

COMPETITION, INNOVATION AND INCLUSIVE GROWTH

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Introduction:

Innovation is a systemic phenomenon that takes place within an economic environment in which the law has a full role to play. However, no definition of the term innovation has general acceptancy. According to the Oslo Manual definition adopted by the Organization for Economic Co-operation and Development (OECD), “An innovation is the implementation of a new or significantly improved product (good or service), or process, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations”. It is important to note that in the Global Innovation Index (GII) 2017, India is indexed at the 60th position in the adoption of innovative technology. Whereas, Switzerland is at the top position followed by the US is in 4th position, it is also lagged behind by the countries like Ireland (10), South Korea (11) and China (22).²

The relationship between competition and innovation and the policy framework to achieve inclusiveness is multifaceted. While in many cases more competition would help generate better growth outcomes, there are also contexts where limiting competition could be desirable. For instance, unequal distribution of resources among market entities as a result of barriers to entry or the inability of newly developing or underperforming firms can inflict a large cost on the economy in terms of productivity growth. On the other hand, some monopoly power, in the form of intellectual property rights, could be potentially needed to give enough incentives for intellectual property owners to encourage innovation and development, which in turn would lead to overall economic growth.

There are also trade-offs between market concentration, growth and efficiency. Big market players, holding a larger share of the market, are able to take advantage of economies of scale and access sufficient resources to incur Research & Development fixed costs. But not all the big players are equal in terms of the provision of employment, good jobs, and their contribution to growth and innovation. Moreover, they could potentially create entry barriers to enjoy their monopoly rents, further restraining competitiveness and inclusive growth.

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² Zafar Mahfooz Noman et. al., *Innovation Technology in Health Care Management in the Context of Indian Environmental Planning and Sustainable Development*, 11(2) INTERNATIONAL JOURNAL ON EMERGING TECHNOLOGIES, 560-564 (2020).

However, there is a contrary opinion, which suggests that competition and innovation are opposed to each other. According to this view, competition policy must either strive for competition or for innovation. But this is a false dichotomy that has recently sprung up.³

This paper will try to bring out the importance of a pro-innovation competition law and policy which will help in achieving a competitive market economy with innovation and inclusive growth better. Achieving sustained economic growth, which can be ascertained by most efficient utilisation of the scarce resources in an economy, is paramount for inclusive growth and innovation. The main objective of this study is to suggest for competition rules and policy, that can encourage innovation, on the innovative performance of the Indian economy.

The study first of all tries to examine the interface between competition law and innovation. It also tries to make an analysis of the present competition policy and their implications on innovation and inclusive growth in India. It also tries to make an assessment of Draft National Competition Policy, 2011; Report of Competition Law Review Committee, 2019 to check the policy implementations for innovation and inclusive growth in India. The finally suggests certain policy proposals for sustained economic development in the country.

The process of competition acts as the driving force for the market enterprises to innovate for a better cost advantage, to bring variety in their products and to deliver cost advantage to the consumers by making available the goods and services at the lowest possible price. Thus, competition is indispensable for innovation in the market.⁴

The recent developments in the market economy have shifted the attention from a mere legal framework to more on competition policy. Although competition policies in many countries may not necessarily be weak, they may need to be modified to address not only consumer welfare but also inclusiveness and innovation. Competition policies giving relaxations to intellectual property rights owners also plays an important role in the market. Big market players may contribute in the creation of a more market efficient economy using the same.

Interface between Competition law and Innovation

Though, competition law and innovation are two seemingly divergent disciplines with their ulterior motives, the interaction and interrelation between competition and economy are getting uncovered. Till recently, promotion of competition in the markets was considered to be the end

³ Timothy Bresnahan, *Pro-Innovation Competition Policy: Microsoft and Beyond*, COMPETITION POLICY RESEARCH CENTER, FAIR TRADE COMMISSION OF JAPAN INAUGURAL SYMPOSIUM (Mar. 08, 2022), https://www.jftc.go.jp/cprc/koukai/sympo/2003symposium/2003agenda_files/agenda19.pdf.

