessions have been documented in studies related to the experiences in Latin America, where the system of concessions in an organized way is believed to have originated. In countries like India with limited experience in competition law, and with enforcement work under the Competition Act, 2002, yet to begin, it may be helpful to explicitly state in the concession agreement that competition law provisions would apply to the concession. This would make the concessionaires sensitive to the provisions of the Competition Act and deter anticompetitive practices.

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Mergers and Acquisitions - how good they are for consumers?*

The air over corporate India is thick with the heady scent of mergers and acquisitions (M&As). In an economy, long suppressed by the license and control regime, this is an entirely new experience and has been accompanied with a sense of nationalistic euphoria. Undoubtedly, many of these mergers present much for the country to be proud of.

In the western economies, M&As are commonplace, being a normal feature of a vibrant economy. Firms may grow organically or they may choose the M&A route. M&As are undertaken by firms to achieve economies of scale and accompanying efficiencies, gain entry to new markets, or access to new technologies. But unfortunately, sometimes the motivation may be less driven by economics and more by personal ambition, as achieving a big presence over a market can be very ego-massaging.

The global market has seen major mergers such as Exxon-Mobil (oil), Bell Atlantic-Nynex (telecommunication), Vodafone-Mannesman (telecommunication), Daimler-Chrysler (automobiles), Proctor & Gamble – Gillette, Adidas-Reebok, and Mittal-Arcelor (steel). In India too, the scene is hotting up; recent M & As include Vodafone-Hutch Essar (telecommunication), Birla-L&T (cement), Holcim-Gujarat Ambuja/ACC (cement) United Breweries-Shaw Wallace (liquor), and earlier: Tatas-VSNL (telecommunication), TCS-CMC, and Reliance-IPCL. Reportedly, in the current calendar year, India leads other Asian countries in the aggregate size of mergers.

Unfortunately, a merger or acquisition is not always easy to manage. Often, the difficult chapter in the story unravels after the merger has taken place, in managing human resource issues and differences in cultures and management styles. Often deficiencies in due diligence reveal lack of synergies and savings that had been presumed prior to the merger. The M&A history has many such troubled examples such as AOL-Time Warner,

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and Daimler Chrysler. These are however, mainly internal issues to the merging enterprises.

From the consumers’ point of view an altogether different issue arises and that is how good the merger is for them and for the economy. Here enter the competition authorities and the competition law. Most M&As do not give rise to a competition concern and competition authorities see no reason for interfering with them. This is particularly so with vertical mergers and conglomerate mergers. The concern mostly arises in the case of horizontal mergers between competitors operating in the same market, i.e. dealing with same goods in the same area.

The Indian Competition Act, 2002 also has provisions for regulating mergers – these are known as ‘combinations’ which include mergers and amalgamations, acquisition and acquisition of control. However, the merger regime is liberal. There is a high threshold below which mergers are outside the jurisdiction of the Competition Commission. The threshold is Rs.1,000 crores of assets and Rs.3,000 crores of turnover. In regard to groups, the threshold is Rs.4,000 crores of assets or Rs.12,000 crores of turnover. In the case of enterprises operating in or outside India, the corresponding thresholds are $500 million of assets or $1500 million of turnover and for groups $2 billion of assets or $6 billion of turnover. Further, pre-notification to the Competition Commission before the merger is not mandatory, but optional. If pre-notification is given, the Commission must dispose of the matter within 90 working days from a particular stage, or else the merger is deemed approved. However, the Parliamentary Standing Committee on Finance which considered the Competition Amendment Bill, 2006 has recommended mandatory pre-notification; the recommendation is under the consideration of Government.

In inquiring into a merger, the Competition Commission has to see whether a merger has caused or is likely to cause an “appreciable adverse effect on competition” (AAEC) and there is a ‘rule of reason’ approach to the inquiry. The Act provides a large number of factors which the Commission must take into account in the inquiry. Most importantly, these include the market share of the enterprises, barriers to entry, level of concentration in the market, likelihood of increase in prices or profit margins, removal of an important competitor, and so on. The Commission must also consider the gains from the merger such as the possibility of failing business, nature and extent of innovation, and

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contribution to the economic development. Enterprises may claim efficiency gains or that one of the enterprise was a sick or dying business and would have exited the market anyway. Thus, the Commission must carefully weigh the positive and the negative consequences of the merger. This approach is not much different from other competition regimes such as the UK, EU and USA.

At the start of the inquiry, the Commission must determine the ‘relevant market’ in which the AAEC is to be assessed. The relevant market comprises of the “relevant product market” and the “relevant geographic market”. The relevant product market broadly comprises of those products or services which are regarded by the consumer as interchangeable or substitutable. For example, a question can arise whether aerated drinks and fruit drinks are in the same product market or not. The factors to be considered by the Commission include physical characteristics or end-use, price, consumer preference and so on. A low priced Maruti 800 may not be in the same product market as a luxury BMW. The relevant geographic market comprises the area in which the conditions of competition for supply or demand are homogenous. For example, in the case of cement, a relatively heavy but low-value product, a question can arise whether the relevant market is the whole country or only a local area or region. The relevant geographic market can be influenced by inter-state restrictions. The factors for determining the relevant product and geographic markets are specified in the Act. The determination of the relevant market calls for economic analysis and use of certain economic tools.

If the Commission finds, which going by historical experiences could be in a small proportion of cases, that the merger is likely to have AAEC, the Commission may refuse approval or may approve it with certain modifications. For example, in the case of the P&G-Gillette merger, the authorities stipulated that a certain part of the business must be divested. The process of inquiry set out in the Act provides full opportunity to the merging enterprises to defend the merger and also to consider any modifications proposed by the Commission. It also provides an open opportunity to opposing parties to present their position to the Commission.

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**Cartels vs Consumers**

At the heart of a market economy is the principle of healthy and vigorous competition. It brings out the best in the competing firms, spurs economic growth and motivation, and maximizes consumer welfare and choice. Apart from this basic principle of economics, experiences around the world underline the benefits from competition. In India, consumers and the economy are finally able to harness the benefits of competition across sectors such as consumer electronics, automobiles, air travel and telecommunications. Is there any practice in the market that can destroy such benefits?

Unfortunately, there is. Competition can be negated by anticompetitive practices by enterprises: collusion amongst competitors, abuse of dominant position and mergers that may appreciably impact competition. Of these, the worst form of practice from the competition perspective is the cartel where enterprises collude to fix prices, limit or control production, share the market or customers, or indulge in collusive bidding. Adam Smith, writing in the *Wealth of Nations* in 1976 famously remarked: “people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices”. Richard Whish, writing in *Competition Law Today: Concepts, Issues and the Law in Practice* ed. by Vinod Dhall that “cartels appear to be alive and kicking throughout the world”, and “cartels were recognized - and prohibited – in the days of the Eastern Roman Empire ------- (that) punished price fixing in relation to clothes, fishes, sea urchins and other goods with perpetual exile ....”. The business world is full of examples of cartelization such as the global cartels for vitamins, lysine, graphite electrodes, dynamic random access memory (DRAM), the cement cartels in Germany and Mexico, and the airlines cartel in the EU. In India too, suspicions of cartels have been heard from time to time in a number of industries such as cement, tyres, trucking and recently in airlines.

Cartels usually operate in secrecy, with the parties going to great length to hide any evidence of the collusion. In the global lysine case, evidence was recovered hidden in the attic of the house of the grandmother of a

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company’s employee! Sometimes, cartels function under the cover of an association of the industry. In the case of the timber industry in India, traders routinely hand out a printed list of prices allegedly set by the timber association! Due to secrecy, cartels are hard to detect or successfully investigate and prosecute.

Competition laws across the globe reserve their most severe treatment for cartels because of their pernicious nature and savage exploitation of consumers. The laws provide heavy penalties e.g., ten per cent of the turnover or three times the illegal gain (treble damages in the US). In several countries, cartels are treated as criminal offences, carrying prison sentences, but that is not so in India. In the UK in addition, guilty persons can be debarred from being directors on firms for up to fifteen years. Competition authorities are also given extensive investigation powers including that of ‘dawn raids’, which were recently incorporated into the EU competition law.

In the infamous vitamins cartel, Hoffman – la Roche was fined $500 million and BASF $255 million in the US, and even larger fines in the EU. In 2005, Samsung agreed to pay criminal fine of $300 million and two other companies were fined $346 million in the worldwide DRAM cartel. Samsung recently agreed to pay $90 million to end law suits brought against it by 41 US states in the same conspiracy. The German Cartel Office slapped fines totaling $879 million on six cement firms, including Heidelberg Cement, Holcim and Lafarge. Seven international airlines are facing a class-action law suit demanding $155 million in Australia; these include Quantas, British Airways, Lufthansa, and Singapore Airlines.

The MRTP Act, unfortunately had no provision directed specifically against cartels and in its long history, there have been but few cases of effective action against cartels, except for isolated examples, as in the trucking industry. On the other hand, the Competition Act, 2002, a modern and economically a more sophisticated law, has fairly stringent provisions against cartels. These include heavy penalty, being the higher of ten per cent of the turnover or three times the illegal profit, in addition to cease and desist order. Further, the cartels are subject to the presumption of being anticompetitive i.e. subject to the *per se* rule instead of the “rule of reason” approach. The Act also allows the Commission to undertake search and seizure operations, similar to those available in the Companies Act.
In order to help in the detection and collection of evidence, many competition laws have the ‘amnesty’ or ‘leniency’ provision. A similar tool exists in the Indian Competition Act. Thus, if any party to a cartel makes a “full, true and vital disclosure” in respect of an alleged cartel, it can expect a lesser penalty. According to the Competition Amendment Bill, currently in Parliament, disclosure must be made before receipt of the Director General’s investigation report and the leniency need not be confined only to the first party making the disclosure but can be extended to subsequent parties also. The leniency provision has proved of extraordinary help to competition authorities in successful prosecution of cartels. In the US, examples of cases prosecuted with the help of this provision include the cartels for vitamins (Rhone Poulence received leniency treatment), DRAM, graphite electrodes, lysine and fine arts cartel involving Southebys and Christie. The enforcement work of the Competition Commission of India has not yet begun, but when it does, cartels will represent its major challenge.

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Essays on Competition Law and Policy
Can there be Competition in Infrastructure?*

Traditionally, infrastructure services across the world have been in the public sector and provided by Government. This includes services like airports, ports, electricity, roads, railways and telecom. With the exception of telecom, the bulk of these facilities in India are still owned by Government and it is only in recent years that the economic reforms have opened entry to private players in these areas.

In telecom, there are now numerous private parties competing with each other. In electricity, private players have entered primarily in generation but also in distribution, e.g., in Delhi. In ports, private operators have either set up terminals in existing ports or developed private ports all by themselves e.g. in Jawaharlal Nehru Port Trust and Pipava port in Gujarat. In roads, there are now several “toll roads” assigned to private parties by State Governments or by the National Highway Authority of India (NHAI). Most recently, private entry has taken place in the airports with the award of modernization/development of Delhi, Bangalore, Hyderabad and Mumbai airports to private entities. On the other hand, in services like water supply, there has been no private entry so far.

Infrastructure unfortunately has strong monopolistic features being either a natural monopoly or a network industry. A monopoly is the very antithesis to competition. Healthy and vigorous competition ensures higher levels of efficiency and maximizes consumer welfare and choice. It spurs economic growth and innovation. On the other hand, a monopoly tends to breed complacency and inefficiency. The abuse of monopoly may be either exploitative e.g. higher or discriminatory prices. Or the abuse may be exclusionary, e.g. refusing access to rivals, or predatory pricing with a view to destroy rivals.

The possible abuse of monopoly gives rise to the need for oversight. This oversight could be through regulation by setting up a sector regulator. Regulators have been set up for sectors such as electricity, telecom and ports. Alternatively, oversight could be achieved through contract. For example, in concessions awarded for roads or airports, conditions are built into the agreement about pricing and quality of service.

