

Competition policy and Law in Nepal.

Rajib Gautam
Under Secretary (Law)
Ministry of Local Development
Nepal.

Competition is a key to survival in any market driven economy. Where markets operate freely and effectively, competition can be expected to bring benefits (ie, encouraging firms to improve productivity, reduce prices and to innovate, whilst rewarding consumers with lower prices, higher quality and wider choice) However, when markets fail competition policy and law are the tools used to bring about the efficient workings of markets and alleviate market failures. This holds true also in the Nepalese context not least because the country has adopted a policy of progressive reforms. The country's recent accession into the WTO has provided impetus to this process.

D) Anti- Competitive Practices in Nepal

It is generally said that the competition is the consumers' best friend. The reason is simple. When there is competition in the market place, firms do tend to supply quality products to consumers at the lowest possible price. Therefore consumer's interest is automatically protected. But there are some anti-competitive practices in Nepal.

a) **Creating Artificial Scarcity:** In Nepal, big business houses are involved in purchasing huge quantities of agriculture products during the peak season from farmers who don not have the capacity to hold the stock. The business houses collectively stock these products in their warehouses for certain period. During the off-season, they start releasing the goods in a way that creates an artificial scarcity in the market. Creating artificial scarcity is essentially an unfair trade practice.

b) **Collective Price Fixing:** A number of commodity and business/ trade societies have emerged to represent the members of various professions with the objective of promoting their interests but have also been engaged in collective price fixing. Consumers have been regularly victimized due to the prevalence of curtailing in number of business practices.

c) **Market Sharing Cartel:** Industries in some sectors that are geographically dispersed have been dividing the market based on the location and size of each factory, i.e. one producer is not supposed to encroach upon another's territory. Moreover, the players are seen to form price cartels within the same region. The consumers are left with no choice but to purchase the products at a virtual

monopoly prices from producers located in their own towns. The market-sharing cartel prevails widely in the manufacturing sector. The reason for such cartels is politico-economic in nature.

e) **Collusive Bidding or tendering:** The very purpose of awarding contracts through bidding or tendering is to get the best possible offer at the lowest possible price. If the competitors collide and bid collectively, the whole purpose of bidding is defeated. The players involved in such activities blame government officials in the concerned offices who invite the tenders of the supply of these goods and services.

f) **Resale price Maintenance:** In Nepal, it is not mandatory for producers to indicate the price of the commodity in the packaging itself, although the Consumer Production Act has made this mandatory. Producers themselves are involved in fixing the minimum resale price of their products.

g) **Tie-up Sales:** Tie-up Sales are frequently used restrictive business practices. In each retail shop one can find a large stock of slow moving items and small stock of fast moving items on the shelves. If consumers want to buy a commodity that is scarce, they will also be forced to buy a quantity of slow moving items, which are in abundance. Tide selling is widely prevalent in the education sector as well as in the public health sector. The mushrooming of private school should have reduced the cost of education, but the law of demand and supply has failed here. Schools have been making money through various tied selling practices i.e. books, dresses etc. Likewise, some of the private hospital patients are forced to make some of the routine pathological tests even if they are not required.

II) Fair Competition Bill, 2060 (2004)

The government since the last decade has been pursuing liberal economic policies that are conducive for the growth and progress of trade and industry. The country is now poised to become a member of the World Trade Organization (WTO) following the approval of Nepal's membership bid during the fifth Ministerial meet at Cancun, Mexico. Likewise, a free trading regime of South Asian countries is also in the offing. Under such circumstances, a Competition Law is a must. The government during the budget for the current fiscal year had targeted to formulate a Competition Law within this fiscal year. The Nepal government, with assistance of United Nations Development Programme (UNDP), is in the process of formulating a Competition Law in Nepal. In this contest, the first draft of the law has been prepared.

Objectives: The main objectives of the first draft of Competition Bill 2060 are as follows:-

- Promoting fair competition for the growth of trade and commerce
- Promoting healthy growth of the national economy through fair competition.
- Promoting wide usage of limited resources and preventing concentration of usage
- Promoting social welfare through equitable allocation of resources
- Promoting high standards in the manufacture of goods and services
- Making available the goods and services at competitive prices to consumers
- Protection of open market.

Features: The following are features of the first draft Competition Bill 2060 (2004)

- This Bill has provisioned to control the activities that may be carried out outside the geographical coverage of Nepal to minimize the negative impact such activities might have on Nepal's domestic market. This will prevent unhealthy trade and unfair market practices.
- In the event that business firms and enterprises decide, agree or understand not to compete or to control competition, this Act has provisioned for the nullification of such decisions, agreements or understandings.
- The present Bill is based on the principle of flexibility and will be implemented on the basis of necessity and requirements and may not be mandatory and rigid. This element of flexibility is expected to promote fair competition in the marketing of goods and services.
- This Bill aims to protect consumers against monopoly rights of trading enterprises that may arise from the joint action of two or more enterprises. It is hoped that such provision in the Act will help control anti-competitive practices, apart from ensuring that the actions of business and trading firms do not come in the way of consumer welfare and open market price formation.
- This Bill has provisioned for the control of mergers and acquisition of two or more firms that have the potential of gaining dominance in the market and acquiring monopoly rights.
- In the event that goods and services are to be provided through an open bidding process, proposed Act has provisioned to ensure that there occurs no irregularity in the bidding procedures and that they are held and competed in a free and equitable manner.
- This Bill has provisions that circumvent and prevent the monopoly rights of firms in the supply of goods or services to the market.
- This Bill also contains special provision that aim at controlling black marketing and misleading advertisements.

