Chapter 5

Competition Policy

India has enacted a Competition Act to replace the outdated Monopolies and Restrictive Trade Practices Act. This chapter examines the new Act and points out challenges ahead for the recently established Competition Commission of India. The analysis is structured around the questions set out in the Policy Framework for Investment *(PFI). Each section is preceded by the relevant PFI question, which serves as general context for consideration of main policy areas.*

Competition policy favours innovation and contributes to conditions conducive to new investment. Sound competition policy also helps to transmit the wider benefits of investment to society.

1. Competition legal framework

> Are the competition laws and their application clear, transparent, and non-discriminatory? What measures do the competition authorities use (*e.g.* publishing decisions and explanations on the approach used to enforce the laws) to help investors understand and comply with the competition laws and to communicate changes in the laws and regulations?

Competition regulation has lagged behind economic reform, but is now catching up

The economic reforms of recent decades have been largely focused on the gradual dismantling of entry barriers in more and more sectors as policies have moved away from central planning and the protection of small producers towards a more market-driven economy. These reforms have allowed increasing scope for the entry of domestic private entrepreneurs and foreign investors in sectors previously reserved for state-owned enterprises and small firms. The licensing of industrial activity has been largely eliminated. While there is still scope for further reform, for example by resuming the stalled privatisation programme and relaxing remaining restrictions on foreign investment, it is clear that the reforms already enacted have transformed India's economy by allowing far greater competition, resulting in higher GDP growth rates. The law and enforcement structure for dealing with constraints on competition have lagged behind this transformation and are now in the process of rapid catch-up.

The Competition Act 2002 replaces an outdated Monopolies and Restrictive Trade Practices Act

The first enactment dealing with competition issues in India was the Monopolies and Restrictive Trade Practices (MRTP) Act 1969, which came into force on 1 June 1970.[1] The MRTP Act was designed to ensure that the operation of the economic system does not result in the concentration of economic power to the common detriment and to prohibit such monopolistic and restrictive trade practices that are prejudicial to public interest. The MRTP Commission was established for the purposes of this Act. By an amendment

in 1991 the state-owned enterprises, with a few exceptions, were also brought under the purview of the Act. The agreements relating to restrictive trade practices, listed in Section 33 of the Act, must be registered, but agreements that are expressly authorised by any other law or have the approval of central government or to which the government is a party are exempted from such registration. The deeming of a restrictive trade practice to be prejudicial to the public interest is hedged about with a number of exceptional circumstances under which it may not be applied, for example that the resulting removal of the restriction may adversely affect employment or exports (Section 38). The provisions relating to unfair trade practices were brought under the purview of the Act by an amendment in 1984 with a view to protecting consumers against false or misleading advertisements or other similar unfair trade practices.

The MRTP Act was found to be insufficient to meet the new policy aim of building a competitive market economy with a steadily growing private sector. New legislation was needed to promote competition at a time when private enterprises were growing in power and government monopolies were being dismantled. While the MRTP Act covered restrictive practices, it did not cover abuse of dominance, which has become an increasing concern. The role of the MRTP Commission was restricted to dealing with cases referred to it, and there was no provision for the Commission to play an active role in promoting competition by educating the public and reviewing government policies and enactments to ensure that they enhance, and not restrict, competition. While the Act did confer powers, including powers of inquiry, on the MRTP Commission, the financial penalties which backed up these powers were eroded by inflation. The MRTP Act stands repealed from 1 September 2009. The MRTP Commission will continue to hear cases filed before that date for a further two years.

In 1999, the government decided to shift the focus of competition policy from curbing monopolies to promoting competition by appointing a committee to suggest a modern competition law. Pursuant to the recommendations of this committee, the Competition Act 2002 was enacted on 13 January 2003. A number of detailed amendments and addenda were provided by the Competition (Amendment) Act 2007. These amendments include a provision of setting up a Competition Appellate Tribunal, which will be a committed body to deal with the appeals against the decisions/orders of the Competition Commission of India and to deal with compensation claims arising out of the decision of the Commission and Arbitration Tribunal.

The Competition Act 2002 prohibits anticompetitive agreements and abuse of dominant position, and also provides for the regulation of mergers and acquisitions to prevent adverse effects on competition. It provides for the creation of the Competition Commission, with clearly specified composition and powers, to administer the law, and sets out detailed provisions on procedures and penalties.