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The third route of oversight is through the Competition Law. The Indian Competition Act, 2002 has specific provisions against the abuse of dominance or monopolistic position. The abuses listed in the Act are unfair or discriminatory conditions or prices of goods or services, including predatory pricing; limiting or restricting production of goods or provision of services; or limiting development; denying market access; imposing supplementary obligations in contracts having no connection with the subject; or using dominance in one market to gain access to another market. The Act applies to all sectors including infrastructure, and even to sectors where sector regulators have been established. The remedies include penalty (upto 10% of the turnover), cease and desist order, award of compensation, and (rarely) division of a dominant enterprise.

The doctrine of ‘essential facility’ is particularly relevant to infrastructure sector; where a particular facility is considered essential, the Competition authority can order compulsory access on reasonable terms. The ‘essential facility’ doctrine is recognized in most competition regimes, and in Australia, it has been incorporated specifically through an amendment to the law.

How can competition be promoted in infrastructure? In various ways. A concession can be awarded through a process of negotiation or a beauty parade or open bidding. The open bidding (auction) route ensures the highest level of competition. The eligibility criteria for bidding need to be determined in a manner as to maximize the number of bidders, subject to passing the minimum qualifications criteria; N+1 bids will usually mean more competition than only N bids. The authorities have to be alert in detecting signs of collusion in the bidding, such as identical prices or offers, similar mistakes or typographical errors in the bid documents, and so on. Such parties which may acquire monopoly rights over several similar facilities in the neighborhood could be made ineligible for bidding, e.g. denying the same party the right to own all terminals in a port or all ports in the neighbourhood.

Provisions that could lead to abuse of the concession can be avoided or diluted in the concession agreement. For example, some concession agreements awarded for roads and ports have stipulated that no competing facility would be set up by Government within a certain number of years. This can perpetuate the monopoly of the concessionaire during that period; instead the concession agreement could give the right to
Government to set up the competing facility once a certain level of capacity utilization has been reached. Clauses can be stipulated which would prevent discrimination in favour of related parties. For example, at Delhi airport, hitherto owned by Airports Authority of India, Indian Airlines enjoyed a separate and large terminal while private airlines were crowded together into a smaller terminal. Such preferential treatment could be a violation under the Competition Act. There is a case involving Rome Airport where it denied access to a competing caterer; this too could be a violation under competition law.

Sector regulators have powers to determine tariff; instead a cap on tariff can be fixed so as to allow competition between parties to offer prices below the cap. This can be ensured, for example, by the Tariff Authority for Major Ports.

In the case of mergers in the infrastructure sector, issues could arise about their impact on competition. Is it likely to create monopolistic control over the market in favour of the merged entity? If there are certain facilities in short supply e.g. parking base at airports or flight slots on merger routes, could the merger lead to a disproportionate share being controlled by the merged enterprise? Would the merged entity be able to exercise discrimination in favour of related parties? On the other hand, what is the efficiency in other benefits to the economy that would arise from the merger? The long list of factors to be considered a base on ‘a rule on reason’ are listed in Section-20 of the Competition Act which the Competition Commission must consider.

Finally, in order to ensure free competition, it is important to separate the functions of operation, regulation and policy making. For example, it may be difficult to ensure fair competition, if Government which has policy making role, is also the regulator and the provider of the services. Similarly, if a municipality is both the oversight body and provider of service for say garbage removal, this may militate against providing a level playing field to competing service providers.

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Essays on Competition Law and Policy
Government Policy can Promote or Chill Competition*

Economic theory tells us that competition in the market is good both for the consumer and the economy. It maximizes consumer welfare and offers wider choice, better products and services. Competition also enhances productive and allocative efficiencies and, as Michael Porter has emphasized in “The Competitive Advantage of Nations”, it sharpens the competitive edge of the national economy. There is an substantial body of empirical studies that have quantified the benefits of competition in different countries. For example, in Australia, the average household income is said to be higher by A$7000 per annum on account of its competition policy. William Lewis has emphasized that competition enabled American productivity to grow by 4% per annum in the mid-1990s. Pro-competition policies in UK and Ireland are said to have added 2.5% to their employment rate between 1978 and 1998.

In India, since the reforms starting 1991, the winds of competition have been blowing across various sectors leading to perceptible gains for the consumer in terms of greater choice, lower real prices and better quality in products such as automobiles, consumer electronics and durables, telecommunication, and even products such as toys, milk and newspapers.

There are several government policies where liberalization can increase the role of market forces in the economy. Reform of trade policy by reducing physical barriers and import duties can provide very powerful competition to domestic players except in non-tradable goods and low value, high volume products. On the other hand anti-dumping measures, if used indiscriminately, can greatly dampen competition from abroad; that may be good for the domestic industry but not for the Indian consumer. At one time, our industrial policy, comprising of licenses, quotas and locational preferences, effectively stifled competition by creating huge entry barriers, inefficiencies and rentier incomes for incumbents. Competition has also been affected by excessive reservation for small-scale industries and for public sector enterprises. Government procurement at the level of the State Governments was at one time highly skewed in favour of local enterprises and SSIs. The labour policy, particularly as reflected in the Industrial Disputes Act, has created exit barriers by compelling industries

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to seek permission before closing down a unit, a permission which was rarely given. Even the lengthy procedures prescribed in the Companies Act relating to winding up / strike off of registered companies create formidable exit barriers and therefore are a disincentive to investment and entry into the market.

There is an ongoing debate between the votaries of Industrial Policy and those of Competition Policy, with the former seeking a larger government role in influencing investments and backing national champions, while the latter regards these as distortionary and efficiency diminishing. Building or backing national champions is a hugely emotive issue, but Michael Porter has concluded that it is difficult to visualize a national champion emerging in a situation where it does not have to face competition at home. Simon Evenett writing in "Competition Law Today" by Vinod Dhall ed. has cautioned about the return of Industrial Policy and the threat it presents to Competition Law and Policy.

Though a number of the policies of the license and control raj have been dismantled since the 1990s yielding greater space to market forces, vestiges of earlier policies remain in a number of areas, for example in labour policy and in sectors such as coal and transport (particularly at the state level).

Some salutary principles need to be recognized in government policy making. Competition needs to be accepted as a basic principle underlying economic policy. Wherever deviation is required, as it may well be in broader public interest, it should be transparent and for specific social and national objectives e.g. universal service obligation, protection of weaker sections and so on. The deviation should also be such as would cause the minimum distortion and misallocation of resources; where policy choices are available, the least distortionary choice should be chosen.

Policies need to observe competitive neutrality as between public or private ownership. In the case of an essential facility, the policy should allow open access to competitors. PPP concessions should preferably be awarded through open bidding as against through negotiations or beauty parades. In the case of subsidy, government could consider an approach that would create competition for the subsidy for example, by having bidding for non-viable infrastructure projects; even in the case of primary education, “educational coupons” can be considered as an option wherever
sufficient educational facilities already exist as an alternative to opening more government schools.

In sectors where a regulatory regime is warranted e.g. in natural monopolies or network industries, regulation should preferably be competition driven and become progressively minimal as a competitive market gets created in the sector. Those segments of the sector that are contestable can be identified and freed from regulation e.g. generation in the electricity sector and refineries in the oil sector. In fact, some countries have begun thinking of a sunset clause in the case of economic regulation. Finally, it is advisable to separate the roles of policy making, regulation, and operation.

In many countries, the competition law or government policy, assigns an active advocacy role to the competition authority. Similarly, in India, Section 49 of the Competition Act 2002 gives the Competition Commission an important advocacy mandate. The Commission has offered its views to government and to regulators in a number of cases such as on the draft Postal Amendment Bill, the Warehousing (Development and Regulation) Bill, 2005, the Shipping Trade Practices Bill, and to the Reserve Bank of India. The Planning Commission has constituted a Working Group on Competition Policy for the Eleventh Plan. The Working Group has made a number of recommendations that could go a long way in promoting market friendly policies and laws, and discouraging overt or covert attempts to perpetuate ministerial or regulatory control in areas where it is no longer required.

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*Essays on Competition Law and Policy*
Abuse of Dominance in Competition Law*

When there is perfect competition in the market, the consumer is sovereign, as his/her welfare is maximised. On the other hand, a monopoly is bad both for the consumer and the economy. The monopolist controls the market, and can increase prices or reduce volumes. There is ‘allocative inefficiency’ and in economic terms, there is ‘deadweight loss’. Since the monopolist is under no pressure to minimize cost, he is often more content to enjoy a quiet life rather than face vigorous rivalry; as economist Liebenstein put it, there is ‘X-inefficiency’.

Thus modern competition law contains specific provisions against monopolistic behavior. The Sherman Act, 1890, to which the origin of competition law is traced, contains specific prohibition against monopolization or attempt to monopolization. Article 82 of the EU treaty prohibits abuse of dominance. Similarly, section 4 of the Indian Competition Act, 2002 prohibits and punishes abuse of dominant position. It does not frown on dominance per se. A firm is free to grow as large as it pleases or achieve as big a market share as it can. The problem arises only when there is abuse of dominance (AOD). As Anderson & Heimler have stated in “Competition Law Today” by Vinod Dhall ed., this is one of the most challenging areas of competition law since firms can achieve dominant position legitimately for example, through innovation, superior production or greater entrepreneurial effort, and many practices that appear on the surface to be anticompetitive can serve legitimate pro-competitive purposes. Thus, in a particular case, different competition authorities can reach different conclusions e.g. the divergent decisions in the Microsoft cases. Experts also rightly warn of the ‘chilling effect’ on competition and innovation that may result from mistaken application of AOD provisions.

Three questions typically arise in AOD cases: first, what is the relevant market in which the dominance/abuse is alleged? Second, is the enterprise dominant in the relevant market? Third, what are the specific indicted practices and do these amount to abuse?

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The relevant market consists of the ‘relevant product market’ and the ‘relevant geographic market’. The ‘relevant product market’ comprises of those products/services that are regarded as interchangeable or substitutable by the consumer; for example, in the case of soft drinks, should the product market include any or all of: aerated drinks, fruit drinks, cold coffee and milk based drinks? Is Coca-Cola or Pepsi interchangeable with apple-juice? The ‘relevant geographic market’ comprises the area where the conditions of the competition are distinctly homogeneous, for example, in the case of a heavy product like cement, is the geographic market to be the entire country or only the local region like say the North-east? The Competition Act lists several factors which the Commission must consider in determining the relevant product and geographic markets.

The next question is whether in that relevant market the firm is dominant or not? Once again the Act gives a long list of factors which the Commission should consider in determining dominance, these factors being similar to factors considered in other jurisdictions, like EU and UK. In the MRTP Act, dominance was defined only in terms of market share (25% or more). In the Competition Act, market share remains a very important factor but other factors too have to be considered such as entry barriers, size, resources, economic power and commercial advantages of the firm, size and importance of the competitors, and so on. Thus, hypothetically speaking, if a firm’s share is 45% but the next firm’s share is 40%, the first firm may not be considered dominant. But if shares of other firms’ are 15% and below, the firm could be alleged to be dominant. On the other hand, if there are no entry barriers and the firm faces potential competition from new entrants, dominance may be hard to achieve. Entry barriers could be like regulatory barriers, high capital costs, non-availability of technology, and so on.

The third question would be that if the firm is indeed dominant in the relevant market, has it abused its dominance? The Competition Act lists specific practices as abuse; these include unfair or discriminatory prices or conditions, limiting or restricting production or technical or scientific development, denying market access, imposing supplementary contractual obligations unconnected to the subject of the contract, and using dominance in one market to enter/protect another market. In the Microsoft case, for example, the allegation was that Microsoft which was dominant (having 95% share) in the operating software market abused its
position to gain advantages in the market for applications software viz. internet browser and MP3 player. In the famous United Brands case in Europe, it was alleged that the company abused its dominance by refusing to supply to a long standing distributor and indulged in discriminatory prices by charging excessively in Denmark where it was dominant while it charged much less in Ireland where it faced effective competition. In another case, Rome Airport was held to be in abuse by refusing access to a competing airline caterer.

