VOLUME - I

Chapter I

PREAMBLE

1.1.1 A broad definition of Competition is “a situation in a market in which firms or sellers independently strive for the buyers’ patronage in order to achieve a particular business objective for example, profits, sales or market share” (World Bank, 1999).

1.1.2 A prerequisite for good competition is trade. In the 19th century, Philip Harwood, the journalist theologian defined Trade as “the mutual relief of wants by the exchange of superfluities” (Mulji, 1999). He added that Free trade as opposed just to Trade is “the unrestricted liberty of every man to buy, sell and barter, when, where and how, of whom and to whom he pleases”. “To buy in the cheapest market he can find and sell in the dearest market he can find” he said was the very essence of free trade.

1.1.3 That “buy cheap, sell dear” happens also to be a sound commercial maxim for avaricious businessmen is not a good argument for rejecting its social value. Indeed, it is specifically this coincidence of commercial self-interest and social benefit that offers the most potent argument for free trade.

1.1.4 However a note of caution is necessary. The purchase of goods in the cheapest market is no guarantee that they will be sold where they are most needed. In poor countries particularly, those most needing the relevant goods may not have the necessary income to purchase them. So the first handicap of free markets is that for a given distribution of income those who can pay the highest price will most be able to purchase the goods regardless of their relative needs. However, in this case, the real culprit is income distribution not the competitive system.

1.1.5 A further drawback with unregulated free markets is that in certain circumstances it could be of greater benefit to the owner of superfluities temporarily to withhold goods from markets in order to extract a higher price. In the past, we have attempted to overcome these difficulties by regulating prices. But these efforts have been generally unsuccessful.

1.1.6 The answer to both these problems is to foster Competition. The greater and simpler the access to markets of superfluities, the more likely it is that at least some commercial agents will be able to seek out cheap prices and satisfy wants. Competition therefore becomes an essential handmaiden to efficient trade.

1.1.7 However, there are two schools of thought. One approach is to have totally free and unfettered competition in the belief that it will drive out all unfair practices. The other approach is to assert that the process of free competition should be supported by regulations which preclude any attempt at subversion of free trade and competition. It may be pertinent here to note that in most parts of the world, free competition is supported by relevant rules and regulations to ensure free trade and absence of unfair practices.

1.1.8 The legislative enforcement of healthy trade practices necessitates the promulgation of the Competition Law. Free competition means total freedom to develop optimum size without any restriction. The limitation, if at all necessary, is not limitation of size but of competition power.

1.1.9 The ultimate raison d'être of competition is the interest of the consumer. The consumer's right to free and fair competition cannot be denied by any other consideration. There is also a need for supportive institutions to strengthen a competitive society notably, adequate spread of information throughout the market, free and easy communication and ready accessibility of goods. A free press, worthy advertisement and even such modern institutions as the Internet could support a modern competitive society. Without them, competition cannot thrive in a kind of vacuum.

1.2.0 Competition policy, in this context, thus becomes an instrument to achieve efficient allocation of resources, technical progress, consumer welfare and regulation of concentration of economic power. Competition policy should thus have the positive objective of promoting consumer welfare.

1.2.1 While competition policy is therefore a desirable objective and an useful instrument for serving consumer interest and welfare, there is first a need to bring about a competitive environment.

1.2.2 The question that is very often asked is that whether we need a new Competition Law at all. The present Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) and Consumer Protection Act, 1986 (CPA) should be sufficient to deal with anti-competitive practices. So the argument goes. The present MRTP Act is limited in its sweep and hence fails to fulfil the need of a competition law in an age of growing liberalisation and globalisation. It should not be forgotten that by April, 2001, all quantitative restrictions (QRs) would have been completely phased out and with low level tariffs already negotiated during WTO rounds, India will be facing severe competition from abroad. Practically, the entire range of consumer goods will bear the brunt of open imports, combined with a lowering of tariff walls in the coming years. Lots of other sectors too will have to be shaped up to face competition. From toy-makers, plastic processors and urea manufacturers to giants of industry like automobile makers, steel producers and textile mills, all will have to face competition from the world over.

1.2.3 One more valid argument for the introduction of a domestic competition law is that it will prevent international cartels from indulging in anti-competitive practices in our country.

1.2.4 Once a domestic competition law is enacted, then a Memorandum of Understanding can be reached with countries like U.S. where cartels are prevented from operating by effective domestic competition laws. In other words, if they cannot indulge in such practices in U.S. they will be prevented from doing so in our country.

1.2.5 Free traders argue that by itself, free trade provides all the safeguards and regulations we require. That is at least what classical economists always taught. However in a modern and technologically more complex age, it is argued that these natural forces are not sufficient. Forces of competition need to be reinforced with a competition law particularly to counter forces of monopoly.

1.2.6 One reason for having domestic competition law is that it should be a precursor to the international competition law, which is sought to be placed on the agenda of the WTO. Competition law must emerge out of a national competition policy, which must be evolved to serve the basic goals of economic reforms by building a competitive market economy.

1.2.7 A second reason, as already argued above, is to benefit from reciprocity from other countries, which have legislated against the abuse of competition through dumping and predatory pricing. However these arguments must be used with caution for, the immediate and short-term effect of dumping and predatory pricing is to lower the cost of goods. It is only the long-term effects that could be deleterious if it destroys alternative domestic productive capacity. These long-term effects may never come about. It would be foolish to lose short-term benefits for illusory long-term gains. It may be wiser to counter the short-term impact by a strictly temporary countervailing duty until the conditions that bring about counter actions no longer prevail.

1.2.8 In so far as international dumping takes place, we already have the necessary mechanism in WTO. A competition law is only of value against domestic abuse of competitive power. In any event, it is safe to say domestic predatory practices are probably less easy to discover or counter. Normally they are controlled by the imposition of fines after due legal process. However these investigations are expensive to unravel abuses and require trained personnel. It may be easier to allow competition to assert itself in due course rather than construct an elaborate machinery.

1.2.9 Finally, with the promulgation of a new competition policy and the proposal of a new competition law, it is necessary to consider the relevance of the existing institutions like MRTP Commission and BIFR in the revised context or whether they are a superfluity to be traded in for a competition law. Along the path to a competitive system, there are several traps that need to be avoided such as the facile substitution of laws on competition for genuine competition. In the absence of a proper competitive environment, we may find ourselves with a first class competition law but no competition. We may also end up by protecting the competitor and not the competitive system. Hence, the Committee decided that it must at the outset record the need for a Competition Policy and the necessary prerequisites to create a competitive environment before spelling out the competition policy and law.

Chapter II

THE NEED FOR A COMPETITION POLICY

2.1 INTRODUCTION

2.1.1 Competition policy is defined as "those Government measures that directly affect the behaviour of enterprises and the structure of industry" (Khemani, R.S. and Mark A. Dutz, 1996). The objective of competition policy is to promote efficiency and maximize welfare. In this context the appropriate definition of welfare is the sum of consumers' surplus and producers' surplus and also includes any taxes collected by the Government.[1[1]] It is well known that in the presence of competition, welfare maximization is synonymous with allocative efficiency. Taxes are generally welfare-reducing.

2.1.2 There are two elements of such a policy. The first involves putting in place a set of policies that enhance competition in local and national markets. These would include a liberalised trade policy, relaxed foreign investment and ownership requirements and economic deregulation. The second is legislation designed to prevent anti-competitive business practices and unnecessary Government intervention - competition law. An effective competition policy promotes the creation of a business environment which improves static and dynamic efficiencies and leads to efficient resource allocation, and in which the abuse of market power is prevented mainly through competition. Where this is not possible, it requires the creation of a suitable regulatory framework for achieving efficiency. In addition, competition law prevents artificial entry barriers and facilitates market access and complements other competition promoting activities. Trade liberalisation alone is not sufficient to promote competition and there is a need for a separate competition policy. Due to persisting trade barriers, the presence of non-tradable goods, transport costs, inter-firm contractual agreements, international cartels, industrial concentration in world markets and differences in tastes and standards, international trade cannot be a substitute for a domestic competition policy.

2.2 THE POLICY REGIME

2.2.1 Historical Background

The strategy of planned economic development adopted by India since the early 1950s, and its evolution over the course of the various five-year plans, has been well documented (Bhagwati and Desai, 1970, Bhagwati and Srinivasan, 1975 and Ahluwalia, 1991). We focus here on those aspects of this development strategy and the concomitant policy regime that are relevant from the viewpoint of competition policy and efficiency in resource allocation.

2.2.2 The broad policy objectives on which India's planned strategy for industrialization was based, were (i) the development of a broad industrial base with a view to achieving self-reliance; and (ii) the promotion of social justice. Self-reliance, in the Indian context, came to mean across the board import substitution. At the time, in addition to the emotional appeal of self-reliance, there were two other justifications for this strategy. The first of these was the Infant Industry argument

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[1[1]] The debate in India has suggested that the choice is between two (conflicting) objective functions: "consumer interest" and "public interest". It is clearly more useful, and less controversial, to use the well-defined concept of "welfare".

and the second was export pessimism, an argument that was also popular among other developing nations during that period. The plethora of policy instruments that were used were essentially aimed at, (i) controlling the pattern of investment, indirectly through industrial licensing and targeting that affected the private sector, and directly through the creation of a large public sector; and (ii) directly controlling the utilisation of foreign exchange.

2.2.3 Although there was a private sector in India, there were virtually no elements of economic activity that were not subject to Government intervention and control. Entry and exit were restricted, firm and plant sizes were determined by Government policy, much of production was directly in the public sector, prices in a number of important sectors were fixed by Government, the allocation of scarce financial resources was determined by formal Government policy and informal interventions, and competition from abroad was severely curtailed by quantitative restrictions (QRs), high tariff walls and restrictions on foreign investment. Thus, most economic decisions were guided by the visible hand of Government and there was no place in this system for competition policy.

2.3 INDUSTRIAL POLICY

2.3.1 Public Sector

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Based on a belief that there was a need for an active State in the process of development, it was envisaged that the State, through the public sector, would be responsible for the development of infrastructure and would have control over key sectors of the economy such as defence and defence equipment, iron and steel, energy, power, transportation and telecommunication. Public sector enterprises were not only protected from competition through reservation, there were also policies that mandated that both Central Government departments and public sector enterprises apply price and purchase preference in favour of the public sector.

2.3.2 Licensing and Other Restrictions

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The Industrial (Development and Regulation) Act, 1951 (IDR Act) empowered the State to channel private investment through the extensive use of industrial licensing. This gave the State comprehensive control over the direction and pattern of investment. With some exceptions, entry into all industries as well as the expansion of capacity, were effectively regulated. In addition there was control over the product mix and the technology. The pattern of investment envisaged in the various five-year plans was implemented in this manner. Additional criteria for the issuing of industrial licenses were geographical location and the import content of the initial investment. The pattern of investment that was fostered, emphasized the development of heavy industry and the capital goods sector. There was a noticeable re-allocation of resources away from the production of consumer goods towards the production of machine tools and capital goods.

