



Comment on the Draft National Competition Policy Statement Of the Government of India[□]

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Background and Executive Summary

The Ministry of Corporate Affairs, Government of India, issued a Draft National Competition Policy Statement (hereinafter “DNCPS”) on July 28, 2011 and invited comments on the same. It is in the opinion of the writers of this comment that this policy can indeed be lauded as an initial step for establishing an overarching policy framework for the purpose of inculcating competition principles in the varied spheres of national policies and legislations, as well as for the promotion of a competitive market structure in the economy, which will gradually lead to maximization of economy efficiency and public welfare.

In terms of their efforts to highlight the necessities, principles and complexities of competition regulation, related legislations and the interrelationship between competition laws and competition policy, the draftsmen of the DNCPS undoubtedly ought to be commended. The draft is indeed a seminal document acknowledging the complementary roles of competition law and policy in engendering competition advocacy with different public and private stakeholders in India. It is a proactive and positive effort to build and sustain a competition culture in India and is more specifically aimed at good governance.

However, having said that, the writers have sought to identify some areas of concern that may be gleaned from the DNCPS, along with raising a set of relevant questions that have gone without answers in the draft, as well as venturing suggestions for improvement in the briefest sense within the DNCPS.

Comments and Analysis

I. COMPETITION IMPACT ASSESSMENT:

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1.1. On the issue of competition impact assessment (hereinafter “CIA”), the policy states -

An illustrative list of parameters for undertaking Competition Impact Assessment is enclosed at Annexure–II. The National Competition Policy Council will facilitate development of a Manual for undertaking Competition Impact Assessment suited to the local context.¹

However, Annexure II goes on to list a set of very broad parameters, which may be insufficient as a form of guidance, given the novelty of the concept to most sectors.

I.2. Given that the policy is going to be relied upon for all future courses of action it must elaborate further on the toolkit for assessment. Thus, like the Guidelines for CIA released by Competition Commission Singapore (October, 2008) and the Competition Assessment Toolkit released by the Korea Fair Trade Commission (October, 2010), the Indian policy too should explain each of the parameters mentioned in Annexure II with examples.

I.3. Moreover, it is to be noted that the assessment cannot be based solely on the parameters mentioned in the Annexure. The OECD suggests a two-stage assessment procedure in which, the first stage is an initial check to determine if a regulation may entail a negative impact on competition and to determine if the next stage of in-depth assessment is warranted. The preliminary assessment is performed through a checklist of questions from the areas suggested by OECD, which are similar to the parameters mentioned in this policy. If any one of these is judged to be negatively affected, the regulation in question should undergo in-depth assessment, which consists of identifying the relevant market and the potential impacts of the regulations on the same. Similarly, under the Singapore Competition Commission’s Guidelines on CIA, the assessment is carried out in the following four stages –

- Step 1: Establish policy goals and policy options
- Step 2: Identifying affected markets
- Step 3: Evaluating impact on competition
- Step 4: Mitigating the adverse impact on competition²

A system like this may prove to be a more effective mode, whereby, not only does the policy provide guidance on preliminary assessment of the impact, but also provides guidance on the stage involving in-depth analysis. Especially regarding identification of the relevant affected market, it is imperative that the policy addresses the issue in considerable detail to make the assessment model more understandable and adoptable.

I.4. Related to the step-wise CIA model suggested above is the issue of defining precisely who shall be responsible for competition analysis. In the majority of economies, an agency proposing a regulation is either compelled to carry out such analysis as part of the regulatory analysis processes, or is considered

¹ ¶ 9.4 of DNCPS, 2011.

² Competition Commission Singapore Guidelines on Competition Impact Assessment for Government Agencies, October, 2008.

the first choice to do so.³ The DNCPS itself suggests that “government departments and ministries will undertake Competition Impact Assessment”, with the National Competition Policy Council (hereinafter “NCPC”) providing technical assistance required in carrying out assessment. However, such a structure carries with it the fear of undermining the role of the competition authorities. Accordingly, as in Mexico and Korea, where the preliminary step is carried out by the proposing agency and, if required, the in-depth analysis is necessarily carried out by a Technical Group of experts under the aegis of the Competition Authority, DNCPS too could adopt a similar model.⁴ Thus, while the government departments and ministries can undertake the preliminary assessment of the impact on competition, any further analysis can be forwarded to a Technical Group set up under the NCPC. The Technical Group can then in turn review the results of the preliminary assessment and determine if assessment should proceed in greater depth, even if no in-depth assessment is deemed necessary by the proposing agency. This system will also ensure that political considerations are kept separate from technical analysis. In the meantime, the regulatory agency and Technical Group should cooperate in the seamless exchange of assistance and opinions.