AOD cases are particularly common in infrastructure sectors since these sectors have natural monopoly or network features such as ports, airports, highways, electricity transmission or distribution, and gas pipelines. In many of these sectors erstwhile public sector undertakings enjoy dominant positions. In a number of countries, a huge proportion of AOD cases relate to the infrastructure or regulated sectors. Regulated sectors in India are in no way immune from the operation of the Competition Act.

What remedies a competition authority can order in an AOD case? The Competition Commission can pass a cease and desist order, impose penalty which may be up to 10% of the annual turn-over, and pass any other order as it may deem fit. It also has the power to recommend to the government the division of a dominant enterprise, which though is resorted to only rarely by competition authorities. Injured parties can also seek compensation under the Act. The consequences of AOD can thus be potentially severe.

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Countries love national champions. We all do. Whether these are champions in sport, in science, or in commerce. Who does not look with admiration at companies like Infosys or TCS or Bharat Forge? Most Indians would have felt a sense of pride when Tata Steel got control of Corus or when Hindalco acquired Novelis?

But do ‘national champions’ require to be nursed? Or do they emerge on the strength of their superior performance in a competitive environment? This has been the subject of an ongoing debate between the opponents and proponents of competition law and policy.

The former advocate that government’s industrial policy should consciously seek to identify, and support ‘national champions’, even if this means creating a monopoly or near monopoly at home, and being resultantly at the cost of domestic consumers. Thus the pursuit of competition law and policy must be diluted or subordinated to the objective of promoting ‘national champions’. In a memorable speech, Prof Paul Geroski, then Chairman of UK’s Competition Commission summed up the three main arguments as follows:

1- Markets today are global; therefore enterprises need to be of a certain minimum size to be able to compete in the global market place.

2- To compete in the global arena calls for heavy expenditure on activities like R & D, distribution networks, etc. This is possible only if enterprises are truly of global dimensions.

3- Certain sectors are particularly important to the national economy, since they have ‘knock on effects’ on other sectors. Firms in these sectors must be propped up by government even if this means discrimination in favour of these firms.

The proponents of the ‘national champions’ theory cite the examples of the East Asian tigers (Korea, Taiwan, Japan) and now even China, who

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according to them have pursued this policy. Ironically, some people in
developed countries too have begun making such noises now that their
firms have started to face the acquisition heat from enterprises in
developing countries. However, not everyone buys this theory in its
entirety.

Informed critics say the East Asian examples are not based on sound
research, and are anecdotal in nature. Prof Simon Evenett, in *Competition
Law Today ed. by Vinod Dhall*, says that the question is whether the
support given by these countries to ‘national champions’ was at the cost of
competition at home, and in a manner that would worry competition law
proponents. According to him the “overwhelming impression...is that the
vast number of industrial policy interventions would not face objections
from an efficiency-minded competition agency.” And further, “little or no
serious empirical evidence is provided to demonstrate that these measures
alone actually worked,...”

Prof. Michael Porter in his study of the competitiveness of nations has
concluded that there is little evidence of ‘national champions’ emerging
where they do not have to face competition at home. He has further
stated that competition in the domestic markets drives national
competitiveness.

Prof Paul Geroski has clinically analysed the arguments put forward by
‘industrial policy’ enthusiasts. He has sought to put the picture straight on
the basis of five counter arguments.

First, he has argued that for most products and services, markets are not
truly global, but are differentiated. He has said, for instance, that even
today, “most markets in Europe are recognizably national: the vast
majority of brand names are national and rarely have much pull beyond
their home markets.”

Secondly, he has argued that critical mass can be achieved just as well,
often better, through “clusters” ( e.g., Silican Valley) as through single
ownership / control, because there is intensive competition between the
rival firms in the “cluster”, while all of them benefit from the common
assets such as skilled labour, distribution facilities, etc.

Thirdly, he reminds that monopolies may have the ability to compete, but
not necessarily the incentive to do so; they often opt for the easy life.
Fourthly, who will choose the national champions for being supported? Lobbying by a domestic powerful firm, facing problems temporarily or otherwise, and blaming its problems on mysterious, wicked firms or forces operating from abroad, is hardly a sound economic basis for support.

Finally, such support, when viewed from a global perspective, is akin to the ‘prisoners dilemma’. When each ‘national champion’ manages to secure backing from its national government, nothing is altered between the several champions in the market, “but taxpayers the world over have been made worse off.” This ‘race to the bottom’ is reminiscent of the race between our states in India to offer attractive sops to Indian companies at the cost of Indian taxpayers. Many of the those industries, after having enjoyed the benefits, today dot the Indian manufacturing landscape like extinct dinosaurs.

Geroski has pointed out that competition law or policy, properly understood, is rarely an obstacle to firms with inherent potential to grow into ‘national champions’. Competition law and policy strive to create truly competitive markets, which generate efficiencies and innovation, the very qualities that go into the making of champions. He states that it is such markets that produce champions, not national governments.

To sum up, the argument here is not that support to ‘national champions’ is unwarranted in every circumstance, but to make the point that support that distorts competition in domestic markets is hardly the kind that will bring sustainable benefit to the national economy or to firms that aspire to be ‘national champions’.

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**Tracking Down Cartels in Competition Law***

Cartels are so unambiguously harmful that competition law and competition authorities, almost everywhere, reserve their strictest treatment for them, and have stepped up their battles against cartels.

OECD and other organizations have estimated the harm caused by cartels in billions of dollars each year. Developing countries are particularly vulnerable. A World Bank paper estimated that in 1997, developing countries imported US $ 81.1 billion worth of goods from industries which witnessed price fixing conspiracies during 1990s; this represents 6.7% of the imports and 1.2% of the GDP in the developing countries. Japan & USA respectively estimated that cartels raised prices by 16.5% and 60-70%. A number of countries reported price declines after anti-cartel enforcement, e.g., Sweden and Finland reported 20-25% fall in asphalt, UK 30% in football replica kits, and Israel 40-60% in envelopes. On average, over-charges are estimated between 20-30% with higher over-charges in case of international cartels. Cartels have variously been described as “highway robbery” and the “supreme evil of anti-trust”.

Competition laws generally treat cartels as *per se* violations, not requiring actual proof of harm. Penalties for cartels can be significantly higher than for other violations. In addition, competition laws/authorities have been reaching for special investigative powers and incentives to unearth evidence. A new tool of recent origin is the hugely effective leniency or amnesty programme under which a cartel member that provides vital information and cooperates with the competition authority can expect lower penalties. Competition authorities have begun receiving numerous leniency applications as parties rush to be the first at the door of the competition authority.

Some countries treat cartels as criminal offences including the US, Canada, Japan and UK. This is based on the logic that while the laws provide severe fines, in practice, this presents problems because a fine may be too high for the enterprise to bear, leading to bankruptcy and loss of jobs. Thus, punishment for natural persons is required, and is provided in many

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countries, including imprisonment in nine countries. Punishment for individuals can also increase the effectiveness of leniency programmes.

Many countries have been tightening their laws e.g., Australia is considering a proposal for criminalization of cartels and barring individuals from office as directors; Brazil has created an intelligence centre for cartel investigation plus provision for dawn raids and wire tapping; and France, Hungary, Israel, Japan, Netherlands and European Commission have introduced leniency programmes. International cooperation has reached its highest level against cartels. Several competition authorities have undertaken awareness programmes for business, procurement agencies, consumers and others.

Conditions that particularly help cartels are a homogenous product (like cement, sugar, tyres, and vitamins), few suppliers and many buyers, price or bidding transparency and, of course, lax laws or enforcement. Platforms that enable rivals to frequently meet can often help them to plan cartel activities, for example, industry associations can sometimes be the cover or even a means for cartelization. Such suspicions have been expressed even in India, e.g., in the case of timber, trucking, cement and also airlines. The strengthening anti-cartel consensus among competition authorities has brought to light numerous cartels. In the global vitamins cartel, one of the most pervasive and harmful cases ever uncovered, the companies received fines of around $ 755 million in addition to prison sentences for senior executives. Similarly, the unraveling of the global lysine cartel marked a turning point in the US drive against this pernicious offence. The German Bundeskartelamt carried out nationwide search of 37 companies and several smaller companies in 2002/03 and unearthed a cement cartel operating, in some cases, since the 1970s! It imposed total fines of more than Euro 700 million, including on Heidelberg Cement and Lafarge Cement. In the Slovak Republic, discovery of a letter from the cement industry association led to the detection and successful prosecution of the cartel. In many of these cases, the leniency provisions also helped.

The Canadian Competition Bureau found a cartel in rubber chemicals that involved regular meetings, communications, agreements to coordinate times and amounts of price increases and sharing of customers and sales volumes. One company applied for leniency. Finally, fines of over $100 million were imposed along with prison sentences and fines on individuals.
Bid rigging is a form of cartel activity and is of great concern to procurement authorities. Bid rigging and collusive bidding by the Dutch and UK construction industries have become landmark cases revealing industry-wide culture of collusive behaviour in tendering. In Netherlands, the disease was so widespread that the Dutch authorities called construction companies to come clean and admit their offences; as a result almost 500 construction companies did so. The industry finally had to undertake major reform of its practices. In UK, the authorities declared this as one of the biggest cartel investigations. Dawn raids were carried out on 57 companies; 38 companies applied for leniency. Between 2000 and 2006, collusive tendering occurred in thousands of tenders approaching a value of £3 million. The authorities made extensive use of the leniency provisions.

Forms of bid-rigging are bid suppression, complementary bidding, bid-rotation and sub-contracting. Competition agencies in many countries have undertaken awareness programmes for procurement authorities including check lists of suspicious behaviour to help identify signs of bid-rigging, for example in Canada, US and Sweden. The US list of possible signs of bid-rigging includes: the same company always winning a particular procurement, the same suppliers submitting bids and each supplier seeming to take turn in being the successful bidder, some bids being inexplicably higher, and bid prices dropping whenever a new bidder enters the fray.

In the Indian Competition Act 2002, cartels are presumed to be anticompetitive; the penalty can be 10% of turnover or three times the illegal gains, compensation claim can be made, search and seizure raids can be carried out with a magistrate’s permission, and there is a ‘leniency’ provision for a cartel member who makes a full and true disclosure that is vital. It is important that the business community makes itself conversant with the law and companies develop internal compliance programmes to avoid, even inadvertently, falling on the wrong side of the law.
An Intellectual Property Right (IPR) is, according to Black’s Law Dictionary, an intangible right “protecting commercially valuable products of the human intellect”; it may comprise patents, copyrights, trademarks and other similar rights. The IPR includes the right to exclude others from exploiting the non-corporeal asset.

The main reason why an IPR is granted is to give an incentive for innovation, research and investment. Absent the IPR protection, other firms would be able to take a free ride on the R & D investment made by the inventor firm. In a sense, IPRs also create competition in innovation. According to Professor Valentine Korah, writing in *Competition Law Today* (edited by the author), competition in innovation is regarded to be more important than competition from someone providing the same product in the same way.

However, IPR laws recognize that the protection cannot be for an indefinite period, as after sometime it should be available to the wider public and enterprise world in the general interest. Even within the IPR period, the intellectual asset may be used without restriction for certain purposes, these not being commercial purposes, such as for research and training. Further, in some laws, provision exists for ‘compulsory licensing’. In the Indian Patents Act, a compulsory license may be sought after three years of the sealing of the patent on three grounds: non-satisfaction of reasonable requirements of the public, non-availability of the patented invention at reasonable price, or patented invention not being worked in India.

Tension arises between IPR and competition law because IPR creates market power, even a monopoly, depending upon the extent of availability of substitute products. IPR restricts competition, while competition law engenders it. Hence, competition law frowns upon the unreasonable exercise of market power or the abuse of dominant position obtained as a result of the IPR. In the EU, the US, and in other jurisdictions as well,

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there are a number of cases which bring out the contradictory pulls emanating from competition law and IPRs. In both jurisdictions, the courts recognize that firms that enjoy a dominant position due to the IPR might in exceptional circumstances have a duty to supply or license the IPR. But according to Professor Korah, in Europe, the requirements of novelty and inventive steps are probably stricter than in the US.

