

Introduction

The globalisation phenomenon is one of the most fascinating of recent history. It has been brought about not only by technological developments but also because of changes in policies and regulations. The globalised world offers so many opportunities that hardly an individual nation can avoid participating. The globalised world stands for unrestricted trade possibilities both in goods and services and for optimal use of capital.

The essential feature of a market economy consists in the freedom to undertake economic activity, within a defined set of general legal constraints. The resulting confrontation of supply and demand leads to an equilibrium on the market with a combination of price and quantity. One of the most powerful tools of the market system is the price mechanism which conveys information on preferences of consumers as well as on cost of production and capacity constraints. Buying a product is like voting for the preferred good or service. This will happen only if there is competition in the market and the competition is fair. Competition means that all will do their best in constructive rivalry. The market mechanism allows turning this energy in a common direction, for the common good. Competition ensures that businesses are under constant pressure to provide consumers with the best possible range of goods at the best possible price. In a free market, business should be a competitive game with consumers as the beneficiaries.

Competition also encourages businesses and companies to improve the quality of the products they sell and services they provide. Consumers will choose a better quality of product, and the business which offers this will increase market share. Improved quality can be seen in many ways – products that last longer, or that

work better. Alternatively it might be about better after –sales or technical support. In order to make consumers notice one product over another, businesses in a competitive market will make them different. This difference can be seemed in a variety of ways. From more interesting packaging to products and services that are better tailored to the needs of individuals. This choice enables consumers to select the product or services that offer the right balance between price and quality for them. To deliver this choice and to ensure products continue to improve, businesses must innovate. They develop new technologies and ideas, each business aiming to produce the best and most modern product or they may develop better and newer services ideas, all aimed at improving the product or lowering the price for the consumer. Competition, and the process of competition, ensures that businesses are able to adapt, and to change. This ability to adapt enables companies and businesses to stay in front of global development, and to ensure that businesses continue to be among the world leaders.

The term “Competition” refers to the process of rivalry among firms and to market structures conducive to such rivalry (or potential rivalry).¹ Competition Policy refers to policy aimed at preserving and promoting competition, both by enforcing competition law against restrictive business practices by firms and by influencing the design and implementation of other governmental policies or measures affecting competition.² Thus competition policy encompasses all government policies that affect competition in the market and as such competition law is a subset of competition policy.³

¹UNCTAD: *Empirical Evidence of the Benefits for Applying Competition Law and Policy Principles to Economic Development in Order to Attain Greater Efficiency in International Trade and Development*, (TD/B/Com.2/EM10),1997, p.4

²*Ibid*

³Stewart Taimoon, *Globalisation, Competition Policy and International Trade Negotiations: Considerations for Developing Countries*, Monograph on Investment and Competition Policy II4, CUTS, Jaipur 2000, p4

Competition can play a major role in enhancing corporate governance. It would not be difficult to think of a situation in which a firm that is subject to no competitive pressure whatsoever – whether within or from outside the market – and is the only or one of the few firms in the market could easily become inefficient and its management becoming lax in its approach, with no real drive for innovation or ‘burning desire’ for efficiency, especially in cases where such a firm is able to charge for its products whatever price it desires. In such a situation, the management of the firm would feel comfortable and safe in the knowledge that the firm is unlikely to be ‘threatened’ or its quiet life disrupted and one adverse consequence that may follow from this situation is a tendency towards or even an engagement in anti-competitive behaviour or abusive conduct. Hence the widely held belief is that competition can address this undesirable situation and on the other it can deliver key benefits in terms of enhancing economic efficiency - notable productive efficiency in the market and lead to maximization of consumer welfare.⁴

Market failures and distortion caused by competition behaviour justify the introduction of competition law to prevent and punish those conducts. This is formed by a set of rules that prohibit anticompetitive behaviour and monitor certain business decisions and translations that may lead to anticompetitive outcomes.⁵

We should be aware that individual companies will try to escape from the competitive pressure. They will seek to agree with their colleagues to share the market in order to produce less goods or services at a higher price. This is good for the individual companies

⁴ Maher M. Dabbah, *Competition Law and Policy in the Middle East*, Cambridge University Press, www.cambridge.org

⁵ Francisco Marcos, “Do Developing Countries need Competition Laws and Policy”, Institute de Empresa, Business School Madrid Spain (Paper presented at Eale Conference), Madrid, 2006.

but bad for society. It is also possible that companies benefiting from a dominant market position may try to abuse this position by refusing to supply or by imposing unfair trading conditions. We should also be aware that dangerously high market power can also be built up through mergers.

The other problem is that a monopolist will not make the maximum effort to supply goods and services at the lowest prices and that undertakings benefiting from special or exclusive rights may draw more benefit than necessary from their special status.

Competition creates three to four distinguishable efficiencies in the market place.⁶ Productive efficiency ensures that any time a good or service is produced, it is done by using the smallest number of resources possible; Allocative efficiency ensures that available resources are used in a satisfactory manner; Dynamic efficiency stresses the need for innovativeness, and the firms are able to adapt to meet new needs by searching for and adopting new technologies and methods; and lastly, Inter-temporal efficiency ensures that the available resources are used in a sustainable way, taking into account the needs of future members of the population.

Need for a Competition Policy

The need for a competition policy must be seen in the context of the excessive economic concentration and ownership, collusive practices by enterprises and the abuse of economic power by firms in dominant positions. A fundamental principle of competition policy and law is the need to balance economic efficiency with socio-economic equity and development.

In a market economy, firms compete with each other to win consumers and increase their share of the market. Competitive markets provide an incentive for firms to perform, producing high

⁶see *Efficiency in Resources*, <http://www.mrwood.com.au/unit3/resources>

quality goods at low prices. There are situations where competition can be seen to be working very well. In other situations however, many barriers exist which prevent markets from being truly competitive and new firms from starting up. These unfair means used by firms to distort or eliminate competition in order to acquire and abuse market power are known as 'restrictive business practices' or anti-competitive practices⁷

Competition policy ensures that markets operate more efficiently, competitively and in the interests of consumers. Competition policy includes laws and policies dealing with anti-competitive practices, as well as competition advocacy which educate the public about the need for competition policy.⁸

The primary goal of competition policy is to maintain and encourage healthy competition. This will encourage the production of goods and services that are desired by consumers, making the most cost-effective use of resources available. Thus consumer gets the best possible choice of goods and services at the lowest possible price.⁹

Competition policy is applying rules to make sure that businesses and companies compete with each other in order to sell their products, innovate and offer a good deal. This process encourages enterprises and efficiency, and it also widens choice. This is how markets work well, for the benefit of enhancing consumer welfare. In this way, consumers benefit from the lower prices, higher quality, and wider choice. It is the process of competition that encourages companies and businesses to strive to provide new products or quality services at competitive prices. Ultimately

⁷DFID, *Competition Policy, Law and Developing Countries*, Trade Matters Series, Department for International Development, London, September 2001, www.Dfid.gov.uk

⁸*Ibid*

⁹*Ibid*

competition is the process by which business seek to increase their market share of a particular product or service, by offering something better to consumers than other businesses. It is consumers that choose between the products and services on offer. And it is consumer choice that ultimately sets the direction that the businesses take. Informed and empowered consumers ensure that businesses do deliver more choice, quality, innovate and lower prices.

Competition Policy has a wider scope than Competition Law. The later is mainly concerned with private conducts or decisions or market participants. Consumer Policy is more than mere Competition law enforcement. It refers to other state rules and interventions affecting markets. It is also related with liberalisation, industrial investment and trade policy, and all of them should work together towards building a competitive market and making national economy thrive.¹⁰

According to Khemani and Dutz “Competition Policy is defined in the broad sense as consisting of two parts – one which is commonly referred to as antitrust or competition law and the other, which comprises micro industrial policies such as tariff and non-tariff policies, foreign direct investment, unnecessary government intervention in the market place and economic regulation designed to present anti- competitive business practices by firms.¹¹

Benefits of Competition

The benefits of competition are lower prices, better products, and wider choice for consumers, and greater efficiency than what would occur under conditions of monopoly. According to neo-classical economic theory, social welfare is maximized in conditions of perfect

¹⁰*Ibid*

¹¹Khemani Shyam and Mark A. Dutz “*The Instruments of Competition Policy and their Relevance for Economic Development*”, in Claudio R. Frischtak (ed) *Regulation Policies & Reform: A Comparative Perspective*, WB, 1995

competition. For this purpose, “social welfare” is not a vague generalized concept, but instead has a more specific meaning: that allocative and productive efficiency will be achieved. The combined effect of allocative and productive efficiency is that society’s wealth overall is maximized. Consumer welfare, which is specifically concerned with gains to consumers as opposed to society at large, is also maximized in perfect competition. A related benefit of competition is that it will have the dynamic effect of stimulating innovation as competitors strive to produce new and better products for consumers. This is a particularly important feature of high technology markets.

A further benefit of competition, which cannot be proved scientifically, is that producers will constantly innovate and develop new products as part of the continual battle of striving for consumers’ business. Thus, competition may have the desirable dynamic effect of stimulating important technological research and development. This assumption has been questioned. Some argue that only monopolists enjoy the wealth to innovate and carry out expensive research. Noted Austrian economist Joseph A. Schumpeter was a champion of the notion that the motivation to innovate was the prospect of monopoly profits and that, even if existing monopolists earned such profits in the short term, outsiders would, in due course, enter the market and displace them. A “perennial gale of creative destruction” would be sufficient to protect the public interest, so that short-term monopoly power need not cause concern. Empirical research tends to suggest that neither monopolists nor fierce competitors have a superior track record in this respect, but it would seem clear that the assertion that only monopolists can innovate is incorrect. In practice, in most economies innovative efficiency is likely to be more important than allocative and productive efficiency.