However, given the lack of expertise and awareness of CIA in most regulatory agencies, it is recommended that the NCPC lead the assessment process for the time being, with regulatory agencies expanding their roles gradually over time.

I.5. Another important issue to be considered is the enforcement of this CIA model. The CIA would *inter alia* assess policies and statutes. So a mechanism envisaged by one governmental policy is effectively assessing other policies, creating a potential problem of exceeding jurisdictional mandate. In this context, similar to CIA is the broader Regulatory Impact Assessment (hereinafter “RIA”) model that has been adopted by many countries. Countries like Mexico (OECD, 1999a) and Korea (OECD, 2000a) have incorporated the model into their legislative process by making formal provisions for RIA.⁵ Drawing inspiration from this, CIA could also be turned into a formal provision with a legislative sanction as opposed to merely a policy directive.

I.6. Finally, since the aim of the Policy is to achieve increased competition advocacy, it is necessary to involve the public in the CIA process. The NCPC, post its in-depth analysis, can better develop its understanding of competition problems and associated costs by publicising its findings that will inform and mobilise relevant interest groups to lobby in favour of reform, especially to avoid the influence of

³ Finland’s regulatory impact assessment allowed for several units of Finnish public administration to participate in the process with each ministry being responsible for the impact assessment within its sphere of competence. However, sensing that the same weakened the Finnish Competition Authority’s role in the regulatory reform, the OECD recommended that in future, to ensure that competition policy considerations and impacts on enterprises’ activities are considered more systematically, ministries should regularly consult the Competition Authority on the competitive aspects of regulatory reforms. The OECD further recommended that a statement be requested from the Competition Authority in cases where it is likely that a regulatory reform may prevent, restrict or distort effective competition and this requirement be enforced through law. See *Regulatory Reform in Finland — A New Consensus for Change*, OECD, 2003.

⁴ See *Competition Assessment Toolkit*, Korea Fair Trade Commission, October 2010; *The OECD Competition Assessment Toolkit in Mexico*, Latin American Competition Forum, September, 2008.

⁵ With Mexico, this was realised through the 1996 amendments to its Federal Administrative Procedure and with Korea, through the President’s Commission on Administrative Reform in 1993 and, then the Basic Act on Administrative Regulations in 1997. See Norman Lee, 2002, <http://ageconsearch.umn.edu/bitstream/30691/1/cr020030.pdf> (Last visited August 20, 2011).

vested interests which may be opposed to change. These interest groups may include household and industrial consumers and potential new entrants to the markets. This would also be in tandem with the Policy's objective of increasing consumer movement.⁶

II. PRINCIPLES, GOVERNMENT INITIATIVES AND ADHERENCE TO PREVIOUS ROLE MODELS

2.1. A brief description of the positive externalities generated from the adoption of the DNCPS would encompass the inclusion of state and sub-state authorities and ensure that a healthy competition culture permeates through all levels of governance. It also envisages consumer movements by promoting public awareness and directs governmental authorities to engage appropriate agencies /experts to conduct sectoral studies to foster competition across sectors. However, the adoption of the principle of institutional separation between the policymaker vis-à-vis the policy operator and regulator, in the formulation of the policy, appears prima facie counter-productive. Therefore, for a more in-depth evaluation of the merits of the draft, it would be imperative to determine the extent to which DNCPS internalized the recommendations of the Working Group on Competition Policy, 2007 which was constituted by the Planning Commission, Government of India⁷ and whose comprehensive Report serves as a guiding light to not only understand the backdrop of the draft Policy, but also the economic exigencies which necessitated the need for a policy-level intervention at this juncture, and most importantly the intention of the Government behind reevaluating the Competition Act, 2002 and introducing a policy statement to redress the shortcomings.

2.2. DNCPS, once finalized, will operate as a cornerstone of Government economic framework policies along with monetary, fiscal and trade policies,⁸ making it imperative that it should be based on certain well-defined principles of competition⁹, which while incorporated within the DNCPS provisions to a certain extent, should be applicable across all sectors of the economy and any deviation from the principles of competition should be only to meet desirable social or other national objective. The requirements of periodic review of a National Competition Policy and adherence to its elements by the organs of Government are other recommendations of the Working Group that the DNCPS omits

⁶ See Karen Ellis & Rohit Singh, 2010, <http://www.odi.org.uk/resources/download/4954.pdf> (Last visited August 20, 2011).