- This Bill has provisioned for the formation of a Market Protection and Monopoly Control Commission to monitor the market as well as to work in accordance with the Act. The formation of the Commission and effective implementation can only ensure the success of the Act. The Commission will set the standards that are left out the Act, promote fair competition and create public awareness.
- The Act contains special providing for waivers in punishment and fines for those who help in curbing malpractice and bringing the offenders to justice.

III) Legislative Provisions

There are very few legislation in Nepal, which has provisions, related to competition. Some of the consumer protection-related legislation has made scanty mention of the term "competition". Even those provisions aimed at promoting competition and/or curbing restrictive business practices are not being enforced properly.

a) Legislative Measures

i) The Constitution of the kingdom of Nepal, 1990.

The Constitution clearly states the need to prevent the concentration of resources within a limited section of society and to prevent economic exploitation of any class of individual. It also mentions about the protection and promotion of national enterprises, be it private or public.

ii) The Black Marketing and Certain other Social Offenses and Punishment Act, 1975.

With the objectives of controlling black marketing, profiteering, hoarding, adulteration and certain other social offences and to maintain the health, convenience and economic well-being of the public, the Black Marketing and Certain other Social Offenses and Punishment Act was enacted in 1975. The Act prohibits business practices such as black marketing, profiteering, and deflection of commodities, hoarding and creation of artificial scarcity, fraudulent sale and the adulteration and sale of drugs.

iii) The Industrial Enterprises Act, 1992

The Act envisages a crucial role for the private sector initiative for economic development in Nepal. It is mentioned in the Act that the Industrial Promotion Board, will give guidelines in attaining the objectives of liberal, open and competitive economic policies pursued by the country so as to make the industrial sector competitive.

iv) The Foreign Investment and Technology Transfer Act, 1992

It has been mentioned in the preamble of the Foreign Investment and Technology Transfer Act, that " whereas, in the process of industrialization of the country, it is expedient to promote foreign investment and technology transfer for making the economy viable, dynamic and competitive through the maximum mobilization of limited capital, human and other natural resources" .

v) The Consumer Protection Act, 1997

With the objectives of maintaining the health of consumers, offering facilities and economic benefits, maintaining the quality of goods and services, controlling the inflation caused by monopoly and unfair trade practices, making arrangements to establish institutions for facilitating consumer complaints and redressing grievances, the Consumer Protection Act was enacted in 1998. This Act is an umbrella act aimed at protecting the rights of the consumer as well as restricting unfair trade practices. The Section 6 of the Act assures and recognizes six rights of the consumer out of eight rights recognized globally. Section 6(1) (C) of the Act clearly mentions that consumers have the right to choose the goods and services at competitive prices as far as possible. The provisions mentioned in the Act can help protect the interest of the consumer and also foster a competitive business environment.

VI) Transparency in Government Procurement

Since governments are important purchasers of goods and services, it is natural for them to favor domestic suppliers in order to boost their businesses. The underlying assumption is that if the business opportunity is provided to domestic suppliers /contractors, it would help stimulate domestic economy because they use local inputs (raw material, labour, technology, managements) in the production process. However (it is argued that this method of favouring domestic suppliers) contractors has proven to be inefficient because of lack of competition resulting from the discrimination against foreign bidder. Such a practice has helped breed vested interest groups and perpetuated rent seeking behaviors. Therefore a transparent system of government procurement will reduce the possibility of red tape and corruption, which will provided predictable market access for the products of foreign origin.

Greater openness acts as a better guarantee of predictability and fairness, which in its turn also encourages international competition for procurement. The implementing transparent procurement decision making is an essential part of economic reform for developing countries as it is integral to the pursuit of sound macroeconomic policies and stabilization measures.

Bribery and corruption are a drain on public exchequer, which could otherwise be diverted to provide better health care and educating to the needy people. For a country Nepal, saddled with corruption has needed to improve governance non-discrimination, greater transparency and predictability all contribute towards reducing discretionary power and rent seeking behavior. Transparency in government procurement is about market access, however it cannot provide a power but market access stimulus to the foreign enterprises unless and until there is explicit provision on non-discrimination. There are some provisions relating to transparency in government procurement in Nepal under following:-

- a) Financial Administration Regulation, 2056 (1999)
- b) Local Body (Financial Administration) Regulation, 2056 (1999)

Conclusion:

Although competition policy is a well-accepted instrument in developed countries to promote competition in the marketplace and enhance efficiency of business enterprises, leading to consumer welfare, it is yet to be understood and appreciated in the Least Developed Countries like Nepal. A few exceptions undoubtedly exist, but they cannot be considered as the rule. In Nepal, there is a serious lack of awareness among stakeholders about the need to formulate a competition Law.