Fair Competition: An Engine of Economic Developement

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Abstract
The main objective of the competition policy and law is to preserve and promote competition, by ensuring efficient allocation of resources in an economy, resulting in the best possible choice of quality, the fair prices and adequate supplies to consumers. The aim of the Competition policy is to enhance the economic efficiency by way of safeguarding and promoting the competition between the firms, persons, etc. Existence of a policy on competition-efficiency of producers is witnessed ushering in maximum welfare to the society keeping profit at a reasonable level for the better involvement of public in the public policy.
The object behind the enactment of the Competition Act in 2002 in India has been the prevention of practices bearing negative effect on competition in the market, to ensure the protection of the consumers' interests and to promote free trade to be carried on by the participants other than the domestic players in the Indian markets, keeping in view the economic welfare of the public for the sake greater good.
Hence, the Competition law in India seems to be very focused over the maintenance of free market economy and controlling the abuse of dominant position by the market player through the anti-competitive practices. The articles in the Indian Constitution highlight the socialist influence on the Indian economy, yet they can be taken as responsible for imposing the duty over the government to ensure the welfare of the society. The competition policy in general, is based on the free market principle of the Economics and it enhances the benefit of the sellers and the consumers.

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INTRODUCTION

"When population increases, the available labour again increases. In turn, luxury again increases in correspondence with the increasing profit, and the customs and needs of luxury increase. Crafts are created to obtain luxury products. The value realized from them increases, and, as a result, profits are again multiplied in the town. Production there is thriving even more than before. And so it goes with the second and third increase. All the additional labour serves luxury and wealth, in contrast to the original labour that served the necessity of life."

It was in 1377, that the Arabian economic thinker Ibn Khaldun provided this definition of economic growth and development in his seminal work Muqaddimah (known as Prolegomena in the Western world).Since then, modern economics has undergone a sea change in terms of defining growth development.

This concept of economic development has undergone a major transformation since the early parts of the starting of modern era. The age of new discovery, signalled the arrival of the mercantilist era. In this age economic development was defined as the net aggregate increase in the item that was under circulation e.g. gold and silver. This was called the bullionist theory. The world saw a scamper for gold and other resources which could create wealth in gold. Trade was the source by which nations could increase wealth and thus ensure growth. The European nations began to search new markets in Asia, Africa and America. This rise in trade and scamper for new markets was coupled with the evolvement of the factory system in the 18th century.

And in 1998 Amartya Sen shot into focus with his path breaking concept of welfare economics which reshaped the post-modern definition of economic development. Moving away from the traditional definition of trade and surplus economic development was now defined as a holistic concept. It was a revolutionary contribution to development economics and social indicators. Sen's theory centered on the concept of 'capability' developed in his article "Equality of What." He argued that governments and economies should be measured against the concrete capabilities of their citizens. This is because top-down development will always trump human rights as long as the definition of terms remains in doubt thus the most important parameter of economic development was the freedom of choices. Any economy is said to achieve success when it can offer its citizens opportunities and choices. These choices can range from the most basic of needs to infrastructure.

It was from this point onwards that the postmodern theory of economic development has undergone a major transformation. Economic development is now not merely measured in terms of GDP but as combination of wide range of factors. It takes into account the infrastructure available, the availability of food, the availability of basic amenities like health facilities, sanitation facilities etc. And this is linked to the surplus generated in trade and other activities which is used back to improve the human infrastructure. Thus growth has been interlinked with human welfare. Economic growth has ceased to be the prerogative of a country but the “right” of its citizens. And it is in this context that the term “fair competition” as an engines for economic development, must be understood and judged.

Fair Competition is the ideal (utilitarian or welfare) that liberalism tells us to strive toward, as a stable way to enhance any reflective dynamical system's informational state. Competition in itself is a very dynamic concept with no unique definition, except what is understood in common terms in the context of market and trade. In a way of defining competition can be stated to be something which is anti-theoretical to the concept of monopoly. Competition germinates a fairness of practices which encourages maximum growth including human development while unfair competition gives rise to ills that affect the health of economy in the long run.