⁴ Payal Malik, *Competition Law in India: Developing Efficient Markets for Greater Good*, 41(2) VIKALPA, 175–181 (2016).

goal and the ultimate goal of economic development was not given due emphasis. The classical view that competition is the process of striving for more market shares and prices has been replaced with the recent development in innovative sectors, where competition also concerns about the use of new technologies, the products with new characteristics etc. So, the competition now focuses more on innovation, its fruits and the processes.⁵ Competition law alone without any development goals in an economy cannot achieve the ultimate objectives as an economic law. With static economic development, where the competition regulation focuses only for consumer welfare objectives with no long-term economic goals, the ultimate objective for economic development shall be frustrated. According to Singh, competition policies in developing economies should support the overall development path of an economy emphasizing dynamic efficiency goals.⁶

It is important to note that the application of competition law must be guided by more economic objective goals for it to serve the ultimate goal for consumer welfare. A reasonably sound and competent framework for application of competition law must be based on 'economic approach' for generating consumer welfare and economic efficiency ensuring innovation and inclusive growth.

Competition Law, Intellectual Property Rights and Innovation

Competition law is that branch of law which protects the interest of the consumers and ensure the freedom of trade in the market in India. In process, it prevents the abuse of monopoly power, restrictions on free and fair competition. However, the *Competition Act*, 2002 has acknowledged rights of the intellectual property owners in the form of relaxations extended to them in enjoying monopoly rights by fact of intellectual property innovations. However, it is clear that the end goal of both laws are to promote consumer welfare and innovation.

The co-relationship between competition and innovation is, therefore, a complex one. The primary object of competition law is to promote consumer welfare by preventing monopoly in the market and the innovation can be achieved by granting monopoly rights with intellectual property rights (IPRs) concessions. Intellectual property rights also act as a competition regulator, a marketable financial asset as well as an economic tool.⁷ Thus, balancing competition and innovation is a tight

⁵ Marie Cartapanis, *Innovation and Competition Law*, COMPETITION FORUM - LAW AND ECONOMICS (Mar. 08, 2022), <https://competition-forum.com/phd-thesis-summary-innovation-and-competition-law/>.

⁶ Ajit Singh, *Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (2002).

⁷ ZAFAR MAHFOOZ NOMANI, *INTELLECTUAL PROPERTY RIGHTS & PUBLIC POLICY* (New India Publishing Agency 2018).

rope walk by the Competition Commission of India, keeping in mind the economic efficiency and inclusive growth implications of the same.

In this era of industrialisation and globalisation, intellectual property protection plays a key role in economic growth and advancement in an economy. Intellectual Property Rights not only helps in growth of business, but also benefits the public at large and act as an important catalyst in achieving consumer welfare.⁸ To encourage innovation, successful innovations must be appreciated through appropriate rewards for the same. Thus, for a successful innovation, the innovator must be rewarded with a quasi-monopoly status, allowing it to exploit the market economy by granting intellectual property rights. Thus, an efficient competition and IP Policy as well as other government instrumentalities to push innovative practices will help establishing a robust economy with innovation and inclusive growth.

The World Trade Organization (WTO) through its Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement lays down the baseline for intellectual property legislations for the member states. The international agreement also provides for certain points on competition law issues in intellectual property rights. The TRIPS Agreement lays down a striking competitive balance for achieving both innovation and economic growth.

The TRIPS Agreement lays down the following guiding principles on the interplay between competition law and IPR:

- a) Each country's choice to reserve its own IPR-related competitiveness policy is up to them.
- b) There must be coherence between the TRIPS Agreement's IPR-related competition policy and the principles given out in the TRIPS Agreement.
- c) Members' primary attention should be on identifying and combating activities that obstruct the spread of protected technology.⁹

⁸ ZAFAR MAHFOOZ NOMANI ET. AL., INTELLECTUAL PROPERTY RIGHTS (IPRS) & ECONOMIC DEVELOPMENT (New Century Publications 2018).

