

Towards Competition Policy and Regulatory Reforms in India

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1. Evolution of India's regulatory and competition landscape

The foundation of Indian democracy is rooted in the concept of social welfare enshrined in its Constitution. The Constitution aims to establish a sovereign, socialist, secular, and democratic republic, ensuring justice in various spheres. For decades, this was attempted to be accomplished by implementation of state-driven economic planning through a multi-pronged governance ecosystem.

As a result, the government took an active role in the economic, social, and industrial spheres by engaging in healthcare, education, and welfare services. A socialist mixed-economy model was adopted where the government controlled key sectors like heavy industries, transportation, etc. The private sector operated under government control in limited areas via licences, quotas, and high tariffs.

In the pursuit of better governance, administrative functions were expanded, leading to extensive powers being delegated to the bureaucracy. Regulations and subordinate legislation gained significance, impacting citizens' lives at the grassroots and shaping governance dynamics.¹

With time, inefficiencies in this model of economic growth started emerging. This led to the foundation of economic reforms post-1985, including delicensing industries, allowing private entry in previously government-held areas, and liberalising tariffs. The government followed a policy of liberalising a sector where public sector had monopolies and subjected them to competition from new private sector players.

From 1991, external liberalisation extended tariff cuts and eased foreign investment. Private companies emerged alongside government ones in sectors like electricity and telecom, leading to

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the need for independent regulators to ensure fair competition and prevent anti-competitive practices.

Targeted reforms were seen in various sectors, including notable reforms such as the introduction of the Securities and Exchange Board of India Act (1992), Foreign Exchange Management Act (1999), the Competition Act (2002), and the Electricity Act (2003).

In 2017, the Goods and Service Tax was introduced.² It was a major market regulatory reform, with the objective to replace the intricate and fragmented tax system with a unified framework that would simplify compliance, reduce tax cascading, and foster economic integration thus promoting a single market in the whole country.³

2. The political economy around competition and regulatory developments

Despite seeming impressive, India's economic development has been plagued with piecemeal regulatory and competition reforms. Obstacles to competition imposed by regulations remain substantial, and the intricacies of rule-making in India are byzantine owing to the multiple tiers of government involved. The complexity of the current regulatory processes, compounded by the presence of multiple regulatory authorities, as seen in the telecommunications sector, exacerbates the issue.⁴

Decision-making in India's political economy has slowed reforms, resulting in a complex regulatory framework that's gradually evolving, still influenced by earlier socialist policies. One drawback which existed for long is the lack of competitive neutrality between incumbent public sector enterprises and the new private sector players. The regulatory and competition framework faced significant challenges such as the existence of information imbalances and externalities, allocation of subsidies and support prices aimed at enhancing welfare, and their exploitation by interest groups with vested interests.⁵

Moreover, in apprehension, a group of Indian business leaders, known as the Bombay Club, united from time to time to urge government protection. They believed that multinational

corporations have significant advantages in technology, marketing, and finances and feared being overwhelmed. They argued that import duties were decreasing rapidly while domestic reforms lag. The Bombay Club has sought a level playing field with foreign companies to prevent what they saw as a new wave of colonisation and a threat to Indian businesses.

While the reforms introduced by the Government have put forth numerous sector-specific laws and strategies, progress has been uneven across various sectors, resulting in variable impacts on individual well-being at the micro level and overall economic growth at the macro level. The power sector for example suffers because of insufficient autonomy and regulated tariffs.⁶

3. Key challenges withholding competition and regulatory reforms

3.1 Jurisdictional overlaps between competition and sector regulators

In economic regulation, sectoral regulators play a crucial role as they tend to employ a proactive approach (ex-ante) compared to competition authorities, who primarily use a reactive approach (ex-post), except in the context of merger reviews. This distinction arises because sector-specific regulators maintain constant engagement with their respective sectors, frequently intervening based on ongoing information from regulated entities. In contrast, competition agencies typically rely on complaints and gather information from the market as needed when potential legal violations arise.⁷

Optimal regulation requires both sector and the competition regulator to work in tandem, frequently communicate, and share feedback. However, overlapping jurisdiction between economic regulators and competition agencies can lead to disputes and hinder the ease of doing business.⁸