History of Competition Law & Fair Competition

India after independence chose a centrally planned economic structure also referred to as the Nehruvian[1] Socialism Model. The Nehruvian Model was a mixed economy model – a model that was neither a market economy like the United States of America nor a socialist economy one like the USSR. Under the mixed model, both the private and public sector co-existed. The approach behind the mixed economy model was to ensure that the Government played a significant role in capital formation in the country in order to promote an inclusive economic growth and social justice.[2] To promote economic objective, the Government reserved for itself strategic industries such as mining, electricity and heavy industries, serving public interest. The functions of the private sectors were made subject to Industrial (Department and Regulation) Act of 1951(IDRA).[3] The IDRA empowered the Government to regulate almost every aspect of the functioning of private sector viz. size of plant and production size, price of goods produced and its distribution, foreign trade and exchange control, labour issues etc. Despite the laudable goals of the Nehruvian model, the result was unsatisfactory. While the objective of the industrial licensing system was to direct resources in socially desired directions, it however resulted in giving discretionary power to government authorities to control investment decisions of private industries, resulting in trade barriers on competition and reduction in efficiency and consequently, the growth of the economy. This compelled the Government to initiate reformation of Indian economy, the reform wave began in mid-1980s, co-incidentally during the regime of Mr. Nehru's grandson Rajiv Gandhi. The limited reforms of 1980s were followed by wholesale reforms in the year 1991. In the wake of 1991 balance of payment crisis[4] another round of wide ranging economic reforms were initiated under the guidance of the then finance minister and present Prime Minister of India Mr. Manmohan Singh. The reforms beginning 1991 were not a one off event and ever since 1991 many more rounds of reforms have been rolled out year after year to usher India into a market based economy. These reforms have to a varying extent influenced every aspect of economic policy including reforms of economic legislation.

[1] Named after the First Prime Minister of India Pandit Jawahar Lal Nehru.
[2] See Macroeconomics of Poverty Reduction : India Case study, http://www.igidr.ac.in/pdf/publication/PP-057.pdf
[3] Act No. 65 of 1951.
[4] See http://www.nytimes.com/1991/06/29/world/economic-crisis-forcing-once-self-reliant-india-to-seek-aid.html

The Raghavan Committee[5] was constituted to recommend a suitable legislative framework relating to competition law for the country. It was felt that although the MRTP Act seemingly had provisions regulating anti-competitive practices, in comparison with competition laws of many countries it was inadequate for promoting competition in the market trade and for reducing, if not eliminating, anti-competitive practices in the country's domestic and international trade.

In pursuance of its mandate, the Raghavan Committee deliberated between amending the existing MRTP Act and enacting a new competition law. Given the above, it was felt that drafting a new law would be most beneficial. This led to the enactment of the Competition Act, The validity of the Competition Act was challenged in the Supreme Court, even before it became fully operational. A writ petition filed in the Supreme Court challenged the constitutional validity of the appointment of a retired bureaucrat as the head of the Commission. The petitioner contended that the Commission envisaged by the Competition Act is a judicial body having adjudicatory powers and in view of the doctrine of separation of powers recognized under the Indian Constitution, the Chairman of the Commission had to be appointed by the Chief Justice of India and not a bureaucrat chosen by the executive. The Supreme Court passed its order on the said matter in January 2005, declining to grant relief sought by the Petitioner in view of the Government offering to amend the Competition Act. As stated in the abovementioned petition, the Competition (Amendment) Bill, 2007 was passed in September 2007 and the said amendment Act inter alia divided the competition authority, as envisaged in the original Act, into two (a) CCI as an administrative expert body; and COMPAT to carry out adjudicatory functions. The CCI was established in October 2003. However the operative provisions of the Competition Act were brought into force in two phases in May, 2009 and June, 2011 respectively.

FAIR COMPETITION: INDISPENSABLE FOR ECONOMIC GROWTH

[5]http://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_ committee.pdf

There is broad agreement that the principal objective is to make the market economy work better by stopping private power from obstructing markets so as to maintain and protect the fair competitive process since it promotes efficiency including consumer welfare and contributing to the progress of the economy as a whole. On the other hand, firms tend to restrict competition through means such as collusive agreements to fix prices and outputs, and exploitative and exclusionary measures, and seek mergers and other forms of combinations to gain or augment market power. Such market failures undermine the benefits of free and fair competitions in the economy and therefore need to be prohibited through legal devices provided by the competition law. Fair Competition also embraces freedom trade, which has been viewed as the economic counterpart of the political democracy.