2.3.3 There were additional barriers to entry placed on the larger firms with the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) and the Foreign Exchange Regulation Act, 1973 (FERA). The so called MRTP firms were prohibited from entering and expanding in any sector except those listed in Appendix 1 of the IDR Act, for which they had to obtain MRTP clearances in addition to the usual industrial licenses. For certain other, "priority" industries, only a capacity license was required.

2.3.4 Small Scale Industry

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An exception to the licensing requirement is the small-scale sector which was promoted with a view to fostering labour intensive production in the consumer goods sector and to spread the impact of industrialisation to rural areas. Though the definition of small scale has been periodically revised upward, up to the early 1980's, these revisions merely kept pace with the rate of inflation. By the late sixties, during the Fourth Five Year Plan (1969-74), policies for protecting the small scale sector against competition from the large scale sector were also put into place.

2.3.5 Foreign Investment and Technology Agreements

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As a result of the Foreign Exchange Regulation Act, 1973 (FERA), the equity of foreign companies in Indian companies was limited to 40 per cent. A large number of such companies had to divest their holdings and bring them down to 40 per cent. With a minority holding, the incentives for greater assistance (e.g. for capital and technology) from the foreign parent were lower. Till 1991, agreements to import technology had to be approved by the Government. The Government had discretion about the maximum royalty that could be paid. Imports of technology were not approved, if the import content of the processes was considered to be too high. Prior approval was essential from the Ministry of Industry for the engagement of foreign technicians, and their terms of payment and tenure were restricted.

2.3.6 Exit Barriers

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In addition to the various entry barriers described above, labour and bankruptcy laws created effective exit barriers. With a view to protecting labour and employment, closures and the retrenchment of labour are controlled by the Industrial Disputes Act, 1947. Under the Sick Industrial Companies Act, 1986, the Board of Industrial and Financial Reconstruction (BIFR) was set up in 1987. Its job is to review the viability of sick units and to recommend rehabilitation or closure.

2.4 TRADE POLICY

2.4.1 Up to the 1970's, the focus of trade policy was on regulating the utilisation of foreign exchange through the use of quota restrictions. This implied licensing for all categories of imports. The import of consumer goods was virtually prohibited. The policy also conformed to the objective of across-the-board import substitution and protection of domestic industry. The two criteria for the allocation of licences were, (i) the "essentiality" of the proposed import, and (ii) "indigenous non-availability" of the proposed import. The latter criterion implied that "if it could be shown that there was domestic production of the imports demanded, then the imports were not permitted (regardless of cost and quality considerations)" (Bhagwati and Srinivasan, 1975). The actual allocations, across industries and across firms within an industry, were essentially ad hoc, based on bureaucratic perceptions of "fairness" and "equity".[2[2]]

2.4.2 Price Controls

[2[2]] After 1978 certain categories of raw materials and intermediate and capital goods could be imported against Open General Licence (OGL), which implied that they were subject to tariffs but not to QRs.

In addition to the fact that certain key raw materials were produced in the public sector, a number of commodities were subject to price and quantity controls. Industries providing important commodities, such as edible oils, sugar, fertilizers, pharmaceuticals, aluminum, cement, steel, coal and petroleum products were subject to price controls and quantity controls of varying degrees. This implied that even in sectors where there was a private sector presence, conditions and outcomes were far from competitive. A complex system of excise and corporate taxes further distorted the incentives.

2.4.3 Financial Sector

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The financial sector was no exception to the regime of Government intervention and control. As a result, the financial system too was characterised by an almost total lack of competition. With the nationalisation of 14 large commercial banks in 1969 about 85% of the assets of the banking system came under public control.[3][3] The long term lending business had very few players. In addition, because they were all publicly owned, the term lending institutions generally acted as a consortium and had the characteristics of a lending cartel. Further, there was virtually no competition between the term lending institutions that concentrate on medium- and long-term finance and the commercial banks with their emphasis on working capital finance.

2.4.4 In the equity market the main policy impediment was the entry barrier put up by the Controller of Capital Issues, who had to approve every issue, and in addition, set the issue price. A company could only approach the financial markets to raise funds when its project had been approved by the Government. Thus, the number of new issues in any period was relatively small. Under-pricing transferred wealth from existing to new shareholders, so there was a strong incentive to prefer rights offerings, which protected the former group, over public offerings. This hindered the widening of the investor base. In addition, public sector financial institutions, dominated by the Unit Trust of India, the insurance companies and the Domestic Financial Institutions were all major players in the equity market giving the government effective control over pricing. This dominance was compounded by the fact that there was no competition from foreign institutional investors (FII's).

2.5 ECONOMIC CONSEQUENCES OF THE POLICY REGIME

2.5.1 Resource Allocation and Industrial Growth

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One impact of the policy regime was to create an unspecialised though highly diversified industrial base. The share of capital goods and basic goods in both the index of industrial production and in value added in manufacturing increased considerably during this period, whereas the share of consumer goods fell from approximately 49% in 1956 to 31.5% in 1970. During the same period the shares of basic goods and capital goods increased from 22.3% and 4.7% to 32.3% and 15.2% respectively.

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[3] Other financial institutions (including life insurance companies) had been nationalised earlier. All property insurance companies were taken over by the Central Government in 1971.

2.5.2 During the period 1956-57 to 1965-66 the industrial sector grew at the rate of 7.1% annually, with the fastest rates of growth being in the non-electrical machinery, electrical machinery, basic metals, metal products, chemicals and paper. On the other hand, the slowest growth rates (approximately 2%) were in the consumer goods sectors, textiles and food products. The period 1966-67 to 1979-80 was marked by a slowdown in industrial growth, with the annual average growth rate falling to 5.5%. The most significant slowdown was experienced in the machinery and basic goods sectors that had experienced the fastest growth rates in the earlier period. The consumer goods sectors did not experience this same slowdown and, in fact, had a marginally higher growth rate during the second period.

2.5.3 Productivity and Efficiency

In addition to the delays, the high administrative costs and the rent-seeking opportunities associated with the system of import and industrial licensing, the incentives generated by the system were detrimental to economic efficiency and productivity. *The combination of policies thus spawned a non-competitive and high cost industrial structure.*

2.5.4 Competitiveness

The "indigenous availability" criteria for the issue of import licences effectively ruled out foreign competition. Domestic competition was limited by the Capital Goods licences and the industrial licensing restrictions on entry and capacity expansion. Since all firms were entitled to their "fair" share of import licences, and since the licences were legally non-transferable, there was no way by which more efficient firms could bid away the scarce imported inputs from less efficient firms. The absence of competition implied that there were limited incentives for cost reduction. The indigenous availability criterion also ensured automatic protection to any domestic producer of an import-substitute "regardless of cost, efficiency and comparative advantage" (Bhagwati and Srinivasan, 1975, pg. 45). Thus there was clearly a climate for the existence of technical inefficiency.

2.5.5 Inflexibility

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The non-transferability of import licences led to inflexibility in the pattern of import utilisation. This problem was exacerbated by the fact that the allocation of the licences was based on administrative criteria rather than considerations of economic efficiency. The system of import licensing is likely to have led to the excessive holding of inventories of intermediates and raw materials by Indian firms.

2.5.6 Minimum Efficient Scale

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Another impact of the industrial licensing system was on the scale of production, with a bias toward smaller plant sizes. This is an obvious fall-out of an entry policy that favours small-scale enterprise even in industries with significant scale economies. In addition, the various concessions available for small-scale enterprises discouraged the growth of plants and encouraged fragmentation. Even larger firms tended to be made up of small plants due to licensing restrictions. The tendency toward smaller plant sizes is also supported by labour and tax laws.

2.5.7 Industrial Concentration

In spite of the bias against large firms, the concentration ratios in the capital goods and intermediates sectors were high. Firms were able to maintain their monopoly power by exploiting the system of licensing to obtain pre-emptive capacity and technology licences. Though the high concentration ratios may be justified on scale considerations, the limited threat of domestic entry and virtual absence of foreign competition allowed for the existence of technical inefficiency.

2.5.8 Capacity Utilisation

Indian industry has also been characterised by an endemic under utilisation of capacity. On the demand side, this has resulted from the capacity mix being determined independently of market demand. Supply side constraints resulting from import licensing aggravated the problem. Since Actual Users' licences were allotted "equitably" on the basis of existing capacity there were incentives for expanding capacity so as to have access to more imports. Further, the existence of excess capacity did not deter entry as the protected environment offered adequate profit opportunities for those who could obtain a licence to enter.

2.5.9 Technology

Restrictions on the import of technology and foreign collaboration led to the use of outmoded and inefficient technologies. This not only limited the competitiveness of Indian exports but also implied higher social costs of production. Import restrictions prevented the import of embodied technology and forced domestic producers to use domestic substitutes, often of poor quality.

To summarise, the strategy of import substituting development along with the distorted price structure led to an allocation of resources towards heavy industry and the capital goods sector, which was not based on the principles of comparative advantage. The absence of domestic competition, along with the unconditional protection from imports provided to domestic industry together with the other aspects of the licensing regime discussed above, fostered a high cost industrial structure which was domestically inefficient in the utilisation of resources and not competitive abroad. In addition to the static mis-allocation and inefficient utilisation of resources, the system was also dynamically inefficient in so far as it was not likely to encourage technical change. On the other hand, a competitive market structure with "right" prices would have promoted a dynamic, efficient, productive and competitive industrial sector. A competitive financial sector would have ensured better utilisation of scarce financial resources and have had a positive impact on the productivity of the industrial sector.

2.6 CHANGES IN THE POLICY REGIME

A. INDUSTRIAL POLICY

2.6.1 Early reforms

In 1985, a number of products were freed from licensing requirements, the MRTP restrictions were relaxed and the definition of an MRTP firm was changed. Increase in capacity upto 49% was permitted for "modernization and renovation" and selected industries were allowed to expand up to a pre-determined Minimum Economic Size of production. To allow greater flexibility in the choice of product mix, licences in some industries were 'broadbanded' which meant that firms were permitted to produce related products using their installed plant and machinery. Some reform of the public sector was also initiated and steps were taken for the liberalisation and development of capital markets. In the public sector, the thrust was on increasing both autonomy and accountability. No significant steps were taken towards the reduction of exit barriers. In fact, under the Sick Industrial Companies Act, 1986, the Board of Industrial and Financial Reconstruction (BIFR) was set up, in 1987, to review the viability of sick units and recommend rehabilitation or closure.