Even after the inception of the Competition Commission of India (CCI) in 2002, several sector laws still delegate competition-related functions to sectoral regulators, resulting in jurisdictional overlap.⁹ This is despite the fact that section 18 of the Competition Act, 2002 mandates the CCI to eliminate anti-competitive practices and promote competition. To achieve the same, section 60

asserts the supremacy of the Competition Act by providing it with an overriding effect vis a vis any other law. However, section 62 contradicts section 60 by stating that the Competition Act shall be in 'addition to and not in derogation' of any other laws. This contradiction is the root of the tussle between the CCI and other sector regulators and is continuing for years now.

Moreover, various sectoral regulators in India, such as SEBI,¹⁰ IRDA,¹¹ TRAI,¹² CERC,¹³ and PNGRB,¹⁴ have been granted powers to promote, not regulate, competition and consumer interest within their respective jurisdictions. This has led to potential jurisdictional overlaps with the Competition Commission of India and consumer disputes redressal fora under the Consumer Protection Act, 1986 (now replaced by Consumer Protection Act 2019), which share similar objectives.

Thus, the problem of jurisdictional conflict between sector-specific regulators and competition authorities arising from various factors, including unclear legislative frameworks, regulatory structures, and past legal rulings. Therefore, there is a need for convergence between the competition authority and the sectoral regulators.

Though such issues have been resolved timely and sectoral regulator in some cases gets primacy on the issues of their jurisdiction, an institutionalised mechanism to prevent such disputes is to yet be adopted. This is in spite of clear recommendations made by several committees of the government and the parliament.

The SEBI oversees mergers and takeovers in the securities sector, while IRDA does the same in insurance. In the telecom sector, mergers are overseen by the Government and not TRAI. The telecom regulator, with jurisdiction over broadcasting sector ensure quality standards, interconnection etc and not for checking anticompetitive practices.

Though empowered under the Electricity Act, 2003, CERC and State ERCs monitor electricity industry players for tariffs and standards. Additionally, PNGRB is tasked with fostering competition and consumer interest in the petroleum and natural gas sectors. In one case of a

complaint of an oil companies cartel, this has led the Delhi High Court to interpret that it has the jurisdiction of checking anticompetitive practices, thus raising the potential for conflicts.¹⁵

In the case of *Shri Neeraj Malhotra v. North Delhi Power Limited and Others*, it was alleged that the electricity distribution companies indulged in antitrust activities.¹⁶ The statutory language used in both the Competition Act and the Electricity Act 2003 (2003 Act) caused confusion and uncertainty, with respect to, which authority shall exercise jurisdiction, the CCI or the Delhi Electricity Regulatory Commission (DERC). It was directed that electricity tariffs aspect would be dealt by DERC and the anti-competitive aspects would be investigated by CCI. To further complicate the overlap, as per Section 60 of the 2003 Act, DERC has the power to issue directions, in case of abuse of dominant position related to the electricity industry. This is just one of the instances of jurisdiction overlap due to unclear statutory language.¹⁷ However, this section has not been implemented by the government to empower electricity regulators hence the confusion has been arrested.

In the matter of *CCI vs Bharti Airtel (2019)*, the Supreme Court was faced with an issue regarding jurisdictional conflict between the Telecom Regulatory Authority of India (TRAI) and the CCI. It held that while TRAI is a specialized body for fact-finding in matters pertaining to telecom, the jurisdiction of the CCI is not ousted, and will begin immediately after the completion of TRAI's fact-finding exercise.¹⁸

More recently, in July 2023, the Delhi High Court in *Telefonaktiebolaget LM Ericsson v. Competition Commission of India* ruled that in an issue of abuse of dominance by a patentee in the exercise of their rights under the patent, the Patents Act, 1970 will prevail over the Competition Act, 2002. Therefore, it granted exclusive jurisdiction to the Controller General of Patents over the CCI and held that it would be contrary to legislative intent to permit CCI to conduct inquiries in allegations of anti-competitive agreements concerning patents.¹⁹

The Delhi High Court has also recently separately held that decisions taken by regulators in the course of carrying out their regulatory functions under their statutory powers are not subject to

review by the Competition Commission of India. In doing so, the court set aside an investigation initiated by the CCI against the Institute of Chartered Accountants of India.²⁰

Consequently, the Indian competition regulator is facing stiff challenges from strong sector regulators in performing its functions of reviewing potentially anti-competitive conduct across sectors.