In the Commercial Solvents case, the company which had a monopoly over a raw material was obliged to supply it to Zoja, a competitor. In the Volvo case, while recognizing the company’s copyright in spare parts, the court pronounced that in three circumstances refusal by a dominant firm to supply a dealer on fair terms may amount to abuse of the power: charging unfair prices, refusing to supply spare parts to dealers to whom it refused a license, and failing to supply spare parts for old models. In the Magill case, the company wanted to produce for TV viewers a comprehensive guide to the programs of the existing three TV stations. However, the TV stations refused to allow Magill to publish their programs citing copyright infringement. The court held this to be abuse of dominance arising from the copyright. In the Microsoft case, the company’s refusal to give to its competitors complete information for interoperability between their softwares and Microsoft Windows was held by the European Commission to be a violation of its competition law. (The case is under appeal).

The Indian Competition Act, 2002 recognizes the importance of IPRs such as patents, copyrights, trademarks, geographical indications, industrial designs and integrated circuit designs. While Section-3 prohibits anti-competitive agreements, sub-section (5) thereof says that this prohibition shall not restrict “the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights” enjoyed under the statutes relating to the above mentioned IPRs. By implication, unreasonable conditions imposed by an IPR holder while licensing his IPR would be prohibited under the Competition Act. This provision is not very dissimilar to the laws in other countries. In some jurisdictions, restrictions that have been regarded as unreasonable, and anticompetitive, include: agreements restricting prices or quantities of goods that may be manufactured, or curbing competition between the licensee and the licensor, stipulating payment of royalty after the license period, certain types of exclusivity conditions, patent pooling, tie-in arrangement, and so. A long list of such practices held to be “unreasonable” is given in the Competition Commission’s booklet on Intellectual Property Rights under the Competition Act, 2002.
Thus, in the case of unreasonable restrictive practices by the IPR holder, relief is available to the affected parties under the Competition Act. The Commission can pass a variety of orders including: penalty up to ten percent of the turnover, cease and desist order, direct modification of the (license) agreement, and any other order or direction that it may deem fit.
Competition Law and the Business of Sport*

Recently, the Economic Times published an “Occasional Paper” by Professor Manoj Pant on “Cricket and Competition Law” in which, amongst critical references to the Board for Control of Cricket in India, he wrote, “Competition among players, sponsors and organizers can probably do more for the game than the BCCI ever will. It is probably a fit case for the Competition Commission of India to consider.”

Well, the enforcement work of the Competition Commission has not yet commenced as this awaits the pending amendments to the Competition Act, 2002 and some follow-up action before the actual work of inquiries and regulation can begin. Thus, there is no enforcement action that the Commission can undertake at this time. But this does raise the broader question of the jurisdiction of the Competition Act and the Competition Commission in the sport arena. This article seeks to throw light on this question for the purposes of advocacy and general awareness, particularly amongst sport organizations.

Sport itself is a socio-cultural activity, and traditionally issues of national sentiments, aspirations and pride have been involved with sport. It is a healthy activity deserving of encouragement and promotion. At the same time, over the last few decades at least, sport has become “big business” and a vast amount of economic activity has grown around it. In the European Union, for example, sport is estimated to generate a value added effect of €407 billion representing 3.65 % of the GDP and 5.4% of the labour market. The economic activities around sport include broadcasting rights, particularly television rights, ticket sales and advertisements. For example, the TV and other rights awarded by BCCI are worth crores of rupees; ticket sales for major events also are of no mean amount. At the same time, sport authorities apply unique rules that place significant restrictions, for example, in respect to event broadcasting, sponsorship, club transfers, players’ participation in rival events, and so on. Some of these rules give rise to market power or restrictive agreements. This situation has led to competition and antitrust litigation against sport bodies on an increasing scale. For example, in the US and the European Union, court decisions involving professional sport have not

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only affected the sport industry and its organization, but also have played a role in the development of the law itself. This has inter-alia compelled the professional sport organizations to abandon or modify many rules and practices governing their businesses.

In the US, professional baseball traditionally enjoyed an exemption from antitrust laws following the Supreme Court ruling in 1922 in *Federal Baseball Club of Baltimore versus National League of Professional Baseball Clubs*. Subsequently, however, this exemption, though not completely eliminated, was significantly limited by the Curt Flood Act of 1998. Other sports such as basketball, football and hockey have been subject to the US antitrust laws and there are several important court decisions against the sport authorities. For example in a 1997 ruling, the court held that the National Football League had unlawfully monopolized major league professional football and it awarded token damages to the petitioner. In another case against the National Football League, the court in 1984 awarded the plaintiffs damages of $50 million.

In the EU, the EC courts have handed down important judgments in sport cases that related particularly to prohibiting anticompetitive agreements and abuse of dominant position. These cases have concerned both the regulatory / organizational aspects of the sport as well as revenue generating activities such as media rights and ticket sales arrangements. In the famous *Meca Medina* case, the European Court of Justice noted the need for sport rules to be compatible with the EC competition law. In the *UEFA Champions League* and *FA Premier League* cases, the European Commission accepted the joint selling of media rights by football associations on behalf of football clubs provided *inter-alia* this was done through open and transparent tender procedures, was for a limited period (say, 3 years) and the rights were broken down into smaller packages to enable several competitors to bid.

The EC has evolved certain general principles for the application of competition law to sport related economic activities and it issued a paper in February, 1999 bringing out its stand on this subject. Some of the issues that the EC has tackled so far are the regulatory role of sport organizers, agreements governing ticket sales to prevent abuse of dominance, broadcasting rights, sponsorship and club relocation.

Coming to our own country, the Indian Competition Act covers all areas of the economy and that would include economic activities arising from...
sports like cricket, hockey, football or golf. The law applies to any ‘enterprise’ as defined in the Act, which includes also an association whether incorporated or not, in India or outside India. The law prohibits anticompetitive agreements and abuse of dominant position (and provides for regulation of combinations). Thus, a sport body, covered under the definition of ‘enterprise’, must take care its actions do not violate any provision of the Act. Going by the history of antitrust challenges faced by sport organizations around the world, a good knowledge of the Indian competition law and insight into the practices that could be regarded as violations of the Competition Act would help the Indian sport organizations avoid the difficulties that have so plagued sport authorities in other jurisdictions.

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Competition Advocacy and Government Policies*

The harm caused by anticompetitive practices by enterprises is so severe, both for the consumer and the economy, that competition law vests the competition authority with enforcement powers to investigate and penalize such practices. Through deterrent use of enforcement powers, competition authorities hope to maintain and promote healthy competition in the market. However, enforcement alone is not enough to sustain competitive markets. Thus, competition authorities are usually given a more pro-active mandate -- that of competition advocacy.

Competition advocacy, in one part, aims to strengthen competition awareness and culture amongst market players, thereby encouraging self-compliance and reducing the need for direct action against erring enterprises. Advocacy is often referred to as compliance without enforcement. This explains why competition authorities in many countries maintain strong awareness programmes.

The other part of Competition Advocacy is in respect of government and regulatory policies. The effect of these policies on market structure and business behaviour can be even more pervasive than the activities of individual enterprises. For example, government policies that affect competition in the market include: sector regulation, trade policy, industrial policy, disinvestment and privatization, labour policies, procurement and so on. To the extent that these laws or policies restrict competition, for instance through administered prices, licensing requirements, entry barriers, preferential treatment, reservations, etc., these can make enforcement of competition law less effective. A suitable framework of policies (no doubt keeping in mind wider social objectives) is therefore a pre-requisite for effective competition in the economy. In this way, Competition Advocacy and enforcement are mutually complementary.

In many countries, the competition authority’s advocacy function is backed by suitable provisions in the competition law. This gives an added edge and effectiveness to its advocacy efforts. In some countries, the advocacy role may be provided in government instructions. In their chapter on Competition Advocacy and Interface with Government in Competition Law

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Today (edited by this author), Philip Lowe and Geraldine Emberger have neatly summarised the advocacy role and activities of competition authorities in several countries.

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

In UK, under instruction from the Cabinet Office, all government offices are obliged to assess the impact of proposed laws on competition. Along with the Office for Fair Trading, the Cabinet Office provides to regulators and ministries advice on how to avoid restrictions of competition. The process of ‘Regulatory Impact Analysis’ (RIA) includes applying a ‘competition filter’; where a proposed law fails the initial ‘simple assessment’ it is subjected to undergo a ‘detailed assessment’. In the United States, the Federal Trade Commission (FTC), under an active advocacy programme, intervenes in a number of regulated sectors such as airlines, rail, telecommunication, electricity and financial services. The Office of Budget and Management of the US government has published guidance on regulatory analysis which brings out the risk of unintended harms and side-effects which might impede marked efficiencies.

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

In Turkey, under the competition law, the competition authority is empowered to provide its opinion on competition aspects of law and regulation. A communiqué issued by the Prime Minister in 1998, urges government ministries and agencies to consult the competition authority in advance about proposed regulations and decisions that may have implications for competition.
The European Court of Justice has encouraged national competition authorities in the European Union to critically examine legislation which frustrates the objective of the European competition rules. The European Commission’s own ‘Impact Assessment Guidelines’ include a specific test to assess the competition impact of new EC legislation. In terms of these guidelines, it must be examined whether the proposed legislation could create any restrictions on competition, directly or indirectly, and whether the legislative objective can be achieved through less restrictive means.

The OECD and International Competition Network have both done considerable work on the advocacy role of competition authorities. The OECD’s ‘Guiding Principles on Regulatory Policy and Performance’ recommend that new and existing regulation should be reviewed with reference to competition, and 'Regulatory Impact Analysis’ should be used in this respect. It further suggests that the competition authority should be empowered to advocate pro-competition reform. Similarly, UNCTAD’s Model Law on Competition recommends that proposed economic legislation and regulation should be subject to ex ante screening by the competition authority.

In India, section 49 of the Competition Act, 2002 gives a definite advocacy role to the Competition Commission. The section, in its present form, provides that government may make a reference to the Commission for its opinion on the possible effect on competition of a policy or law, and the Commission is required to give its opinion, which is not binding on the Government. It also states that the Commission shall take suitable measures, as may be prescribed, for the promotion of competition advocacy, creating awareness and imparting training on competition issues. While the Commission has not received any reference so far from a ministry under section 49, it has on its own offered its opinion in certain cases to the concerned authorities in the hope that this will help the authorities in designing more market oriented policies that, if these restrict competition, will do so only to the extent necessary for meeting the policies’ objectives.
Competition Law and Trade Associations

What is the connection between competition law and a trade association such as an industry association or a chamber of commerce. Plenty—if you see the competition law carefully and traverse the history of antitrust litigation involving trade associations. This article is a primer on this subject designed to help trade associations better appreciate their responsibilities under the competition law.

Competition law typically prohibits three kinds of activities by enterprises. It condemns cartels and other anticompetitive agreements. It prohibits abuse of dominant position by a firm. And it bars mergers and acquisitions that can have anticompetitive effects. It is the first category of anticompetitive agreements that must most concern trade associations. Agreements may be horizontal—between competitors making similar or substitutable products (such as sugar, cement, steel or tyres), or vertical agreements—between enterprises at different stages of the supply chain, such as between a manufacturer and a distributor.

Trade associations make a positive contribution to the economy, particularly to the specific industry they represent. They can legitimately lobby the authorities to resolve problems facing the industry, or create awareness about new laws or taxes or environmental issues, or ready the industry to meet new challenges. But the very fact that an association brings together competitors presents the risk that they will enter into an agreement that might violate the competition law. Any such agreement held under the auspices or cover of a trade association, can spell trouble for not only the conspiring firms but also for the association and its office bearers.