2.6.2 Reforms since 1991

The reforms initiated in 1991 were on a much wider scale. The Industrial Policy Statement issued by the Government of India on 24 July 1991 stated:

> The attainment of *technological dynamism and international competitiveness* requires that enterprises must be enabled to swiftly respond to fast changing external conditions that have become characteristic of today's industrial world. Government policy and procedures must be geared to assisting entrepreneurs in their efforts. This can be done only if the role played by the Government were to be changed from that of only exercising control to one of providing help and guidance by making essential procedures fully transparent and by eliminating delays (Italics added) (Industrial Policy, 1991).

This resulted in the introduction of changes in policies relating to industrial licensing, foreign investment, technology imports, Government ownership of industry and special controls on very large private enterprises.

2.6.3 Delicensing

The Industrial Policy of 1991 abolished licensing in all but 18 industries, many of which were subsequently delicensed. At present only seven industries are subject to licensing. Although the sugar industry was delicensed in January 1999, it remains subject to a number of other controls. These controls have ensured that there are no new entrants into the industry.

2.6.4 Public sector

In 1991, Government abolished the monopoly of the public sector industries except those where security and strategic concerns still dominated. These include arms and ammunition and allied defence equipment, atomic energy and nuclear minerals and railway transport. Major industries including iron and steel, heavy electrical equipment, aircraft, air transport, shipbuilding, telecommunication equipment and electric power are now open for private sector investments. A large number of loss-making public enterprises were referred to the Board for Industrial and Financial Reconstruction (BIFR). Essentially two different types of reforms were envisaged: greater autonomy for public sector enterprises and greater private sector ownership.

2.6.5 The system of price preferences has been discontinued, although the practice of using private sector bids to request public sector units to submit a fresh bid continues. This system of "purchase preference" has recently been extended with some modifications to orders placed up to 31 March, 2000. Under this provision, a Government enterprise whose bid is within 10%

of that of a large private unit is allowed to revise its price downward and is eligible for a parallel rate contract. Given the emphasis on privatisation and reform of the public sector, such purchase preferences are now an anachronism.

B. TRADE AND COMMERCIAL POLICY

2.6.6 Early reforms

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There was an increase in the number of capital goods, intermediates and raw materials included in the Open General Licence (OGL) list, reduction and rationalization of the duty rates on selected capital goods, intermediates and industrial raw materials and less stringent rules in the granting of licences for items that continued to be under discretionary control. Although there was an increase in tariffs, quantitative restrictions have been and are gradually replaced with tariffs.

2.6.7 Between 1971-79 the rupee depreciated by 32 per cent in real terms against key currencies. This trend was reversed during 1979-81 and was followed by a corrective real depreciation of 7.6 per cent after which the real exchange stabilised. A flexible exchange rate policy after 1985 has been instrumental in having a positive impact on exports.

2.6.8 Reforms since 1991

Import licensing and Tariffs

The Export and Import (EXIM) Policy (1990-93) was replaced by the EXIM Policy (1992-97) and then the EXIM Policy (1997-2001). The former contained a Negative List on imports subject to licensing and almost all consumer goods were subject to import licensing. In the latter, the list of restricted consumer goods was pruned, the number of canalised items was reduced and the import of some restricted items was liberalised by permitting their imports through freely transferable Special Import Licences (SILs). As a result of WTO commitments, India will have to do away with the quantitative restrictions regime by April 2001.

2.6.9 Tariffs are also being reduced in a phased manner. Prior to 1991, India's import tariff structure was among the highest in the world. The average applied tariff rate has been lowered from 125 per cent in 1990-91 to 35 per cent in 1997-98 and the peak rate of duty has declined from 335 per cent in 1990-91 to 40 per cent in 1999-2000.

2.7.0 Exchange rate policies

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The macroeconomic stabilisation and structural adjustment programme, initiated in mid-1991, adjusted the external value of the rupee which was overvalued for most of the preceding period. An explicit dual exchange rate system was introduced in March 1992 on a temporary basis to facilitate a shift to a more liberal exchange rate regime. The foreign exchange budget was abolished and the exchange rate unified in March 1993. The rupee was floated and the exchange rate was to be determined by the forces of demand and supply in the foreign exchange market. Although there are significant imperfections because foreign exchange convertibility on capital account is not permitted, the freeing of the current account has made the foreign exchange market more competitive.

2.7.1 Foreign investment

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The Industrial Policy announced in July 1991 (Industrial Policy, 1991) liberalised the existing industrial policy regime leading to the liberalisation of foreign direct investment, foreign technology agreements and compulsory industrial licensing. Automatic approval was permitted for investment upto 51 per cent equity in 34 industries. 100% foreign holding was permitted in Export Oriented Units. The Foreign Investment Promotion Board (FIPB) was set up to process applications for cases not covered by automatic approval. Several additional measures were undertaken during 1992-93 to encourage investment flows including foreign direct investment, portfolio investment, Non-Resident Indian investment and deposits and investment in global depository receipts. By 1994, subject to certain restrictions, foreign investment in the consumer goods and pharmaceutical sectors was permitted. The permissible upper limit on foreign holding was increased to 74% in 1996.

2.7.2 Financial Sector

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Starting in 1988/89, a process of gradual de-regulation of the financial sector was begun. Although the entry has not been substantial, entry of domestic and private foreign banks has been permitted. Further rationalisation and mergers in this segment will help provide more effective competition to the public sector banks. As a result of liberalisation of regulatory controls on Non-Banking Financial Companies, these now provide some competition to traditional banks. Domestic Financial Institutions have also entered into more conventional banking activities (short term lending) providing some competition to the conventional banking sector. Conversely, the commercial banks have also increased their term lending activities, thus reducing the oligopolistic position of the Domestic Financial Institutions.

2.7.3 The office of the Controller of Capital Issues was abolished in 1992 leading to freer pricing of issues. Private sector mutual funds and Foreign Institutional Investors (FII's) were permitted to trade in equities, increasing competition on the buyer side of the equities market and reducing the importance of publicly owned FII's. Competition in exchanges was introduced with the setting up of the National Stock Exchange.

2.8 THE UNFINISHED AGENDA

Clearly, in certain areas, the changes in the policy environment have been far reaching. With the objective of modernising Indian industry and making it more competitive both domestically and internationally, the recent reforms have combined the liberalisation of imports with a relaxation of investment controls. On the industrial policy front, the reforms have led to the virtual abolition of industrial licensing requirements with a view to promoting domestic competition, encouraging entry and investment, achieving better capacity utilization and economically viable scales of production. The trade policy reforms have two main objectives. The first is to introduce foreign competition through imports. The second is to make cheaper and better quality inputs available to Indian producers and to promote the import of embodied technology. Although these are two major areas where Government controls have been reduced and the economy has been allowed to move towards market-determined prices, there are a number of areas where controls and restrictions persist. The removal of these is essential for "getting prices right", achieving efficiency in resource use and maximising consumer welfare. In some cases a suitable regulatory framework needs to be established to ensure competitive, welfare maximising behaviour on the part of the producers. These are essential pre-requisites for creating a competitive business environment.

2.8.1 As we have noted earlier, the policy of reservation and preferential treatment for the small-scale industry continues. There does not appear to be any move to reverse this, and this clearly has important implications for efficiency. Connected to this is the fact that consumer goods continue to be subject to quota restrictions and are largely protected from foreign competition. A second area of concern is the public sector where privatisation and disinvestment have been negligible and the public sector continues to get preferential treatment in Government procurement. Public sector firms continue to dominate the market in a number of sectors. This too has significant implications for efficiency. Third, prices continue to be administered for certain important commodities that include some petroleum products, fertilizers and sugar cane, distorting both production and consumption decisions in these important areas. Administered prices are also prevalent in sectors such as power and transport where the public sector dominates. Progress in introducing competition or effective regulation in the important infrastructure areas of power, transport and communications has been far from satisfactory. Due to changes in technology, a number of these do not remain natural monopolies and it is possible to introduce competition directly. Where private entry has been allowed, there is a need for setting up effective and independent regulatory agencies. These issues are discussed next.

2.8.2 Reservation for Small Scale Industry

Small-scale industry reservation policies have not undergone any major change since 1991. In spite of the fact that some items have been removed from the reserved category of products, the total number of reserved items is 812. Although firms producing any of these items are protected from competition from "large" domestic firms, *they are also restricted from growing*. Quota restrictions on imports of consumer goods and relatively high tariffs on other goods reserved for the small-scale sector have also protected small-scale industry from (foreign) competition. Clearly, this situation is welfare reducing due to the higher prices that consumers have to pay.

2.8.3 This situation is not going to persist for long. Due to commitments to the World Trade Organisation (WTO), the quantitative restrictions will be removed and tariffs gradually reduced over the next few years. This implies that although firms in this sector will be protected from competition from large domestic firms, they will be subject to competition from abroad. Such asymmetric exposure to competition will have an adverse impact on domestic welfare as a result of profit shifting from domestic to foreign firms. Thus, over the long run, welfare is likely to be reduced in this way unless restrictions on domestic entry and on the growth of current incumbents are removed. The problem is compounded by the fact that a large amount of investment is going into this sector due to the relatively high protection, it currently enjoys.

2.8.4 The sector needs to be opened up for entry by large domestic firms. Although this may have some impact on income distribution, the efficiency gains that will arise from better technology and competition and efficient scales of production will lead to higher social welfare. In any case, as has been noted, if firms are not allowed to grow and entry is not free, current incumbents are unlikely to survive in the face of foreign competition. In these circumstances it is far from efficient to restrict entry and growth of firms. Such a policy is anti-consumer and, what is worse, is not synonymous with helping small entrepreneurs. To fulfill such an objective, there should be a separate set of policies that help new entrepreneurs to enter and small firms to grow (Abid Hussain Committee Report, 1997).[4[4]]

2.8.5 Public Sector

To a large extent, the imperative for privatisation of the public sector has arisen from fiscal considerations. From the point of view of economic efficiency and competition policy, it is important that the public sector does not enjoy monopoly power and is subject to market disciplines through competition. Most of the sectors where the public sector operates have in recent years been opened up to entry by private sector firms. However, as we have noted earlier, the public sector is given preferential treatment in Government procurement. We are of the view that the public sector should be exposed to competition and not given any preferential treatment.

2.8.6 Second, in regulated sectors, the regulator should not make any distinction between public and private companies and, more important, any public sector entity that is itself a service provider should not have any regulatory functions or authority.

2.8.7 Third, for historical reasons, public sector firms are often large and dominant in the industry. In addition to the problems caused by Government patronage, they could distort the dynamics of competition in the sector in which they operate because of their size, inefficiency, soft budget constraints and ill-defined objective functions.

Without significant privatisation, these barriers to efficiency will remain.