Similar conflicts have also been seen between sector regulators. For e.g. a conflict between the securities regulator and the insurance regulator as to who will have jurisdiction over insurance linked investment products.

3.2. Absence of a National Competition Policy

In 2009²¹, the Finance Minister emphasised the need for a competition policy by stating that “Competition Law alone is not sufficient for realising the gains from greater competition.” He further elaborated that “there is a need to engage in advocacy with stakeholders, including public institutions, in order to build a culture of competition that is receptive to and supportive of the new competition regime.” The Competition Policy can serve as the framework for enforcing regulations that ensure fair competition among businesses and companies. This, in turn, promotes entrepreneurship and operational efficiency, leading to an expanded array of options for consumers while fostering lower prices and enhanced product quality. Some of the benefits of having a competition policy are listed below:

3.2.1 Affordable Pricing for All: One of the most straightforward methods for a company to gain a significant market share is by offering competitive prices. In a vigorously competitive marketplace, prices are driven down. This not only benefits consumers by making products more accessible but also serves as an incentive for businesses to innovate, thereby stimulating overall economic growth.

3.2.2 Elevated Product Quality: Competition incentivises businesses to enhance the quality of their goods and services in order to attract a larger customer base and expand their market

presence. Improved quality encompasses various aspects, including products with greater durability, enhanced performance, superior after-sales or technical support, and more friendly and efficient customer service.²²

3.2.3 Expanded Variety: In a competitive market, businesses strive to distinguish their products from those of their competitors. This results in a wider selection of choices for consumers, enabling them to select products that strike the right balance between price and quality.

3.2.4 Fostering Innovation: To provide this diverse array of choices and deliver superior products, businesses must constantly innovate in various facets, such as product conceptualisation, design, production techniques, and service delivery.

3.2.5 Global Competitiveness: Competition within India not only strengthens domestic companies but also equips them to compete effectively against global counterparts beyond the national borders. This reinforces their ability to hold their own in the global marketplace.²³

Various public policies and institutional arrangements can significantly reduce competition. In fact, government interventions in the marketplace often enable restrictive business practices. Therefore, the role of competition policy goes beyond enforcing competition law; it also involves actively participating in shaping the economic policies of the country. Government policies crafted with a focus on social welfare and prioritising specific sectors can potentially exert adverse effects on competitive market structures, corporate conduct, and overall economic performance. Hence, the competition policy must act as a proponent of competition, taking proactive steps to influence government policies that reduce entry barriers, encourage deregulation and trade openness, and minimise unnecessary government interference in the market.

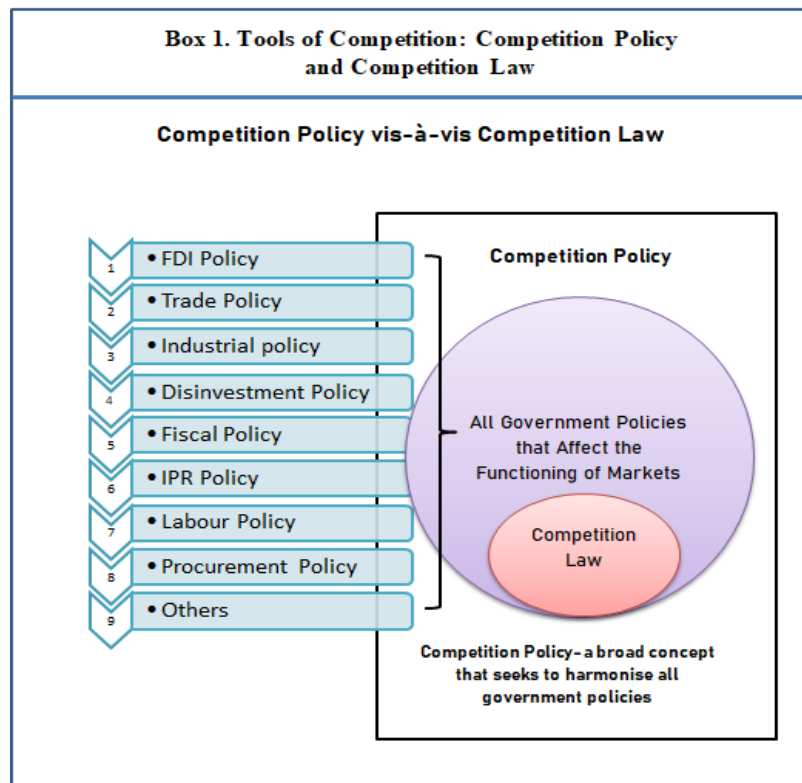
To this end, in 2011, the Union Government came up with a draft National Competition Policy Statement with a view of making the Indian economy more competitive, boost productivity and to achieve inclusive growth. The Policy aimed at further infusing the principles of competition in various legislations and policies. The Policy Statement also made some suggestions with respect