⁹ Pooja Pal, *Intellectual Property and Competition Law in India*, LEXLIFE INDIA (Mar. 08, 2022), <https://lexlife.in/2021/08/02/intellectual-property-and-competition-law-in-india/>.

The Government decided to bring a new competition law to deal with competition issues by amending the existing *Monopolies and Restrictive Trade Practices Act*, 1969 with the *Competition Act*, 2002 fulfilling the World Trade Organization mandate.¹⁰

To achieve the goal for ensuring innovation and inclusive growth in a market economy like India, the application and enforcement of the Indian competition law must be sustained with robust policy framework on competition as well as intellectual property rights. In present economic scenario, both competition and intellectual property play complementary roles in attaining the end goal of consumer welfare protection. The basic tenet of competition law is to prevent anticompetitive practices and promote competition. On the other hand, intellectual property rights encourage inventions, which again encourages competition in the market. Thus, the end goal of both the policies are consumer welfare and innovation.

Competition and Innovation in India

The pre-1991 era India's industrial policy was characterized by huge mis-allocation of resources in the country resulting in disproportionate growth of some big business houses in so far as it impeded growth, technical change and innovation. The Mahalanobis Committee set up in the month of October 1960 to enquire about the distribution and levels of income submitted its report in February of 1964 that the only top 10% of Indian population cornered around 40% of the income and the major business undertakings were flourishing because of the existence of countries 'planned economy'. The unconditional protection provided to domestic industry, together with the other aspects of the licensing regime under the *Industries (Department and Regulation) Act*, (IDRA), 1951, fostered a high cost industrial structure which ultimately resulted in inefficient utilization of resources making Indian counterparts incapable of competition at international level.

After 1991, widespread economic reforms took place throughout the world and the economy shifted itself from Command-and-Control policies to an economy based more on free market principles. India, acknowledging the liberalization, privatization and globalization, opened up its economy by removing controls during the Economic liberalisation. The variety of reforms, which tried to improve the financial structure of our nation, was aimed to rise market contestability with the presumption that it would increase competitiveness of Indian industry and add to the inclusive economic growth.

¹⁰ Zafar Mahfooz Nomani et. Al., *Regulation of Anti-Competitive Practices and Trade Secret Laws under Competition Legislation of India: A Paradigmatic Analysis*, MANUPATRA INTELLECTUAL PROPERTY REPORTS (2013).

However, liberalized markets cannot be apparent to be competitive per se. The large dominant firms or groups of firms in concert may still pose threat to competition, best utilisation of scarce economic resources preventing inclusive growth. Thus, without a strong competition regime, liberalized markets cannot ensure the productivity and innovation gains that they were believed to yield. Here lies the need for a robust competition law and policy for the overall economic development and inclusive growth.

The countries undergoing economic reform have recognized that competition policy can promote economic liberalization. It is well understood to the policymakers now that a market driven by competition, without anticompetitive restraints, ensures lower prices, improved quality and innovation.¹¹ The Competition Commission of India not only acts as the regulatory authority under the *Competition Act*, 2002, but also it performs the great responsibility of preserving and promoting competition. However, the existence of too much of state intervention may also lead to suboptimal outcome. Some state interventions, such as regulating resource allocation, policy interventions, curtaining external competition to promote domestic market players may be counterproductive in the medium to long-run. So, in general, policymakers should be cognizant of the differential impact of state interventions on market economy.