2.8.8 Exit Policies

Along with free entry, a necessary condition for efficiency is free exit. Although entry barriers have been reduced considerably in recent years, there has been no change in exit restrictions. This is a serious source of inefficiency in Indian industry. Exit is difficult in Indian industry because of the labour and bankruptcy laws. In addition, the former arguably reduce employment below what it would otherwise be and the latter restrict the mobility of scarce capital resources.

2.8.9 Closures and retrenchment of labour are governed by the Industrial Disputes Act, 1947 and related statutes. These statutes have evolved over a period of time, the balance generally being in furthering and protecting the interest and welfare of organized labour. As a result of this set of legislation, firms cannot lay off labour during low periods and firms desiring to exit cannot do so easily. Exit barriers in the form in which they exist today, i.e. requiring prior Government approvals for lay-offs, retrenchments and closure, were brought in to the Industrial Disputes Act as a part of emergency measures initiated by Mrs. Gandhi in mid 70s.

[4[4]] These issues have been discussed in detail by the Abid Hussain Committee in its report.

These were designed to counterbalance the restrictions on "right to strike" that were placed during that period. Infact retention of these measures, post emergency till date, is a clear aberration. It may also be pertinent for us to point out that these restrictive provisions on exit barriers actually applied to no more than 3% of the working population in India. It does not make sense if 97% of the working population can exist without such protection, why it is so critical to provide a high level of protection for a nominal 3% of the top end population amongst the working class. Clearly the logic is not economical or social, but the political power of the trade unions in the organised sector**.**

2.9.0 Efficiency requires that firms that cannot survive in a competitive market should close down and release precious resources. It also requires that hiring decisions be based on the social cost of labour and not on costs that are distorted by such laws. Due to these restrictions, firms are often at a competitive disadvantage because labour costs are virtually fixed even in the long run. Clearly these laws have an adverse impact on employment by distorting the relative price of labour and capital and, at best, end up protecting those that are already employed rather than promoting employment. In view of this, the Industrial Disputes Act, 1947 and connected statutes need to be amended to allow easy exit. While seeking "easy exit", we are not proposing "cheap exit". As a country where social security measures are limited, the Government may be perfectly justified – in fact has the obligation to provide for exit payment to workers at enhanced rates than what is presently provided for at the rate of "15 days wages for each year of completed service".

2.9.1 For medium and large firms exit is also subject to the provisions of the Sick Industrial Companies Act and the decisions of the Board of Industrial and Financial Reconstruction (BIFR) set up under this Act. Restructuring and closure of "sick" firms is subject to the decision of BIFR. As is well known, cases referred to BIFR often take years before a final decision is reached. In the interim, "sick" and unviable units continue to function. In addition BIFR advises on financial restructuring - a matter that should ideally be left to market driven financial entities - which leads to the misallocation of scarce financial resources. Another problem is that BIFR deals with cases on a firm-by-firm basis and does not deal with industrial sickness as whole.

2.9.2 Competition in a dynamic setting is subject to the Schumpeterian forces of "creative destruction" (Schumpeter, J.A., 1942). This requires an industry that is flexible and can restructure and adapt easily to changing circumstances. For this to be possible, and for capital and labour to relocate (to more efficient uses) more easily, requires much more rapid bankruptcy procedures than those that are currently in place.

2.9.3 State Monopolies, Privatisation and Regulation

In a number of important infrastructure industries such as transport, communications and power, state monopolies persist. In certain cases limited privatisation has taken place but a suitable regulatory framework is still evolving. In areas that were traditionally considered natural monopolies, one solution was to have State run monopolies on the assumption that these set the right prices and maximised welfare. The other option was to have regulated private participants, where the regulators' job was to set prices that mimicked a competitive market and thus maximised welfare. In certain cases, changes in technology have made competition possible in areas that were hitherto considered natural monopolies. There is considerable scope for introducing regulated competition into most of these areas.

2.9.4 The railways in India continue to be a State owned monopoly with administered prices and very limited competition from other modes of transport. In civil aviation, some competition has been allowed but restrictions on entry continue. The State owned domestic airline continues to play a major role and is a market leader in setting prices. Most States have State owned road transport corporations with an administered fare structure and limited competition.

2.9.5 With a few exceptions, the generation, transmission and distribution of power continue to be through State owned (Central and State Government) monopolies. Prices are administered, costs are high and quality is generally poor and unreliable. Welfare maximisation requires that competition be introduced in this sector. A pre-requisite for this is the unbundling of the monolithic State owned enterprises and the setting up of effective and independent regulatory authorities.

2.9.6 Although some competition has been permitted in the area of telecommunication, a lot more needs to be done. The only area where some competition exists is mobile telephony. Basic and long distance telephony is virtually a State monopoly. The situation is still evolving and the role and authority of the regulator and the status of the State owned monopolies are still not clearly established.

2.9.7 Summary

Although significant steps have been taken to increase competition in various sectors of the economy, a number of important things need to be done that are essential for a competition policy. There is the need for a Competition Law Tribunal (Competition Commission of India) that will act as a watch-dog for the introduction and maintenance of competition policy. It will promote the introduction of the required changes in the policy environment and once this is done, it will perform a pro-active advocacy function for competition. Competition Law should deal with anti-competitive practices, particularly cartelisation, price-fixing and other abuses of market power and should regulate mergers. It is important to ensure that such legislation does not itself become anti-competitive and this is a real danger. For this, it is necessary to ensure that the law is precise and discretion is kept at a minimum.

Chapter III

PRE-REQUISITES FOR A COMPETITION POLICY

3.1.1 The world economy has been experiencing a progressive international economic integration for the last half a century. There has been a marked acceleration in this process of globalisation and also liberalisation during the last three decades.

3.1.2 Liberalisation and Economic Reforms

The economic factors, which have been instrumental in this process of globalisation, are the dismantling of barriers to international economic transactions, the development of enabling technologies and emerging forms of industrial organisations. Recent years have seen widespread regulatory reforms and the privatisation of many State-owned enterprises. These reforms have been undertaken as a result of an increased awareness and evidence of regulatory failure. There is a perception, in the developed countries and market economies, and also in the developing and under developed economies that not only do markets fail to function but regulation is often seen not achieving its objective of correcting market failures (OECD, 1992).

3.1.3 The formulations of an intellectual rationale for globalisation suggest that it is a means to ensure not only efficiency and equity but also growth and development in the national economies in particular and the world economy in general. There is the neo-liberal model, which suggests certain analytical foundations for the intellectual rationale. It argues that Government's intervention in the economic process can lead to serious inefficiencies. It further argues that a competitive market is the preferred alternative as it is seen to generally perform better. The model proceeds on the assumption that relative market prices conforming in ratio to international prices (as far as possible) should govern policies on resource allocation and resource utilisation and further proceeds to suggest that national boundaries, national ideologies and domestic economic concerns should not act as constraints.

3.1.4 Regulatory regimes were enforced in many countries in the 60's and 70's. India, in particular had a kind of a strong regulatory regime till 1991, when certain measures and policies were ushered in as a part of the liberalisation and globalisation process and economic reforms. The regulation regime utilised many devices, ranging from price control to control of the "commanding heights" in the economy by State-owned enterprises, allocation of public procurement, control of foreign direct investment, regulation of entry and exit including those of sick units, public subsidies, etc. Governments also used various means to monitor the shaping of industry structures and to protect their national firms from the rigours of domestic and international competition. With economic deregulation, countries have taken to measures designed to eliminate public monopolies and to open competition in strategic sectors such as telecommunications, electricity generation and distribution, airlines, railway transportation etc. There has been an increasing trend towards introduction of competition in the economic activities of many countries - developed, developing and least developed. However, competition cannot be legislated for.

3.1.5 What is needed is a range of Government policies to enable the economy to conform to basic market principles. Trade policy, industrial policy, privatisation, de-regulation, regional policy and labour and social policy all need to be conducted in a manner compatible with the market mechanism for an economy to function as efficiently as possible. These policies need to be conducted in a complementary manner and it is important that a mechanism exists for incorporating the "competition dimension" within Government decisions on such policies. Experience suggests that, in the process of transition to a less regulated and more open economy, the existence and application of Competition Policy can usefully support other policy initiatives (APEC, 1999).

3.1.6 If Indian Industry is to compete effectively on a global basis, it is only fair that it should be governed by laws and regulations which are globally competitive. It is therefore important that a specific study should be made of existing laws and regulations from the perspective of the new competition regime. A particular example which comes to mind relates to the disclosure requirement for annual accounts under the Companies Act, 1956. The present requirements involve, inter alia, a great deal of quantitative information which is of little or no benefit to the shareholders but which would definitely help the competitor by providing him with vital information. This handicap is not suffered by competitors in other parts of the world which have a more compact but effective annual report requirement. In the context of the Competition Policy it is therefore, suggested that the Annual Corporate Report requirements should be thoroughly reviewed to eliminate those which are not globally compatible while at the same time, ensuring that shareholders and investors are provided with better and more effective information. Since the Competition Policy depends very largely on free and open entry, it follows as a corollary that impediments to free and easy exit are not allowed to be handicaps to a full Competition Policy. For this reason, it is our suggestion that there is need to repeal or substantially modify the provisions of the Sick Industrial Companies Act (SICA) and the Urban Land Ceiling Act.

3.1.7 Consumer Interest and Public Interest

At this stage, a brief discussion on the difference between consumer interest and public interest may be necessary to help appreciate the analysis, in the next section, of the interaction between trade policy and competition policy.

3.1.8 Often, consumer interest and public interest are considered synonymous. But they are not and need to be distinguished. In the name of public interest, many Governmental policies are formulated which are either anti-competitive in nature or which manifest themselves in anti-competitive behaviour. If the consumer is at the fulcrum, consumer interest and consumer welfare should have primacy in all Governmental policy formulations.

3.1.9 Consumer is a member of a broad class of people who purchase, use, maintain and dispose of products and services. Consumers are affected by pricing policies, financing practices, quality of goods and services and various trade practices. They are clearly distinguishable from manufacturers, who produce goods and wholesalers or retailers, who sell goods.

3.2.0 Public interest, on the other hand, is something in which society as a whole has some interest, not fully captured, by a competitive market. It is an externality. However, there is a justifiable apprehension that in the name of "public interest", Governmental policies may be fashioned and introduced which may not be in the ultimate interest of the consumers. The asymmetry arises from the fact that all producers are consumers but most are producers as well. What is desirable for them in one capacity may be inimical in the other capacity. A simple example will make the point clear. A farmer wants the price of goods he consumes to be as cheap as possible but wants the highest price for its produce. A Government wishing to encourage agriculture for self-sufficiency in food as a national security measure faces the conflict : should it support high prices to encourage production or low prices to protect the consumer? This is a characteristic public interest-consumer interest conflict. In general, it can be stated that buyers want competition and sellers monopoly. The economists' answer is that there are in a society too many such divergent interests and therefore the resolution is best left to markets without Government intervention. They are all too conscious of the possibility of abuse of the expression "public interest" by vested interests.