Competition Law

On the other hand the proliferation of Competition Laws is undoubtedly linked to the wave of neo-liberal economic reforms since the 1980's and, in particular, to the issues rose as a result of privatization programmes which many nations embraced in the last two decades.¹² It is also part of the broader proliferation of liberal democracies and market oriented economics becoming the dominant ideological models in the wake of the collapse of the communist block.¹³ Other motivating factors include the recent global waves of mega-mergers, the increased potential for cross border anticompetitive practices, the ascendancy of economic integration with the World Trade Organisation (WTO), and lastly the radical shift in the policy in international institutions that now encourage and emphasis the adoption of competition law in developing countries and endorse its vital role in the process of development.¹⁴

Competition law is a set of rules, disciplines and judicial decisions maintained by governments relating either to agreement between firms that restrict competition or to the concentration or abuse of market power on the part of private firms¹⁵. By providing the framework for competitive activity, its aim is to make markets operate more effectively. And by protecting the process of competition, it is believed to be of vital importance.¹⁶

¹²Paul Cook, "Competition Policy, Market Power and Collusion in Developing Countries" in Paul Cook et al, (eds), *Leading Issues in Competition, Regulation and Development*, 2004

¹³*Ibid*

¹⁴Nnamdi Dimgba, "The Need and the Challenges to the Establishment of a Competition Law Regime in Nigeria", <http://www.globalcompetitionforum.org/regions/africa/Nigeria/>

¹⁵Bernard Hockman and Peter Holmes, "Competition Policy, Developing Countries and WTO", World Bank Working Paper, Washington DC, 1999

¹⁶Hansard, House of Lords, 30 Oct 1997, Col 1156 cited in Mark Furse, Competition Law of the EC & UK, p1

According to Hockman and Holmes, National Competition law can be defined as the set of rules and disciplines maintained by governments relating either to agreements between firms that restrict competition or to the abuse of a dominant position. Competition policy has a much broader domain. It encompasses the set of measures and instruments used by governments that determine the “conditions of competition” that reign on their markets. Antitrust or competition law is a component of competition policy. A key distinction between completion law and competition policy is that the latter pertains to both private and governments actions, whereas antitrust rules pertain to the behaviour of private entities (firms).¹⁷ Competition law tackles restrictive business practices. Competition law may be generic, addressing restrictive business practices across all sectors of the economy, or specific to individual sectors.

An important principle governing competition law is that ‘one size does not fit all’. This means that there is no universally applicable harmonized model: domestic competition law should be designed to suit a country’s stage of economic development, legal system and enforcement capability.

A major focus of competition law and policy is the avoidance of market dominating behaviour of business through, *inter alia*, price fixing or market-sharing cartels, abuses by leading firms and undue concentration. The main objective is to promote competition as a means of assisting in the creation of markets responsive to consumer signals, and ensuring the efficient allocation of resources in the economy and efficient production with incentives for innovation. This is expected to lead to the best possible choice of quality, the lowest prices and adequate supplies to consumers, leading to increased

¹⁷Houcman, Bernard and Peter Holmes, “*Competition Policy, Developing Countries and the WTO*”, World Bank Working Paper, Washington DC, World Bank, 1999

consumer welfare. There is a growing consensus that competition is an essential ingredient for enhancement and maintenance of competitiveness in the economy.

The substance and practice of competition law varies from jurisdiction to jurisdiction. Protecting the interests of consumers and ensuring that entrepreneurs have an opportunity to compete in the market economy are often treated as important objectives. Competition law is closely connected with law on deregulation of access to markets, state aids and subsidies, the privatization of state owned assets and the establishment of independent sector regulators. In recent decades, competition law has been viewed as a way to provide better public services. Robert Bork has argued that competition laws can produce adverse effects when they reduce competition by protecting inefficient competitors and when costs of legal intervention are greater than benefits for the consumers.¹⁸

All stakeholders in the competition process, including government, business, consumers and academia, must understand and support the principles of competition and be actively involved during the process of adopting competition legislation. Consumers need to appreciate the role of competition in ensuring value for money; business needs to recognize the benefits of competition both to secure value for money when sourcing their supplies and to ensure a fair market for their products.¹⁹

Competition Law and Policy: International Scenario

There are at least hundred systems of competition law in the world today. Some of these laws date back more than a century: the

¹⁸Ahmed Farouk Gheneim, *“Competition Law and Competition Policy: What Does Egypt Really Need?”*, Working Paper 0239, ERF Working Paper Series Cairo, 1998

¹⁹DFID, *Background Briefing- Law and Developing Countries*, Trade Matters Series, Sept. 2001, p. 2

US for example, enacted the Sherman Act in 1890. The competition rules of the European Union were adopted by the Treaty of Rome of 1957. The German Act against Unfair Restraints of competition was also adopted in 1957. Antitrust Law in the United Kingdom began with the Monopolies and Restrictive Practices (Inquiry and Control) Act of 1948. The first competition law in Japan was the Act concerning Prohibition of Private Monopolies and Maintenance of Fair Trade of 1947. Since the 1990's the number of systems of Competition Law has proliferated. Competition Law is now in place in all six continents, and in all kinds of economics – large, small, continental, island, advanced, developing, industrial, trading, agriculture, liberal and post communist.

In almost all countries that have a competition law, the stated objective of the legislatures is to improve economic efficiency and thus contribute to economic development. It is also widely accepted that the law should aim to increase consumer welfare. This is an attainable objective, because the removal of obstacles to competition will tend to put downward pressure on the prices of intermediate and final goods and services.

For many developing countries, competition law is a recent innovation. This upsurge in interest in competition law in developing and transition economics reflects the substantial changes that have been taking place in the political and economic environment. During the past two decades, many developing countries have instituted a programme of microeconomic reform, involving greater reliance on markets and less emphasis on state intervention. Underlying these reforms is a renewed confidence that market forces and the individual decisions of consumers and privately owned business can make a greater contribution to economic and social development than an inward looking centralized economic system. However, the potential benefits of a shift towards a more market – oriented economy will not be realized

unless business firms are prevented from imposing restrictions on competition. In the following pages we have analysed the structure and nature of competition law existing in select countries to enable the readers to have an idea of what is existing in other countries.

United Kingdom

In UK the Competition Commission (CC) is one of the independent public bodies which help ensure healthy competition between companies in UK for the benefit of companies, customers and the economy. It is responsible for investigating mergers, markets and other inquiries related to regulated industries and competition law. It is a competition regulator under the Department for Business, Innovations and Skills.

The Competition Commission replaced the Monopolies and Mergers Commission in April 1999. It was created by the Competition Act of 1998 although the majority of its power is governed by the Enterprise Act, 2002. The Enterprise Act, 2002 introduced a new regime for the assessment of mergers and markets in UK. The CC's legal role is now clearly focused on competition issues, replacing a wider public interest in the previous regime. The Enterprise Act gave the Competition Commission wide powers and greater independence than the MMC had previously, so that it now makes decisions on enquiries rather than giving recommendations to government and is also responsible for taking appropriate actions and measures following enquiries which have identified competition problems. These powers can include blocking mergers, requiring companies to sell off assets and making changes to the way particular markets operate. The Competition Commission cannot instigate investigations itself – an enquiry commences following the referral of a particular case to the Competition Commission, most often by the Office of Fair Trading (OFT) or by other sectoral regulators.

European Union

Competition is a basic mechanism of the market economy and encourages companies to provide consumers, products that consumers want. It encourages innovation, and pushes down prices. In order to be effective, competition needs suppliers who are independent of each other, each subject to the competitive pressure exerted by the others. Competition policy is now broadly recognized as a crucial factor for the creation of proper conditions for economic growth and prosperity, since it influences investment decisions, business acquisitions, pricing policies and economic performance. Competition policy helps promote a better allocation of resources and strengthen the competitiveness of European industry to the benefit of the citizens.

The antitrust area covers two prohibition rules set out in the Treaty on the functioning of the European Union.

- First, agreements between two or more firms which restrict competition are prohibited by Article 101 of the Treaty, subject to some limited exceptions. This provision covers a wide variety of behaviours. The most obvious example of illegal conduct infringing Article 81 is a cartel between competitors (which may involve price-fixing or market sharing).
- Second, firms in a dominant position may not abuse that position (Article 102 of the EC Treaty). This is for example the case for predatory pricing aiming at eliminating competitors from the market.

The Commission is empowered by the Treaty to apply these prohibition rules and enjoys a number of investigative powers to that end (e.g. inspection in business and non business premises, written requests for information, etc). It may also impose fines on undertakings that violate EU antitrust rules. Since 1 May 2004, all

national competition authorities are also empowered to apply fully the provisions of the Treaty in order to ensure that competition is not distorted or restricted. National courts may also apply these prohibitions so as to protect the individual rights conferred to citizens by the Treaty.

The Directorate General for Competition enforces the competition rules of the Community Treaties, in order to ensure that competition in the EU market is not distorted and that markets operate as efficiently as possible, thereby contributing to the welfare of consumers and to the competitiveness of the European economy. The work of DG COMP is essential to the achievement of the EU's strategic objectives as expressed in the "Community Lisbon Program", because it makes a significant contribution to the efficient functioning of the internal market and promotes the conditions necessary to stimulate knowledge and innovation, to make Europe a more attractive place to invest and work, and to create more and better jobs. The principal instruments available to DG COMP for accomplishing its mission are: a) the enforcement of competition rules on antitrust, mergers, State infringements and State aid control, b) sector inquiries and market monitoring, c) policy development, d) competition advocacy and, e) International cooperation.

United States of America

In the USA the Fair Trade Commission (FTC) deals with issues that touch the economic lives of most Americans. In fact, the agency has a long tradition of maintaining a competitive market place for both consumers and businesses. When the FTC was created in 1914, its purpose was to prevent unfair methods of competition in commerce as part of the battle to "bust the trusts". In 1938, Congress passed the Wheeler – Lea Amendment, which included a broad prohibition against "unfair and deceptive acts and practices". In 1975

the Congress passed the Magnuson – Moss Act, which gave the FTC the authority to adopt trade regulation rules that define unfair or deceptive acts in particular industries.

The FTC is an independent agency that reports to Congress on its actions. The FTC's work is performed by the Bureau of Consumer Protection, Competition and Economics. Bureau of Consumer Protection's mandate is to protect consumers against unfair, deceptive or fraudulent practices. The Bureau enforces a variety of consumer protection laws enacted by Congress as well as trade regulation rules issued by the Commission.

The FTC's antitrust arm, the Bureau of Competition seeks to prevent anticompetitive mergers and other anticompetitive business practices in the market place. By protecting competition, the Bureau promotes consumers freedom to choose goods and services in an open marketplace at a price and quality that fit their needs and fosters opportunity for businesses by ensuring a level playing field among competitions. The Bureau fulfills this role by reviewing proposed mergers and other business practices for possible anticompetitive effects, and when appropriate recommending that the commission take formal law enforcement action to protect consumers. The Bureau of Economics helps the FTC evaluate the economic impact of its actions. To do so the Bureau provides economic analysis and support to antitrust and consumer protection investigations and rule makings.