The most serious violations are agreements to fix prices, allocate territories or customers, collude in submitting bids (or bid rigging), or resort to group boycotts (of non-cooperating members). These are ‘naked restraints’ of trade or ‘hard core cartels’. Such agreements are regarded per se violations and the most severe penalties under competition law are usually reserved for such infringements of the law. In several countries, cartels are treated as criminal offences, carrying prison terms apart from huge

* Edited version published in Economic Times, New Delhi, 16 May, 2007 under the title ‘Trade chambers must guard against anti-competitive pacts’
fines. Many countries have the leniency or whistleblower provision that encourages any party to the cartel to come clean on the assurance of lenient treatment. Collectively, these provisions of competition law present serious prospects for violators. A few examples from various countries will illustrate the risks for trade associations.

A supermarket in Belgium complained against an association of Belgian manufacturers and retailers of tobacco products for fixing profit margins of various categories of wholesalers and retailers, setting minimum retail prices, forbidding its members from selling to certain categories of customers, and requiring large department stores to stock a minimum range of tobacco products. The court ruled against the association and held that these practices constituted a decision of the association and an agreement between the members, the object and effect of which was to restrict competition.

In the US, serious allegations of cartel-like behaviour were brought against Swiss watch companies and associations. These included fixing minimum prices of watches and maximum prices of parts, and boycotting those who violated these restrictions. The association was named as a defendant because there was apprehension that it could aid the conspiracy by policing members’ conduct and influencing them to participate in the cartel. The court ruled against the association, and placed it and its members under serious behavioural constraints.

In a land mark case, the US Supreme Court held that the canon of ethics of the National Society of Professional Engineers prohibiting its members from submitting competitive bids for engineering services, that applied with equal force to complicated and simple projects and to both inexperienced and sophisticated customers, was in contravention of the antitrust law.

In a well known case, the US Federal Trade Commission sued the Superior Court Trial Lawyers Association, District of Columbia for collective action and boycott, including strike, in support of their demand for raising the fees of lawyers appointed to represent indigent defendants. The Supreme Court held that the collective boycott being in aid of the economic interests of the association’s members, it constituted a naked restraint of trade and a horizontal agreement between competitors; it was held to be a per se violation of the antitrust law. These examples hold useful lessons about the vulnerability of trade associations to the competition law.
Competition law protects the interests of consumers and supports efficiencies in the economy. Many companies that value good corporate governance, and are aware of the grave consequences of violating this law, maintain strong company compliance programmes (CCP). The Competition Commission of India, in fact, has commissioned the Institute of Company Secretaries to formulate a model CCP, which the Commission intends to disseminate to enterprises and trade associations to help lift the level of compliance.

Recently, the Competition Committee of Thailand’s Board of Trade put out for consultation a ‘Competition Compliance Guide for Trade Associations and Chambers of Commerce’ (available at www.thaiechamber.com). It is worth a glance from our own trade associations. Its objectives include: disseminating knowledge of competition law, creating a culture of compliance, facilitating early detection of violations, and stimulating good corporate governance. It advocates every trade association adopt a formal CCP clearly indicating its intent of compliance. In respect of membership, it advises associations not to exclude competitors who meet the eligibility criteria, not to restrain members from dealing with non members, or prevent non-members from accessing information whose denial would limit their ability to compete, or include competition sensitive agenda items in its meetings. As for meetings, it lists certain subjects that ought not to be discussed, such as prices, profit margins, collective tendering, control of production/ supplies, and division of customers/territories. Associations would be well advised to heed such guidelines.

The Indian Competition Act inter alia prohibits anticompetitive agreements of the kinds mentioned above. It is particularly severe on horizontal agreements, including cartels. The penalty provided is ten percent of the turnover or three times the illegal profit, whichever is greater. There is a whistleblower type provision for lesser penalty on a party to a cartel that comes clean with full and true disclosure that yields vital information, and cooperates with the Competition Commission. The definition of cartel includes an association that indulges in anticompetitive activity. The stakes thus are high and the consequences severe.

Trade associations in India, as socially responsible bodies and in enlightened self interest, can proactively promote compliance on the part of enterprises as well themselves.

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Essays on Competition Law and Policy
The Prime Minister, Dr Manmohan Singh, during his speech at the CII Annual Summit on 24 May, 2007, called on corporate India to “desist from non-competitive behaviour”. He added, “The operation of cartels by groups of companies to keep prices high must end. It is unacceptable to obstruct the forces of competition from having freer play.” Most pertinent and timely advice; coming from no less a person than the Prime Minister, it would hopefully be taken seriously by any business living on the wrong side of the law.

In my articles in the Economic Times of 2 March and 13 April, 2007, I underlined the enormous harm--running often into billions of dollars--that cartels inflict on society by robbing consumers and breeding inefficiencies in the economy. Cartels are therefore seen as the most egregious competition law offence. The severest penalties in competition law are reserved for cartels, and competition authorities almost everywhere are waging determined battles against them. In India too, the Competition Act 2002 contains stringent provisions against cartels; these were highlighted in my previous articles. Unfortunately, the Act’s enforcement sections are yet to come into force, awaiting as they do pending amendments to the Act. Till then the Competition Commission cannot inquire into alleged cartels or other violations of the Act.

Law enforcement is an ongoing battle of wits between the law breakers and the law enforcers. As the former resort to novel ways of evasion and avoidance of detection, enforcement agencies must play catch-up by using smarter methods of detection and investigation. Happily, one area in which enforcement agencies have narrowed the gap with offenders is in the hunt for cartels.

This article explains a specific tool developed to fight cartels viz the leniency programme, also called the amnesty programme in the US. The

* Edited version published in Economic Times, New Delhi, 29 May, 2007 under the title ‘Blowing the whistle on cartels’

**(The article draws substantially from the chapter on “Leniency Programmes in Competition Law” in the book, ‘Competition Law Today” ed. by the author).**
principle used is simple i.e. offer lenient treatment to any member of a cartel who is prepared to blow the whistle on the conspiracy, provide vital evidence against it, and cooperate with the competition authority in the investigation. The principle is not exactly novel; it is broadly similar to the principle underlying the “approver” provision in the Indian criminal law or the “plea bargaining” practice in the US, though somewhat different from the typical “whistleblower” laws in some countries. But, its application to competition law is relatively recent. The US was the first to effectively use the leniency programme and, seeing its spectacular results, others have followed, such as the European Commission, UK, Canada, Germany, France, Brazil, Japan, Mexico, Korea, Australia, others – and now India.

Cartels are notoriously difficult to nail. Knowing they are illegal, they operate in secrecy and go to great lengths to hide their activities. Many cartels have thus succeeded in operating stealthily for years without being detected, for example, the German cement cartel, the Dutch construction industry cartel and the global lysine cartel. But the leniency programme has rocked the stability of cartels as the intriguing ‘empty chair at the table’ and the anxiety to be the ‘first at the door of the competition authority’ have rendered a cartel fearful of its very insiders. After the US revised its leniency programme, it received more than two leniency applications per month as against one application per year in the earlier period. Similarly, in Canada, Korea and the EU the number of applications multiplied manifold after revision of their leniency policies. Reportedly, of the 50 cartel cases in the US pending in 2005, over half resulted from disclosures by leniency applicants.

Armed with ‘insider account’ and ‘hot evidence’ from the leniency applicant, competition authorities find it easier to secure cooperation from other cartel members or to mount covert investigation operations like video taping and telephone tapping. They have also obtained stiffer penalties from courts; for example, since 1997 the US authorities obtained criminal fines of over $ 2 bn and in 2002 alone the total jail sentences amounted to 10,000 days, the average jail sentence rising to 18 months!

Some of the most notorious cartels exposed recently have been consequent to leniency applications. The global vitamins cartel led to penalties of $500 mn on Hoffmann-La Roche and $225 mn on BASF, plus prison terms for senior executives. However, Rhone Poulence, the leniency applicant, escaped severe punishment. In the graphite electrodes cartel, the leniency applicant received amnesty while the second, third and fourth
companies respectively received fines of $32.5 mn, $110 mn and $135 mn. In the infamous fine arts auction case, the amnesty applicant’s cooperation directly resulted in Sotheby’s decision to plead guilty and pay a $45 mn fine, and a jail sentence of one year and fine of $7.5 mn for its former chairman, Elbert Taubmann.

Successful leniency programmes have some common features. The first requirement is certainty about the rewards for being the first in the queue. Prior to its revision in 1993, the US leniency policy was vague and merely assured giving “serious consideration” to not prosecuting the leniency applicant, leaving wide discretion to the authority but great uncertainty in the applicant’s mind. Under the revised policy, full leniency to the first applicant is automatic. Similar changes were carried out in EU in 2002, in Australia in 2005, Ireland in 2001, and by other countries. The changes led to dramatic improvements.

Also the preconditions must be clearly defined, e.g., the applicant: must give full and continued cooperation to the authorities, should not have been the ring leader, must terminate involvement with the cartel, must not have coerced any other party into the cartel, should provide restitution to the victim where possible, should disclose its involvement in other competition law offences, and the disclosure should be truly a corporate act as against an individual’s confession.

Transparency and predictability are essential; for example, in interpretation of the preconditions, in the confidentiality policy, and in the circumstances in which the information may be used against the applicant. Competition authorities in UK, Canada and US have put out public guidelines designed to assist enterprises better understand the authority’s leniency policy. Finally, confidentiality of the applicant’s identity and the information furnished by it has to be provided.

The Indian Competition Act, in Section 46, incorporates the leniency principle. It allows a party to a cartel, that has made a “full and true disclosure” and that is “vital”, to receive lesser penalty provided the disclosure is made before proceedings have been instituted or investigation has been directed by the Competition Commission. Only the first applicant is eligible. However, the Competition (Amendment) Bill 2006 seeks to broaden the scope by making eligible subsequent applicants and extending the deadline by when the application can be given to the time when the Director General submits the investigation report to the

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Commission. The Parliamentary Standing Committee, in fact, recommended that complete amnesty should be guaranteed to the first applicant and reduced penalties to subsequent applicants. The report of the Committee is under the consideration of government.

The leniency incentive is therefore available to the Competition Commission of India and, going by overseas experiences, may prove an effective tool in the hands of the Commission and equally a deterrent for cartels. It may thus help maintain healthy competition in the markets with its attendant benefits for the consumer and the society.
The institutional structures of a modern economy owe much to the learned professions—such as the accountants, lawyers, engineers and architects. Upon these professions rest, for example, our systems of corporate accounts and finances, our understanding and implementation of the country’s laws, and the erection and stability of our industrial plants and buildings. We rely on the quality and standard of the services provided by these professions because of the high level of education and skills that go into their making, and in addition to the oversight exercised by the regulatory bodies that prescribe appropriate standards of qualification and professional conduct such as, in India, by the Institute of Chartered Accountants of India (ICAI), Institute of Cost and Works Accountants of India (ICWAI), Bar Councils and the Medical Council. Thus as a consumer when we use the service of an accountant, lawyer, engineer or architect we are assured of the credentials of the service provider and his/her personal accountability in providing the service. In the event of a violation of the code of conduct, we have an avenue for redress.

Regulation of these professions therefore has a wholesome purpose, and it is practiced in almost all countries. It usually covers areas like entry requirements such as the qualifying examination and/or practical training, granting exclusive rights to perform certain services only to qualified members of the profession, and prescribing a code of professional ethics. But when the regulation extends beyond such areas, contentious issues can arise. This article is about the growing awareness worldwide for maintaining a fine balance between regulation and competition in the learned professions generally.

Competition, free and fair, in any economic activity is in the interest of the consumer and the society as a whole. Competition maximizes consumer welfare, by ensuring adequate availability of goods and services (in this case, professional services) at affordable prices, lowering prices, and expanding choice; it also leads to greater efficiencies and innovation. Competition should therefore be restricted only if this will serve a clear public purpose. This is the economic principle that underlies the competition law.

* Edited version published in Financial Express, New Delhi, 20 June, 2007 under the title ‘Rivalry in professional services’
From the competition perspective, regulatory rules that inhibit competition amongst the professionals, but whose justification for maintaining the quality of these services is tenuous need to be reviewed, for example, the rules that prevent price competition, control forms of business structures, and restrict advertising. Some professional regulators/associations prescribe the level of fees / charges or lay down floor rates or price caps. In respect of business structures, some regulators/associations allow only partnership firms but not limited liability companies. Some rules prohibit advertising, including truthful advertising. In the eyes of competition authorities, such restrictions adversely affect consumers by raising prices, restricting choice, inhibiting innovation, and generally serve more the interest of the members of the profession than the consumer of these services.

