

Competition Law and Policy for Sustainable Growth

Concept Paper for the Second International Conference on Competition Law

12-13 November, New Delhi

India has had much to celebrate over the past decade that has understandably led to a growing conviction among Indians that the upcoming century belongs to India. India has become one of the world's fastest growing economies with a global presence in automotives, business process outsourcing, telecommunications, pharmaceuticals and information technology. India's GDP in purchasing power terms is \$3,526 billion averaging a GDP growth rate of 8.5% for the last five years. This makes India world's fourth largest and second fastest growing economy. The harsh reality is India is also home to world's largest number of illiterate, undernourished and hungry people. Of the 771 million illiterates in the world 268 million are Indians. While its GDP and Sensex has been registering meteoric rises, growth in literacy has been paltry 12% over 10 years. This has dragged down India's Human Development Index to a shameful 128, one of the lowest.

According to research conducted by Professor Tim Besley of London School of Economics, a one percent rise in GDP amongst low income countries translates on average, globally, into a reduction in poverty of 0.73. In India the figure is 0.65. In Kerala, Punjab and West Bengal the ratio is above unity, while in Rajasthan it is 0.43, in Maharashtra 0.4, and Bihar a meagre 0.3.

India's growth narrative is linked to the dreams and hopes of its youth. The only way to realise this dream is through a nation wide explosion of innovation. This requires free, fierce but fair and open competition that is possible only through judicious framework for competition policy and law. Our aim is to show competition law as a driver of inclusive growth that leads to sustainable prosperity. India's Planning Commission in its mid-term review of the 11th five year plan (2007-2012) has adopted "Inclusive Growth" as a guiding principle. It is because of this that our first Conference on Competition Law, held in last November, was titled Competition Law as an instrument of inclusive growth. The second conference scheduled 12-13 November 2010, in New Delhi, is themed Competition Policy and Law for Sustainable Prosperity.

Our aim is to use competition law as an instrument of competition policy to drive triple bottom line justice – social, economic and environmental justice. We use the term environmental justice as humanity is going to face a natural resource crunch which in severity will be much graver than the recent cash or credit crunch. Our focus is to improve the competitiveness of entities by skilful allocation of natural, human and economic resources. This would need utmost transparency and openness in the operations of markets something that we would need to factor in the competition law as we challenge its direction. The regulators would need to be consciously working to ensure transparency and proactively deal with abuse of dominance and collusive behaviour that has stifled innovation. We have to apply competition law to facilitate radicals to continually confront and challenge incumbents by cheaper and superior products and services through constant innovation.

Developing economies like India need to use competition law to overtake the west in economic growth. The practice of the competition law in US has proved counter-productive and has made the law firms the only winners. So while US experience is of enormous learning value to us we must blend it with needs of emerging economies who use competition law to spur innovation as a fuel to fire their engines of growth. We need to constantly challenge competition law itself to ensure it fulfils the real objectives of enactment .

The principal objective of competition law is to foster competition as an instrument for accelerating growth through innovation and economic efficiencies thus maximising consumer welfare by offering better products at lower prices. It achieves its objectives in three ways:

- (i) prohibiting anti-competition agreements and practices that harm free trade and competition;
- (ii) preventing abuse of dominant position and anti-competitive practices that lead to such a dominant position;
- iii) regulating mergers and acquisitions.

Competition is irrefutably beneficial for every market participant. Competitive markets give consumers wider choice and lower prices. It gives sellers stronger incentives to minimize their costs through innovation and other productivity enhancing techniques. This enables firms to pass on cost savings to the customers and offer better products and greater choice at lower prices.

Nonetheless the gap between the assumptions of such theories and the market realities and practices both in developing and developed countries remains pervasive. While there is a broad consensus on the competition policy objectives there is considerable divergence in the application and practice of competition law leading to question marks about its efficacy. Even in a mature jurisdiction like United States with a century of experience in anti-trust laws, there have been confusing and apparently contradictory judgments on antitrust cases.