Taking for example the recent example of new entrants in Southeast Asian airports where the competition in low cost carriers just got fierce with new entrants like Jet, Spice jet, Sahara and Kingfisher are evident signs of India. Â stepping on the pedal to boost it's an economic growth with amended bilateral aviation agreements. Yet demand growth is such that even with fuel prices at record levels, the outlook for Indian carriers and tourist flows into and out of India have never looked this good. A bunch of low cost carriers from India and Southeast Asia will further boost growth as price points are lowered, thereby unleashing an even bigger economic boom with the competition getting more fair and free.

This is the theme of preserving pluralism and distribution of market power; both these objectives reflect the once prevailing fear of allowing concentration of economic power in the hands of a few market agents. Recently, the aim is to lessen the adverse effects of Government intervention in the economic sphere apart from countering private restraints to competition. In South Africa, the law specifically seeks the objective of increasing the participation of black-owned businesses in the economy.

The role of competition policy have been to protect the process of competition and free market access, by prevention and elimination of monopolies, monopolistic practices and other restrictions for the efficient functioning of markets, as a means of attaining economic efficiency in production. This includes the preservation and protection of the process of competition (not competitors), with a view to maximising economic efficiency (static and dynamic), by achieving efficient market outcomes, in the form of lower consumer prices and better quality products. There is little doubt that considerable thrust for persisting development in international commerce stems from trade liberalisation. Similarly, globalization and liberalization of the world economy have brought to the forefront deliberations on issues of fair competition in global trade. The crux of the relationship between trade and competition policy is that, in an environment where firms are increasingly organizing their operations on a global scale and where trade barriers between nations are falling, firms are more exposed to the regulatory systems and business practices that exist in the economies of their main trading partners. Taking the case of India its Planning Commission in its mid-term review of the 11th five year plan (2007-2012) has adopted "Inclusive Growth" as a guiding principle. Our aim is to use competition law as an instrument of competition policy to drive triple bottom line justice - social, economic and environmental justice. 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 wilful 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. But now it is clear in Indian as well as in US law through so many case that the rules and regulations seek for fair competition allowing different entities so that the competitiveness can be maintained through the competition existing between the entities.

One drawback of allowing foreign companies to enter into the market in the garb of promoting fair and free competition through FDI is that they might gain a dominant position in the relevant market thus charging higher prices. The drawback of the private sector by having monopoly and power concentration and instances of inflation and recession should not happen which are mostly because of unfair competition as the market goes down with the going down of prevailing company like that has to be dealt by imposing certain restrictions via competition law to induce fair competition boosting the economic growth of the country.

International Trends in Competition Law Enforcement

The internationalization of trade and commerce has transformed the outlook of global economy and legal systems. There is increasing awareness that economic benefits and challenges of anti-competitive behaviour, abuse of dominant position by market players and cross-border effects of trans-national merger activity go hand in hand. This draws attention to the role and responsibilities of various competition/anti-trust authorities and regulators around the world. In the following section, we will discuss the major developments in the competition law sphere in certain significant jurisdictions including United States of America ("USA"), European Union, Japan and China with specific focus on certain industries. Recent high-profile investigations have involved telecommunications, energy, finance and banking, consumer industries and basic commodities industries. This exercise will provide an insight on the enforcement actions taken by competition/anti-trust authorities across several jurisdictions to ensure deterrence to anti-competitive activities.

International Cartels

Anti-cartel enforcement is a top priority and no sector is exempted in USA and European Union. China and Japan have also taken pro-active steps to ensure compliance with competition laws. In USA, the Department of Justice ("DOJ") has been particularly active in prosecuting cartels with an international dimension. Most of the DOJ's investigations have been of suspected international cartel offenses and increasingly defendants are foreign companies. With most manufacturing having moved outside of USA, chiefly to Asia, the DOJ has been aggressive in extending the global coverage of US cartel enforcement. There has also been a marked increase in both the fines being imposed as well as the length of the prison terms.

2014 saw the extradition of two businessmen from Germany and Canada, the first extraditions in the world for antitrust offences in USA.120 Nippon Yusen Kabushiki Kaisha, a Japanese freight forwarding firm, pleaded guilty to conspiring to fixing prices in International Ocean shipping services. The company paid USD 59.4 million criminal fine and agreed to co-operate with further investigation of the Japanese Fair Trade Commission ("JFTC") in the industry.121 The Antitrust Division of the DOJ continues to impose record high fines totalling up to USD 1.27 billion at the end of Financial Year 2014.122

Settlement negotiations are increasingly favoured by companies to avoid the risk of catastrophic sanctions that are imposed by the European Union ("EU"), which witnessed the levy of 1.67 billion in fines in 2014. In Temba Industries and CFPR v. Commission, the European Court of Justice ("ECJ") held that the European Commission is not bound to take the position adopted during settlement negotiations. The European Commission may, in fact, extend the scope of investigation to a party which withdraws from settlement negotiations if the European Commission deems it justified in light of evidence which subsequently comes into picture. Furthermore, the Court confirmed that fines imposed may be higher than that proposed at the time of settlement negotiations in case of withdrawal by the party from such negotiations.