⁷ Order no. I& M-3(32)/2006 dated June 5, 2006 in the context of formulation of the Eleventh Five Year Plan.

⁸ Foreword by Vinod Dhall, Chairman of the Working Group on Competition Policy, Planning Commission, Government of India, February, 2007. (In 2007, the task entrusted on the Working Group on Competition Policy, which was set up under the aegis of the Planning Commission, was to recommend a set of comprehensive policy instruments and strategic interventions to effectively generate a culture of competition, ensuring the involvement of all stakeholders. Its mandate also included the task of devising the most effective and workable institutional mechanism for synergized relationship between sectoral regulators and the CCI.), ¶ 4.2.5.

⁹ Id., ¶ 5.2.1.

to emphasize. The positive externalities generated by the Competition Policy should extend to the all levels of the Central Government, State Government and sub-state authorities.¹⁰ Given the impact of the same on inhibiting competition in the relevant markets, market fragmentation, and freedom of inter-state trade, review of such policies by the State Governments as well as assessing CIA of other sectoral policies are a few of the Working Group's pertinent recommendations and in this aspect DNCPS seems to have followed the Working Group's suggestion to heart.

2.3. An important tool of advocacy is the ability of many competition authorities to give an opinion on proposed legislation and public policy on their own, so that the law makers and policy makers consider the competition dimension and give reasons for deviating from them for the benefit of the public. However, given the wide canvas of the DNCPS, it would be necessary to set up an institutional arrangement for monitoring the progress of the implementation of the policy. The Working Group's suggestion of setting up a Competition Policy Oversight Council (hereinafter "CPOC") thus appears viable.¹¹ The mandate of this CPOC was broad enough to include monitoring, policy impact assessment, enjoying functional and monetary autonomy, authority to incentivize cooperation and also a composition consisting of independent experts, representatives of the concerned ministries, State Governments, industry, consumer welfare organizations and other civil society organizations. In its current form, DNCPS, while envisaging an institutional arrangement to implement the policy-objectives has not just semantically deviated from the Working Group Report but has also vested a broader mandate on the National Competition Policy Council (NCPC)¹², which unfortunately lacks again in terms of specificity of guidelines.

III. IMPLEMENTATION MEASURES

3.1. The measures suggested in DNCPS appear to be more assessment measures rather than implementation measures. The DNCPS projects the in-house cells (mentioned in ¶ 9.10 of the DNCPS) as primarily advisory bodies. The question is about the next possible step after competition impact assessment, and whether the same can be implemented by way of an action plan to rectify anti-competitive areas. Further, with regard to the concept of in-house cells, it must be kept in mind that it is always preferable that nobody judges his own actions, especially at the administrative levels. Unfortunately, this is what the in-house cells are being conceived to do. Therefore, there is need for a mechanism, not just to oversee, but to control and monitor the performance of these cells.¹³

3.2. With regard to the proposals of ¶ 9.3.b of DNCPS, there appears to be a lack of specificity as to the mode of involving consumer movement. It is suggested by the writers of this comment that the NCPC build consumer capacity and strengthen their resource base by requiring the in-house

¹⁰ Id. ¶ 5.3-5.5.

¹¹ Id., ¶ 5.6.

¹² ¶ 9.10 of DNCPS, 2011.

¹³ See Helpdesk Research Report: Critique of Governance Assessment Applications available at <http://www.gsdrc.org/docs/open/HD699.pdf> (last visited on August 20, 2011)

cells to proactively function as consumer awareness/competition advocacy cells. The in-house cells can play a dual role of consolidating consumer grievances which are brought before them (and which involve competition issues) by suggesting solutions and/or directing them towards the Competition Commission, while simultaneously performing preliminary assessment of anticompetitive effects.¹⁴

3.3. ¶ 9.3.c of DNCPS suggests encouraging formulation, adoption and wide dissemination of competition policy principles, but remains silent on the specific implementation mode of the same, given that the NCPC does not have the power to prescribe sanctions. Suggestions have also been made regarding the incentive that can be offered to the governmental ministries and departments. However, in the mind of an observer, the question arises as to how one ministry can effectively incentivize, encourage and direct another. The policy should therefore elaborate upon the aspect of financial grants, their sources, allocation, distribution and justification thereof.