US antitrust decisions in the first half of twentieth century exhibited hostility to large successful firms. This has since changed. Recent judgments have shown greater understanding of market economics and have been more judicious. Nonetheless defining monopolies continues to remain a big challenge. Competition law poses more a public policy challenge than a legal argument. In a seminal case known as the Grinnell Test , the US Supreme Court distinguished between the willful maintenance of monopoly power as opposed to power resulting from growth or development as a consequence of a superior product , business acumen , or historic accident. The court's language, however, provides little guidance on how one could differentiate the type of conduct that violated Section 2 of Sherman Act. As such even after more than four decades there remain disagreements among lawyers, advocates, scholars, courts and competition authorities and anti trust agencies in various jurisdictions over what constitutes a monopoly or abuse of market dominance.

The need for competition law becomes more evident when foreign direct investment is

liberalized. The impact of FDI is not always pro-competitive. Very often foreign direct investment takes the form of a foreign corporation acquiring a domestic enterprise or establishing a joint venture with one. By making such an acquisition the foreign investor may substantially lessen competition and gain a dominant position in the relevant market thus charging higher prices. Another scenario often encountered in developing and transition economies, is where the affiliates of two separate multinational companies (MNCs) have been established in competition with one another in a particular market, following the liberalisation of foreign direct investment in that country. Subsequently, the parent companies overseas decide to merge. With the affiliates no longer independent of one another, competition in the host country may be virtually eliminated and the prices of the products artificially inflated.

Most of these adverse consequences of mergers and acquisitions by MNCs can be avoided if an effective competition law is in place in the host country. Furthermore an economy that has implemented an effective competition law is in a better position to attract foreign direct investment than one that has not. This is not just because most multinational corporations are expected to be accustomed to the operation of such a law in their home countries and know how to deal with such concerns but also that multinational corporations expect competition authorities to ensure a level playing field between domestic and foreign firms.

It has to be emphasized that a robust competition policy is central to economic reforms. Liberalization, if not accompanied by competition laws and policy aimed at controlling economic behaviour and structures, can result in substantial price increases and reduced benefits for the overall economy. If monopolistic structures are allowed to continue unchecked, price liberalization will not be effective. The same can be said of privatization of state monopolies into private monopolies. Similarly opening markets for imports and FDI might bring enhanced competition, but if no safeguards exist, foreign firms might also engage in anticompetitive practices and abuse dominant market position. Hence the need for a strong and effective competition law which will ban anti-competitive agreements and encourage conduct where there are demonstrable net public benefits.

This is why India decided to abolish its archaic Monopolies and Restrictive Trade Practices Act and passed the Competition Act 2002 thus shifting its focus from curbing monopolies to promoting competition.

Competition policy is a complex, cross-cutting policy instrument which is affected by

a number of interconnected factors. Its effective implementation requires a holistic and integrated mind with ability to hold two opposing views in mind and still have the capacity to function. With resource crunch getting severer, we will have to balance the allocation of not just two but three resources – economic, environmental and human. Its practitioners, more than anyone, need to be men and women of “significant learning”, learning ie more than a mere accumulation of facts and presentation of a carefully constructed argument couched in legal rhetoric.

Competition law is a strange beast and is going to get stranger with natural capital demanding its due share in resource allocation . All this is anathema to the purists and doctrinaires. Owen Dixon, Chief

Justice of Australia when asked whether it was part of the duty of a lawyer to contribute towards the progress of society, replied it was not. The duty of a lawyer, he said was “to keep a hand on and hold steady the framework and foundation of law”.

We have come a long way since. US Supreme Court judge, Justice Brandeis, the author of famous Brandeis Brief that has motivated social and economic legislation in US, says, “A lawyer who has not studied economics is very apt to become a public enemy”. These are harsh words but as Lord Keynes said “Words have sometimes to be harsh since they represent an assault on the thought of the unthinking”.

Nonetheless in this meta-digital and multi-reality world of wrenching change where the very nature of change is changing itself we have to use law as a drive of change and innovation. An overriding aim of competition law is to promote economic justice. “It is a hand maiden of modern economics and should be part of laws that reflect societal values known as sociological jurisprudence”, says Mr Fali Nariman , one of India’s foremost jurists.

We are living in a world of harsh inequalities, inequity and injustice. There appears a widening disconnect between law and justice. Lawyers are heirs to a noble tradition of inventiveness. The most ennobling element of a lawyer’s profession is his ability to ensure justice to his client. As Pope Paul VI said “If you want peace, work for justice.” Competition law is essentially an instrument that helps us achieve that elusive goal.

***Madhav Mehra is the President of the World Council for Corporate Governance and International Academy of Law**