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Building a Better Competition Regime in India

“As the enforcement of the Indian Competition Act has begun in full swing, voluntary corporate compliance and capacity building of the stakeholders are critical steps to build and develop a better competition culture in India”, said Salman Khurshid, Indian Minister for Corporate Affairs. He was speaking at an International Conference on the “Interface between Competition Policy & Law and Business Strategy” organised by CUTS Institute for Regulation & Competition (CIRC) in association with CUTS and NERA Economic Consulting. More than 50 participants from among the competition authority, legal community, corporate houses and academia attended the event. On this occasion, he released a Toolkit on the Competition Law in India, jointly prepared and published by CUTS and CIRC.

Delivering the Special Address, Dhanendra Kumar, Chairman, Competition Commission of India (CCI) said that CCI has a huge deficit in terms of skills not only at the Commission but also in companies which need to remain compliant to the competition law.

Mukesh Kacker, Director General, CIRC announced the launch of a part-time certificate course on “Competition Law and Business Strategy” to cater to the needs of practicing lawyers, economists and business executives (see Back Cover). The need for formulating and implementing a national competition policy was

discussed at length by Pradeep Mehta, Secretary General, CUTS.

Eduardo Perez Motta, Chairman, Mexican Competition Authority explained why there is less competition in non-tradable sectors and how it affects people at large. Allan Fels, Former Chairman, Australian Competition Authority discussed his experience of dealing with anti-competitive practices in professional services, particularly, medical services.

SL Rao stressed on the regulators’ timeliness in making decisions. Regarding the regulatory domain of a sectoral regulator, L Mansingh, Chairperson Petroleum and Natural Gas Regulatory Board (PNGRB) stated that PNGRB can accept complaints on competition issues in consultation with CCI. S Chakravarthy, Former Member, Monopolies and Restrictive Trade Practices (MRTP) Commission of India discussed various forms of abusive practices.

Yannis Katsoulacos, Athens University pointed out that while dominance is a legal concept, market power is an economic concept. David Mathew, an expert from NERA Economic Consulting highlighted how the wrong use of criteria while determining relevant markets, can lead to flawed outcomes.

According to Shubhashis Gangopadhyay the interface between competition authority and sectoral regulators should not be viewed as adversarial. Noted economist, TCA Anant dealt on the use of ex-ante and ex-post analysis in competition law and sectoral regulation. Nitin Desai, former Chief Economic Adviser to the Government of India, stated that it is time to combine economics and law while making policies. He underlined that CIRC is envisioned to fill this gap.



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Building a Better Competition Regime in India

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Will the Petroleum Regulator Stand Up?

– Mukesh Kacker*

Much has already been written about how regulation of anti-competitive behaviour leads to increased allocative efficiencies and consumer welfare. Less, however, seems to have been written on whether the structures of regulation put in place secure these desirable ends.

This is particularly true of India where independent regulation is of relatively recent origin. It will be worthwhile to take a close look at the state of regulation in the petroleum and natural gas sector, which has been consistently in news, of late.

The petroleum sector consists of four sub-sectors, namely, exploration and production, oil refining and marketing, natural gas transportation and marketing, and crude oil and petroleum products pipelines. Of these four, the first, referred to as upstream, is supposed to be regulated by the Directorate General of Hydrocarbons (DGH), while the remaining three downstream sub-sectors fall under the domain of PNGRB.

The DGH was created by a government resolution in 1993 and was posited as the regulator of the upstream sector. Nothing could be farther from the truth. It is neither independent nor a regulator. When the instrument of creation, a Ministry of Petroleum and Natural Gas order, derives its genesis from a mere resolution, rather than a statute, then independence would remain an illusory concept. The DGH operates under direct and complete administrative control of the ministry. It functions with the assistance of an advisory council and members of the council and staff of the DGH are appointed on a deputation/tenure basis by the ministry in consultation with the DGH chief. In terms of its mandate, the DGH is predominantly an advisory, rather than a regulatory, body.

As per the ministry order, the DGH has been mandated to regulate only one area – preservation, upkeep and storage of data and samples pertaining to petroleum exploration, drilling, production of reservoirs et cetera and to cause the preparation of data packages for acreages on offer to companies. In all other areas relating to various aspects of exploration and production, it is only supposed to advise the ministry.