Australia

The Australian Competition and Consumer Commission is an independent statutory authority. It was formed in 1995 to administer the Trade Practices Act, 1974 and other Acts. The ACCC promotes competition and fair trade in the market place to benefit consumers, business and the community. It also regulates national infrastructure

industries. Its primary responsibility is to ensure that individuals and business comply with the Commonwealth's competitions, fair trading and consumer protection laws. The ACCC is the only national agency dealing generally with competition matters and the only agency with responsibility for enforcing the Trade Practices Act and the state/territory application legislation. In fair trading and consumer protection its role complements that of the state and territory consumer affairs agencies, which administer the mirror legislation of their jurisdictions and the Competition and Consumer Policy Division of the Commonwealth Treasury.

Canada

In Canada the Competition Bureau is an independent law enforcement agency that contributes to the prosperity of Canadians by protecting and promoting competitive markets and enabling informed consumer choice. The Bureau is headed by the Commissioner of Competition and is responsible for the administration and enforcement of the Competition Act, the Consumer Packaging and Labeling Act, the Textile Labeling Act and the Precious Metals Marking Act. The basic operating assumption of the Competition Bureau is that competition is good for both business and consumers. The Bureau has the ability to refer criminal matter to the Attorney General (AG) of Canada, who then decides whether to prosecute before the courts. The Bureau also has the power to bring civil matters before the Competition Tribunal or other courts depending on the issue.

Russia

Russia has adopted a new anti-monopoly law, making some important adjustments in the regime for regulation of competition. The new law on the Defense of Competition (the "New Law") became

effective on October 26, 2006. The New Law is intended to modernize and update Russian Competition law, and includes certain new concepts and terminology. It replaces the former Law on Competition and the Restriction of Monopolistic Activity in the Commodity Markets, as amended (the "1991 Law"), except that the definition of the key term "affiliated persons" will still be regulated by the 1991 Law. The 1991 Law was supplemented by a number of regulations adopted by the government body in charge of protecting competition, currently known as the Federal Anti-Monopoly Service ("FAS"); presumably, these will eventually be replaced by corresponding regulations under the New Law. In addition, the New Law governs the financial sector, thus combining the main rules of Russian competition law under a single statute. The New Law applies to relations "affecting competition on commodities and financial services markets" in the Russian Federation. It seeks to promote fair competition, and to deter monopolistic and other anti-competitive behavior in the distribution of goods and services.

The New Law specifically applies in the event of:

- Monopolistic Activities: (i) unfair competition (ii) abuse of dominant position; (iii) anti-competitive agreements/ coordinated actions between/among market participants; (iv) anticompetitive agreements with/acts of governmental authorities; and (v) anti-competitive actions during auctions/ tenders;
- Economical Concentration on the Market: (i) establishment of business entities; (ii) mergers and acquisitions; (iii) purchasing of shares or participatory interests; (iv) acquiring of "rights to determine business activities" of business entities; and (v) acquisitions of certain fixed and intangible assets;
- Selection of Financial Organizations that will provide

financial services to state and municipal bodies, as well as to “natural monopolies” such as major utilities; and

- Distribution of State Aid.

Switzerland

In Switzerland the protection of competition is the most important regulatory task in a market economy. This task is primarily performed using the instruments provided by the Act on Cartels. The application of the Act is the duty of the Competition Commission and its Secretariat. The Competition Commission is an independent federal authority. The tasks of the Competition Commission are combating harmful cartels, monitoring dominant companies for signs of anti-competitive conduct, enforcing merger control legislation and preventing the imposition of restraints of competition by the state.

South Africa

The origin of competition policy in South Africa lies with the Regulation of Monopolistic Conditions Act, 1955. A review of the Act in the 1970’s found that it had been unsuccessful in preventing a dramatic increase in oligopolies. As a result the maintenance and promotion of Competition Act, 1979 was introduced and the Competition Board, tasked with administering the Act was established. The 1979 Act was amended in 1986 to give the Competition Board further powers, including the ability to act not only against new concentrations of economic power but also existing monopolies and oligopolies. However, it was widely recognized that technical flaws in the Act prevented the effective application of competition law on both substantive and logistical grounds. A new Competition Act was passed in the Parliament in 1998. The purpose of the Act is to promote and maintain competition in South Africa.

Caribbean Community

In 1972 the Commonwealth Caribbean leaders at the Seventh Heads of Government conference decided to transform the Caribbean Free Trade Association into a common market and establish the Caribbean Community, of which the common market would be an integral part.

The Caribbean Community (CARICOM) established the CARICOM Competition Commission under Article 171 of the Revised Treaty of Chaguaramas in 2008. The functions of the Commission are to apply the rules of competition in respect of anti-competition cross-border business conduct; to promote and protect competition in the community; to monitor anti-competitive practices of enterprises; to investigate and arbitrate cross border disputes and to keep the Community Competition Policy under review and advice and make recommendations to enhance its effectiveness.

Zambia

The Zambian Competition Commission was established under the Competition and Fair Trading Act to prevent anti- competitive and restrictive business practices and promotes Consumer Welfare. The law came into force in 1995. The Commission is an autonomous corporate body under the Ministry of Commerce, Trade and Industry. The Act deals with agreements, decisions and concerted practices by firms and organizations that prevent distort and/or restrict competition.

United Republic of Tanzania

For many years Tanzania economy was centrally planned, until mid 1980's during which, the country embarked on a programme of trade liberalisation, which was followed by the policy of privatizing

state owned enterprises from 1992. In the late 1990's the Government began concerted efforts to create a viable regulatory framework in the country. These efforts culminated into the enactment of the Fair Competition Act, 2003. The Fair Competition Commission (FCC) is an independent government body established under the Fair Competition Act to promote and protect effective competition in trade and commerce and to protect consumers from unfair and misleading market conduct. The ultimate goal of the Act is to increase efficiency in the production, distribution and supply of goods and services. The FCC makes necessary interventions to ensure that competition is allowed to regulate the competition market. It also intervenes to prevent significant market dominance, price fixing and extortion of monopoly rent to the detriment of the consumer, market instability.

Mauritius

The Competition Commission of Mauritius is a statutory body established in 2009 to enforce the Competition Act of 2007. This Act established the competition regime in Mauritius under which the CCM can investigate possible anticompetitive behaviour by businesses. In its investigations the CCM has considerable powers to compel businesses and others involved to provide information. The Commission is a parastatal, under the aegis of the Ministry of Business, Enterprise and Co-operatives. However, the Commission is independent of Government in its decision making.

Pakistan

Competition Commission of Pakistan (CCP) was established on 2nd October, 2007 under the Competition Ordinance, 2007. Major aim of this Ordinance is to provide for a legal framework to create a business environment based on healthy competition towards improving economic efficiency, developing competitiveness and

protecting consumers from anti-competitive practices.

Prior to Competition Ordinance, 2007, Pakistan had an anti-monopoly law namely 'Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance' (MRTPO) 1970. The Monopoly Control Authority (MCA) was the organization to administer this Law. In the fast changing global and national economic environment, the MRTPO, 1970 was inadequate to address competition issues effectively. This was because: i) the 1970's law was out of date for a modernizing and rapidly transforming market economy; ii) due to several limitations in the law, the MCA was not able to meet the expectations of businesses and the consumers at large; iii) the first generation reforms that liberalized the economy and unleashed the power of the private sector required a competition policy framework that could promote and protect competition and innovation.

Considering the above, Government of Pakistan launched a program to develop Competition Policy as a key "second generation reform" initiative. Towards this end, the Ministry of Finance and the MCA worked with the World Bank and the Department for International Development (DFID), UK. As a result of these efforts, Competition Ordinance, 2007, replaced the MRTPO and institutional capacity building of the newly formed Competition Commission is underway.

Competition Ordinance, 2007, considers the current economic realities as well as corrects the deficiencies of the MRTPO related to definitional aspects, coverage, penalties, and other procedural matters. The law seeks to prohibit abuse of market dominance, certain types of anti-competitive agreements, deceptive market practices, and mergers of undertakings that substantially reduce competition. This is combined with major emphasis on advocacy role of the Commission to promote voluntary compliance and to give a 'competition face' to micro and macro-economic policies.

In line with modern competition regimes, the law adopts a 'carrot and stick' approach - the law provides for higher fines combined with imprisonment for non-compliance; on the other hand, the carrot is sweetened with sophisticated leniency provisions that may eventually lead to no fines and imprisonment, subject to certain conditions. To maintain high standard of evidence for unearthing secret cartels, the Competition Commission has legal powers to conduct searches and inspections.

Promulgation of Competition Ordinance, 2007 and establishment of a credible Competition Commission will go a long way to develop competition culture and conducive environment for business activity in Pakistan.

Competition Law and Policy in India

Competition is accepted as the life blood of the market economy. It spurs innovation and higher productivity leading to accelerated economic growth; brings the benefit of lower prices to the consumers, and provides them with wider choices and better services. Around the world the competitive pressures have helped suppress inflation and raise living standards through improved productivity.