to the methodology and parameters for undertaking Competition Impact Assessment of relevant legislation and policies.

CUTS served as a ranking member of the committee responsible for its formulation. To assist the Committee, CUTS was also commissioned by the Ministry of Corporate Affairs to carry out snap studies on the competition scenario in about 13 sectors²⁴. This helped the Committee to adopt evidence-based policy recommendations. In order to achieve the aims of the Policy, an institutional framework was also proposed to adopt, coordinate and oversee its implementation. It was supposed to be implemented in cooperation with Central Ministries, CCI, State Governments and sub-State authorities.

While the Policy was not adopted by the Government for unknown reasons, several recommendations were put into practice, such as promotion of an internal market through GST and liberalisation in the civil aviation sector. This also brought in healthy competition and also promoted competitive neutrality between the state owned airlines and private players. Many other reforms took place due to the debate around the draft Competition Policy.

Developing and implementing a strong competition policy is crucial for harnessing the benefits of a liberalised, market-driven economy. With the dynamic changes in India's markets, especially in the digital sector, it's imperative for competition laws and policies to adapt and ensure a fair playing field for businesses of various sizes and natures. The absence of investor trust, brought about by constantly changing legislation, necessitates the need for legal predictability.



It is evident from Box 1 that competition law falls within the broader scope of competition policy. In addition to regulating the legal aspects, competition policy aims to align all government policies impacting competition and consumer well-being, including trade policy and industrial policy. It also influences domestic laws, regulations, and policies to establish a fair and equitable business environment for enterprises, regardless of their nationality or the nature of ownership. While competition can enhance competitiveness, the reverse is not always true.

3.3. Limited structural, functional and financial autonomy with competition and regulatory agencies

The primary concerns confronting regulators in India pertain to their insufficient autonomy and the absence of parliamentary oversight. Regulators currently operate on the periphery of the reform process and, as a result, are unable to exert significant influence on policy formulation and implementation. The Telecom Regulatory Authority of India (TRAI), for example, lacks substantial punitive authority, financial independence, and control over its hiring process. The Department of Telecom (DoT), under the telecom ministry, exerts significant influence across all

aspects of the telecom sector, including policy-making and player regulation, including merger review. Unfortunately, the appointment of TRAI's chairman has frequently fallen to retired civil servants who may not possess a comprehensive understanding of regulatory principles, laws, or international best practices.²⁵ To perform their functions effectively, regulatory and competition agencies must have sufficient structural, functional, and financial autonomy, as discussed below.

3.3.1 Freedom from Political Interference: Both structural and operational freedom are desirable in the context of promoting competition. The bodies currently tasked operate with restricted independence. Many regulatory bodies are subject to political influence, and their leaders answer to government ministries. This alignment with party politics compromises the essential requirement for both structural and operational autonomy. Most ministers and bureaucrats responsible for key ministries belong to the ruling party, which can lead to the promotion of the ruling party's vested interests. The structural independence of regulatory bodies is vital in ensuring a fair marketplace, preventing favouritism towards state-owned or private entities with government influence. Enforcing laws and policies demands a sustained commitment to prevent regulatory uncertainty, which could have adverse effects on consumers and small businesses.²⁶