In *Competition Commission of India vs Steel Authority of India & Anr* (2010)¹², the Hon'ble Supreme Court highlighted the objective of competition law is to promote economic efficiency which will ultimately promote innovative practices. The Court observed:

The main objective of competition law is to promote *economic efficiency* using competition as one of the means of assisting the creation of market responsive to consumer preferences. *The advantages of perfect competition are threefold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices.* These factors by and large have been accepted all over the world as the guiding principles for effective implementation of competition law. (emphasis added)

The Court observed that the main objective of competition law is to promote economic efficiency and creation of a market with (a) effective allocation of resources, (b) productive efficiency, (c) dynamic efficiency which will ensure innovative practices. Here, where the court had emphasised on the promotion of 'innovative practices', the court has indirectly hinted for a market economy

¹¹ Zafar Mahfooz Noman et. al., *Competition Laws and Policies in BRICS Region: Challenges and Opportunities*, 1(2) MANUPATRA COMPETITION LAW REPORTS, 127-135 (2016).

¹² *Competition Commission of India v. Steel Authority of India & Anr.*, (2010) Civil Appeal no. 7779 of 2010.

with innovation and inclusive growth. Innovative ideas, products and business practices give the advantage to the enterprises to uphold competitive superiority in the market along with furthering their own commercial benefits.¹³

Draft National Competition Policy and Innovation

The National Competition Policy and related matters (Committee), a committee was constituted by the Ministry of Corporate Affairs, under the Chairmanship of Shri Dhanendra Kumar, Former Chairperson of Competition Commission of India. However, this was not first ever demand for a National Competition Policy (NCP). The High-Level Committee on Competition Policy and Law (Raghavan Committee) constituted in the year 1999 for suggesting a new and effective competition law had also recommended for the same. A Planning Commission Working Group on Competition Policy was also constituted in the year 2007.

In the Draft National Competition Policy Statement issued by the Government of India, *the Premise of Competition Policy* highlighted the role of competition policy on innovation as under:

4.1 The fundamental role of competition policy is to guarantee consumer welfare by encouraging optimal allocation of resources and granting economic agents appropriate incentives to pursue productive efficiency, quality and innovation.

Highlighting the correlation between good governance and competition, the Policy Statement has also observed that competition policy helps to create an enabling environment for entrepreneurial development. It also holds that competition policy is an essential pre-requisite for a vibrant economy, and for creation of new employment opportunities. Focussing on the role of competition policy in achieving an economy with inclusive growth, it further observed:

5.3 The role of competition in promoting inclusive growth is also well recognised, as also in promoting greater efficiency, innovation and productivity.

The broad objectives of the NCP as provided under Para 11.27 also includes promotion of innovation as one of the policy objectives.

11.27. The broad objectives of the NCP should be:

- (i) to preserve the competitive process and to encourage competition in the domestic market so as to optimize efficiency,*
- (ii) promote innovation and maximize consumer welfare,*

¹³ Zafar Mahfooz Nomani, et. al., *Intellection of Trade Secret and Innovation Laws in India*, 16(4) JOURNAL OF INTELLECTUAL PROPERTY RIGHT, 341-350 (2011).

- (iii) *to promote, build and sustain strong competition culture within the country;*
- (iv) *to achieve harmonization in policies, laws and procedures regarding competition dimensions at all levels of governance,*
- (v) *to ensure competition in regulated sectors and to establish an institutional mechanism for synergized relationship between the Competition Commission and sectoral Regulators, and*
- (vi) *to strive for a single national market.*

Emphasising the role of an effective competition policy framework in creating an environment conducive to entrepreneurship, it is further provided, “*The consequence of this (an effective competition policy) is higher economic efficiency, greater innovation and enhancement of consumer welfare.*”

Competition Law Review Committee and Innovation

The Central Government has constituted a *Competition Law Review Committee* on 1 October, 2018 to review the *Competition Act*, 2002 to ensure that the legislation is in sync with the changes in economic scenario. The *Committee* was set up to suggest if any necessary change is required. The press release that notified the appointment of the *Committee* forwarded its justification as: “It is essential that the *Competition Law* is strengthened, and re-calibrated to promote best practices which result in the citizens of this country achieving their aspirations and value for money.”