Constitutional Basis of Competition Policy

Since independence ensuring economic justice as enshrined in the Constitution, has been one of the main objectives of the government. The Preamble of the Constitution declares Justice – Social, Economic and Political as one of the objectives to be achieved by the state. In the Part IV of the Constitution, the Directive Principle of the State Policy, the guiding principles for governance enshrined in Articles 38 and 39 provide that state shall strive to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice, social, economic and political,

shall inform all the institutions of national life²⁰; the state shall, in particular, direct its policy towards securing that the ownership and control of material resources of the community are so distributed as best to sub-serve the common good ²¹ and the State shall, in particular direct its policy towards securing that the operation of economic system does not result in concentration of wealth and means of production to the common detriment.²² On the other hand the Constitution makers were keen to confer free right to carry on trade, commerce and profession. According to Fundamental Right under Article 19(1) (g) all citizens shall have the right to practice any profession, or to carry on any occupation, trade or business. However, this right under Article 19(1) (g) is subject to reasonable restrictions in terms of a law enacted providing (a) reasonable restriction on this right 'in the interest of public' (b) prescribing professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business (c) enabling the State to carry on any occupation, trade or business to the exclusion of citizens wholly or partially.²³ Constitutional right to freedom of trade, commerce and intercourse within India enshrined in Part XII of the Constitution is subject to Parliamentary law imposing restrictions in public interest except for interstate discrimination and State laws so long as it does not discriminate between goods imported from or manufactured in other states.²⁴

Genesis and Evolution of Competition Law

The licenses and controls regime along with other command control regulations prevailing in India continued for quite a long period

²⁰The Constitution of India, Article 38

²¹*Ibid* Article 39(b)

²²*Ibid* Article 39(c)

²³*Ibid* Article 19(6)

²⁴*Ibid* Articles 301 to 307

after independence, resulting in stunted economic development. During those years the value of free entrepreneurship and allowing competition to drive growth seem to have been lost. In October 1960 the Government of India constituted Mahalanobis Committee on Distribution of Incomes and Levels of Living under the Chairmanship of Prof P. C. Mahalanobis.²⁵ The Committee submitted its report four years later, highlighting growing income inequalities in India in the post-independence period. Among its many conclusions, the Committee observed:

... that the working of the planned economy has contributed to the growth of big companies in Indian industry. The growth of private sector in industry especially of the big companies has been facilitated by financial assistance provided by the public institutions like the Industrial Finance Corporation of India, the National Industrial Development Corporation, etc.²⁶

Such inequality in income was seen as being contrary to the constitutional ideal of “Justice-Social, Economic and Political” as also provisions contained in the Directive Principles of State Policy read with reasonable restrictions on fundamental rights and constitutional freedom relating to trade and commerce. Thus the Government of India acceded to the above suggestion of the Mahalanobis Committee and accordingly had set up a Monopolies Enquiry Commission on 16th April, 1964 under the Chairmanship of Mr. Justice K.C. Das Gupta.²⁷ The Terms of Reference of the said Commission were as follow:

²⁵Government of India; Planning Commission, *Report of the Committee of Distribution of Income and Level of Living*, Report in two Volumes on February 1964, Delhi (Mahalanobis Committee)

²⁶*Ibid* at 30 para 54

²⁷There were other four members, Mr. G.R. Rajagopal, Mr. K.R.P. Iyengar, Mr. R.C. Dutta and Dr. I.G. Patel.

To enquire into the extent and effect of concentration of economic power in private hands and the prevalence of monopolistic and restrictive practices in important sectors and economic activities other than agricultural, with special reference to:

- (i) the factors responsible for the such concentration and monopolistic and restrictive practices;
- (ii) the social and economic consequences, extent to which they might work to the common detriment; and
- (iii) suggest such legislative and other measures as might be considered necessary in light of such inquiry, including, in particular any new legislation to protect essential public interests and the procedure and agency for the enforcement of such legislation.²⁸

The Monopolies and Restrictive Trade Practices Act, 1969

The Monopolies Enquiry Commission which submitted its report on October 28, 1965, was convinced that “the dangers from concentrate economic power and monopolistic and restrictive practices are not imaginary but do exist in a large measure either at present or potentially.²⁹ The Commission, therefore, felt the necessity to devise suitable public policy to “avert or atleast minimize” these dangers.³⁰ In pursuance of this approach the Committee also drafted a Bill which was thoroughly considered later on by the Government of India before drafting its own Bill for final submission to the Parliament. The Monopolies and Restrictive Trade Practices Bill was passed by both the Houses of Parliament and received the assent of the President on December 27, 1969. Thus India enacted its first competition law called the Monopolies and Restrictive Trade

²⁸Government of India, *Report of the Monopolies Inquiry Commission*, Delhi, 1965, p- (i)

²⁹*Ibid* at 138

³⁰*Ibid*

Practices Act, 1969 (MRTP Act). It came into force on June 1, 1970 as the Monopolies and Restrictive Trade Practices Act, 1969.

Since 1970, the Act had been amended several times to suit the changing circumstance most notably in 1984 and 1991. The focus of the MRTP Act was more on the control of monopolies and the prohibition of monopolistic and restrictive trade practices rather than increasing competition. The objective of the Act was to provide that operation of economic system does not result in the concentration of economic power to the common detriment. It also provided for controlling the monopolies, and prohibition of monopolistic and restrictive trade practices. The object was to keep watch over the behaviour of all monopolies and monopolistic and restrictive trade practices and interfere only when they were prejudicial to public interest. The Act established the Monopolies and Restrictive Trade Practices Commission for the purpose and Government acquired significant powers vis-à-vis private enterprise. Keeping in view the dangers of monopoly and monopolistic tendencies and need for curb on unfair trade practices for safeguarding the interest of consuming masses, the Act was amended by the Monopolies and Restrictive Trade Practices (Amendment) Act, 1984. The amended Act provided measures to deal with unfair trade practices, the new concepts inducted for the protection of consumers.

The MRTP Act created two authorities. There is the Director-General of Investigation and Registration who is appointed by the Government of India. He has several functions under the Act, viz., to investigate into complaints of monopolistic, restrictive or unfair trade practices, register restrictive trade agreements, make application to the Commission to undertake investigation into restrictive or unfair trade practices. Then there is the Monopolies and Restrictive Trade Practices Commission, appointed by the Central Government. A person who is, or has been, or is qualified to be, a Supreme Court or

a High Court Judge is appointed as the Chairman. Other members of the Commission are persons possessing knowledge or experience of dealing with problems relating to economics, law, commerce, accountancy, public affairs or administration. Thus, the Commission is not purely a legalistic body; it has several other disciplines represented in its membership. The Commission has investigatory, advisory and adjudicatory functions. The Central Government may refer to the Commission any matter relating to the concentration of economic power or monopolistic trade practice for investigation and report. The power to make final orders in these matters vests with the Central Government.³¹ The Commission can enquire into any restrictive or unfair trade practice on receiving a complaint from any trade or consumers' association, or a consumer, upon a reference made to it by the Central Government or a State Government, or upon an application of the Director-General, or *suo motu* in respect of any restrictive/unfair trade practice. As regards prevention of concentration of economic power, the Commission has no power to undertake a *suo motu* enquiry; it becomes active only when a reference is made to it by the Government, and the power to make final orders in this area vests with the Government. In case of a monopolistic trade practice, the Commission can initiate a *suo motu* enquiry without any reference being made by the government, but the Commission is to send its report to the Central Government which alone can make a final order.

The economic crisis in which the country found itself finally led to the reforms that started in 1991. In 1990s India responded to the world wide trend of globalization by opening up its economy, removing controls and resorting to liberalization. Correspondingly it was felt that the Indian market should be geared to face competition from within the country and outside. The MRTP Act attracted sharp

³¹See provisions in Chapters III and IV of the MRTP Act.

criticism as it proved to be ineffective in achieving the objectives stated in the Act. The Act failed in curbing concentration of economic power or regulating the diverse monopolistic, restrictive and unfair trade practices. Further as the focus of the MRTP Act was more on the control of monopolies and the prohibition of monopolistic and restrictive trade practices, it was felt that the MRTP Act has “become obsolete in certain respects in the light of international economic developments relating more particularly to competition law, and there is need to shift the focus from curbing monopolies to promoting competition”³². Hence the Government decided to enact a new law for bringing competition in the Indian market. Therefore, the Central Government, constituted a high level committee in October 1999 under the chairmanship of SVS Raghavan, to go into the aspects of competition policy and the related law. The committee submitted its report in May 2000. Its recommendations formed the basis of a draft Bill, which was presented in the Parliament. After considering its report and the suggestions from trade, industry and the general public, legislature enacted a new law called the Competition Act, 2002. The Bill got President’s assent in January 2003, after two and half years.

The Competition Act, 2002

The Competition Act, 2002, received assent of President of India on January 13, 2003 and was published in the Gazette of India dated January 14, 2003. Some of the sections of the Act were brought into force on March 31, 2003 and majority of the other sections on June 19, 2003. The Competition Commission of India was established on October 14, 2003, but could not be made functional. Before the Chairman could enter office, a Public Interest Litigation was filed before the Supreme Court of India on October 30, 2003. Certain

³²Statement of Objects and Reasons of the Competition Act, 2002

provisions of the Act and rules framed thereunder were subject matter of the legal challenge on the following grounds:-

- (i) the Competition Commission to be headed by a bureaucrat, would replace the MRTP Commission which had all along been headed by a Judicial Member;
- (ii) Commission has adjudicatory functions which mandated that the Chairperson must be a Judicial Member.

Hon'ble Supreme Court of India delivered its judgment, on the legal issues raised, on January 20, 2005. While disposing of the writ petition, the Hon'ble Supreme Court held that if an expert body is to be created by the Union Government, it might be appropriate for the Government to consider the creation of two separate bodies, one with expertise for advisory and regulatory functions and the other for adjudicatory functions based on the doctrine of separation of powers recognised by the Constitution.

Keeping in view the observations of the Hon'ble Supreme Court of India, the Act was amended by the Competition (Amendment), Act, 2007. The Competition (Amendment) Bill, 2007, *inter alia*, provides for the following:-

- (a) the Commission shall be an expert body which would function as a market regulator for preventing and regulating anti-competitive practices in the country in accordance with the Act and it would also have advisory and advocacy functions in its role as a regulator;
- (b) For mandatory notice of merger or combination by a person or enterprise to the Commission within thirty days and to empower the Commission for imposing a penalty of upto one percent of the total turnover or the assets, whichever is higher, on a person or enterprise which fails to give notice of merger or combination to the Commission;

- (c) for establishment of the Competition Appellate Tribunal, which shall be a three member quasi-judicial body headed by a person who is or has been a Judge of the Supreme Court or the Chief Justice of a High Court to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission;
- (d) for adjudication by the Competition Appellate Tribunal of claims on compensation and passing of orders for the recovery of compensation from any enterprise for any loss or damage suffered as a result of any contravention of the provisions of the Act;
- (e) for implementation of the orders of the Competition Appellate Tribunal as a decree of a civil court;
- (f) for filing of appeal against the orders of the Competition Appellate Tribunal to the Supreme Court;
- (g) for imposition of a penalty by the Commission for contravention of its orders and in certain cases of continued contravention a penalty which may extend to rupees twenty-five crores or imprisonment which may extend to three years or with both as the Chief Metropolitan Magistrate, Delhi may deem fit, may be imposed.³³

By the amendment the Government of India introduced provisions to constitute a judicial appellate authority while leaving the expert regulatory space to the Commission. The Competition Act, 2002 as amended, provides for setting up of the Competition Commission of India (CCI) comprising of a Chairperson and a minimum of two and maximum of six Members. In addition, it also provides for establishment of a Competition Appellate Tribunal to hear and dispose of appeals against the order of the Commission

³³Statement of Objects and Reasons to the Competition (Amendment) Act, 2007

and also to adjudicate on the claims of compensation that may arise from the findings of the Commission or orders of the Appellate Tribunal.