3.3.2 Adequate Availability of Resources: Resource limitations pose a significant concern for regulatory bodies in India. They confront financial constraints, necessitating prior approval from political authorities for their funding requirements. Regulatory bodies, irrespective of their location, grapple with the persistent obstacle of inadequate resources. They must judiciously allocate resources to support the crucial, albeit frequently underfunded, functions of law enforcement and advocacy. Resource shortages and inefficient regulatory processes are a substantial challenge in the world's fifth-largest economy. This situation results in disparities and challenges within the business environment, adversely impacting small-scale industries and impedes competition.²⁷

3.3.3 Credibility as an effective and fair advocate for competition: The competition agency and sector regulators need a strong reputation spanning the public and private sectors. They must educate policymakers, businesses, workers, and consumers on the benefits of competition and instill confidence in their role as a champion of sound competition policy, necessitating a

comprehensive approach. A triumphant endeavour in competition advocacy, such as within the realm of regulatory reform, can yield economic advantages that surpass not only a solitary victorious enforcement action by a regulatory body but also multiple such actions.²⁸

3.3.4 Training and capacity building: To act as credible forces, regulatory and competition agencies would need to undergo periodic training and capacity building. Capacity building within a regulatory agency involves recognising and putting into action institutional and managerial procedures that enhance the effectiveness and efficiency of regulation. "Effectiveness" pertains to the agency's capability to carry out regulation in alignment with its intended goals, whereas "efficiency" concerns the reduction of the use of limited resources in the regulatory process. We need an innovative approach towards capacity building of both the sectoral regulators and the competition regulator.²⁹ Capacity building for national competition and regulatory authorities can consist of several components, including institutional training, assistance in improving investigative methods and data analysis, a review of primary and secondary legislation, and promotion of advocacy initiatives.³⁰

4. Global experience on competition policy and regulatory reforms

Global examples demonstrate that coordination between sector-specific and competition regulators can be effectively handled through institutional methods. One option is to prioritise either sector-specific regulatory legislation or competition law. Alternatively, a concurrent approach can be adopted, wherein both competition law and the industry or sector-specific regulatory legislation share equal authority through a consultative process. Another approach is the establishment of policy coherence units, as the need for collaboration extends beyond just competition and sector regulators, often involving multiple regulators.

The European model emphasises mandatory consultation between competition authorities and sector regulators. In contrast, some countries like Mauritius and South Africa require sector regulators and competition authorities to establish memoranda of understanding to align their jurisdictional powers. In the Indian context, both have been recommended.

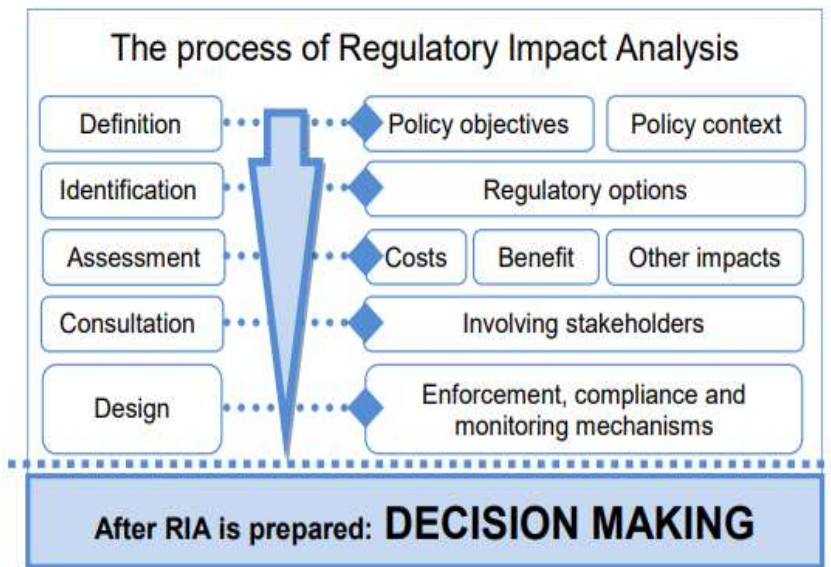
Brazil has a notably fragmented institutional structure concerning competition law enforcement, with numerous involved institutions. However, cooperation agreements exist between competition authorities and specific regulatory agencies like Aneel, ANTT, and Anatel. Argentina has a legal requirement for consultation between the competition agency and sector regulators but the requirement applies to the competition agency and not the sector regulators. A shift in approach is advocated. Spain has proposed merging the competition authority and certain sector regulators into a single entity.³¹ The National Authority for Markets and Competition (CNMC) possesses absolute institutional and functional autonomy when carrying out its responsibilities. It maintains distinct legal status and capacity, adheres strictly to the law, and operates independently from the government, public entities, and businesses.