Fortunately, advocacy by competition authorities is being heard, and recently reforms have been undertaken in several countries, principally in four areas:

1. **Entry and access restrictions**: The licensing requirement in professions, while determining who is allowed to practice, is often also used to restrict fresh entry into the profession. For example, in Japan, in the late 1980s no more than 500 lawyers were admitted to the bar each year. In some professions, proposals are heard to limit or reduce the number of new entrants, regardless of the entrants’ competence on the ground that already there is enough competition in the profession. In Germany, lawyers from one region who were until recently not allowed to associate with lawyers from another region, are now permitted to practice nation-wide. In Australia, in 1992, the State Governments agreed to allow professionals registered in one state to practice in any other State. Similarly, the Australian Institute of Chartered Accountants in 1995 abolished its residence requirement for membership. In France and some common law countries, the distinction between the barristers (who alone can practice in courts) and solicitors is progressively being diluted. In some countries, ‘new professions’ with lower entry qualifications have been created and these ‘new professions’ are allowed to provide certain services that need lesser specialization in the area.
(2)  **Fee control**: Mandatory fee scales have been increasingly challenged as anticompetitive and detrimental to consumer interest, the greatest concern being about mandatory minimum fee. In many countries such regulation of fees is being relaxed.

(3)  **Advertising prohibition**: Advertising plays an important role in informing consumers and bringing new products and services to the notice of the public, thereby also facilitating the entry of new service providers. The lifting of restrictions on truthful, non-deceptive advertising has been observed by some studies to lower fees, improve services and enhance consumer access to services.

(4)  **Forms of Organisation**: The importance of maintaining fiduciary responsibility of a profession has been the consideration underlying the controls over the types of organization the professionals are allowed. But in some countries, the restrictions took extreme forms; for example, in Japan, a lawyer was allowed only a single office which must be within the area of the bar association to which the lawyer belongs. There has been a move towards a more balanced approach in this matter. In some European countries now, law firms are allowed to operate as corporate entities. In the US, attorneys are permitted to form "professional corporations", though with some restrictions. The relaxed rules are said to have resulted in the appearance of new forms of delivery of services, for example, in the US the emergence of 'walk-in clinics' offering medical care where earlier doctors were needed and 'legal clinics' bringing legal advice within the reach of consumers who earlier found lawyers to be too expensive.

An OECD paper, "Competition in Professional Services" (from which this article has drawn extensively) recommends several principles for quality regulation of professional services that least restrict competition. It *inter alia* suggests: entrance requirement into the profession should not be disproportionately high e.g. by limiting the number of fresh entrants; restrictions that curb healthy competition should be eliminated e.g. those that restrict prices or divide markets; and truthful advertising should be permitted. It further suggests that a professional association should not be given the exclusive right to decide on entrance requirements or the extent of exclusive rights; and competition between professional associations providing similar qualifications should be encouraged. It further recommends that qualifications from other countries should be recognised,
and citizenship and residence requirements should be eliminated; but no doubt bilateral issues are involved in this case.

In most countries the jurisdiction of competition law extends to the professions, and competition authorities have tried to increase the space for competition without affecting quality and reliability of the service. Case law from several countries illustrates this point. In the US, the Supreme Court struck down the rule of the National Society of Professional Engineers that prohibited members from competing with each other on price before the client had selected one of them for the project. In another case, the Supreme Court condemned the dentists’ practice of boycotting the insurers’ review of dental x-rays. In a case concerning the Texas State Board of Public Accountancy, the courts struck down the Board’s rule banning competitive bidding by public accountants. In a case relating to the Superior Court Trial Lawyers Association, District of Columbia, the court ruled that the collective boycott by the lawyers who were appointed to represent indigent defendants in support of their demand for increase in their fees was a violation of the antitrust laws.

In UK, the Competition Authority found that in various professions (barristers, veterinary surgeons, surveyors, and accountants) several restrictions particularly relating to advertising, fee scales, etc. operated against public interest. This has led to liberalization of these rules, and presently freedom to advertise and compete on prices is widely accepted in UK professions. In Denmark, the competition commission’s intervention resulted in the law society allowing lawyers to advertise their special field of interest and the association of veterinary surgeons terminated its restriction on advertising fees. In Canada, the court prohibited two law associations from agreeing on the fees members could charge from the public for certain services. In France, the competition authority condemned a boycott by local architects intended to maintain fee levels.

In UK, a guidance issued by the Office of Fair Trading, the competition authority, explains that the competition law is applicable to a body of professionals and has identified several restrictions on competition within the professional services, such as restrictions on advertising, restrictions on forms of service provision and recommendations on fees. Similarly, the European Commission’s “Report on Competition in Professional Services” recommends that professional bodies apply a ‘proportionality test’ in assessing whether any of their rules or decisions infringe the EC competition law, ie. whether the restrictions pursued a clearly articulated
and legitimate public interest objective, whether they are necessary to achieve that objective and whether there are no less restrictive means to achieve this.

Going by the global experiences illustrated above with specific examples from the professions in a number of countries, in India too it may be worthwhile for the regulators of the learned professions to consider whether any of their rules must be reviewed from the competition perspective without detriment to the quality and reliability of the profession. Introduction of healthy competition would better serve the interests of the consumers of these professional services, and ultimately of the professions themselves. The Competition Commission, as part of its advocacy function, could provide relevant advice to the regulatory bodies.

As for the professionals in their individual capacity, it may be worth noting that the Competition Act 2002 applies to any “enterprise” engaged in any “activity” relating inter alia to the “provision of services of any kind”. “Activity” includes “profession or occupation”. Thus the professional service providers are not outside the ambit of the Act. In terms of section 3 of the Act, an agreement between professional service providers or a (non-statutory) decision taken by their association which has an “appreciable adverse effect on competition” is prohibited; further if such agreement or non-statutory decision by the association falls within the ambit of subsection 3 of section 3, (for example, an agreement to determine prices or allocate geographical areas or customers) it would be “presumed” to have an appreciable adverse effect on competition. Such case could thus attract complaints/enforcement under the Act.
For over a century, the shipping liner industry has been characterized by a peculiar phenomenon that goes by the (rather exalted) name of ‘Shipping Conferences’; these are in truth associations or clubs of shipping firms operating on the same route that are engaged in fixing freight rates and regulating capacity. Some of these conferences also coordinate sailing schedules or create exclusive territories, and in some instances are even alleged to restrict investment in larger and faster ships. Besides, some Conferences also resort to a ‘pool’ mechanism whereby shipping firms are each assigned a percentage of the total business. Usually a conference has a secretariat to administer its affairs and monitor compliance with its decisions.

Shipping conferences were once justified on the ground that competition in shipping lines is not sustainable but destructive, and it would drive down rates to un-remunerative levels and throw firms into bankruptcy or leave only a monopoly which would be worse than the cartel itself. On this ground, shipping conferences gained conditional immunity from the competition laws in several countries, such as the US, UK, EU & Japan. However, this extraordinary leniency towards shipping conferences has begun to change.

Even early on, the US required that as a condition of the exemption, the conference must be ‘open’ i.e. not exclude any firm that wishes to join it, and the conference agreement be filed with a Government oversight agency. The United Nations issued a Code of Conduct, effective 1983, whose basic principles included: meaningful consultation with the shippers’ representatives, transparency in conference activities, and non-discrimination against any country, particularly the shipping lines of less developed countries.

The OECD, after an in-depth review in 2002, drove a hole into the shipping conference argument, observing that the industry had failed to demonstrate that price fixing was indispensable to the provision of regular,
efficient and sustainable shipping services, that customers had not shared in the benefits of price fixing, and there were alternative mechanisms (other than cartels) available to shipping lines for seeking greater efficiencies, effective services and sustainable business. The OECD recommended an end to the antitrust immunity granted to shipping conferences. This was followed by a review by the European Commission, which in October 2006, decided to repeal the 'block exemption' from the competition law available to shipping conferences. The Commission noted that the end to the exemption will yield economic benefits such as decline in shipping prices, improvement in the reliability and quality of service, increase in the competitiveness of EU shipping firms, and likely beneficial impact on EU trade and ports.

The Australian Productivity Commission has also recommended repeal of the exemption. In the US the Antitrust Modernisation Commission which has undertaken a comprehensive review of the US antitrust laws has strongly encouraged Congress to review the immunity for shipping conferences.

Critical do not buy the 'destructive competition' argument advanced by shipping conferences and denounce their harmful effects as being little different from cartels in other industries, such as rise in prices, fall in output, and loss of efficiency, service quality and consumer choice.

One of the oldest shipping conferences in the world is the IPBCC (India Pakistan Bangladesh Ceylon Conference) that operates on the routes between India and Europe, controlling about 75% of the traffic. It has 18 members, the vast majority being foreign shipping lines. The Indian public sector firm, Shipping Corporation of India, is also a member! It is alleged that the IPBCC fixes freight rates and also other charges like Terminal Handling Charge (THC), Bunker Adjustment Factor (BAF) and Currency Adjustment Factor (CAF) the effect of which on prices is substantial. Under a Rate Restoration Initiative (RRI), the Conference increases rates from time to time. For example, it announced freight rate increases effective 1 May, 1 July and 1 September, 2007. Given the immense market power of IPBCC, its rates are said to become the standard for non-conference members also.

Given the fact that 95% of India’s international trade by volume and 70% by value is sea borne, the impact of cartel type activity by IPBCC on the
competitiveness of Indian exports and the cost of India’s imports can be huge.

India’s new competition law, the Competition Act, 2002 provides for no exemption for the shipping conferences. It regards cartels as a very serious violation which is ‘presumed’ to be anticompetitive. The penalties provided for cartels are particularly severe; apart from the enterprises engaged in the cartel, an officer of the company also can be liable, and if an association (like a shipping conference) is proved to have been a party, it too is liable to be penalized.

The Competition Commission of India, as part of its advocacy role, has drawn the attention of shipping conferences to the new law and urged them to discontinue cartel type practices. The author personally met the shipping industry with the help of the Director General of Shipping and has also drawn the attention of the Shipping Ministry to the need to end such practices. These efforts by the Commission, in the nature almost of a Competition Advocacy Plus role, would hopefully be heeded by the shipping industry. That will be in the shipping industry’s own interest as well.

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Essays on Competition Law and Policy
Bluelines: when will Delhi escape this menace?*

A public enemy stalks Delhi’s roads and, to boot, it has the permit to do so. It is the Blueline bus.

For years now, Delhi’s commuters have had a raw deal in urban transport, only partially ameliorated by the modern Metro. The service is characterized by ramshackle buses, overloaded, and totally undisciplined in how they drive, where they stop to board or drop passengers (in the middle of the road), where they do not stop (at the traffic light), and whom and how many they kill. This historic city, capital of the world’s second largest country, with population over 14 mn., and with dreams of becoming a ‘world city’, cannot boast of a decent bus service.

Is there an escape from the Blueline menace? There is, provided we make a systemic shift and junk altogether the current ‘license-raj’ system of allocating bus permits, and learn from a host of better practices that have transformed bus services in many countries and cities. Today any one with a ragtag box on wheels can lay claim to a bus permit, and can succeed in getting one if he has the influence or the money to buy his way through.

While Delhi’s Bluelines hog the headlines, the state of bus services in many states, with few exceptions, is scarcely better. Generally everywhere, the buses are in short supply, bus quality is poor, breakdowns are frequent, there is no such thing as punctuality, and if you are smart, you would take out an insurance before you board a public bus.

The Competition Commission of India, as part of its advocacy role, commissioned a study, through the NCAER, of the Passenger Road Transport Sector in the country. The study was undertaken to underpin the Commission’s advocacy work with the State governments, to see if greater competition and institutional reform could improve the service. Seven sample states were selected covering the different regions of the country-Maharashtra, Rajasthan, West Bengal, Orissa, Tamil Nadu, Kerala, and Himachal Pradesh. For external learning, the project included case

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studies of reform of bus services in some other countries, namely UK, USA, France, Sweden, Finland, Kyrgyzstan, Chile and Sri Lanka to see what practices had led to improvements.