In accordance with the provisions of the Amendment Act the Competition Commission of India and the Competition Appellate Tribunal have been established. The provisions of the Competition Act relating to anti-competitive agreements and abuse of dominant position have been brought into force w.e.f. 20th May, 2009 and the Commission has started dealing with cases under these provisions. The MRTP Act and Commission established thereunder have been repealed on the Competition Commission and Appellate Tribunal becoming fully operational.

As per the Preamble of the Act, the Act is for achieving the following objectives:

- to prevent practices having adverse effect on competition,
- to promote and sustain competition in markets,
- to protect the interests of consumers, and
- to ensure freedom of trade carried on by other participants in markets.

To achieve the above objectives the major areas of focus under the Act are:

- (i) Prohibition of anti-competitive agreements;
- (ii) Prohibition of abuse of dominance;
- (iii) Regulation of Combinations (acquisitions, mergers and amalgamations of certain size); and
- (iv) Competition Advocacy.

Competition Commission of India

To achieve the above objectives, the Act provides for the establishment of a Commission known as Competition Commission of India (CCI). The Central Government may, by notification, establish

the CCI.³⁴ The Commission is a body corporate having perpetual succession and a common seal with power, subject to provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued.³⁵ The head office of the Commission shall be at such place as the Central Government may decide from time to time.³⁶ The Commission may establish offices at other places in India.³⁷

The function of the CCI is to eliminate practices having an adverse effect on competition, to promote and sustain competition in markets, to protect interests of consumers, and to ensure freedom of trade carried on by other participants in markets in India and matters connected therewith or incidental thereto.³⁸ This objective is distinguished from the objective of the MRTP Commission, which was to ensure that the 'operation of the economic system does not result in the concentration of economic power to the common detriment' and 'to prohibit the growth of monopolies and restrictive trade practices'. The difference in the objectives of the MRTP Commission and the CCI reflects the difference in the nature of state intervention. While under the MRTP Act, the Commission was concerned with preventing the growth of monopolies, in the Competition Act the Commission is concerned with ensuring free and fair competition and protecting consumer interest. The shift is from control to regulation, and also from ideology to pragmatism. This is in consonance with the new economic policy of liberalisation.³⁹

³⁴The Competition Act, 2002, Section 7 (1)

³⁵*Ibid*, Section 7 (2)

³⁶*Ibid*, Section 7 (3)

³⁷*Ibid*, Section 7 (4)

³⁸*Ibid*, Preamble and Section 18

³⁹S. P. Sathe, *Administrative Law*, 7th Edn, Lexis Nexis Butterworths, 2004, p. 352

The Act, in section 3(1), prohibits enterprises or associations of enterprises or persons or association of persons from entering into agreements in respect of production, supply, distribution, storage, acquisition, or control of goods or provision of services that cause or are likely to cause an appreciable adverse effect on competition within India. Clause (2) of the section makes such agreement void. Clause (3) describes what types of agreements would be presumed to have an appreciable adverse effect on competition. Clause (4) declares that any agreement amongst enterprises or persons at different stages or levels of production chain in different markets, relating to production, supply, distribution, storage, sale or price of, or trade in goods or provision of services shall be in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India. Such agreements include (i) tie-in arrangement, (ii) exclusive supply agreement, (iii) exclusive distribution agreement, (iv) refusal to deal, and (v) resale price maintenance. Clause (5) says that nothing herein, however, applies to copyright or patent etc.

Section 4 forbids abuse of dominant position. What amounts to abuse of dominance has been detailed in sub section (2) of that section. According to Section 4(2) there shall be an abuse of dominant position under sub-section (1), if an enterprise or a group—(a) directly or indirectly, imposes unfair or discriminatory—(i) condition in purchase or sale of goods or service; or (ii) price in purchase or sale (including predatory price) of goods or service. (b) limits or restricts—(i) production of goods or provision of services or market therefore; or (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or (c) indulges in practice or practices resulting in denial of market access in any manner; or (d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or

according to commercial usage, have no connection with the subject of such contracts; or (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Combinations that mar competition are forbidden by section 6 and they are void. No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.⁴⁰ The CCI has the responsibility of identifying such objectionable agreements or combinations.

Initially the Act provided that the CCI shall consist of a Chairperson and not less than two and not more than ten other members, to be appointed by the Central Government.⁴¹ The Central government, however, must appoint chairperson and one member during the first year of establishment of the Commission.⁴² The chairperson and every other member shall be persons of ability, integrity and standing, who (i) are or have been or are qualified to be High Court Judge, or (ii) have special knowledge of and professional experience, for not less than fifteen years, in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs, administration or in any other matter which, in the opinion of the Central Government, would be useful to the Commission.⁴³ The chairperson and members are whole-time members.⁴⁴ However, Section 8 has been substituted by the Competition (Amendment) Act, 2007 and now provides that the Commission shall consist of a Chairperson and not less than two and not more than six other Members to be

⁴⁰The Competition Act, 2002, Section 6(1)

⁴¹*Ibid*, Section 8 (1)

⁴²*Ibid*, Section 8 (1) proviso

⁴³*Ibid*, Section 8 (2)

⁴⁴*Ibid*, Section 8 (3)

appointed by the Central Government. The Chairperson and every other Member shall be a person of ability, integrity and standing and who has special knowledge of, and such professional experience of not less than fifteen years in, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters, including competition law and policy, which in the opinion of the Central Government, may be useful to the Commission. The Chairperson and other Members shall be whole-time Members. The Chairperson and other Members of the Commission shall be appointed by the Central Government from a panel of names recommended by a Selection Committee consisting of –

- a) the Chief Justice of India or his nominee —— Chairperson;
- b) the Secretary in the Ministry of Corporate Affairs —— Member;
- c) the Secretary in the Ministry of Law and Justice —— Member;
- d) two experts of repute who have special knowledge of, and professional experience in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters including competition law and policy—— Members.⁴⁵

The Chairperson and every other Member shall hold office as such for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment. However, the Chairperson or other Members shall not hold office as such after he has attained the age of sixty-five years.⁴⁶ The Chairperson and other Members shall not, for a period of two years from the date on which they cease to hold office, accept any employment in, or connected with the management or administration of, any enterprise which

⁴⁵*Ibid*, Section 9 (1)

⁴⁶*Ibid*, Section 10 (1)

has been a party to a proceeding before the Commission under this Act. However, nothing contained in this section shall apply to any employment under the Central Government or a State Government or local authority or in any statutory authority or any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956.⁴⁷

When the Chairperson is unable to discharge his functions owing to absence, illness or any other cause, the senior-most Member shall discharge the functions of the Chairperson until the date on which the Chairperson resumes the charge of his functions.⁴⁸ The Chairperson or any other Member may, by notice in writing under his hand addressed to the Central Government, resign his office.⁴⁹ The Central Government may, by order, remove the Chairperson or any other Member from his office if such Chairperson or Member, as the case may be,—

- a) is, or at any time has been, adjudged as an insolvent; or
- b) has engaged at any time, during his term of office, in any paid employment; or
- c) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or
- d) has acquired such financial or other interest as is likely to affect prejudicially his functions as a Member; or
- e) has so abused his position as to render his continuance in office prejudicial to the public interest; or
- f) has become physically or mentally incapable of acting as a Member.⁵⁰

⁴⁷ *Ibid*, Section 12

⁴⁸ *Ibid*, Section 10 (5)

⁴⁹ *Ibid*, Section 11 (1)

⁵⁰ *Ibid*, Section 11 (2)

However, no Member shall be removed from his office on the ground specified in clause (d) or clause (e) of that subsection unless the Supreme Court, on a reference being made to it in this behalf by the Central Government, has, on an inquiry, held by it in accordance with such procedure as may be prescribed in this behalf by the Supreme Court, reported that the Member, ought on such ground or grounds to be removed.⁵¹

The Chairperson shall have the powers of general superintendence, direction and control in respect of all administrative matters of the Commission. The Chairperson may delegate such of his powers relating to administrative matters of the Commission, as he may think fit, to any other Member or officer of the Commission.⁵²The Commission shall meet at such times and places, and shall observe such rules and procedure in regard to the transaction of business at its meetings as may be provided by regulations.⁵³The Chairperson, if for any reason, is unable to attend a meeting of the Commission, the senior-most Member present at the meeting, shall preside at the meeting.⁵⁴All questions which come up before any meeting of the Commission shall be decided by a majority of the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the Member presiding, shall have a second or/casting vote. The quorum for such meeting shall be three Members.⁵⁵ A person or an enterprise or the Director General may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of his or its officers to present his or its case before the Commission.⁵⁶

⁵¹*Ibid*, Section 11 (3)

⁵²*Ibid*, Section 13

⁵³*Ibid*, Section 22(1)

⁵⁴*Ibid*, Section 22(2)

⁵⁵*Ibid*, Section 22(3)

⁵⁶*Ibid*, Section 35

Duties, Powers and Functions of Commission

It shall be the duty of the CCI to eliminate practices having any adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade for participants in markets in India.⁵⁷

Inquiry into Certain Agreements and Dominant Position of Enterprise

The CCI may inquire into agreements made by an enterprise or an association of enterprises in respect of production, supply, distribution, storage, acquisition, or control of goods or provision of services, in case such agreements are alleged to have had an adverse effect on competition. The CCI may also inquire into alleged abuse of dominant position by an enterprise. Such an inquiry may be taken up either on its own motion, or on (i) receipt of any information, in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or (ii) a reference made to it by the central government or a state government or a statutory authority.⁵⁸ The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:—

- i creation of barriers to new entrants in the market;
- ii driving existing competitors out of the market;
- iii foreclosure of competition by hindering entry into the market;
- iv accrual of benefits to consumers;
- v improvements in production or distribution of goods or provision of services; and
- vi promotion of technical, scientific, and economic development

⁵⁷ *Ibid*, Section 18

⁵⁸ *Ibid*, Section 19 (1)

by means of production or distribution of goods or provision of services.⁵⁹

The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:—

- (a) market share of the enterprise;
- (b) size and resources of the enterprise;
- (c) size and importance of the competitors;
- (d) economic power of the enterprise including commercial advantages over competitors;
- (e) vertical integration of the enterprises or sale or service network of such enterprises;
- (f) dependence of consumers on the enterprise;
- (g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
- (h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers,
- (i) economies of scale, high cost of substitutable goods or service for consumers;
- (j) countervailing buying power;
- (k) market structure and size of market;
- (l) social obligations and social costs;
- (m) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;
- (n) any other factor which the Commission may consider relevant for the inquiry.