3.2.1 Interaction between Trade Policy and Competition Policy

The process of globalisation has to some extent obfuscated the distinction between Competition and Trade Policy. Many countries and business houses have adopted global strategies, which are a cause of increasing economic inter-dependence. In order to regulate such business strategies, Governments of various countries have been working on the nature, scope and application of Trade and Competition Polices.

3.2.2 Competition policy and liberal trade policy seek to achieve the same objective namely economic efficiency. In a manner of speaking, competition policy seeks to achieve economic efficiency by liberalising domestic markets and by having laws that protect and promote competition. A liberal trade policy seeks to achieve economic efficiency by liberalising markets by removing the barriers to trade at the border. Free trade and competitive behaviour are thus necessary conditions for efficiency.

3.2.3 The interest in the interactive and interface aspects of trade and competition policy stems from perhaps the following four factors. First, when barriers like tariffs are reduced or eliminated, there is a risk that private barriers to trade may replace them and nullify the benefits of trade liberalisation. As traditional barriers fall, the incentive for collusion and similar practices increases. Second, Governments are equally concerned with the adverse impact that inappropriate or inefficient regulations have on economic performance. Weak enforcement of competition principles could mitigate against expansion of trade and investment opportunities and a more productive economy. The lurking danger of private anti-competitive conduct replacing public conduct may assume a real shape. Third, with the distinction between domestic and international markets getting more and more blurred, through globalisation, many links exist between trade and competition policies in multiple jurisdictions. As enterprises globalise their operation to take advantage of the benefits of transportation and telecommunications, the current trade and competition policies may not be adequate to meet the challenges. Fourth, in a number of areas governed by World Trade Organisation (WTO) regime like General Agreement on Trade in Services (GATS), specific competition policy issues are emerging.

3.2.4 Irrespective of whether a country is developed, developing or an economy in transition, its international competitiveness is in part determined by the degree of competition or rivalry among domestic firms and therefore an effective competition policy is essential for the creation of globally competitive industries (Porter, 1990).

3.2.5 Empirical evidence suggests that Trade Policy and Competition Policy are complements, if the full benefits of liberalisation are to be achieved (APEC, 1999 Pg.15 -18).

3.2.6 Pre-requisites for Competition Policy

The foregoing analysis emphasises that one of the significant issues arising in the interface between Trade and Competition Policies is to gain market access in countries, where barriers to entry and barriers to free and fair trade exist. Barriers with the acquiescence of Government, impair the benefits that could otherwise be attained through liberalised trade. There is therefore the need to examine such issues, particularly competition-related (Goldman, 1996). In other words, the extant legal milieu and executive policy decisions/instructions need to be examined in order to frame a catena of pre-requisites before a competition policy is put in place.

3.2.7 A source of tension in many countries, particularly the developing ones, is the priority attached to competition policy relative to the rank order assigned to other Governmental policies, including policies that have the support of statutes. Given the extensive interface, competition policy has with other Governmental policies, there are areas in which the respective objectives may be complementary such as in the case of initiatives directed at de-regulation and privatisation of State-owned corporations. However, in other areas such as trade, investment and regional development policies, conflicts may often arise. The extent of consistency, or its lack, in different Governmental policy measures, can support or thwart the objectives of competition policy.

3.2.8 If multiple objectives are allowed to rein in the Competition Policy, conflicts and inconsistent results may surface detriment to the consumers. For instance, promoting small businesses and maintaining employment could conflict with attaining economic efficiency. With this kind of small business objective, competitors rather than competition may be protected. In addition, such concerns as community breakdown, fairness, equity and pluralism cannot be quantified easily or even defined acceptably. These concerns have a logic of their own and it cannot be gainsaid that they should not be taken care of in Governmental policies. But it needs to be underscored that attempts to incorporate such concerns may result in inconsistent application and interpretation of Competition Policy, besides dilution of competition principles. The peril is that the competitive process may be undermined, if too many objectives are built into the Competition Policy and too many exemptions/exceptions are laid down in dilution of competition principles.

3.2.9 In an earlier section, public interest and consumer interest were distinguished. In many cases, public interest may be significantly divided and what might be considered clearly in the public interest by one party may be seen as less important by another. The complexity of the public interest approach to Competition Policy may produce significant tension between different stakeholders. Implementation of Competition Policy risks becoming captive to the political process, if it attempts to serve different interest groups, which may not be conducive to maintaining or promoting effective competition. In other words, though the public interest approach to Competition Policy permits the consideration and balancing of different economic, social and political objectives, the independence with which the policy can be administered can easily become constrained.

3.3.0 The central exercise therefore is to pursue an appropriate Competition Policy without being constrained by or conflicting with other public policy objectives. Within this exercise, the main issue is the priority attached to Competition Policy objectives in the overall framework of Governmental policies. For this purpose, it is necessary to list Governmental policies that impact on Competition Policy. Micro-Industrial Governmental policies that may support or adversely impinge on the application of Competition Policy would include:

- Industrial policy
- Reservations for the small scale industrial sector
- Privatisation and regulatory reforms
- Trade policy, including tariffs, quotas, subsidies, anti-dumping action, domestic content regulations and export restraints (essentially WTO-related)
- State Monopolies policy
- Labour policy

3.3.1 In addition, there could be other sector-specific policies in environment, healthcare, and financial markets that may restrict rather than promote the objectives of Competition Policy. The formulation and implementation of these and other policies need to be tuned to take into account competition principles. Indeed, Competition Policy can be regarded as the fourth cornerstone of Governmental economic framework policies along with monetary, fiscal and trade policies.

3.3.2 Industrial Policy

The Industries (Development and Regulation) Act, 1951 (IDR Act) is essentially designed to promote and regulate industrial development. If competition principles, fair and free trade and market driven environment are desirable objectives, the need for the regulatory statute for industrial development may not be necessary at all. No licence or permission need be a requirement for an industrial undertaking to be set up or for the expansion of an existing undertaking except for location (avoidance of urban-centric location), for environment protection (anti-pollution, banning chemical industries in habitated concentrations), for prevention of use of scarce resources (timber from trees), for discouraging conspicuous consumption, for protection of monuments and National heritage and for protecting the society from threats to public health (tobacco, liquor etc.). Subject to the aforesaid safeguards and similar ones in National interest, the IDR Act doesn't seem to have relevance anymore.

3.3.3 Reservations for the Small Scale Industrial Sector

India has been following a policy for decades encouraging and protecting the small scale industrial sector. There are both efficient and inefficient small scale units and well-managed and ill-managed ones. Competition principles would dictate the theory that inefficient and ill-managed firms should exit from the market. The concern implicit in this theory is that exit of such firms will render employed persons being thrown out of employment, thus aggravating the unemployment situation in the country. It cannot be denied that the small scale sector generates significant employment but it does so at a considerable cost to the exchequer by way of loss of revenue entailed by a plethora of exemptions from indirect taxes available to this sector of the economy. Thus, while a policy for the welfare of the small scale sector cannot be regarded as unreasonable, it must be tempered by the knowledge that it involves heavy costs. Reservation of products for small scale and micro enterprises has led to poor quality of output. Since, many of them are suppliers of ancillaries to organised producers, it leads to the overall poor quality of products to consumers. Efficiency of such suppliers is poor because of the lack of skills, low capital availability, poor quality of machinery, heavy labour orientation, poor cost control, low output and poor quality of outputs.

3.3.4 In a paper presented to the Expert Group constituted by the Ministry of Commerce, Government of India to study the interaction between Trade and Competition Policy, a pointed reference was made to the plethora of laws and rules in India that explicitly protect favoured players and reduce competition in the name of public interest (Aiyar, 1998).

3.3.5 Public interest is frequently and unabashedly invoked to protect one specific interest group (unionised labour, small scale industries, handloom weavers) with no explanation of how or why the interest of this group transcends all others. Such protectionism in the name of public interest leads to sacrifice of efficiency, raises potential costs and risks and discourages new investment.

3.3.6 The Expert Group referred to above has observed that "all Governmental policies will have to be viewed through the competition lens to ensure that consumer interest and welfare and economic efficiencies and development dimensions are not pejorated" (Expert Group, 1999).

3.3.7 The trend in the policies of the Government, of late, is towards dereservation of many products, which hitherto have been reserved for the small scale sector. In Germany which believes in the protection of competition as a driving force behind the market economy, the Act against Restraints of Competition (ARC) provides for some exemptions from the general ban on cartels. The ARC authorises certain kinds of cartel agreements which are associated with economic advantages without excessively restraining effective competition. One such kind of a cartel is the small and medium sized business cartel. The logic in such authorisation or exemption is that cooperation agreements between small and medium sized businesses enable such enterprises to improve their market opportunities when competing against large companies.

3.3.8 Taking a cue from the German pattern and exempting small scale industries from the applicability of Competition Policy may not be and will not be necessarily a solution for the welfare and interest of the small scale sector. Protection of such units can only be a drag on the economy and waste of scarce resources (particularly capital resources). If at all there should be a national goal in this area, it should be the welfare of the efficient and well-managed small scale sector. Exemption from the competition principles cannot be a handmaiden to be used for protecting laggards in the small scale sector.

3.3.9 Having said this, in order to encourage and assist the efficient and well-managed small scale sector units, the following suggestions may merit consideration.

a) There should be no reservation of products which are on Open General Licence (OGL) for imports.

b) There should be progressive reduction and ultimate elimination of reservation of products for the small scale and handloom sector. However, cheaper credit should be made available to them. More specifically, the bank credit rate may be linked to the inflation rate, so that the small scale sector and handloom sector units may be enabled to be competitive not only domestically but also internationally.

c) The threshold limit for the small scale industrial sector may be increased appropriately as the existing limit is too small, having regard to inflation over the last few years and the exchange rate changes.

3.4.0 Privatisation and Regulatory Reforms

Recent years have seen widespread regulatory reforms and the privatisation of many State-owned enterprises. These reforms have been undertaken as a result of an increased awareness and evidence of regulatory failure. The increase in reliance on market mechanisms to promote economic progress is exemplified by the trend towards privatisation, de-regulation, adoption and enforcement of Competition Law, reduction in the scope of industrial policy etc. (Jenny, 1997). India is now on the anvil of formulating and implementing the second generation economic reforms (the first generation reforms have been under implementation for some time now, particularly after 1991). But still, even now, there are price controls and dual pricing in India leading to distortions in the market. For instance, restrictions on sugarcane prices and procurement, production capacities, dual pricing of sugar (levy and non-levy), restraint of exports and imports and many other like restrictions have enabled the inefficient producers of sugar to continue and prevent the rise of a competitive industry (Rao, 1998).