In the downstream sector, we have a genuine regulator, owing its existence to a statute and not to a mere resolution. The PNGRB Act was passed in 2006 and notified on October 01, 2006. The PNGRB has been vested with very tangible regulatory powers and the statutory nature of its genesis gives it its independence. But despite its powers and independence, it is the ministry which seems to call the shots in the regulatory space. Before



March 28, 2002, marketing and pricing of petroleum products, including transportation fuels, namely, motor spirit (MS) and high-speed diesel (HSD), was controlled by the government under a mechanism known as “Administered Price Mechanism (APM)”.

The APM was dismantled by a notification on March 28, 2002. As a result, the theoretical position since October 01, 2006 is that all entities are free to price their products and the PNGRB is to regulate anti-competitive behaviour like predatory pricing. However, strangely, the government still fixes the prices of MS and HSD and the PNGRB appears to be either powerless or disinterested in doing anything about it. How can the government fix these prices now? What is the role of PNGRB?

These issues have been examined brilliantly in a landmark judgement, dated October 05, 2009, by the Appellate Tribunal for Electricity, in appeal number 50 of 2009. The judgement, either directly or indirectly, establishes the following positions:

- Sections 11(a), 12 and 25 of the PNGRB Act, 2006, together give a wide amplitude to its duties and powers to foster fair trade and competition amongst the entities.
- The dismantling of the APM by the notification dated March 28, 2002 was a policy decision which has not been reversed by another policy decision. The government, therefore, cannot fix prices under the garb of policy.
- Section 2(x) of the Act specifically provides that it is only the entities which can fix the price and not the government.
- The above power given to the entities to fix the price cannot be usurped by the government.
- If the prices are to be fixed by the government as a sovereign, then it has to be declared as a public policy after observing formalities as provided under the Constitution.

After this judgement by the tribunal, the case is now before the PNGRB. It will be interesting to see whether PNGRB asserts its independence and buries the ghost of APM once and for all.

* Director General, CIRC. Abridged from an article that appeared in the Business Standard, on December 24, 2009.

Still a Long Journey for Railways

– Rajesh Chakrabarti*

As China zooms into the record books with a train linking Wuhan and Guangzhou, over 1,000 km apart, in less than three hours, in India the much-vaunted Indian Railways transformation story of Lalu Yadav is being questioned by his successor, Mamata Banerjee. She has sought to ascribe much of the transformation to creative accounting changes. Political equations aside, the tactical incentives for Mamata to downplay her predecessor's accomplishments are obvious – they lower the base against which her own achievements in office will be seen.

About the same time that Mamata's White Paper hit Parliament, an in-depth, independent study¹ hit the stands. Reading it together with the White Paper gives an interesting insight into the Indian Railways story.

Giving a lucid and gripping account of the change process, the book concludes that indeed there has been a major transformation in the Indian Railways and credits Lalu with giving senior bureaucrats and technocrats freedom to do what they thought was right, and a team of innovative top managers, led by Sudhir Kumar, IAS, officer on special duty in the ministry of railways, for actually coming up with the changes that made the difference.

There is little doubt that at the turn of the century, Indian Railways was in trouble, deep trouble. Rattled by a series of accidents and near-bankruptcy, an expert committee headed by the former Reserve Bank of India Deputy Governor, Rakesh Mohan had suggested radical surgery downsizing the 1.4 million workforce, restructuring top management, outsourcing non-core activities and increasing passenger fares. Unsurprisingly perhaps, the report was shelved. By 2008, Indian Railways has been resuscitated without doing any of the above.

The book attributes the turnaround story to three basic thrusts – increasing the permitted load of freight trains, speeding up train movements to reduce the turnaround times and what the authors' call "developing business savvy". This last includes a host of management decisions that built on the under-utilised potential of railways from rationalising freight rates to tapping advertising revenue potential. Much of these three thrusts, particularly the first two, were feasible largely because of the investment in railway safety and other areas made by Lalu's predecessor and archrival, Nitish Kumar, between 2001 and 2004.

Mamata's White Paper, on the other hand, contends that the growth was hardly surprising. First, it was just pillion-riding on the great Indian growth story during



The book carefully sketches the organisational nature of the railways, with all its challenges of size, bureaucracy and political interference, and the finesse with which the key players pushed change effectively in such a complex setting.

the period and actually didn't reach its potential if one accepted the World Bank's estimate of an elasticity of 1.25 for railway gross domestic product (GDP) to economy GDP. Second, it is not as if freight rates have not risen; they have actually risen significantly, as high as 44 percent in food grains and 35 percent in fertilisers over the period. Finally, much of financial results stemmed from two accounting changes – capitalising of principal repayment lease charges to Indian Railway Finance Corporation and marking the reimbursement from government for building strategic non-commercial lines as an income.