⁵⁹ *Ibid*, Section 19 (3)

Procedure for inquiry under Section 19

On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a *prima facie* case, it shall direct the Director General to cause an investigation to be made into the matter. If the subject matter of information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information. Where on receipt of a reference from the Central Government or a State Government or a statutory authority or information received under section 19, the Commission is of the opinion that there exists no *prima facie* case, it shall close the matter forthwith and pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be. The Director General shall, on receipt of direction, submit a report on his findings within such period as may be specified by the Commission. The Commission may forward a copy of the report referred to the parties concerned. However, in case the investigation is caused to be made based on reference received from the Central Government or the State Government or the statutory authority, the Commission shall forward a copy of the report referred to the Central Government or the State Government or the statutory authority, as the case may be. If the report of the Director General recommends that there is no contravention of the provisions of this Act, the Commission shall invite objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be, on such report of the Director General. After consideration of the objections and suggestions, if any, the Commission agrees with

the recommendation of the Director General, it shall close the matter forthwith and pass such orders as it deems fit and communicate its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be. If, after consideration of the objections or suggestions, if any, the Commission is of the opinion that further investigations is called for, it may direct further investigation in the matter by the Director General or cause further inquiry to be made by in the matter or itself proceed with further inquiry in the matter in accordance with the provisions of this Act. If the report of the Director General recommends that there is contravention of any of the provisions of this Act, and the Commission is of the opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of this Act.⁶⁰

Orders by Commission after Inquiry into Agreements or Abuse of Dominant Position

Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders:—

- (a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;
- (b) impose such penalty, as it may deem fit which shall be not more than ten percent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements

⁶⁰ Ibid Section 26

or abuse. In case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of upto three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of the continuance of such agreement, whichever is higher.

- (c) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;
- (d) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;
- (e) pass such other order or issue such directions as it may deem fit.

While passing orders under this section, if the Commission comes to a finding, that an enterprise in contravention to section 3 or section 4 of the Act is a member of a group as defined in clause (b) of the Explanation to section 5 of the Act, and other members of such a group are also responsible for, or have contributed to, such a contravention, then it may pass orders, under this section, against such members of the group.⁶¹

Division of Enterprise enjoying Dominant Position

The Commission may, notwithstanding anything contained in any other law for the time being in force, by order in writing, direct division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position. The order may provide for all or any of the following matters, namely:—

- (a) the transfer or vesting of property, rights, liabilities or obligations;

⁶¹ *Ibid*, Section 27

- (b) the adjustment of contracts either by discharge or reduction of any liability or obligation or otherwise;
- (c) the creation, allotment, surrender or cancellation of any shares, stocks or securities;
- (d) the formation or winding up of an enterprise or the amendment of the memorandum of association or articles of association or any other instruments regulating the business of any enterprise;
- (e) the extent to which, and the circumstances in which, provisions of the order affecting an enterprise may be altered by the enterprise and the registration thereof;
- (f) any other matter which may be necessary to give effect to the division of the enterprise.

Notwithstanding anything contained in any other law for the time being in force or in any contract or in any memorandum or articles of association, an officer of a company who ceases to hold office as such in consequence of the division of an enterprise shall not be entitled to claim any compensation for such cesser.⁶²

Inquiry into Combination by Commission

The Commission may, upon its own knowledge or information relating to acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of section 5 or merger or amalgamation referred to in clause (c) of that section, inquire into whether such a combination has caused or is likely to cause an appreciable adverse effect on competition in India. However, the Commission shall not initiate any inquiry under this sub-section after the expiry of one year from the date on which such combination has taken effect.⁶³ The Commission shall, on receipt of a notice under

⁶² *Ibid*, Section 28

⁶³ *Ibid*, Section 20 (1)

sub-section (2) of section 6, inquire whether a combination referred to in that notice or reference has caused or is likely to cause an appreciable adverse effect on competition in India.⁶⁴ For the purposes of determining whether a combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market, the Commission shall have due regard to all or any of the following factors, namely:—

- a) actual and potential level of competition through imports in the market;
- b) extent of barriers to entry into the market;
- c) level of combination in the market;
- d) degree of countervailing power in the market;
- e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
- f) extent of effective competition likely to sustain in a market;
- g) extent to which substitutes are available or are likely to be available in the market;
- h) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
- i) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
- j) nature and extent of vertical integration in the market;
- k) possibility of a failing business;
- l) nature and extent of innovation;
- m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;
- n) whether the benefits of the combination outweigh the adverse impact of the combination, if any.⁶⁵

⁶⁴ *Ibid*, Section 20 (2)

⁶⁵ *Ibid*, Section 20 (4)

Procedure for Investigation of Combination

Where the Commission is of the *prima facie* opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India, it shall issue a notice to show cause to the parties to combination calling upon them to respond within thirty days of the receipt of the notice, as to why investigation in respect of such combination should not be conducted. After receipt of the response of the parties to the combination, the Commission may call for a report from the Director General and such report shall be submitted by the Director General within such time as the Commission may direct. The Commission, if it is *prima facie* of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall, within seven working days from the date of receipt of the response of the parties to the combination, or the receipt of the report from Director General, whichever is later direct the parties to the said combination to publish details of the combination within ten working days of such direction, in such manner, as it thinks appropriate, for bringing the combination to the knowledge or information of the public and persons affected or likely to be affected by such combination. The Commission may invite any person or member of the public, affected or likely to be affected by the said combination, to file his written objections, if any, before the Commission within fifteen working days from the date on which the details of the combination were published. The Commission may, within fifteen working days from the expiry of the aforementioned period of 15 days, call for such additional or other information as it may deem fit from the parties to the said combination. The additional or other information called for by the Commission shall be furnished by the parties within fifteen days from the expiry of the 15 days period within which the information was sort. After receipt of all information and within a period of forty-

five working days from the expiry of the 15 days period provided for furnishing the information, the Commission shall proceed to deal with the case in accordance with the provisions contained in section 31.⁶⁶

Orders of Commission on Certain Combinations

Where the Commission is of the opinion that any combination does not, or is not likely to, have an appreciable adverse effect on competition, it shall, by order, approve that combination including the combination in respect of which a notice has been given under sub-section (2) of section 6.⁶⁷ Where the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall direct that the combination shall not take effect.⁶⁸ Where the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition but such adverse effect can be eliminated by suitable modification to such combination; it may propose appropriate modification to the combination, to the parties to such combination.⁶⁹ The parties, who accept the modification proposed by the Commission, shall carry out such modification within the period specified by the Commission.⁷⁰ If the parties to the combination, who have accepted the modification, fail to carry out the modification within the period specified by the Commission, such combination shall be deemed to have an appreciable adverse effect on competition and the Commission shall deal with such combination in accordance with the provisions of this Act.⁷¹ If the parties to the combination do

⁶⁶ *Ibid*, Section 29

⁶⁷ *Ibid*, Section 31(1)

⁶⁸ *Ibid*, Section 31(2)

⁶⁹ *Ibid*, Section 31(3)

⁷⁰ *Ibid*, Section 31(4)

⁷¹ *Ibid*, Section 31(5)

not accept the modification proposed by the Commission, such parties may, within thirty working days of the modification proposed by the Commission, submit amendment to the modification proposed by the Commission.⁷² If the Commission agrees with the amendment submitted by the parties, it shall, by order, approve the combination.⁷³ If the Commission does not accept the amendment submitted, then, the parties shall be allowed a further period of thirty working days within which such parties shall accept the modification proposed by the Commission.⁷⁴ If the parties fail to accept the modification proposed by the Commission within the allowed period of thirty working days or within a further extended period of thirty working days, the combination shall be deemed to have an appreciable adverse effect on competition and be dealt within accordance with the provisions of this Act.⁷⁵ Where the Commission has directed under sub-section (2) that the combination shall not take effect or the combination is deemed to have an appreciable adverse effect on competition under sub-section (9), then, without prejudice to any penalty which may be imposed or any prosecution which may be initiated under this Act, the Commission may order that—(a) the acquisition referred to in clause (a) of section 5; or (b) the acquiring of control referred to in clause (b) of section 5; or (c) the merger or amalgamation referred to in clause (c) of section 5, shall not be given effect to. The Commission may, if it considers appropriate, frame a scheme to implement its order under this sub-section.⁷⁶ If the Commission does not, on the expiry of a period of two hundred and ten days from the date of notice given to the Commission under sub-section (2) of section 6, pass an order or issue direction in

⁷² *Ibid*, Section 31(6)

⁷³ *Ibid*, Section 31(7)

⁷⁴ *Ibid*, Section 31(8)

⁷⁵ *Ibid*, Section 31(9)

⁷⁶ *Ibid*, Section 31(10)

accordance with the provisions of sub-section (1) or sub-section (2) or sub-section (7), the combination shall be deemed to have been approved by the Commission.⁷⁷ For the purposes of determining the period of two hundred and ten days specified in this subsection, the period of thirty working days specified in sub-section (6) and a further period of thirty working days specified in subsection (8) shall be excluded.⁷⁸ Where any extension of time is sought by the parties to the combination, the period of ninety working days shall be reckoned after deducting the extended time granted at the request of the parties.⁷⁹ Where the Commission has ordered a combination to be void, the acquisition or acquiring of control or merger or amalgamation referred to in section 5, shall be dealt with by the authorities under any other law for the time being in force as if such acquisition or acquiring of control or merger or amalgamation had not taken place and the parties to the combination shall be dealt with accordingly.⁸⁰ Nothing contained in this Chapter shall affect any proceeding initiated or which may be initiated under any other law for the time being in force.⁸¹

Competition Advocacy

The Central Government and a State Government may, in formulating a policy on competition (including review of laws related to competition) or any other matter, as the case may be, make a reference to the Commission for its opinion on possible effect of such policy on competition and on the receipt of such a reference, the Commission shall, within sixty days of making such reference, give its opinion to the Central Government, or the State Government,