It further concluded that the consumer and producer welfare and economic growth and competitiveness in international trade have all flowed out of competition policies, deregulation and surveillance over Restrictive Business and Trade Practices. Noting that competition rewards good performance, encourages entrepreneurial activity, catalyses entry of new firms, promotes greater efficiency on the part of enterprises, reduces cost of production, improves competitiveness of enterprises and sanctions poor performance by producers, the empirical evidence in the report suggests that competition ensures product quality, cheaper prices and passing on of cost savings to consumers. The report also observed that competition promotes two types of efficiencies, namely, static efficiency (optimum utilisation of existing resources at least cost) and dynamic efficiency (optimal introduction of new products, more efficient production processes and superior organizational structures over time) (UNCTAD, 1997). Analysing the empirical evidence, the UNCTAD report had the following to say:

In the Netherlands, it has been calculated that the average annual consumer loss arising from collusive practices or restrictive regulations in several service sectors amounts to 4,330-5,430 million guilders (around $2.1-2.7 billion) (Hendrik P. van Dalen 1995). Data relating to the United States show that a bid rigging conspiracy for the sale of frozen seafood which was eventually prosecuted had an average mark-up over the competitive price over a one year period of 23 per cent (LukeM.Froeb et al. 1993) and the breakdown of price-fixing conspiracies in some industries has led to steep declines in manufacturing costs (Scherer and

David Ross 1990). It is true that cartels may sometimes facilitate adjustment, but vigorous competition may sometime be as or more effective in forcing rationalisation of industries, particularly in larger markets (Scherer and David Ross 1990). An examination of some exempted rationalisation cartels in Germany (several different types of cartels are allowed under the German competition law, subject to certain conditions) found that they had promoted the viability of the producers in the industries concerned, but there was little evidence that they had contributed to productivity and efficiency improvements, while they had resulted in higher prices and less output (David B. Audretsch 1989).

With the advent of globalisation the world economies have been truly linked. In 2008 when the subprime lending crisis hit the US economy the world economy shuddered. Similarly when major banks failed is the economic crisis in the US in 2009 the crisis spilled over to Europe and one by one the European nations tumbled into crisis. This shows the deep relation the world has in terms of economy. Thus WTO and other organizations stress on greater interactions which ensures fair competition.

Different ways of Unfair / Anti-Competition Practices

- Conspiring to Fix Market Prices-Discussing prices with competitors, even if it affects a small marketplace, may be construed as a violation of antitrust law.
- Price Discrimination-Using dominant industry power to secure favourable product prices from buyers, even though such prices are unavailable to weaker companies in the same industry, is generally a violation of antitrust laws.
- Conspiring to Boycott -Conversations with other businesses regarding the potential boycott of another competitor or supplier may violate antitrust law.
- Conspiring to Allocate Markets or Customers -Agreements between competitors to divide up customers, territories or markets are illegal. This provision applies even when the competitors do not dominate the particular market or industry.

Whenever such events occur economic growth is stunted in the long run. It is for these reasons fair competition is a necessary and a sufficient condition for acting as an agent of economic growth. There is empirical evidence of the benefits of a fair competition regime vis-á-vis economic development, greater efficiency in international trade and consumer welfare listed in a report (UNCTAD1997). The evidence, albeit referring to experiences of developed countries, indicated substantial benefits from the strengthening of the application of competition policy principles in terms of "greater production, allocative and dynamic efficiency, welfare and growth.

Advantages of Fair Competition

Fair competition has a few major hallmarks which act as the engine to economic development. **Fair competition induces sustainability** in the economy. Sustainability can be explained in terms of carrying capacity. Sustainability ensures strength to the economy to carry forward its story of growth. For example let us take the example of the coal industry. Coal industries in India have rarely been able to produce quality coal vis-à-vis its availability. This is mainly due to the loopholes of the coal mining policy. Now in place of that a fair competitive process of coal which takes into concerns the environmental issues would result in better output of coal production. The draft policy of the new coal plan reflects this very spirit. A competitive spirit would ensure a fair and judicious use of resource which in turn will generate sustainability.