The Competition Act is non-discriminatory

All economic entities are covered by the Competition Act 2002, including private enterprises and government bodies, both central and local, except where they are in discharge of sovereign functions. The word "person" is defined in the Act to include: an individual; a Hindu undivided family; a company; a firm; an association of persons, whether incorporated or not, in India or outside India; any corporation established under any central, state or provincial act or a government company; any corporate body incorporated outside India; a co-operative society; a local authority; every artificial judicial person not falling into the preceding categories. The word "enterprise" includes government bodies acting as economic units, as opposed to carrying out sovereign functions.

The Competition Commission is intended to be expert and independent

The Competition Commission consists of a chairperson and not less than two and more than six other members. These are all appointed by the central government on the recommendation of a selection committee headed by the Chief Justice of India or his nominee and including the Secretary in the Ministry of Corporate Affairs, the Secretary in the Ministry of Law and Justice and two experts in a relevant academic subject.

All members of the Commission hold office for a term of five years and are eligible for re-appointment. Members of the Commission can be removed from office by the central government on the recommendation after an enquiry made by the Supreme Court following an inquiry initiated after a reference made to the Court by the central government. The structure of the Commission is not further specified in the Act, however, these are to be prescribed by rules to be made under the Act.

The Commission is funded by grants from the central government. These are placed in a Competition Fund, which is administered by a committee of members of the Commission chosen by the Chairperson. The Commission must maintain proper accounts for audit by the Comptroller and Auditor-General of India, and must also prepare annual reports giving a true and full account of its activities to the central government for presentation to each House of Parliament.

Prohibition of anticompetitive agreements

Section 3 of the Act states that no enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services which causes or is likely to cause an appreciable adverse

effect on competition within India. Any agreement that contravenes this provision is considered void.

Agreements presumed to have an appreciable adverse effect on competition are those horizontal agreements which: directly or indirectly determine purchase or sales price; limit or control production, supply, markets, technical development, investment or the provision of services; share the market or source of production or provision of services by allocating geographical area or market, or type of goods or services, or number of customers; directly or indirectly result in bid rigging or collusive bidding.

Other forms of horizontal agreements are prohibited if they cause or are likely to cause an appreciable adverse effect on competition. Similar is the case with vertical agreements, including: *tie-in arrangements*, which require a purchaser to purchase other goods as a condition of purchase; *exclusive supply agreements*, which restrict the purchaser from dealing with other sellers; *exclusive distribution agreements*, restricting output or supply of goods and services or allocating any area or market for the disposal and sale of goods; *refusals to deal*, which restrict the persons or classes of persons to whom goods are sold; and *resale price maintenance*, *i.e.* forcing retailers to charge set prices.

Exceptions to prohibition include the imposition of reasonable conditions necessary to protect intellectual property rights specified in the Act. Agreements relating to the production, supply, distribution or control of goods or provision of services for export are also exempted.

Prohibition of abuse of dominant position

Section 4 of the Competition Act 2002 states that no enterprise or group shall abuse its dominant position. Dominant position is defined in the Act as a position of strength enjoyed by an enterprise in the relevant market in India which enables it to operate independently of competitive forces there or affect its competitors or consumers there in its favour. Abuse of dominant position includes: directly or indirectly imposing an unfair or discriminatory condition or price (including predatory price) in the purchase or sale of goods or services; limiting or restricting the production of goods or the provision of services or market therefore, or technical or scientific development relating to goods or services to the prejudice of consumers; or denying market access in any manner; making contracts dependent on the acceptance of unrelated supplementary obligations; or using a dominant position in one market to enter into, or protect, another market.

The regulation of combinations

Combinations covered by the Competition Act 2002 include mergers and acquisitions involving large enterprises, *e.g.* acquisitions in which the acquirer and the enterprise being acquired have joint assets of over 10 billion rupees or turnover of more than 30 billion rupees in India, or, in India and abroad, assets

of over USD 500 million, including at least 5 billion rupees in India, or turnover of over USD 1.5 billion, including at least 15 billion rupees in India. When one or more enterprises involved in the combination belong to a group, the threshold is four times higher. Another category of combinations that is covered involves the acquisition of control by a person over an enterprise when the person already has direct or indirect control over another enterprise producing, distributing or trading similar or substitutable goods or services, also subject to minimum size criteria.