In the states, the study found that Rajasthan had the highest level of competition for bus services, and it had also the highest level of efficiency and customer satisfaction. It concluded, “Competition policies can be considered as the main catalyst in Rajasthan for its efficient performance over the more affluent Maharashtra. .... Orissa STC’s better performance over that of West Bengal can also be attributed to pro-competition policies.”

The research team reviewed the benefits from reforms in other countries. For example, in UK (outside of London), bus service supply improved by 24%, the frequency improved by 21%, and the efficiency rose to 3.5 times the level in some other European countries. The subsidy per passenger km. reduced to one third the previous level. In London, competition led improvements transformed the service, where the operational costs declined by 35%, bus kms improved by 24%, and the subsidy fell by 47%. According to one estimate, in the absence of competitive contracting, costs for London transport would have been $15 bn higher between 1985 and 2001.

In the US cities, competitive tendering has equally contributed to cost reduction between 40-46%. Similarly, in Goteborg, Sweden, reforms led to a 100% increase in cost recovery and 30% decrease in public subsidy.

The study has strongly proposed a shift from the system of discretionary permits to one of competitive tendering, a system wherein there will be ‘competition for the road’ instead of the current killing ‘competition on the road’. All bidders must satisfy certain qualifying conditions including criteria such as proven experience, capacity in terms of number of buses, repair and recovery facilities, and so on. The bid must be won in open and transparent competition.

On commercially non-viable routes, the study has suggested again a competitive subsidy bidding process, the winning bid being the lowest subsidy demanded. Here it proposes two alternative models: the USO approach used internationally to assure access to essential services at affordable rates, or the Operational Viability Gap Funding.
The recommendations can bring about far reaching improvements as it has done in other countries. The practice is not a lot different from the competition based bidding in areas like highway construction, ports or airports. It can be equally tried in bus services. Mere tinkering with the current system will not do.

The State Transport Departments, currently in the role of doling out permits and raising revenues should be recast into a modern regulatory regime with responsibility for maintaining oversight on the sector and ensuring the availability of reliable and affordable bus services to the consumers.

The Competition Commission has sent the observations of the NCAER study to the concerned authorities, including the Ministry of Road Transport and the Planning Commission. It has specifically drawn the attention of the Delhi Government in the light of the Blueline accidents. It is hoped the Competition Commission’s efforts will generate the necessary debate and fresh thinking for bringing about systemic shifts in the policy and the regulatory framework for bus services, and will sweep away the current archaic practices that give such a bad deal to the ordinary consumer.

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Allocation of Spectrum and the Beautiful Mind

In December 1994, the then American Vice President, Al Gore was announcing the launch of the first ever auction of spectrum in the US. Billed by the New York Times as “the greatest auction ever” it fetched the authorities an unprecedented $7 billion. Around the same time, a few hundred miles to the north, a taxi was ferrying a frail looking mathematician, John Forbes Nash, to Newark Airport on his way to Stockholm to receive the Nobel Prize for economics.

What was the connection between the two events? It was the connection between Game Theory and auctions. Game theory had been first launched by John Von Neumann and Oskar Morgenstern, who had argued that this theory would give economists a way to investigate how each economic player’s actions influence those of others. But their work was confined basically to two player “zero-sum games”. In the 1940s, John Nash extended the concept to any finite game (not just zero-sum games) and proved that even non-zero-sum games with more than two players must have at least one strategic equilibrium, the "Nash equilibrium". (His proposition is often illustrated by the simple but stark example of the 'Prisoner's Dilemma'.) Nash’s paper was destined to herald major shifts in economic theory, but sadly at that time the powerful tool he had handed economists was not realized— even by Neumann, and Nash’s brilliant paper was lost in oblivion. Meanwhile, as Sylvia Nasser poignantly describes in her biography, A Beautiful Mind, Nash himself descended into the dark world of schizophrenia and roamed aimlessly, ghost like, in the corridors of Princeton University for years. But by the time, three decades later he miraculously recovered, his path-breaking work had gained wide recognition, leading to the award of Nobel Prize.

In later years, leading economists have worked on the game theory and the Nash equilibrium analysis, and one of its most telling applications has been specifically in the area of auctions, whose precise rules make them akin to games and a natural testing ground for the Game Theory. The theory has also been the platform for several subsequent Nobel prizes for economics.

In the US, before 1994, the spectrum was not auctioned; till 1982, it was distributed by administrative systems of allocation—much like in India today. At one stage, it was even given on the basis of lotteries. But the
process was both inefficient and unfair, and led to much rent-seeking and sometimes bizarre results. In one case a group of dentists won the license for Cape Cod area and promptly sold it to Southwestern Bell for $41 million!

It was a matter of time before Congress virtually directed the Federal Communications Commission (FCC) to use auctions to distribute spectrum. And FCC turned to Game Theory economists for help – in understanding the economic principles of auction and in designing a good auction for this valuable and scarce resource. Game theory economists were engaged even by prospective bidders to help them make rational bids that would reflect the real economic value of the spectrum. The rest is history. Not only did this professional approach help government reap billions, equally importantly it obliged the bidders before entering bids to do serious economic and commercial homework, and after the bidding to utilize the spectrum efficiently. Other countries followed suit and worldwide till 2001 alone more than $100 billion worth of spectrum was sold by governments and acquired by telecom operators. A professionally designed competitive bidding has become the norm in several countries for the sale of spectrum, and the experience has been largely very successful.

In a recent article, a former Chairman of TRAI has made the proposition that auction would kill the telecom industry! It hasn’t done so elsewhere. He has referred specifically to the (failed) 1995 auction in India and (rather disputably) to the 3G auctions in Europe. However, the article omitted to mention the history of successful auctions from around the world resulting in its being the instrument of first choice today. A more useful approach would have been to analyse the reasons why the 1995 auction in India led to sub-optimal results and to suggest improvements in its design. We should learn from past failures and from experiences elsewhere, and not swing from one mistake to another one.

As opposed to administrative allocation of spectrum, the advantages of competitive bidding are well known. It is transparent, leads to real price discovery, the higher revenues accrue to government rather than to private players alone, it weeds out non-serious bidders and rewards the most efficient user of spectrum, discourages black market, and is also less litigation prone. In India competitive bidding is used in the case of oil and gas blocks, coal blocks, and concessions for development of highways and airports, and other assets. So why not for the spectrum? If competitive
bidding is not resorted to, there should be a specific and convincing rationale for not doing so.

The Competition Commission of India gave its views on competition related issues to TRAI and Department of Telecommunications, and it is some satisfaction to see that certain recent decisions taken by DOT converge with its views, specifically the decisions to allow number portability and to auction 3G spectrum.

Presently, in India, a controversy is raging about the allocation of spectrum, particularly for 2G services, and it is in the press every day. Instead, it would be more productive to base the debate on economic arguments, and to induct professionals to design a suitable competitive bidding / auction process that will best capture the intended objectives, such as optimizing government revenue, being fair to all players, and ensuring post-bidding effective competition in the telecom markets, which will be in the interest of efficiency and consumer welfare, and of the healthy growth of the telecom sector. If legacy or legal issues have to be addressed, competitive bidding/auction can still be used for price discovery, and combined with other devices to plan the allocation on the basis of the discovered price.
Rationale for Merger Regulation in Competition Law*

The Competition Commission was established in October, 2003. But the Commission could not take up inquiries and regulation due to challenges to the law in the Hon’ble Supreme Court followed by the process of amendments to the Act. The passage of the Competition (Amendment) Act, 2007 has now set the stage for fully activating the Commission.

Like all modern competition laws, the Act has four limbs: prevention of anti-competitive agreements like cartels; prevention of abuse of dominance; regulation of combinations (mergers, etc.); and competition advocacy. The four limbs are inter-related, if any one limb is taken out, the whole would be an incomplete entity. Even the OECD has recognised the Act as “close to state-of-the-art” and has urged its early operationalisation.

However, once again, concerns are being expressed by some sections in the corporate sector about provisions relating to merger regulation. Some of these concerns are understandable and must be addressed; but some other concerns arise from incomplete understanding of the law, and some from experiences with MRTP Act. This article is aimed at addressing these concerns.

The MRTP Act and the Competition Act are as different as chalk and cheese. The former, over time, emerged as an arm of the ‘command and control regime’, while the Competition Act is an essential ingredient of a market based economy, seeking proactively to promote and preserve competition and its benefits in markets. The Competition Commission is also unlike a sector regulator. For the Commission, the market is the best regulator, rewarding the efficient and punishing the inefficient enterprises. The Commission’s role is like a referee’s, allowing rivals to compete vigorously and stepping in only when a foul is committed, the fouls being only the prohibited acts in the Act.

Merger regulation is part of competition law in all important jurisdictions in the world. The rationale for merger review is that some mergers could have anti-competitive fall out. This is mainly confined to horizontal mergers i.e. mergers in the same product line, as against vertical or conglomerate mergers. The international experience is that 85% of the mergers are cleared without detailed inquiry and another 10% after
inquiry. Only about 5% of the mergers are blocked or given conditional clearance.

The anti-competitive effect of mergers arises from increased risk of collusion amongst reduced number of players or from creation of excessive market power or even monopoly. One, these effects can eliminate or dilute the benefits of effective competition i.e. increased consumer welfare, higher levels of efficiency and greater innovation. Secondly, it is easier to deal with a merger than to post facto control market power or collusions. Thirdly, ordering a de-merger can be socially and economically very costly. Fourthly, without merger review, collusive enterprises could escape punishment by simply resorting to the merger route thereby defeating the purpose of the law. Fifthly, mergers change the industry structure and are more long lasting than a collusion.

A few examples would illustrate why some mergers (a small proportion) are disallowed. The Lonrho & Gencor merger was blocked by the European Commission because the two firms would have accounted for 70% of the world platinum supply, whereas the other suppliers were fragmented. The merger of office supply retail chains, Staples and Office Depot, was opposed by the US FTC because of the resulting high market share and likelihood of increased prices. The acquisition of Portugal’s gas company GDP by its electricity company EDP and Italian energy company ENT was stopped by the European Commission as EDP and GDP having dominant positions pre-merger in electricity and gas markets, this vertical merger could have led to “input foreclosure” for rivals by increasing their cost of gas, the raw material for producing electricity. The reported bid by BHP Billiton, the world’s largest mining group to acquire its rival Rio Tinto for $135 billion, giving it huge market power in iron ore supply, has led to calls from steel makers across several countries to antitrust authorities to prevent the merger.

In India, some of the mergers/acquisitions that have taken place or announced could have given rise to deep concerns over dilution of competition. Some acquisitions that took place during the disinvestment of PSUs might have needed investigation from the competition perspective.

The main concerns voiced by industry about the merger provisions in the Act are: one, the time period of 210 days given to the Commission for deciding a merger is too long; two, the Act does not provide a minimum threshold for transaction size and even small transactions must seek
clearance from the Commission; three, even M&As that have no connection with the Indian market (domestic nexus) need approval and four, the enterprise size thresholds should be raised. There is some justification for these concerns. Accordingly the Competition Commission proposes, subject to legal vetting, to address these issues through its implementing regulations, for example, one, by prescribing short time caps for fast track clearance of non complex mergers; two, providing *de minimis* thresholds in the case of acquisition of shares, voting rights or assets; and three, providing *de minimis* thresholds for ‘domestic nexus’ of both merging parties (or requiring only ‘information’ to be filed in such cases). Four, while the enterprise size thresholds provided in the Act are amongst the highest in the world there is a specific provision for their periodic revision by Government.