3.4. Whereas DNCPS lays down certain general ideas, there is no mechanism, or regime, or instrument proposed to achieve any of these goals. The proposed strength of the NCPC as per the Planning Commission Discourse on the National Competition Policy (2007) is a mere 25, rendering the functions enlisted practically unachievable. It is suggested that the strength for such a task be enlarged to around 200.¹⁵ In terms of assessment of the degree of impact of transactions on market competition and means of addressing the same, it may further be advised that policy makers under DNCPS should also consider Technical Assistance from developed world institutions, which have considerably greater experience as well as expertise in such fields.¹⁶

IV. SECTORAL REGULATION

4.1. The DNCPS is surprisingly silent on the aspect of sectoral regulation through a comprehensive competition policy. Although in ¶ 3.1, it refers to the linkages between competition and various sectoral policies, it does little to highlight the need for a sectoral regulation working in tandem with the competition policy. In ¶ 6.2, it states that there is a need to ensure an institutional mechanism between and among the sectoral regulators and/or the CCI to ensure that there are no jurisdictional gridlocks. Unfortunately, DNCPS does not delve into greater details about its relationship with the sectoral regulators.

4.2. Mention may be made in this respect of the Working Group having highlighted as far back as 2007 the need for having a sectoral regulation in place in the larger framework of competition

¹⁴ Hon. Richard D. Cudahy and Alan Devlin Anticompetitive Effect 59 Minnesota Law Review 2010 available at http://minlr.stereointeractive.com/files/2011/04/Cudahy-Devlin_MLR.pdf (last visited on August 20, 2011); Professor Einer Elhauge comments of Professor Elhauge on DG Competition Discussion Paper on Exclusionary Abuses available at <http://ec.europa.eu/competition/antitrust/art82/072.pdf> (last visited on August 20, 2011)

¹⁵ See Competition Law and Policy in Brazil: A Peer Review – 002010073 © OECD / IDB 2010

¹⁶ Michael W Nicholson, D. Daniel Sokol and Kyle W. Stiegert Assessing the efficiency of antitrust/competition policy technical assistance programs (Paper prepared for the 2006 ICN Cape Town Conference ICN Working Subgroup on Technical Assistance Implementation)

policy. The Group noted that each sector suffers from its own sector-specific issues and efficient managements of such issues at a micro level is important in ensuring effective competition in the market. Although sectoral regulations are specific while competition policy is generic, they are complementary. There is a need to appreciate the role of competition policy as a more efficient tool to regulate the competition in the market with increasing competition as opposed to regulatory interventions. The need for cooperation between the various regulators across all the sectors that the DNCPS identifies to have an integral relationship with the competition sector becomes further imperative for prevention of inefficient use of resources and presence of technical expertise of the sectoral regulators which shapes the market.¹⁷ In this aspect, while the Working Group's detailed suggestions seem adequately comprehensive, such has not been adopted by the DNCPS.

4.3. Another important suggestion is highlighting the need to set up sectoral agencies subsequent to the setting up of the competition authority, which enables the competition authority to play the role of a mentor. This will ensure that there is sufficient competition advocacy in a particular sector. Although this may be difficult in the existing sectors, perhaps any new sectoral regulation could take the same into account.¹⁸ Similarly, there should be concrete measures of introducing competition advocacy in the various existing sectors. This will also enable the competition authority to form an opinion about the targeted sector in an independent and informed manner which will bridge the gap of insufficient technical expertise.¹⁹ The policy lacks adequate guidelines in this regard.

Conclusion

In the light of the aforementioned discussion regarding the DNCPS, the writers are of the opinion that the initiative taken by the Ministry in formulating this draft is indeed laudable, especially in terms of attempting to achieve harmonization in policies, laws and regulations of the Government as far as competition dimensions are concerned and promoting a strong competition culture at the Central, State and Sub-State level. However, a more organised and detailed approach is required in matters of effecting inter-sectoral regulatory cooperation, efficient institutional supervision, competition impact assessment and implementation measures.

¹⁷ Amitabh Kumar, Do we need more sectoral regulators?, FINANCIAL EXPRESS, May 13, 2005.

¹⁸ John Hike, Improving Relationships between Competition Policy and Sectoral Regulation, available at <http://www.oecd.org/dataoecd/30/38/38819635.pdf> (Last visited August 20, 2011).

¹⁹ Ibid.