Combinations causing or likely to cause an appreciable adverse effect on competition within the relevant market in India are void.

Notice must be given to the Competition Commission of any such combination within thirty days of the approval of a merger proposal by the boards of directors concerned or the execution of any agreement for acquisition. The combination can come into effect after two hundred and ten days from the date of such notice or when the Commission approves it, whichever is earlier.

If the Commission considers that a combination has caused, or is likely to cause an appreciable adverse effect on competition, it may issue a notice calling on the parties to respond within thirty days of receipt of the notice to explain why an investigation should not be conducted. Within seven days of receiving a reply to this notice the Commission can, if not persuaded otherwise, direct the parties to publish details of the combination within ten working days, and may then invite any person or member of the public who might be affected by the combination to file written objections to it within fifteen working days from publication of these details. After receiving the written objections, within 15 days, the Commission may call for such additional or other information as it may deem fit from the parties. The additional or other information may be furnished by the parties within 15 days. After receipt of all information, the Commission must then make a judgment within forty-five working days.

The Commission may, after such consideration, decide to: 1) approve the combination; 2) direct it not to take effect; or 3) propose appropriate modification to eliminate any appreciable adverse effect on competition. In case 3), the parties must carry out the modification within the period specified by the Commission, or the combination is deemed to have an appreciable adverse effect on competition and will be dealt with accordingly. If the parties submit an amendment that is accepted by the Commission, the combination will be approved; if unacceptable, the Commission may propose a modification that the parties then have thirty working days to accept.

2. Resources of the competition authorities

Do the competition authorities have adequate resources, political support and independence to implement effectively competition laws?

The Competition Commission has powers of enforcement and inquiry…

The Competition Commission is empowered to take strong remedial actions to deal with anticompetitive agreements and abuse of dominant position. During the course of an inquiry, it can pass an interim order restraining a party from continuing with such an agreement or abuse for the duration of the inquiry. It can impose a penalty of up to 10% of the average turnover of an enterprise for the three preceding financial years. In the case of a cartel, the Commission can impose on each member a penalty of up to three times the profit or up to 10% of turnover, whichever is higher, for each year of the continuation of such an agreement. After the inquiry, the Commission may issue a cease and desist order directing a delinquent enterprise to discontinue and not to re-enter an anticompetitive agreement or abuse its dominant position. The Commission may also direct that an enterprise enjoying a dominant position be divided.

The Competition Commission also has powers of inquiry, supported by penalties for non-compliance with its procedures, including the power to: order compensation for loss or damage incurred by contravention of its orders; a fine of 100 000 rupees per day for failure to comply with its directions; a penalty of up to 1% of total turnover or assets, whichever is higher, for failing to furnish information on a combination; a fine of from 500 000 to 10 million rupees for knowingly making a false statement or omitting any material particular.

… with no automatic exemptions…

Unlike the MRTP Act, the Competition Act 2002 does not grant automatic exemptions to government-related bodies. The central government does, though, have the power to grant specific exemptions on grounds of: security of the state or public interest; international treaty, agreement or convention obligation; the performance by an enterprise of a sovereign function on behalf of the central government or a state government.

… but a limited competition advocacy role

Section 49 of the Competition Act 2002 gives the Competition Commission a role in competition advocacy which its predecessor, the MRTP Commission, did not have. Both central and state governments may refer policies and laws on competition or any other matter to the Commission for its opinion on the possible effect. The Commission must then give its opinion within 60 days of such a reference.

However, no obligation is imposed on any government body to make a reference to the Commission, and the Commission's opinion is non-binding. Nor does the Act empower the Commission to take the initiative in selecting for its review policies or laws which might affect competition.

Section 49 also enjoins the Commission to take suitable measures for the promotion of competition, creating awareness and imparting training about competition issues. The Commission has accordingly established a website *www.cci.gov.in*, on which can be found details of its competition promotion and education activities, including: four workshops on competition policy and law it organised in New Delhi and Mumbai in 2006-08; 24 articles explaining competition law published by the Commission in major newspapers; and 76 presentations on competition law and related topics. The Commission has published a series of seven advocacy booklets outlining the Commission's activities, including its competition compliance programme for enterprises, and explaining key concepts in the Competition Act 2002, including abuse of dominance, bid-rigging, cartels and intellectual property rights. The Commission has informed the OECD[2] that it is intensively engaging stakeholders, has organised over 100 workshops and seminars, and has a network of nodal government departments at the state level. Nodal officers have been appointed by 28 states and union territories. Five states have also constituted state-level Competition Advisory Committees with representation from various stakeholders.