After consulting various industry chambers, professional institutes, Government Departments/ Ministries, NGOs, including various experts and stakeholders, the *Committee* finally submitted a dense 220 pages report to of the *Competition Law Review Committee* to Smt. Nirmala Sitharaman, the union minister for Finance and Corporate Affairs on 26 July, 2019 recommending certain amendments to the *Competition Act*, 2002. Apart from its encouraging start-ups, focus on ease doing business, etc. the *Committee Report* stressed upon investment and innovation in India.¹⁴

The *Committee Report* had advocated for not penalising excessive pricing as abuse of dominant firms. To cite example of not holding excessive pricing as illegal under some leading monopoly laws, it referred to the decision of the US Supreme Court in *Verizon Communications Inc. v. Law Offices of Curtis Trinko*¹⁵, that “mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system... the opportunity to charge monopoly prices - at least for a short period - is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth.” According to this line, holding an enterprise for excessive pricing may take away the incentives to

¹⁴ Nikhil Sud, *India's Competition Law Report Is a Mixed Bag for Investment and Innovation*, MEDIANAMA (Mar. 08, 2022), <https://www.medianama.com/2019/08/223-india-competition-law-report/>.

¹⁵ *Verizon Communications Inc. v. Law Offices of Curtis Trinko*, (2004) 540 U.S. 398.

reduce cost and innovate. However, the report had not recommended any changes in the law in this regard leaving the scope to the CCI to deal with excessing pricing under its broad scope.¹⁶

The *Committee Report* had also highlighted the need for recognizing digital technology to leverage its potential and increase efficiencies, promote consumer welfare and create a favourable ecosystem for businesses. The *Committee* had also stressed for exploring possible strategies to seize opportunities presented by the digital economy and address concerns that it may pose. It had also suggested that it is the best opportunity to accommodate the ever-growing digital markets under Indian competition law. The *Committee* had also shared for furthering the objects of the Competition Act, including protecting and promoting consumer welfare, facilitating entry and growth of new players in markets and encouraging existing companies to innovate.¹⁷

One of the recommendations of the *Committee* for the benefit of investment and innovation in India is provision for a “green channel” for most of the combinations take place. In this procedure, the combining parties may proceed to consummate the combination by merely providing the required information regarding the combination to the CCI cutting short the long procedure for notification and waiting for approval by the CCI. The recommendation is based on the recognition of the fact that “vast majority of mergers and acquisitions...have no major concerns regarding appreciable adverse effects on competition.” This recommendation has also provided for strict consequences in case the combining entities provide inaccurate or incomplete information to balances the enabling provision.

However, the *Committee Report* has failed to address the issue of devastating effects of over-enforcement of competition law on innovation. The developed competition law jurisdictions like the EU and all have recognised that when the activity in question results in innovations and gives the benefit to the consumers, the competition law authorities should avoid intervening the same. Any such interventions will be an erroneous decision because of the likelihood of complex issues at play, and in such a given case, the harms of over-enforcement exceed the harms of under-enforcement. In this regard, the major question is that whether digital markets necessitate a new set of Competition rules or the existing legal framework has the flexibility to deal with the same.

Looking into the overall global developments on the same, the *Committee* had opined that since the area is still emerging and any policy recommendation in the area is left to the Think Tank to be constituted by the CCI for reviewing the trends in the market.¹⁸

¹⁶ Chapter 6, Para 5.4 - 5.5; REPORT OF COMPETITION LAW REVIEW COMMITTEE, 2019.

¹⁷ Chapter 8, Para 1.1; REPORT OF COMPETITION LAW REVIEW COMMITTEE, 2019.

¹⁸ Chapter 8, Para 1.7; REPORT OF COMPETITION LAW REVIEW COMMITTEE, 2019.

Conclusion

Thus, it is beyond any doubt that innovation plays an important role in today's increasingly global and competitive economy. India, as one of the important competition jurisdictions in the world, it is committed to incorporate necessary changes to the existing competition law and policy to create an updated and innovation-friendly competition regulatory environment.