There are other concerns or misunderstandings which are not well founded, for example: one, the definition of ‘dominance’ should be based on market share; two, predatory pricing should also stipulate minimum market share; and three, ‘group’ should be removed from definition of dominance. Basing ‘dominance’ only on market share would be retrograde, a throw back to the MRTP Act, and contrary to universal practice. For the same reason, market share alone cannot be the basis for predatory pricing. Similarly, the concept of ‘group’ in dominance is very much part of most competition laws e.g. EU, Germany, Brazil, South Africa, and several others.

The Competition Commission has already made it known that in accordance with its well established consultative approach it would enter into consultation with industry and other stakeholders in respect of the above and other concerns in order to evolve appropriate solutions in its implementing regulations. The consultation process is already actively under way.

A section of industry has also suggested that while other parts of the Act may be brought into force, merger regulation should wait for several years. Such a suggestion runs contrary to the rationale (given above) for merger review, which is part of competition law in all important jurisdictions. In fact, the US and EU found it necessary to introduce merger regulation after failing to control anti-competitive practices through other provisions of their laws. Besides how would then the anti-competitive fall out of some mergers in our country be prevented and how would the consumer and economy be protected from monopolistic or collusive
practices following such mergers? The considerations about consumers and economic efficiencies are equally important, and competition law strikes a balance between these considerations and the interests of industry.
Need for competition in infrastructure sectors

India started its reform process in 1991, virtually forced by a crisis particularly related to foreign exchange. This was the period when India began to reform its economic laws, regulations, and policies. Changes were made in the trade policy, imports and exports, industrial policy licensing regime, and foreign investment norms. Price control through APMs was also removed in a number of areas. Disinvestment and privatization were initiated, and there were changes in the exchange rate and interest rate regimes, regulation of banking, stock market, insurance, and many other sectors. The entire gamut of governmental policies and regulations was overhauled. It was increasingly realized that for certain areas, autonomous regulators would have to be brought in, which would substitute the hitherto regulatory role of the government.

The CCI (Comptroller of Capital Issues) was abolished and in its place SEBI (Securities and Exchange Board of India) was set up. The IRDA (Insurance Regulatory and Development Authority) was also established under a separate Act. TRAI was brought in to regulate the telecom sector. There was also a TAMP. The Electricity Act was enacted and electricity regulatory commissions were established at the centre and in the states. More recently, the PNGRB Act has been enacted under which a new downstream regulator is being set up. There are also proposals for new regulators in other areas such as airports. This gives an idea on how wide the regulatory framework will spread and the important role these agencies will play in economic regulation of various sectors.

Now when we look at the regulatory provisions that have been brought in and those that are proposed, what picture do we see? One point that emerges is that there is a lack of uniformity or commonality of principles across various sector regulators. The other point that emerges is that in many government ministries, there exists inadequate understanding on what constitutes regulation. What is supposed to be achieved and what are the guiding principles of regulation?

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For instance, there is a proposal for setting up a Posts Regulatory Authority. The new proposal says that the Department of Posts will have monopoly up to 300 grams. Private services providers can enter or provide service only above 300 grams. So if one wants to post a letter, one has no choice but to go to the Department of Posts as no private provider can accept that letter unless you put some stones in it. Further, all private providers will have to register with the Registration Authority under the Department of Posts. This Registration Authority can also accept or refuse or cancel the registration. It brings back memories of the licensing era. Further, every private service provider shall give to the Department of Posts a USO contribution equal to 10% of its turnover, which is no mean amount.

Finally, there will be a Postal Regulator. And what will be this Postal Regulator do? He/she will regulate the private service providers but not the Department of Posts, which is a monopoly. There seems to be some fallacies in this proposal and if this kind of regulatory apparatus goes through, it will constrain the development of service and increase the costs to the end-consumers.

If the Department of Posts works efficiently and there is pressure on it to perform, then it should be able to balance the costs and prices in such a way that it does not run into losses. If it indeed does run into losses, there should be a better way of administering the USO contribution. As stated earlier, there is a proposal to have a regulator to regulate the private service providers. The moot point is what is there in the private service delivery of letters or parcels that needs to be regulated? It is not a monopoly service that needs oversight, and entry (at present) is relatively free. Further, the proposed structure of the regulator is such that it will be under the Department of Posts. So one cannot expect an independent oversight of the sector.

So what should be the principles of good regulation? The first principle is to clearly set what needs to be regulated, and what should not be regulated. There are many areas of economy that do not have features, which demand regulation. Sometime back there was an announcement to bring in a steel regulator. What is the need for the steel industry to be regulated? It is important to keep our hands away from those areas that ought not to be regulated and which could perform better when left to the market forces. Regulation is justified in the areas where there may be
natural monopoly such as ports or where there is network industry such as telecom.

There are many empirical studies that tell you how competition will bring out the best amongst the players. Such studies have been conducted in USA, Australia, UK, and Ireland. De-regulation has reduced real prices and improved quality of service. For some sectors, it is best to allow free play of the market forces. In case there is any player within such sector who is subverting competition – whether public or private – there is competition law to deal with it. Second, regulation should be undertaken in a manner that does not perpetuate regulation but rather promotes competition and interplay of market forces. Success of regulation should be measured in terms of the extent to which it creates space for market forces and competition; and makes regulation less required. Economic regulation can even fade away and so there is also a case for considering a sunset clause, as is the case in Canada and the Netherlands.

Third, it is important to avoid regulatory capture. When the regulatory commission is manned entirely by people who come from within the industry (whether private or public sector), regulatory capture becomes intense. It is also important to understand that there can be serious anti-competitive practices within the regulated sector. This is borne out from examples from all over the world. For instance, a cartel that was formed in France between three service providers recently in 2002/03 had to pay a fine to the extent of Euro 534 million.

Abuse of dominance also is likely in the infrastructure sector and there will not be level playing field between the dominant player and other players. In developing countries, there is a need and emphasis on building infrastructure and government is undertaking the public–private partnership route to spur investments. However, there can be number of competition issues when concessions are being given. Handing out a monopoly to a player to run the facility for certain number of years raises some competition issues. Any monopoly is prone to abuse and therefore there is need for an effective oversight mechanism. In cases where there is no regulator, the oversight is usually exercised through the concession agreement. Two kinds of competition issues arise. One is at the stage of awarding concession. What is the route? What is the process that you are following in awarding the concession? How transparent is the process? And what is the extent of competition? So in the bid stage itself, it is important to be careful about the process being adopted. What are the terms of

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concession? What kind of facilities are you giving to the concessionaire? And are those facilities likely to restrict competition during the term of the concession. Therefore, there could be a lot of issues involved in the regulatory process, particularly when there are regulators, and even when there are no regulators, where concessions are given out.
India had a controlled economy for several decades. In the 1990s, when economic reforms became imperative, one of the issues immediately addressed was the law relating to competition. The earlier MRTP Act had been enacted within a certain economic paradigm and it was no longer relevant even with amendments. The new Competition Act was enacted in December 2002 and received the President’s assent in January 2003. Soon after the enactment, it was embroiled in litigation which went on for over twenty months till the Supreme Court decided the case; thereafter the process of amendment has been going on. The enforcement provisions of the Competition Act cannot come into play till the act is amended and the amendments would be the first step in operationalising the Competition Commission. Other measures on a parallel basis are necessary to get the Commission going, such as sanction and appointment of professionals and other staff, training, particularly the use of training facilities available both in India and overseas.

The Competition Act was part of the process of reform to ensure that Indian markets are competitive and that the benefits of competition go to consumer welfare and economic efficiency. To ensure that the benefits do go to the right channels the two pre-requisites are the Competition Policy and Competition Law. Competition Policy advocates that the government policy should be to shed controls and restrictions, avoid barriers to entry and should be pro-competition. Administrative or bureaucratic decision making and discretionary decision making should be minimised. Once such a competition policy or competition promoting policy is in place, the market should sustain it. This would necessitate a competition law aimed at activities by enterprises to minimise or suppress competition.

Indian Competition Law is based on the best practices available in competition laws across the world and it broadly consists of three limbs: Anti-Competitive Agreements, Abuse of Dominance and Mergers. The first two limbs are ex-post activities of the Competition Commission which is the ultimate friend of the market economy. It is and should be a non-interfering body which steps in only when the market forces cannot find a correction to a particular situation. It would operate ex post and not ex ante.

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In the case of the third limb, Mergers, the Commission has an ex-ante role in the sense that a merger can be reviewed even before it has taken place. The current position under the law requires voluntary notification of mergers but it is most likely that the position on mergers will change and that a mandatory notification regime will come into place, after which every merger above the threshold (which is a very high threshold) will have to come to the Competition Commission. The experience worldwide has been that Competition Commissions do not have a problem with a majority of mergers, say 85%. It is a very small proportion of mergers in which the Commissions feel they must make a detailed enquiry and of them, only in about 5% of the cases do the Commissions find it necessary either to stop the merger or to modify it or to tell the parties to shed some parts of the business in order not to block competition in future.

There is a fourth limb, which is Competition Advocacy. The Competition Commission has a role in suggesting to the government and to regulatory bodies to follow a more pro-competitive policy or regulation. Governments often give up controls only to transfer them to a regulator, but that is not the solution. It is important to set up regulators in certain areas, such as natural monopolies or network industries, and equally important not to impose regulation in those areas which are open to market forces. Further, regulation must be competition driven and should not perpetuate itself, in that it should create a competitive market and then fade away. The European Commission, for instance, has instructed the national telecom authorities across the EU, to regard the telecom sector as a competitive market except for small portions in eastern Europe, and regulation there is minimal. Canada and the Netherlands now stipulate a kind of sunset clause for regulation.

While the Indian Competition Act envisages a role for advocacy, it is a weak role. The Competition Commission will start its enforcement activity after amendments come through but can offer opinion on several policy issues suo-moto. However, there are instances where the Competition Commission has interacted with the government and regulators and given its views on laws and policies that are being formulated. For example, when the postal department came with a new bill directing that post up to 300 gm would be a monopoly of the Indian Post Office, that there would be a regulator to regulate the Private Sector but not the Post Office and so on, the Commission gave its views that there was no justification for either of the moves. The bill will likely be modified, and we
have to see the outcome. The Commission gave its views to the Planning Commission on the formulation of a Competition Policy, including a report on the competition approaches in the Eleventh Plan document.

The Commission has also commissioned a large number of studies in different sectors of the economy, on issues relating to competition, and the study reports have now started coming in. These studies are an effort to have a better insight into the market forces in different sectors, so that the Commission is in synergy with the market when looking at cases in a particular sector. For instance, the Commission, through the NCAER, carried out a study of the passenger transport industry in the country with 7 sample states. The report recommended that the passenger transport sector which is controlled and regulated by the State Transport Authority and Regional Transport Authorities, be put under a regulator like the Electricity Regulator or the Telecom Regulator and routes be given out through competitive bidding. Those routes which are not viable can be financed through cross subsidy. It was also recommended that a transparent, competition based, market based transport policy be followed.

Another area where studies have been commissioned is capacity building and institution building.

The Commission is also preparing the ground work for the time when it will commence inquiry work and is setting processes in place to ensure setting of strict time limits disposing of cases and passing the final order within 21 days of the final hearing; not more than three adjournments; internal guidelines; and so on. The Commission is also providing for a Consent Order in order to minimise competition litigation. Strict standards of transparency are being recommended with every order being posted on the website. This will also serve the purpose of Competition Advocacy.
i See World Bank/OECD, Glossary of Industrial Organization Economics and Competition Law; see also Registrar of Restrictive Trade Agreements v. WH Smith & Sons, 1986 All ER 721.


iii Section 2(c) of the Act states that a cartel “includes an association of producers, sellers, distributors, traders or service providers, who, by agreement among themselves, limit control, or attempt to control the production, distribution, sale or price of, or trade any goods or provision of services.”


viii MCI Commc’ns Corp. v. AT&T, 708 F.2d 1081 (7th Cir. 1983).


x Section 21 states that in the course of proceeding before any statutory authority, if an issue is raised by any party that any decision which the authority has taken or proposes to take is or would be contrary to any of the provisions of the Act, then such statutory authority may make a reference in respect of such issue to the Commission. The Commission is required to give its opinion within sixty days to the statutory authority, which may then pass such order as it deems fit.