3. Anticompetitive practices of incumbent enterprises

To what extent, and how, have the competition authorities addressed anticompetitive practices by incumbent enterprises, including state-owned enterprises, that inhibit investment?

The Competition Commission started work in 2009

All seven members of the Competition Commission were appointed in 2009. However, the number of support staff remains far short of the original target, as is clear from a comparison of the existing and proposed organograms on the Commission's website (*www.cci.gov.in*).

The Monopolies and Restrictive Trade Practices (MRTP) Act remains temporarily in force

Under Section 66 of the Competition Act 2002, the Monopolies and Restrictive Trade Practices (MRTP) Act stands repealed and the Monopolies and Restrictive Trade Practices Commission (MRTPC) stands dissolved, but may continue for two years from the commencement of the Competition Act with effect from 1 September 2009 to deal with all cases lodged before commencement under the provisions of the MRTP Act. The backlog of cases will thus be handled by the MRTPC until 2011.

4. Capacity of the competition authorities

> Do the competition authorities have the capacity to evaluate the impact of other policies on the ability of investors to enter the market? What channels of communication and co-operation have been established between competition authorities and other relevant government agencies?

The extent to which the competition authorities have the capacity to evaluate the impact of other policies on the ability of investors to enter the market remains to be determined. The relationship of the Competition Commission with sector-specific independent regulators is not well-defined and the consequent overlapping of regulatory jurisdictions may cause uncertainty for businesses. While the Commission has not yet established channels of communication with other government agencies, it has provided its opinions on several pieces of draft legislation, such as the draft Postal (Amendment) Bill 2006, draft Carriage by Road Bill 2005, draft Shipping Trade Practices Bill 2006 and the Warehousing (Development and Regulation) Bill 2005.

5. Costs and benefits analysis of industrial policies

> Does the competition authority periodically evaluate the costs and benefits of industrial policies and take into consideration their impact on the investment environment?

The Competition Authority has not yet started its work, so it has no record of evaluating the costs and benefits of industrial policies or their impact on the investment environment. However, under its advocacy mandate, the Commission looks at the economic policies of the government from the perspective of competition. There is provision for central and state governments to refer issues to the Commission for comment. The Commission is expected to give its views, which are advisory, not mandatory, within 60 days.

6. Monitoring of privatisations

> What is the role of the competition authorities in case of privatisations? Have competition considerations having a bearing on investment opportunities, such as not permitting market exclusivity clauses, been adequately addressed?

The Commission has no explicit role in monitoring industrial policy or privatisations. Like the MRTP Act, the Competition Act 2002 does not specify a role for the Commission in monitoring privatisations or in evaluating the costs and benefits of industrial policies. Whether such a role will develop remains to be determined once the Commission has started work.

7. International co-operation

To what extent are competition authorities working with their counterparts in other countries to co-operate on international competition issues, such as cross-border mergers and acquisitions, bearing on the investment environment?

The Commission has powers to inquire into an anticompetitive agreement or abuse of dominant position taking place outside India, if it has, or is likely to have, an appreciable adverse effect on competition in India. Such inquiries may be facilitated by agreements with other countries. The Competition Commission is empowered under Section 18 of the Competition Act 2002 to enter into any memorandum or arrangement with any agency of any foreign country, provided that this has received prior central government approval and is for the purpose of discharging the Commission's duties under the Act. This is a distinct improvement on the MRTP Act, which contained no provision for international co-operation on competition.

The Commission reports that it has not yet signed agreements with other competition authorities, but has the mandate to enter into memorandums of understanding to cover its needs.[3] The provisions on external co-operation for enforcement have not yet been used because the Commission has not yet started enforcement work.

Notes

1. A full text of the MRTP Act is on the Ministry of Corporate Affairs website, *www.mca.gov.in*.
2. During the OECD research mission to New Delhi, 4 July 2008.
3. OECD research mission to New Delhi, 4 July 2008.