The report itself admits that the long-run elasticity for India is below 0.8. As for freight rate changes, a careful look does not seem to suggest that the railways was gorging, only using a multi-part pricing strategy, that, at its unlikely worst, could seem complex to customers. As for the accounting changes, first these are publicly notified and audited by multiple agencies. If the changes were not made, and if the effect of the Sixth Pay Commission was evenly distributed, the average annual cash surplus before dividend would have dropped from Rs 17,734 crore to Rs 12,473 crore.

White Papers are always great for transparency. In this case, it does a good job of scaling down the financial feat, but there is no way of denying that a transformation did happen. As a tactical ploy, however, this report may backfire later. Mamata would be ill-advised to assume that she herself will not be judged in time by the same standards she is now applying. But then again she may be counting on a job change very soon.

* Teaches at the Indian School of Business, Hyderabad. Abridged from an article that appeared in Financial Express on December 29, 2009.

1 V Nilakant & S Ramnarayan, *Changing Tracks: Reinventing The Spirit of Indian Railways*, Collins Business, New Delhi, 2009.

Announcement of Certificate Course

Certificate Course on the Interface between Competition Policy & Law and Business Strategy

EQUIP YOURSELF WITH A DISTINCT PROFESSIONAL ADVANTAGE

With the passage of the Competition Act 2002 (as amended), business strategy decisions such as pricing, agreements across value chains and between competitors, mergers and acquisitions (M&As), usage of intellectual property rights (IPRs) etc. are likely to be impacted. Companies and their executives today are faced with fresh challenges to comply with the new Competition Law in India. This course is specially designed to help such executives and students of business management, economics, law, chartered accountancy and company secretaryship, acquire professional skills and gain first-mover advantage.

About the course

The certificate course will be delivered through 14 written modules, designed, written and reviewed by well-known competition experts. About 30 hours of rigorous classroom interactions are tailored to meet the needs of the industry. All participants will be given written modules prior to the commencement of the course. Classes will be held in New Delhi over a period of six days on Saturdays.

The course will be taught with a special focus on the economic underpinning of competition issues. You will gain:

- Analytical skills to comprehend issues relating to business strategy and competition policy & law; and
- Knowledge of compliance issues related to the Competition Act 2002.

All successful participants will receive a certificate from CIRC.

Comprehensive Coverage of the Course

- Basics of competition policy & law
- Economic tools and techniques for competition analysis
- Understanding business strategy in view of:
 - ◆ abuse of dominance;
 - ◆ vertical agreements across value chains;
 - ◆ horizontal agreements amongst competitors including cartels; and
 - ◆ M&As
- Organisation structure of the CCI
- Remedies under the Competition Act 2002
- Interplay between IPRs and competition law

- Knowledge of competition laws across select countries
- Cross border competition and futuristic issues
- Interface between competition policy & law and business strategy

Learn from Experts in the Field

- Aditya Bhattacharjea, Delhi School of Economics
- Amit Kapur, Jyoti Sagar Associates
- Geeta Gouri, CCI
- Jaivir Singh, Jawaharlal Nehru University
- K K Sharma, CCI
- G R Bhatia, Luthra & Luthra Law Offices
- Manas Chaudhuri, Khaitan and Co.
- Manoj Pandey, CCI
- M M Sharma, Vaish Associates
- Payal Malik, Indicus Analytics
- Pradeep S Mehta, CUTS International
- Raghav Narsalay, Accenture Institute for High Performance
- R S Ratna, Indian Institute of Foreign Trade
- S Chakravarthy, Former Member, MRTP Commission
- Samir Gandhi, Economic Laws Practice
- Sanjay Pandey, Amity Law School
- Sharad Bhansali, APJ-SLG Law offices
- Shubhashis Gangopadhyay, India Development Foundation
- S Sundar, The Energy and Resources Institute
- TCA Anant, Delhi School of Economics

How to register?

You can register for the course online at:
www.circ.in/cpl.htm.

For further assistance, please write to:



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