In India, where replacing multiple regulators with one unified body isn't feasible due to its size, a more cooperative and collaborative approach is recommended. Unlike the UK, where the Competition Appellate Tribunal oversees competition cases across sectors, India currently has separate appellate bodies for various sectors and in the absence National Company Law Appellate Tribunal (NCLAT) works as the appellate body. Adopting a similar model as the UK could promote a competition culture in India, streamlining the appeals process for greater efficiency provided adequate state capacity and resources are made available.³²

5. Key Reforms Required for Unlocking Next Wave of Competition and Regulatory Reforms in India

5.1 Institutionalising Regulatory Impact Assessment

The adoption and systematic implementation of Regulatory Impact Assessment (RIA) forms the foundation of governments' ability to guarantee the effectiveness and efficiency of regulations. Countries such as Australia, the United Kingdom, the European Union, and the United States have well-established RIA systems. CUTS has been advocating to institutionalise RIA in India as well. In practical use, RIA starts by identifying and defining the problem that necessitates regulation. It then assesses costs, benefits, and implementation methods, including alternatives. RIA aims to choose the regulatory approach that maximises public benefit.³³



Institutionalising RIA Guidance Paper, OECD

In January 2023, the Second National Conference of Chief Secretaries of India chaired by the Prime Minister took place, with the focus on rationalising compliances. It resolved that “Regulatory impact assessment is to be made an intrinsic part of the regulatory ecosystem and the cost and benefits of proposed and existing compliances are to be ascertained through stakeholder consultations before proposing any change.” It recognised that no standard institutional framework/or overarching guidelines are in place for Central/state departments to evaluate the need of regulatory compliances. Guidelines are required to capture and analyse the impact of existing regulatory compliances in terms of cost and benefits/burden on the office and the beneficiary.³⁴ This is a step in the right direction, and needs to be appropriately followed through in letter and spirit.

In order to institutionalise RIA in India, following measures can be adopted:

- The introduction of the Regulatory Productivity Act is essential. This legislation should mandate that all proposed laws, policies, executive orders, and regulations include an RIA Statement. It must outline the steps for conducting an RIA, including cost-benefit analysis and structured public input.

- Each government department and agency should establish dedicated RIA Units, allocated with adequate resources.³⁵
- A Regulatory Productivity Commission (RPC) at the national and state levels should oversee the RIA process, ensuring quality and initiating evaluations of existing regulations. The RPC will comprise government nominees, industry representatives, and external experts, chaired by the Prime Minister, issuing annual RIA quality reports.
- NITI Aayog can provide RIA support, coordinate stakeholders, offer capacity building, and address RIA Units' challenges in consultation with the RPC.³⁶

Implementing RIA in India would ensure a thorough examination of how proposed regulations could affect industry structure, company behaviour, and competitiveness. It would also assess the impact of price regulations on firms' viability, balancing potential drawbacks with the benefits of stable consumer prices and increased transparency. Price regulations may hinder price-based competition and alter firms' cost structures, affecting overall competition.³⁷

It appears that the Government has set for itself phased targets for institutionalisation of RIA, comprising, pilot rollout of a framework to assess cost of different regulations (2023-24), ensuring institutional set-up to implement RIA across central and state departments (up to 2025), and advance level of RIA implementation across departments (up to 2027).³⁸ To meet these deadlines, the government will require assistance from external expert agencies.