Fair competition induces innovation in the market. The Toronto Stock Exchange (TSE) was, for a century the dominant Canadian exchange. Suddenly in mid-90’s it found its outdated trading system was routinely overwhelmed by high volumes, resulting in frequent trading freezes. Canadian companies such as BlackBerry began listing on the New York Stock Exchange. New competitors entered the market. Pure Trading, a Toronto-based alternative market, launched a new exchange that offered an attractive fee structure and new trading technologies. An alliance of Canada’s largest banks announced another exchange. Most analysts believed three exchanges in Canada would be too much. Yet the competition was powerful, and today the TSE uses sophisticated trading software, with lower trading fees, and has recaptured lost liquidity. The Canadian stock market is far more efficient and user-friendly because of the 2000 competition.

Fair competition induces transparency in the market. Till the 1990's Air India was the only flight airliner which was allowed to operate. It followed its own pricing regime which was not only high but also non transparent. With the advent of the open sky policy other airliners entered the fray. As soon as the other airlines entered the field the air travel prices came down drastically and the pricing regime became transparent. In the telecom sector too, a similar pattern was observed and post- liberalization these two sectors have registered extraordinary growth.

Fair competition also introduces efficiency in the economy as well. With the entry of private educational health institutes in large number in many areas health has seen a major improvement. This human development is an integral part of the economic development as well. Since a healthy demographic population will act as the actors of the economic development.

CONCLUSION

It is clear that competition policy promoting fair competition has an important role to play in the promotion of economic growth in a modern economy; but that role should neither over-sold not under-sold. It's not a magical cure-all for anything that ails an economic system and there are clearly other important influences on the growth rate of a modern economy. Nevertheless, competition policy clearly does play an important role: directly, because of emphasis on competitive markets and the efficiencies that flow there from, which surely encourage economic growth; and indirectly, because of the "markets" mind-set that accompanies it and can encourage efficient financial markets, which in turn encourage the saving and efficient investment that themselves are important contributors to growth. Good competition policy should not stay stagnant but should adapt as circumstances change and especially as economics thinking evolves. Barriers to competition are pervasive and harm innovation, productivity and growth - in developing countries. Fair competition matters, both for economic growth and for reducing poverty. Helping markets to work better, by removing unnecessary distortions to competition, can lead to significant reforms of the business environment. These factors make competition policy and law a priority area for reform in developing countries. There is a need for a wider understanding at policy levels in government, in the business sector and by consumers, of the beneficial impact of effective and fair competition and of competition policy on an economy. Where competition policy is part of an open and well-regulated economy, it can help encourage both domestic investment and FDI, because it encourages investor confidence by setting a consistent framework within which the business sector operates. A fair competition policy allows innovative new entrants an important role in the development process promoting growth and reducing opportunities for corruption and rent seeking, and creates more space for entrepreneurs and small and medium sized-enterprises.

The trend in recent years has been to move away from centrally planned systems towards market-oriented systems where nations such as US and Great Britain, successful initiatives have been undertaken to deregulate previously regulated industries, so as to enhance the role of market forces in shaping those industries. These changes emanate from a growing global acceptance of 'the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress which shows importance of fair competition in economic growth. To be fully effective, a competition policy must be supported by a "culture of competition", and the political willingness where the objectives of competition are widely understood and form a natural part of the background to decisions by government, firms and consumers. Civil society and a vigorous consumer movement in particular, can play a constructive and valuable role in the development of a culture of competition. Vested interests that oppose reforms and fair competition have to be overcome. An open media and an informed judiciary are needed if competition policy and law are to be fully effective.

As the 21st century dawns on mankind, man has witnessed rapid development in all fields. These developments have made man's life better and more comfortable than what it was a hundred years ago. With the passage of time growth and development has touched not only the rich but everyone else. Better infrastructure, better healthcare, better education, more opportunities for growth.21st century has truly been the story of mankind's achievements. Yet man has a long way to go since even these developments have loopholes that have to be rectified. And this change can be brought forward by a sense of fair competition, a system where aspirations are fulfilled, where growth and opportunities would be prerogative of all. Fair competition truly acts as the engine of economic development. The hope that fair competition generates can be summarized in the following quote:

"In 20th century majority of the people believed that life would be better......The best part is that they know they can achieve it."