3.4.1 There is therefore an imperative need to further the economic reforms of liberalisation, de-regulation and privatisation so as to enable the consumers to reap the benefits of competition in the market. Nonetheless, a caveat needs to be added that while competition principles will govern and inform all Governmental policies including further economic reforms, there should be some flexibility in the Competition Policy to provide for the needs, aspirations and goals of the country. It also needs to said that economic reforms including liberalisation, de-regulation and privatisation should be so designed that they strengthen the Competition Policy and vice-versa. These two paradigms should be complemental to each other.

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3.4.2 Trade Policy

It has been noted earlier that Trade Liberalisation and Competition Policy are complementary to each other and that neither can fully achieve its objects without the other. Given this premise, an appropriate approach would be to adopt Competition Policy simultaneously with Trade Liberalisation and other economic reforms such as privatisation and deregulation. In this way, Competition Policy would act as a catalyst for economic reforms and development based on market-oriented principles.

3.4.3 While an open Trade Policy will be supportive of Competition Policy objectives, it is not always that the former will be a guarantor of competition in all circumstances. Governmental policies, particularly those that give rise to restraints and distortions in trade practices and the market, may be a threat to the attainment of competition objectives. All trade policies may therefore be required to fall within the framework of competition principles. The framework needs to be based on two parameters, one, whether a restriction affects all competitors or just foreign competitors and the other, whether the restriction falls within the category of measures that have been traditionally subject to Competition Law disciplines. Trade policies laid down by the Government include measures relating to industrial policies, domestic regulations, licensing requirements, discriminatory standard-setting practices, State monopolies and State trading enterprises, all of which may be restricting competition domestically and impeding market access to foreigners. In the interest of the consumers and free and fair trade, it is necessary to have an effective Competition Policy to ensure that trade policies fall within the contours of competition principles.

3.4.4 Trade policy includes tariffs, quotas, subsidies, anti-dumping actions, domestic content regulations and export restraints. Trade policies of this kind and of a similar nature need to conform to competition principles and where they do not, will be required to be refashioned, so that they do. To make the Competition Policy effective it should be ensured that there should be no physical or fiscal barriers to domestic trade from one end of the country to another. It would mean fiscal measures like uniform Sales Tax, abolition of Octroi, elimination of such other State level entry or exit taxes and elimination of all physical control of goods movement throughout the country.

3.4.5 State Monopolies Policy

State monopolies are not only a reality but are regarded by many countries as inevitable instruments of public growth and public interest. While ideology may have played some role in spurring the growth of State monopolies, much of this increase can be attributed to the pragmatic response to the prevailing milieu, which is frequently an outcome of the historical past in different countries. A view shared by many is that State monopolies and public enterprises in India have played a vital role in its developing process, have engineered growth in critical core areas and have performed social obligations. Nonetheless, there is also a recognition, consequent on the adverse financial results and the resultant pumping of budgetary oxygen from the Government treasury to those enterprises, that there is not only scope for their reformation but also for structural and operational improvements. This recognition has led to the trend towards privatising some of them. This is also a part of the general process of liberalisation and deregulation. Privatisation involves not only divestiture and sale of Government assets but also a gradual decline in the interventionist role played by them.

3.4.6 State monopolies may lead to certain harmful effects, anti-thetical to the scheme of a modern Competition Policy. They are :

A. The dominant power enjoyed by State monopolies may be abused because of Government patronage and support.

B. Because of the said patronage, State monopolies may adopt policies which tantamount to restrictive trade practices. For example, preference to public sector units in tenders and bids, insistence on using public sector services for reimbursement from Government (travelling allowance for Government officials).

C. State monopolies suffer from the schemes of administered prices, contrary to the spirit of Competition Policy.

3.4.7 It is well accepted that competition is a key to improving the performance of State monopolies and public enterprises. The oft-noted inefficiency of Government enterprises stems from their isolation from effective competition (Aharoni, Yair, 1986). In the interest of the consumers, State monopolies and public enterprises need to be competitive in the production and service delivery. While Government should reserve the right to grant statutory monopoly status to select public enterprises in the broad national interest, it is desirable for the Government to always keep in mind that de-regulation of statutory monopolies and privatisation are likely to engender competition that would be healthy for the market and consumers.

3.4.8 Efficiency is related more to the degree of competition rather than to ownership (Jones, et al, 1990). The Governmental policy in this regard should be to divest its shares and assets from State monopolies and public enterprises and to privatise them in a phased manner in all sectors other than core areas and in areas related to the security of the country and to the sovereign functions of the State. In other words, the Governmental policy should be to exit from businesses where it has no reason to be in. Where it is not Government's business to be in business, it should exit by divestiture and privatisation.

3.4.9 Labour Policy

The Industrial Disputes Act, 1947 mainly and the connected statutes constitute the legislation relating to the interest of the labour. These statutes have evolved over a period of time, the balance generally being in furtherance and in protection of the interest and welfare of the labour. While this may appear to be a step in the right direction, one aspect cannot be overlooked, namely, that firms desiring to exit cannot do so easily because of certain provisions in the existing labour legislation. Firms, which cannot logically survive in a competitive market, should be capable of closing down. More often than not, they were rendered unviable because labour costs is becoming a fixed cost given the labour regulatory framework in India and also is becoming highly inflationary due to the effects of automatic neutralisation of inflation through schemes of dearness allowance widely prevalent in the subcontinent in the industrial sector and the concept of periodic long term settlements leading to substantial upward revision in remuneration and benefits for the unionised workforce every 2-3 years. If unviable units continue to operate in the market, it can only be at a heavy price for the society. In a competition driven market, non-viable, ill-managed and inefficient firms must be allowed to exit freely, subject to their conforming to the rules and regulations governing their liabilities.

3.5.0 Contestable markets are based on the theory of free entry and free exit. If competition is an engine of growth and consumer welfare, it is necessary and even inevitable that the laws of the country encourage the viable, well-managed and efficient units and allow the non-viable, ill-managed and inefficient to fail by the way side. The Industrial Disputes Act, 1947 and the connected statues need to be amended to provided for an easy exit, subject, of course, to their legal obligations in respect of their liabilities.

3.5.1 WTO Compatible Policies

When discussing the pre-requisites for a Competition Policy, it is necessary to keep in view the impact on competition of a broad range of trade policy instruments and WTO provisions. Being a signatory to the WTO Agreements, India needs to fashion its Competition Policy without trenching any of the WTO Agreements or principles.

3.5.2 Summary

1. The essence and spirit of competition should be preserved while positing the Competition Policy and seeking to harmonise the conflicts between Competition Policy and Governmental Policy.

2. The Industries (Development and Regulation) Act, 1951 may no longer be necessary except for location (avoidance of urban-centric location), for environmental protection and for monuments and National heritage protection considerations etc.

3. There should be no reservation for the small-scale sector of products which are on Open General Licence (OGL) for imports. There should be a progressive reduction and ultimate elimination of reservation of products for the small scale industrial and handloom sectors. Cheaper credit in the form of bank credit rate linked to the inflation rate should be extended to these sectors to enable them to become and be competitive. The threshold limit for the small scale industrial and small scale service sectors needs to be increased.

4. The economic reforms of liberalisation, deregulation and privatisation need to be further progressed and should be so designed that they strengthen the Competition Policy and vice-versa.

5. All trade policies should be open, non-discriminatory and rule-bound. They should fall within the contours of the competition principles. All physical and fiscal controls on the movement of goods throughout the country should be abolished.

6. Government should divest its shares and assets in State monopolies and public enterprises and privatise them in all sectors other than those subserving defence and security needs and sovereign functions. All State monopolies and public enterprises will be under the surveillance of Competition Policy to prevent monopolistic, restrictive and unfair trade practices on their part.

7. The Industrial Disputes Act, 1947 and the connected statutes need to be amended to provide for an easy exit to the non-viable, ill-managed and inefficient units subject to their legal obligations in respect of their liabilities.

8. Structures like BIFR need to be eliminated.

9. Concerns relating to trade dimensions vis-à-vis WTO Agreements and principles need to be squarely addressed.

Chapter IV

THE CONTOURS OF COMPETITION POLICY

A. INTRODUCTION AND SCOPE

4.1.1 It is evident from the discussion in previous chapters that the scope of competition policy is broad and essentially includes all Governmental measures that directly affect the conduct and behavior of enterprises and the structure of industry with the objective of promoting efficiency and maximising welfare. To the extent the implementation of Competition Policy requires legal backing, there is need for a Competition Law. Competition Law, therefore, has a more specific focus and is, as a result, necessarily more limited in scope. Thus, whereas the former covers a whole array of executive policies and approaches, the latter is a piece of legislative enactment having the character of enforceability in a court of law.

4.1.2 There are a number of laws that directly or indirectly have an impact on economic activity and competition. In other cases, executive decisions of the Government that do not have the legislative backing also have an impact on economic activity and competition behaviour. In the earlier chapters on "The need for a Competition Policy" and "Pre-requisites for a Competition Policy", we discussed some of the laws, such as the IDR Act and SICA, and policies, such as those affecting trade, that affect the behaviour of economic agents and have an impact on competition. As the pre-requisites for Competition Policy are achieved and economic activity is gradually less subject to interventions, the need for a Competition Law to give effect to the Competition Policy will become more important. The focus of the law will be on preventing anti-competitive behaviour that is welfare reducing. The underlying premise is that free markets work to provide the desired economic outcomes, but that markets can do this, only if the process of competition in these markets is protected from abuse. It follows that the only legitimate goal of Competition Law is the maximisation of economic welfare. In this way, the Competition Policy will be effective in promoting equity and economic development through maximising welfare and achieving a more efficient resource allocation.

4.1.3 It follows that Competition Law Authority (Competition Commission of India) will be governed by the principles of competition in its adjudicatory effort. In other words, primarily its objective will be to act as an effective instrument for engendering and protecting competition in the market in the interest of maximising national welfare. It will deal effectively against specified anti-competitive practices and will have powers to mete out deterrent punishment to those who violate its provisions.

4.1.4 Other existing laws

About eighty countries today have Competition Laws. The history of Competition Laws dates back to the 1860's and 1870's when American States enacted "anti-trust"[5[5]] laws. These culminated in the Sherman Act of 1890. This was followed by the enactment of the Clayton

[5[5]] The use of the word "trust" to denote a monopoly is peculiar to the U.S. and has persisted for historical reasons.