5.2. Effective coordination between competition and regulatory agencies

A unique model is required in India to ensure effective coordination between competition and regulatory agencies. Key elements of such model could include:

5.2.1 A concurrent framework that mandates continuous cooperation between sector regulators and competition authorities. This would require legislative amendments to clarify their roles, in line with other countries. Unfortunately, India's proposed amendments to competition law haven't embraced this idea even after over a decade. Such mandatory cooperation and consultation would prevent duplication of enforcement, enhance legal certainty, and uphold the integrity of the

Competition Authority. This will empower regulators to apply their industry-specific knowledge when initiating cases within their respective sectors, and optimise the enforcement of competition law by fostering collaboration and partnerships.³⁹

5.2.2 Formal and Informal Mechanisms: Forums like the UK Competition Network and India's Forum of Indian Regulators (FOIR) provide platforms for collaboration. Formal schemes like participation rights and referrals should be considered, along with expert exchanges, training programmes, and regular exchanges of ideas and policy level coordination between sectoral regulators and the Competition Commission of India. This coordination is crucial for a more favourable regulatory landscape, promoting business ease, investment, and economic growth.⁴⁰

5.3 Utilising technology for effective regulatory governance

RegTech (Regulatory Technology) involves leveraging cutting-edge technology to enhance how businesses handle regulatory compliance. Effective RegTech deployment enhances regulatory readiness by anticipating market shifts, simplifying complexity, and adapting swiftly to regulatory changes. Combining RegTech with agile governance maximises returns, enhancing system flexibility to adjust regulations rather than implementing new processes.⁴¹

5.4 Convergence between Competition, Regulatory and Industrial Policies

Effective industrial development requires a balance between competition and well-designed industrial policies. While competition drives firms to innovate and invest in growth, industrial policies can enhance their ability to make growth-inducing investments. These policies must, however, adhere to competition rules. The success of industrial policies hinges on the level of market competition. Research in China indicates that state intervention has a more positive impact on total factor productivity, growth, and innovation in highly competitive sectors, while the effects are negative in less competitive ones. On the flip side, an opposing perspective argues that the very foundation of industrial policy, which emphasises boosting priority sectors and favouring local champions, contradicts the principles of competition policy.

Even in competitive markets, there may be imperfections necessitating industrial policies to remove constraints and incentivise investments. Ultimately, a thriving economic system requires a synergy between competition and industrial policies.⁴²

In the United States, industrial policy has gained prominence, with bipartisan support for the CHIPS Act aimed at revitalising the domestic semiconductor industry. The US government is allocating \$39 billion from the \$280 billion CHIPS Act to bolster advanced semiconductor manufacturing to mitigate these risks. The Biden administration's industrial policy includes plans for two semiconductor clusters by 2030, along with strict conditions for funding recipients, including a ban on expanding chip capacity in China and commitments to affordable childcare. Additionally, subsidies for clean energy are part of the Inflation Reduction Act (IRA).

Japan is also providing substantial subsidies to reduce reliance on China, while the EU is allocating €160 billion for digital innovations. Italy seeks a common EU approach to support competitiveness in response to US subsidies.⁴³

India can build on the path where a sound industrial policy initiates a 'virtuous cycle' of industrialisation within the domestic economy and relies on market mechanisms for its sustainability. Additionally, there's a need to explore fair-market capitalism as an alternative approach to achieving national security objectives, distinct from protectionist industrial policies. Instead of favouring national champions, this approach promotes a diversified global supply chain built on principles of open and equitable trade, thus preventing economic competition. This strategy can ultimately enhance efficiency, and innovation, and reduce the risks of supply chain disruptions through diversification and international collaboration.

One of the key prerequisites in this regard would be ensuring convergence between industrial, trade, competition and other regulatory policies. Adequate efforts will be needed in India to ensure this. While the Gati Shakti programme has some elements of inter-department cooperation, its experience needs to be utilised to institutionalise mechanisms for ensuring collaborative approaches in design and implementation of policies across sectors, through

establishment of policy coherence units in the offices of Prime Minister and Chief Ministers of different states.

The Indian economy is at a pivotal juncture. Two decades of economic reforms have propelled remarkable growth and expanded the economy's horizons. It's now crucial to embark on a second wave of growth-oriented reforms that can further boost economic growth and harness the innovative potential of our dynamic entrepreneurial community. Implementing a National Competition Policy and adoption of Regulatory Impact Assessment holds the potential to unlock growth opportunities across various sectors and align with the aspirations of our populace.

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