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## Balancing competition laws & PSUs

A common challenge faced by competition authorities in other countries with mature competition law regimes is to determine the correct balance between protecting the public service element of public sector undertakings (PSUs) from the rigours of competition, while stimulating the PSUs to be more responsive to free and fair competition. In regions such as the EU, this challenge has largely been addressed in the key utility sectors such as posts and telecommunications. India is at the starting blocks of this challenge. Although the amended Competition Act has been in force for 18 months, it is only now that the consequences for PSUs are beginning to be realised.

India adopted a strategy of having a mixed economy (public and private enterprises) after Independence. While the number of government majority-held companies has come down over the years, some PSUs are key players in their respective markets. It is, perhaps, therefore not surprising that the government still represents the largest business owner in India, with PSUs accounting for 26% of the gross domestic capital formation.

While the Act provides for an exemption from the application of competition rules to actions related to sovereign functions of the government, the demarcations between sovereign and non-sovereign functions are not clear at least for some PSUs and their activities. This would leave them open to often time-consuming and costly litigation.

This summer, [Reliance Industries](#) registered a complaint with the Competition Commission of India alleging that some of the PSUs, namely IOC, BPCL and HPCL have formed a cartel to supply aviation turbine fuel to Air India.

Similar complaints against PSUs could increase as they are particularly susceptible to allegations of infringement of competition law owing to the size and scale of their operations. Some of the welfare initiatives of PSUs such as ensuring availability of postal services in villages could lead to pricing below cost and an attempt to balance this loss elsewhere. Such practices can raise issues under competition law.

It is acknowledged in most jurisdictions that some services cannot be delivered in a competitive environment and hence, there is a need for protecting such services from the application of competition law. In contrast to countries with a long competition law history, in India legal uncertainty remains as there are no official guidelines for so-called services of general economic interest and judge made law is yet to state clearly where government functions begin and end.

There is a provision in the Competition Act whereby the government may exempt any class of enterprises from its application if such exemption is necessary in the interest of the public. This, by itself, would not suffice as PSUs or other undertakings would

need to know in advance the scope of the applicability of the law to conduct a proper assessment of their practices. In other words, it is not clear which of the actors have to play within the rules of the game and when the government can dictate that some services need to be delivered without fear of competition law infringement.

Exemptions need to exist to cover several services that include distribution of electricity , water, telecom services and the availability of credit to low-income families . This gives precedence to welfare maximisation gains over profitable production. Otherwise, poor or remote regions face the risk of being cut off from essential services. However, there are many grey zones.

Courts in the EU and US have ruled for over two decades on questions that Indian courts are very likely to face in the coming years. For example, the US regulator for postal service has been created following a Supreme Court decision that exempted US Postal Service from antitrust laws.

Providing for the applicability of competition rules to PSUs was one of the laudable changes that came about with the Competition Act. However, it is yet to be seen how exactly this will be implemented . Looking abroad for guidance is certainly rewarding and even promises to avoid repeating some of the same mistakes.

Still, India has to develop its own, country specific approach taking into account the needs of the population, the state of its economy and the role of PSUs in extending the welfare state objectives. Be they private or state-owned , companies will have to deal with these questions soon.

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