Act and the Federal Trade Commission Act in 1915. Subsequent to this, the Robinson-Patman Act, 1936 and the Celler-Kefauver Act, 1950 were enacted. These statutes, together with subsequent amendments, judicial interpretations and the priorities and interpretations of enforcement agencies, form the body of the Competition Law as it is practiced in the US today. Although U.S. antitrust law has multiple goals, an important objective in the maximization of consumers' surplus plus producers' surplus (economic welfare). Articles 85 and 86 of the 1957 Treaty of Rome (now Articles 81 and 82) serve as the principal Competition Law of the European Commission\European Union. Article 85 (now Article 81) deals with the joint exercise of market power by one or more firms, and Article 86 (now Article 82) deals with the exercise of market power by a single firm[6[6]]. More recently, since 1990, a number of new Competition Laws have come into force with the conversion of the socialist economies of Central and Eastern Europe (CEE) to market-based economies. These laws are largely based on the relevant Articles of the Treaty of Rome and have been enacted to create the legal infrastructure required for supporting a market economy in these countries. One of the most recent enactments is the UK law – the Competition Act, 1998 – which came into force on 1 March, 2000. The new Act is more closely in tune with the Competition Law of the European Commission. The Act has prohibitions that are in line with Articles 85 and 86 (now Articles 81 and 82) of the Treaty of Rome. One key difference is that mergers are required to be compulsorily notified under the European Commission law but not under the new U.K. law. Although there are differences, the Japanese Antimonopoly Law, 1947 is similar in formal structure to the European and U.S. laws. In practice, however, the implementation of Japanese Competition Policy is quite different from the U.S. and European Commission. The Japanese experience has been one of a centralised and hierarchical Government orchestrating the actions of a centralised and hierarchical business sector.

4.1.5 4.1.5 Objectives

As noted above, the underlying premise is that, in the presence of competition, the market will achieve the objective of maximising welfare. Competition Policy includes all Governmental measures that have the objective of creating and sustaining the appropriate market environment. The purpose of any Competition Law is to provide teeth to Competition Policy, where this is necessary. Generally a great deal of discretion is likely to exist in the administration and implementation of the policy and the law, in the name of public interest. Thus the danger, as with any Government intervention, is that this may lead to too much intervention and over-regulation. Therefore, in designing and administering the law, great care needs to be taken that the scope for necessary intervention and over-regulation is minimised, as this would defeat the fundamental objective of consumer interest, for which the policy and the law are being created.

4.1.6 The "public interest" dimension may have primacy over the consumer interest dimension in exceptional circumstances but such exceptions should be few and far between and should not be allowed to dilute competition. Any such exceptions should be laid on the floor of the Parliament with full justification for the same. Care should be taken not to allow "public interest" to be abused to circumvent competition.

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4.1.7 Meeting present day needs

[6[6]] In modern parlance the former is referred to as "agreement among firms" and the latter as "abuse of dominance".

A study of the formal U.S. law, its amendments and interpretations shows that the law is not static. It has constantly been evolving and has responded to the needs and thinking of the times. Most early Competition Laws were designed for countries that existed in a world that was less globalised and less competitive internationally that it is today. Industrial Organisation (IO) theory, the branch of economic theory that provides the theoretical foundation for Competition Law, has also been changing. During the 1950's the thinking on the subject had emphasised the primacy of market structure. Subsequently, with the so-called New Industrial Economics, the emphasis rightly shifted from structure to the conduct of firms and, more recently, to the concern with strategic behaviour following from the game-theoretic models of IO theory. The shift of focus from market structure to firm behaviour and conduct is now also well established in the implementation of Competition Law and Policy worldwide. On the other hand, the extremely laissez faire thinking in the U.S. that dominated enforcement and interpretation during the 1970's and 1980's and reached its zenith during the Reagan years has given way to new thinking that justifies more activism on the part of the enforcement authorities.

4.1.8 Thus, it is obvious that there can be no law for all times and all situations. In designing the law for India, we need to utilise the experience of others and also keep in mind our own unique requirements. India is currently in transition from being a protected economy with a highly dirigiste regime to becoming a liberalised economy in a globalised world. Indian firms today cannot be compared with the U.S. "trusts" of the 1880's. They need to survive and be able to compete, not through protection but through efficiency and growth. Any law that is not sensitive to these needs could easily become counter-productive and act as a barrier to increasing efficiency and welfare.

4.1.9 Focus of the law

There are three areas of enforcement that provide the focus for most Competition Laws today[7][7]:

- Agreements among enterprises
- Abuse of Dominance
- Mergers or, more generally, Combinations among enterprises

4.2.0 Although there are differences in emphasis and interpretation across countries, and over time within countries, the purview of the laws in most countries is generally limited to these three areas. The focus of the Competition Act, 1998 of the U.K. is limited to agreements between undertakings and abuse of dominance. The fact that the Sherman Act, 1890 excluded the issue of mergers led to the enactment of the Clayton Act, 1915. The Clayton Act, also included a provision prohibiting price discrimination and the Federal Trade Commission Act, 1915 declared "unfair methods" of competition illegal. The Celler-Kefauver Act, 1950 softened the anti-merger provisions of the Clayton Act, 1915.

7[7] Although it does not directly form a part of Competition Law, legislation regarding various regulatory authorities falls under the larger ambit of Competition Policy. Rationalisation of this set of legislation forms a part of the discussion on Competition Policy. "Unfair Trade Practices" that are inimical to consumer interests are not included here and should be included in the relevant Consumer Protection Act(s).

4.2.1 These three areas are not mutually exclusive and there is considerable overlap between them. A number of actions that constitute abuse of dominance could infringe the law regarding agreements among enterprises. The actions are similar though the causes might be different. In the one case, it is the joint action of one or more undertakings that is in question, whereas in the other, it is the action of one dominant undertaking that is the driving force. The concern with mergers is ultimately a concern with market power and the possible abuse of that market power by the merged entity. In spite of this, most laws deal with this separately. One reason for this is that it might be difficult to deal with the situation after the fact. In spite of the inevitable duplication that follows from this classification, it provides a useful taxonomy for organising the thinking about Competition Law.

4.2.2 Scope

State Monopolies and Government Procurement. In a number of countries, Government enterprises are excluded from the purview of the Competition Law. With the exception of Government entities engaged in sovereign functions, there is no valid justification for such exclusion and all other Government enterprises should be within the ambit of the law.

4.2.3 As Government is a large purchaser, in the interest of promoting competition, it should not generally discriminate between types and classes of producers by giving price and purchase preferences. This is in accordance with the recommendations in the previous chapters that reservations for the small-scale sector should be removed and that the public sector in all areas except in those related to the security of the country and to the sovereign functions of the State should gradually be phased out. However, Government purchases for the Public Distribution System and defence and certain emergency purchases may be exempted.

4.2.4 By the same logic, Government enterprises and departments engaged in any sovereign function (like defence, law and order, currency functions) may not be subjected to the rigours of Competition Law.

4.2.5 Preference in Investments

Preference in favour of public sector companies is noticed in the Income Tax Act also. For instance, a charitable or religious trust or institution is allowed to invest its funds in certain approved securities. One of such securities is an investment or deposit in any public sector company. This is a case of discrimination in favour of public sector companies, which is not in consonance with the principle of competition. Such a discrimination does not satisfy the rule of reason, because an investment in a weak public sector company may in fact be less safe than an investment in a well run company in the private sector. The Committee appreciates the need to ensure that charitable and religious funds are safely invested but believes that this need is not necessarily satisfied by an exclusive discrimination in favour of the public sector, irrespective of the quality of the public sector company in which the investment is made. The need to ensure the security of the invested funds would probably be better served by a requirement that such funds should be invested only in a company which has received a high credit rating from an approved rating agency.

4.2.6 The decision of regulatory bodies can also be reviewed on the touchstone of Competition Law.

4.2.7 **Foreign Companies.** All foreign companies operating in India will fall within the ambit of the Competition Law. Thus any violation of the law by a foreign investor in India, will be in the ambit of the law. By the same token, any foreign investment through mergers or take-overs will also be in the purview of the relevant section of the Competition Law. In short, the Competition Law will be of universal applicability whether it is a domestic company or a foreign company.

4.2.8 **Commercial Consumption.** All consumers will be treated equally and the law will not distinguish between consumers who purchase goods or services for personal use or for commercial use. Thus for the purpose of the Competition Policy/Law a consumer is any purchaser of goods and/or services regardless of the purpose for which the purchase is made.

4.2.9 **Professional Services.** Bodies administering the various professions should use their autonomy and privileges for regulating the standards and quality of the profession and not to limit competition and to deny normal opportunities for growth and development. This has been dealt with in detail in Chapter VIII in the end called "Competition Policy and Professional Services".

4.3.0 **Standards.** Quality and safety standards for goods and services ensure a certain minimum quality and are generally for the benefit of consumers. This is often necessary even if it leads to some restrictions on competition. In other words, only goods and services that satisfy the minimum criteria are allowed to compete. However, there are situations where firms or groups of firms oftentimes in positions of dominance may use standards and specifications to prevent entry of other firms into the market. Such practices, if designed to prevent market access, should attract the attention of the relevant section on abuse of dominance and/or exclusionary practices.

B. AGREEMENTS AMONG ENTERPRISES

4.3.1 Agreements between firms have the potential of restricting competition. Most laws make a distinction between "horizontal" and "vertical" agreements between firms. Horizontal agreements refer to agreements among competitors and vertical agreements are agreements relating to an actual or potential relationship of buying or selling to each other. A distinction is also made between cartels – a special type of horizontal agreements – and other horizontal agreements and between vertical agreements between firms in a position of dominance and other vertical agreements. Generally, vertical agreements are treated more leniently than horizontal agreements as, *prima facie*, a horizontal agreement is more likely to reduce competition than an agreement between firms in a buyer-seller relationship.

4.3.2 It is not necessary that the agreement in question should be a formal or written agreement to be considered illegal. In principle, any kind of agreement (including oral and informal agreements and arrangements) could be illegal, if it violates the law. In the case of written or formal agreements, there can be no legal controversy. On the other hand, in the case of oral or informal agreements, it is necessary to prove the existence of an agreement. Proof will generally be based on circumstantial evidence, and parallelism of action between firms can indicate this. It follows that any prohibitions should also apply to what in the U.K law are known as “concerted practices”. Although the distinction between these and agreements are often imprecise, a concerted practice exists when there is informal cooperation without a formal agreement.

4.3.3 However, a distinction needs to be made between what could be called an illegal practice of price cartellisation and must, therefore, be curbed and punished and a perfectly legitimate economic and business behaviour in responding to a situation in which a given competitor is placed in what could be described as a price leadership position. When a price leader alters price of his goods or services due to factors such as increase in the cost of inputs, rawmaterials or other related costs, most other competitors will have no choice, but to follow him though the extent could vary. This cannot be said to be illegal because its behaviour is not based on any prior discussion or understanding, but on the sheer economic premise that any price increase taken by a small player ahead of the price leader would imply significant penalties in terms of loss of custom. These price followers, therefore, have no choice but to wait until the price leader takes a price increase. To assume in each such case, an informal co-operation (or informal agreement), would be too harsh and would ignore a market place reality.