⁷⁷ *Ibid*, Section 31(11)

⁷⁸ *Ibid*, Explanation to Section 31(11)

⁷⁹ *Ibid*, Section 31(12)

⁸⁰ *Ibid*, Section 31(13)

⁸¹ *Ibid*, Section 31(14)

as the case may be, which may thereafter take further action as it deems fit. The opinion given by the Commission shall not be binding upon the Central Government or the State Government, as the case may be in formulating such policy. The Commission shall take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues.⁸²

Extra Territorial Jurisdiction of the Commission

The Commission shall, notwithstanding that—(a) an agreement referred to in section 3 has been entered into outside India; or (b) any party to such agreement is outside India; or (c) any enterprise abusing the dominant position is outside India; or (d) a combination has taken place outside India; or (e) any party to combination is outside India; or (f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India, have power to inquire in accordance with the provisions contained in sections 19, 20, 26, 29 and 30 of the Act into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India and pass such orders as it may deem fit in accordance with the provisions of this Act.⁸³

Powers of the Commission

Power to Issue Interim Orders

Where during an inquiry, the Commission is satisfied that an act in contravention of sub-section (1) of section 3 or sub-section (1) of section 4 or section 6 has been committed and continues to be committed or that such act is about to be committed, the

⁸² *Ibid*, Section 49

⁸³ *Ibid*, Section 32

Commission may, by order, temporarily restrain any party from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to such party, where it deems it necessary.⁸⁴

Power of Commission to Regulate its Own Procedure

In the discharge of its functions, the Commission shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government, the Commission shall have the powers to regulate its own procedure.⁸⁵ The Commission shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely:-

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavit;
- (d) issuing commissions for the examination of witnesses or documents;
- (e) requisitioning, subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, any public record or document or copy of such of record or document from any office.⁸⁶

The Commission may call upon such experts, from the field of economics, commerce, accountancy, international trade or from any other discipline as it deems necessary to assist the Commission in the conduct of any inquiry by it.⁸⁷ The Commission may direct any person:

⁸⁴ *Ibid*, Section 33

⁸⁵ *Ibid*, Section 36(1)

⁸⁶ *Ibid*, Section 36(2)

⁸⁷ *Ibid*, Section 36(3)

- (a) to produce before the Director General or the Secretary or an officer authorized by it, such books, or other documents in the custody or under the control of such person so directed as may be specified or described in the direction, being documents relating to any trade, the examination of which may be required for the purposes of this Act;
- (b) to furnish to the Director General or the Secretary or any other officer authorized by it, as respects the trade or such other information as may be in his possession in relation to the trade carried on by such person, as may be required for the purposes of this Act.⁸⁸

Penalties

Contravention of orders of Commission –The Commission may cause an inquiry to be made into compliance of its orders or directions made in exercise of its powers under the Act. If any person, without reasonable cause, fails to comply with the orders or directions of the Commission issued under sections 27, 28, 31, 32, 33, 42A and 43A of the Act, he shall be punishable with fine which may extend to rupees one lakh for each day during which such non-compliance occurs, subject to a maximum of rupees ten crore, as the Commission may determine. If any person does not comply with the orders or directions issued, or fails to pay the fine imposed, he shall, without prejudice to any proceeding under section 39, be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to rupees twenty-five crore, or with both, as the Chief Metropolitan Magistrate, Delhi may deem fit. The Chief Metropolitan Magistrate, Delhi shall not take cognizance of any offence under this section save on a complaint filed by the Commission or any of its officers authorized by it.⁸⁹

⁸⁸ *Ibid*, Section 36(4)

⁸⁹ *Ibid*, Section 42

Compensation in case of contravention of orders of

Commission- Without prejudice to the provisions of this Act, any person may make an application to the Appellate Tribunal for an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by such person as a result of the said enterprise violating directions issued by the Commission or contravening, without any reasonable ground, any decision or order of the Commission issued under sections 27, 28, 31, 32 and 33 or any condition or restriction subject to which any approval, sanction, direction or exemption in relation to any matter has been accorded, given, made or granted under this Act or delaying in carrying out such orders or directions of the Commission.⁹⁰

Penalty for failure to comply with directions of Commission

and Director General- If any person fails to comply, without reasonable cause, with a direction given by—(a) the Commission under sub-sections (2) and (4) of section 36; or (b) the Director General while exercising powers referred to in sub-section (2) of section 41, such person shall be punishable with fine which may extend to rupees one lakh for each day during which such failure continues subject to a maximum of rupees one crore, as may be determined by the Commission.⁹¹

Power to impose penalty for non-furnishing of information

on combinations- If any person or enterprise who fails to give notice to the Commission under subsection (2) of section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one percent of the total turnover or the assets, whichever is higher, of such a combination.⁹²

⁹⁰ *Ibid*, Section 42A

⁹¹ *Ibid*, Section 43

⁹² *Ibid*, Section 43A

Penalty for making false statement or omission to furnish material information- If any person, being a party to a combination,—(a) makes a statement which is false in any material particular, or knowing it to be false; or (b) omits to state any material particular knowing it to be material, such person shall be liable to a penalty which shall not be less than rupees fifty lakhs but which may extend to rupees one crore, as may be determined by the Commission.⁹³

Penalty for offences in relation to furnishing of information- Without prejudice to the provisions of section 44, if a person, who furnishes or is required to furnish under this Act any particulars, documents or any information,— (a) makes any statement or furnishes any document which he knows or has reason to believe to be false in any material particular; or (b) omits to state any material fact knowing it to be material; or (c) wilfully alters, suppresses or destroys any document which is required to be furnished as aforesaid, such person shall be punishable with fine which may extend to rupees one crore as may be determined by the Commission. Without prejudice to the above provisions, the Commission may also pass such other order as it deems fit.⁹⁴

Power to impose lesser penalty -The Commission may, if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit, than leviable under this Act or the rules or the regulations. However, lesser penalty shall not be imposed by the Commission in cases where the report of investigation directed under

⁹³ *Ibid*, Section 44

⁹⁴ *Ibid*, Section 45

section 26 has been received before making of such disclosure. Further lesser penalty shall be imposed by the Commission only in respect of a producer, seller, distributor, trader or service provider included in the cartel, who has made the full, true and vital disclosures under this section. Also lesser penalty shall not be imposed by the Commission if the person making the disclosure does not continue to cooperate with the Commission till the completion of the proceedings before the Commission. Further, the Commission may, if it is satisfied that such producer, seller, distributor, trader or service provider included in the cartel had in the course of proceedings,— (a) not complied with the condition on which the lesser penalty was imposed by the Commission; or (b) had given false evidence; or (c) the disclosure made is not vital, and thereupon such producer, seller, distributor, trader or service provider may be tried for the offence with respect to which the lesser penalty was imposed and shall also be liable to the imposition of penalty to which such person has been liable, had lesser penalty not been imposed.⁹⁵

Contravention by Companies

Where a person committing contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder is a company, every person who, at the time the contravention was committed, was in-charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. However, any such person shall not be liable to any punishment if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention.

⁹⁵ *Ibid*, Section 46

Where a contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that contravention and shall be liable to be proceeded against and punished accordingly.⁹⁶

Competition Appellate Tribunal

Chapter VIII A of the Act, inserted by the Competition (Amendment) Act, 2007, provides for the establishment, powers and functions of Competition Appellate Tribunal. The Central Government shall, by notification, establish an Appellate Tribunal to be known as Competition Appellate Tribunal –

- (a) to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under sub-sections (2) and (6) of section 26, section 27, section 28, section 31, section 32, section 33, section 38, section 39, section 43, section 43A, section 44, section 45 or section 46 of the Act;
- (b) to adjudicate on claim for compensation that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any finding of the Commission or under section 42A or under subsection(2) of section 53Q of this Act, and pass orders for the recovery of compensation under section 53N of this Act.⁹⁷

⁹⁶ *Ibid*, Section 48

⁹⁷ *Ibid*, Section 53 A(1)

Composition of Appellate Tribunal

The Appellate Tribunal shall consist of a Chairperson and not more than two other members to be appointed by the Central Government.⁹⁸ The Chairperson of the Appellate Tribunal shall be a person, who is, or has been a Judge of the Supreme Court or the Chief Justice of a High Court. A member of the Appellate Tribunal shall be a person of ability, integrity and standing having special knowledge of, and professional experience of not less than twenty five years in, competition matters including competition law and policy, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs, administration or in any other matter which in the opinion of the Central Government, may be useful to the Appellate Tribunal.⁹⁹

The Chairperson and members of the Appellate Tribunal shall be appointed by the Central Government from a panel of names recommended by a Selection Committee consisting of –

- (a) the Chief Justice of India or his nominee
Chairperson;
- (b) the Secretary in the Ministry of Corporate Affairs.....
Member;
- (c) the Secretary in the Ministry of Law and Justice
Member.¹⁰⁰

The Chairperson or a member of the Appellate Tribunal shall hold office as such for a term of five years from the date on which he enters upon his office, and shall be eligible for re-appointment. However, no Chairperson or other member of the Appellate Tribunal shall hold office as such after he has attained, in the case of the Chairperson, the age of sixty-eight years; and in the case of any

⁹⁸ *Ibid*, Section 53 C

⁹⁹ *Ibid*, Section 53 D

¹⁰⁰ *Ibid*, Section 53 E

other member of the Appellate Tribunal, the age of sixty-five years.¹⁰¹

Appeal to Appellate Tribunal

The Central Government or the State Government or a local authority or enterprise or any person, aggrieved by any direction, decision or order referred to in clause (a) of section 53A may prefer an appeal to the Appellate Tribunal. Every appeal shall be filed within a period of sixty days from the date on which a copy of the direction or decision or order made by the Commission is received by the Central Government or the State Government or a local authority or enterprise or any person referred to in that sub-section and it shall be in such form and be accompanied by such fee as may be prescribed. However, the Appellate Tribunal may entertain an appeal after the expiry of the said period of sixty days if it is satisfied that there was sufficient cause for not filing it within that period. On receipt of an appeal, the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against. The Appellate Tribunal shall send a copy of every order made by it to the Commission and the parties to the appeal. The appeal filed before the Appellate Tribunal shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal within six months from the date of receipt of the appeal.¹⁰²

