Beyond restriction

- Competition, and the constraints on it
Commentarao - S.L. Rao

Most people understand the simple law of economics. Supply will match demand through the mechanism of price, in a competitive market. In practice, of course, there are many constraints on the effects of competition for the consumer. They include moving goods and services between places, a big buyer or seller using size to get better terms and to dominate, connections and contacts used to get more favourable treatment. In India, only some years ago, we complained about being exploited by manufacturers and trade. For instance, cement prices would go up uniformly, property contractors reneged on commitments, mergers like Glaxo with Smith, Kline and French, and how they would affect prices of medicines.

In 1991, we began the process of enlarging the role of the private sector in the economy. The government began removing restrictions and controls on starting or expanding new enterprises. As a result there is a near-vanishing of government's role in telling investors what they can produce, where, with what production capacity, type and source of technology, what could be paid as royalty, how many people they would employ - in many cases, even what prices they could sell at, and whom they could sell to. This has made the economy grow, improved consumer choice and quality of supplies, and benefited all.

Another restriction on enterprises was the Monopolies and Restrictive Trade Practices Act, which was intended to prevent private enterprises from getting 'dominant' shares in markets. The definition of what were the boundaries to a market was often so restrictive that market dominance was an inevitable conclusion. A finding of dominance had penalties like cutting production by enterprises. To take a hypothetical example, coconut oils from Kerala could be a market, with coconut oils all sourcing a larger market. Coconut oil is an edible oil, and part of the market category of edible oils and fats. The market share of one brand of coconut oil will further fall as the market definition is expanded to include relevant substitutes. The more restricted the definition of the market, the greater the market share of a supplier, and accusations of being dominant.

The portion of the MRTP Act relating to 'restrictive practices' was strong, but implementation was not so thorough as to protect the consumer from efforts by suppliers to restrict choice, to 'tie' purchases of one product to another, and so on. Instead, the MRTP Act was another element in the control mechanism over private investments. These restrictions did not benefit consumers or the economy. Further, MRTP did not apply to State-owned enterprises, a significant element that dominated the economy in crucial sectors. The Monopolies Commission created under the MRTP Act was not applied to State-owned enterprises even when they were very large, dominant or monopolies, and favoured by government policies.

The Competition Act, 2002, had an entirely different purpose. It recognized that competition was beneficial to consumers. Since a successful enterprise will aggressively use every available method to improve sales. Deep pockets help sales below cost until other enterprises are overcome in the market. Clout in the market could reduce distribution and visibility of other suppliers. Vendors could influence buyers to write specifications that were more suited

to the offerings of the vendors concerned. It is essential if competition is to be effective in benefiting the consumer, that no supplier gets unfair advantage over others in the market.

The Competition Act laid down the market actions that could create market dominance, with possibility of unfairness. It established an independent regulator to oversee the markets, with strict powers to punish violators, and a specialist tribunal to speedily decide appeals. Mergers between enterprises in similar fields had to be cleared by the commission. Its ambit was not restricted to any sector. Competition was expected to provide greater choice for consumers, freedom of entry and exit for enterprises, ensuring that full information was available to all on supplies, prices and quality, with no restrictions on movement of goods and services. However, even after the liberalization that began in 1991, State-owned enterprises remained dominant especially in infrastructure, and remained prominent in many other sectors. These enterprises were not as regulated as were the private participants in the same sectors. Many received government support.

The Competition Commission has, in the last three years, done considerable work in many sectors. They have dealt with cartels, price fixing, market dominance, uncompetitive practices, unfair practices, given rulings on merger proposals by enterprises, and used its penal powers to discipline a variety of enterprises. It has also cleared many others alleged to have acted against the interests of the consumer by engaging in non-competitive practices. There is developing realization in industry that there is a watchdog to ensure free competition, which acts speedily and firmly.

There are safeguards to prevent misuse of the law. Thus, many airline passengers are bewildered by the huge difference in fares between the same locations at different times, by the lack of a time-table that shows the fares, by extortionate fees for changing or cancelling tickets. However, the Competition Commission has, for the present, precluded itself from deciding this issue because apparently there is no player who dominates the market and is so able to influence others. It is also argued that these varying fares represent the prices for different products and are a result of market forces of supply and demand, even if they deny the consumer definite price information.

Where the Competition Commission has yet to make a difference is in infrastructure. Railways, roads, the generation, transmission and distribution of power, the exploration, refining and distribution of oil and gas, metro rail, ports, airports, are either wholly or dominantly under Central or state government ownership. Government ownership restricts the choice for consumers who have to take what is available from the State-owned enterprise. Even where the sector has a statutory regulator, governments have by-passed the regulator's decisions. This is particularly so with tariffs. Governments are able to impose cross-subsidies on the provider so that the 'rich' can subsidize the 'poor'. This causes adverse financial impact on the enterprises. Another example is of airports, which do not provide low cost, 'no frills' terminals, so that low-cost and minimum-service airlines can keep air fares low.

Some legislations provide for 'open access' to allow the consumer to choose between suppliers, wherever they might be located. In practice, this is only marginally done since governments put restrictions to protect their own enterprises. Further, in many instances, like electricity, there is limited availability of transportation to buy and move the product or service. Recently for example, government has proposed that power allocations to enterprises could be negotiated bilaterally. The proposal will enable private deals. It lacks the transparency that is available when the transactions take place in the market on an Exchange.

Even when competition is sought to be introduced merely at the time of bidding for an infrastructure project, the terms are so restrictive that competitive bidding is problematic. Thus bidders for roads and power projects have to forecast future rates of interest, foreign exchange, inflation, wages, and so on for 25 to 30 years - a feat that not even the government is able to achieve. This almost invariably puts the bidder in a financially difficult position. Competitive bidding becomes farcical. The Competition Commission has through its decisions made many actors conscious about anti-competitive practices and the penalties when caught. But a major part of our economy remains either outside the purview of the commission or is yet to be reached.

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