Exclusion of Jurisdiction of Civil Courts

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Commission or the

¹⁰¹ *Ibid*, Section 53 F

¹⁰² *Ibid*, Section 53 B

Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.¹⁰³

Awarding Compensation

Without prejudice to any other provisions contained in this Act, the Central Government or a State Government or a local authority or any enterprise or any person may make an application to the Appellate Tribunal to adjudicate on claim for compensation that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any findings of the Commission or under section 42A or under sub-section(2) of section 53Q of the Act, and to pass an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by the Central Government or a State Government or a local authority or any enterprise or any person as a result of any contravention of the provisions of Chapter II, having been committed by enterprise. Every application made shall be accompanied by the findings of the Commission, if any, and also be accompanied with such fees as may be prescribed. The Appellate Tribunal may, after an inquiry made into the allegations mentioned in the application made, pass an order directing the enterprise to make payment to the applicant, of the amount determined by it as realisable from the enterprise as compensation for the loss or damage caused to the applicant as a result of any contravention of the provisions of Chapter II having been committed by such enterprise. The Appellate Tribunal may obtain the recommendations of the Commission before passing an order of compensation. Where any loss or damage referred to is caused to numerous persons having the same interest, one or more

¹⁰³ *Ibid*, Section 61

of such persons may, with the permission of the Appellate Tribunal, make an application under that sub-section for and on behalf of, or for the benefit of, the persons so interested, and thereupon, the provisions of rule 8 of Order 1 of the First Schedule to the Code of Civil Procedure, 1908, shall apply subject to the modification that every reference therein to a suit or decree shall be construed as a reference to the application before the Appellate Tribunal and the order of the Appellate Tribunal thereon.¹⁰⁴

Procedures and Powers of Appellate Tribunal

The Appellate Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government, the Appellate Tribunal shall have power to regulate its own procedure including the places at which they shall have their sittings. The Appellate Tribunal shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely:-

- a) summoning and enforcing the attendance of any person and examining him on oath;
- b) requiring the discovery and production of documents;
- c) receiving evidence on affidavit;
- d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or copy of such record or document from any office;
- e) issuing commissions for the examination of witnesses or documents;
- f) reviewing its decisions;

¹⁰⁴ *Ibid*, Section 53 N

- g) dismissing a representation for default or deciding it *ex parte*;
- h) setting aside any order of dismissal of any representation for default or any order passed by it *ex parte*;
- i) any other matter which may be prescribed.

Every proceedings before the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code, 1860 and the Appellate Tribunal shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.¹⁰⁵

Execution of Orders of Appellate Tribunal

Every order made by the Appellate Tribunal shall be enforced by it in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Appellate Tribunal to send, in case of its inability to execute such order, to the court within the local limits of whose jurisdiction,-a) in the case of an order against a company, the registered office of the company is situated; or b) in the case of an order against any other person, place where the person concerned voluntarily resides or carries on business or personally works for gain, is situated. The Appellate Tribunal may transmit any order made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by that court.¹⁰⁶

Contravention of Orders of Appellate Tribunal

Without prejudice to the provisions of this Act, if any person contravenes, without any reasonable ground, any order of the Appellate Tribunal, he shall be liable for a penalty of not exceeding

¹⁰⁵ *Ibid*, Section 53 O

¹⁰⁶ *Ibid*, Section 53 P

rupees one crore or imprisonment for a term up to three years or with both as the Chief Metropolitan Magistrate, Delhi may deem fit. However, the Chief Metropolitan Magistrate, Delhi shall not take cognizance of any offence punishable under this sub-section, save on a complaint made by an officer authorized by the Appellate Tribunal. Without prejudice to the provisions of this Act, any person may make an application to the Appellate Tribunal for an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by such person as a result of the said enterprise contravening, without any reasonable ground, any order of the Appellate Tribunal or delaying in carrying out such orders of the Appellate Tribunal.¹⁰⁷

Appeal to Supreme Court

The Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to them. The Supreme Court may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed after the expiry of the said period of sixty days.¹⁰⁸

Power to Punish for Contempt

The Appellate Tribunal shall have, and exercise, the same jurisdiction, powers and authority in respect of contempt of itself as a High Court has and may exercise and, for this purpose, the provisions of the Contempt of Courts Act, 1971, shall have effect subject to modifications that,— (a) the reference therein to a High

¹⁰⁷ *Ibid*, Section 53 Q

¹⁰⁸ *Ibid*, Section 53 T

Court shall be construed as including a reference to the Appellate Tribunal; (b) the references to the Advocate-General in section 15 of the said Act shall be construed as a reference to such Law Officer as the Central Government may, by notification, specify in this behalf.¹⁰⁹

Director General

The Central Government may, by notification, appoint a Director General for the purposes of assisting the Commission in conducting inquiry into contravention of any of the provisions of this Act and for performing such other functions as are, or may be, provided by or under this Act.¹¹⁰ The Director General shall, when so directed by the Commission, assist the Commission in investigating into any contravention of the provisions of this Act or any rules or regulations made thereunder. The Director General shall have all the powers as are conferred upon the Commission under subsection (2) of section 36. Without prejudice to the provisions of sub-section (2), sections 240 and 240A of the Companies Act, 1956, so far as may be, shall apply to an investigation made by the Director General or any other person investigating under his authority, as they apply to an inspector appointed under that Act.¹¹¹

The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.¹¹² No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Commission or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance

¹⁰⁹ *Ibid*, Section 53 U

¹¹⁰ *Ibid*, Section 16(1)

¹¹¹ *Ibid*, Section 41

¹¹² *Ibid*, Section 60

of any power conferred by or under this Act.¹¹³ The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.¹¹⁴ The Monopolies and Restrictive Trade Practices Act, 1969 is hereby repealed and the Monopolies and Restrictive Trade Practices Commission established under sub-section(1) of section 5 of the said Act shall stand dissolved.¹¹⁵

Conclusion

Inaugurating the Conference on Competition, Public Policy and Common Man in 2009 Shri Pranab Mukherjee, the Finance Minister remarked that competition alone is not sufficient for realizing the gains from greater competition. There is a need for broad based societal understanding of the law and acceptance of its values for full success. In general, 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. It is important to bring common people's concern to the fore. Thus the crucial question, relevant to the context is: how competition can secure the economic well of the common man. There is also need to operationalise the Act and ensure that various bodies under the Act are set up and start functioning. Any further delay would have a negative effect. Along with this, the capacity building programmes need to be taken up to strengthen the structural mechanism under the Act.

The gains from competition law can only be realized with effective enforcement. For that government should provide adequate infrastructure and funds to CCI to make it an effective forum to prevent anti-competitive practices and play an important role in competition advocacy.

¹¹³ *Ibid*, Section 61

¹¹⁴ *Ibid*, Section 62

¹¹⁵ *Ibid*, Section 66(1)

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Monograph Series 11

COMPETITION POLICY AND LAW

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**CENTRE FOR CONSUMER STUDIES
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Preface

In a democracy the state has to intervene to regulate trade and commerce not only to avoid concentration of the means of production and market dominance but also to promote the laudable ideals of free market and protection of the consumers. The basic tenets of democracy and market competition are ingrained in the value system of freedom of individual choice, abhorrence of concentration of power, decentralized decision making and adherence to the rule of law. The common goal of both democracy and market competition is the same; to ensure public welfare. However, firms while competing with one another, often adopt unfair means to restrict competition. This is where competition law assumes a pivotal role in achieving the targets of democracy and economic justice. Competition law reinforces the fundamental right to carry on any occupation, trade or business by prohibiting unreasonable restraints on the exercise of these rights through anti-competitive practices.

After Independence, India adopted and followed policies comprising of Command-and-Control laws. It was in the 1990s that widespread economic reforms were undertaken by Government of India. As economic liberalisation took root in India, the need for an effective competition regime was also recognised.

In due course of time the Competition Policy emerged as a critical component of the overall economic policy framework. The aim of the competition policy is to create a framework of policies and regulations that will facilitate competitive outcomes in the market. Competition Policy is intended to promote efficiency and to maximize welfare of the consumers. There are two components of a

comprehensive Competition Policy. The first involves putting in place a set of policies that enhance competition and the other component is to frame a law which seeks to increase economic efficiency, enhance consumer welfare, ensure fair trading, prevent abuse of market power and minimizes unwarranted regulatory controls. Proliferation of competition law has taken place world over irrespective of the stage of economic development of the country including economic, social and political policies pursued by it.

India also enacted the Competition Act in 2002, but due to various reasons the mechanism could not be put in place. Now the Competition Commission has been set up and the work has begun. However, a number of steps are still to be taken to fully operationalise the Act.

The Centre for Consumer Studies, IIPA has been bringing out a number of publications on issues that affect the consumers. This monograph will help the readers to understand the rationale of enhancing competition and providing a mechanism to redress complaints.

We would like to thank Mr. B. S. Baswan, Director, IIPA for his encouragement and support. We are also thankful to the Department of Consumer Affairs, Government of India for their help.

Date: June 16, 2010

Place: New Delhi

Suresh Misra

Sapna Chadah



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Bhartendra Singh Baswan
Director

Foreword

Over the last two decades there has been a steady shift in public policy resulting in a movement towards greater reliance on the markets to provide goods and services, while the State concentrates on its regulatory and promotional functions. The assumption is that while privately owned enterprises are more efficient and innovative as they operate under competitive market conditions, the State should focus on the supply of public goods and infrastructure, apart from its welfare and law and order responsibilities.

Competition is a process that can lead to efficient outcomes and encourages businesses and companies to improve the quality of the products they sell and the services they provide. The market economy is also prone to failure where unscrupulous players undermine the benefits of competition through collusive behaviour or abuse of dominance. State regulation is thus necessary to prevent abuse of a dominant position, the creation of cartels and to protect the consumers through developing an effective 'competition policy and law', as a number of developing economies have done. India enacted the Competition Act, 2002 and set up a Competition Commission, which has finally replaced the MRTP Commission.

It is against this backdrop that the Centre for Consumer Studies, Indian Institute of Public Administration, New Delhi, has brought out the present monograph on "Competition Policy and Law". I would like to thank the authors, Prof. Suresh Misra and Ms. Sapna Chadah for bringing out this monograph in its present form. It's an important contribution to the literature on competition and will help the readers to understand the need and rationale for competition in a welfare state.

Place: New Delhi
Date: June 16, 2010


B.S. Baswan

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