4.3.4 Horizontal Agreements

Horizontal agreements are agreements between two or more enterprises that are at the same stage of the production chain and, in the same market. The most obvious example would be that of agreements between enterprises dealing in the same products. However, in general, it is important to define the ***relevant market***[8[8]]. To attract the provision of the law, the products must be substitutes. Being at the same stage of the production chain implies that the parties to the agreement are both (all) producers, or retailers or wholesalers. As has been interpreted over the years in the U.S. (and enacted more recently in other countries) a distinction is drawn in this regard between horizontal and vertical agreements. In certain circumstances it can be established that firms that are collaborating on some socially valuable activity may need to agree to do away with competition so to establish the cooperative relationship. In this, the European Community law goes beyond the objective of maximising welfare and explicitly allows some restrictive contracts if they promote progressiveness and consumers ultimately stand to gain. The Japanese law also allows for actions in contravention of the law provided they are in the “public interest”. It would be dangerous to allow the kind of discretion in interpretation possible under the Japanese law. Any exceptions that are permissible should be clearly laid down. However, we recommend that restrictive contract which are designed to promote use of energy efficient manufacturing processes and production of Eco-friendly products or conservation of natural resources should be explicitly permitted as exceptions.

4.3.5 Agreements are considered illegal only if they result in unreasonable restrictions on competition. Based on the U.S. law, this is tested on what is known as the “rule of reason” analysis. It is also required that the parties to the agreement are engaged in rival or potentially rival activities. A potential rival is one who could be capable of engaging in the same type of activity. Such a provision has generally been interpreted to mean that firms that are under common ownership or control are not considered as “rival” or “potentially rival” firms. Under the U.K. law, an agreement infringes the law only if it has as its object or effect an ***appreciable***

[8[8]] This is discussed in some detail in the next section.

prevention, restriction or distortion of competition. This is obviously to be determined on a case-by-case basis.

4.3.6 It is not possible to provide an exhaustive list of agreements that attract the attention of such provision, and the "rule of reason" needs to be applied to individual cases. An illustrative list would include the following:

- Agreements regarding fixing of purchase or selling prices
- Agreements limiting quantities, markets, technical development or investment
- Agreements regarding territories to be served and sources of supply
- Agreements regarding dissimilar treatment of equivalent transactions with other trading parties that place them at a disadvantage.

4.3.7 Agreements involving a presumption of illegality:

In general the "rule of reason" test is required for establishing that an agreement is illegal. However, for certain kinds of agreements the presumption is often that they cannot serve any useful or pro-competitive purpose and therefore do not need to be subject to the "rule of reason" test. The following kinds of horizontal agreements are often presumed to be anti-competitive.

- ***Agreements regarding prices.*** This would include all agreements that directly or indirectly fix the purchase or sale price.
- ***Agreements regarding quantities.*** This includes agreements aimed at limiting or controlling production and investment.
- ***Agreements regarding bids (collusive tendering).*** This includes tenders submitted as a result of any joint activity or agreement.
- ***Agreements regarding market sharing.*** These include agreements for sharing of markets by territory, type or size of customer or in any other way.

4.3.8 The presumption is that such horizontal agreements and membership of **cartels** lead to unreasonable restrictions of competition and may, therefore, be presumed to have an appreciable adverse effect on competition. This provision of *per se* illegality is rooted in the provisions of the U.S. law and has a parallel in most modern legislations on the subject. The Australian law prohibits most price fixing arrangements, boycotts and some forms of exclusive dealing. Similarly, the new U.K. law presumes that certain agreements have an "appreciable effect" on competition. In case such a provision is to be made in the law, there should be very limited scope for discretion and interpretation on the part of the prosecuting and adjudicating authorities. Hence, such agreements are presumed to be illegal and the governing principle is that they have an 'appreciable' anti-competitive effect. It may be pointed out that a significant number of the Members of the Committee were not in favour of identifying categories presumed to be illegal. They feel that they should be subject to the 'rule of reason' and that the CCI can issue relevant regulations in this regard. But the majority however felt that such agreements are presumed to be illegal.

4.3.9 Vertical Agreements

Vertical agreements, on the other hand, are agreements between enterprises that are at different stages or levels of the production chain and, therefore, in different markets. An example of this would be an agreement between a producer and a distributor. Vertical restraints on competition include:

- Tie-in arrangements
- Exclusive supply agreements
- Exclusive distribution agreements
- Refusal to deal
- Resale Price Maintenance (RPM)

4.4.0 In the past, the U.S. anti-trust laws had treated vertical restraints, like tie-in arrangements quite harshly. This thinking has changed in recent times, and, under the rule of reason, vertical agreements are generally treated more leniently than horizontal agreements. This is because vertical agreements can often perform pro-competitive functions. Such agreements are generally considered anti-competitive if one or more of the firms that are party to the agreement have market power. In such a situation, the agreement is, in any case, likely to attract the provisions of the law relating to abuse of dominance.

4.4.1 In a number of countries, RPM is presumed to be *per se* anti-competitive. The majority of the Members of the Committee also felt that RPM should be treated as presumed to be illegal. However, after considerable discussions, in order to arrive at a consensus, it was decided not to treat it as presumed to be illegal. It will be judged under the 'rule of reason'.

4.4.2 The following conclusions arise in this section out of the discussion :

- Certain anti-competitive practices should be presumed to be illegal.
- Agreements that contribute to the improvement of production and distribution and promote technical and economic progress, while allowing consumers a fair share of the benefits, should be dealt with leniently.
- The "relevant market" should be clearly identified in the context of horizontal agreements.
- Blatant price, quantity, bid and territory sharing agreements and cartels should be presumed to b*e* illegal.

C. ABUSE OF DOMINANCE

4.4.3 In existing competition laws, there are two kinds of prohibitions of abuse of dominant positions:

1. **The first relates to actions *taken by an incumbent firm to exploit its position of dominance* by charging higher prices, restricting quantities, or, more generally, using its position to extract rents.**

2. **The second relates to actions *by an incumbent in a dominant position to protect it position of dominance* by making it difficult for potential entrants and competitors to enter the market.**

4.4.4 In the case of the latter, it is important to distinguish between growth due to product superiority and/or efficiency leading to a larger market share and the wilful restriction of acquisition and maintenance of market power. Generally firms that are in a legally acquired position of dominance are allowed to exploit this position by charging higher prices and making extra-normal profits. So long as there are no barriers to entry, the market will generally be contestable. Thus, although dominance is a necessary condition for establishing violation of this provision, it is by no means a sufficient condition. ***For an act to be in contravention of this provision, it is imperative that abuse of a dominant position be established.***

4.4.5 Dominance

The Committee recommends that "Dominance" and "Dominant Undertaking" may be appropriately defined in the Competition Law in terms of "the position of strength enjoyed by an undertaking which enables it to operate independently of competitive pressure in the relevant market and also to appreciably affect the relevant market, competitors and consumers by its actions". The definition should also be in terms of "substantial impact on the market including creating barriers to new entrants". This definition may perhaps appear to be somewhat ambiguous and to be capable of different interpretations by different judicial authorities. But then, this ambiguity has a justification having regard to the fact that even a firm with a low market share of just 20% with the remaining 80% diffusedly held by a large number of competitors may be in a position to abuse its dominance, while a firm with say 60% market share with the remaining 40% held by a competitor may not be in a position to abuse its dominance because of the key rivalry in the market. <u>Specifying a threshold or an arithmetical figure for defining dominance may either allow real offenders to escape</u> (like in the first example above) or result in unnecessary litigation (like in the second example above). Hence, in a dynamic changing economic environment, a static arithmetical figure to define "dominance" will be an aberration. With this suggested broad definition, the Authorities/Tribunals concerned would have the freedom to fix errant undertakings and encourage competitive market practices even if there is a large player around. Abuse of dominance is key for the Competition Policy/Law.

4.4.6 It is important that the law be designed in such a way that its provisions on this count only take effect, if dominance is clearly established. As already stated, there is no single objective market share criteria that can be blindly used as a test of dominance. The law should ensure that only when dominance is clearly established, can abuse of dominance be alleged. Any ambiguity on this count could endanger large efficient firms. The more recently legislated laws of the Central and Eastern European countries are based on the relevant Articles of the Treaty of Rome and are more interventionist in design. They rely exclusively on market shares to establish dominance. The U.S. law requires the additional criterion of entry barriers.

4.4.7 Before assessing whether an undertaking is dominant, it is important, as in the case of horizontal agreement, to determine what the ***relevant market*** is. There are two dimensions to this – the ***product market*** and the ***geographical market***. On the demand side, the relevant product market includes all such substitutes that the consumer would switch to, if the price of the product relevant to the investigation were to increase. From the supply side, this would include all producers who could, with their existing facilities, switch to the production of such substitute goods. The geographical boundaries of the relevant market can be similarly defined. Geographic dimension involves identification of the geographical area within which competition takes place. Relevant geographic markets could be local, national, international or occasionally even global, depending upon the facts in each case. Some factors relevant to geographic dimension are consumption and shipment patterns, transportation costs, perishability and existence of barriers to the shipment of products between adjoining geographic areas. For example, in view of the high transportation costs in cement, the relevant geographical market may be the region close to the manufacturing facility.

4.4.8 ***To be considered dominant, a firm must be in a position of such economic strength that it can behave, to an appreciable extent, independently of its competitors and customers.*** Therefore, to assess dominance it is important to consider the constraints that an enterprise faces on its ability to act independently. The current market share is a necessary but insufficient pre-requisite for dominance. In spite of having a large market share a firm may be constrained by the threat of competition from potential entrants and by the purchasing power of its own customers. Entry barriers could result from absolute advantages such as patents (legal) and access to certain inputs. These could also result from strategic first-mover advantages. High sunk cost could make markets incontestable. Exclusionary practices could increase the strategic advantages of the first mover. Lastly, factors other than existing or potential competition need to be considered. For example, strong purchasing power – if customers are powerful relative to the enterprise – can also constrain the behaviour of the firm.

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4.4.9 Abuse

In general, actions that are considered anti-competitive and illegal in the context of agreements are also illegal, if undertaken by a dominant firm. These would include charging or paying unfair prices, restriction of quantities, markets and technical development. Discriminatory behaviour and any other exercise of market power leading to the prevention, restriction or distortion of competition would obviously be included. We probably need to clarify that there is a fine distinction between defending one's market position or market share which is perfectly legal and legitimate and may involve certain level of aggressive competitive behaviour and exclusionary and anti competitive behaviour. An illustrative list of these has already been provided in the previous section and is not repeated here. However, as noted above, a greater threat to competition is from the action (s) of dominant firms that are inimical to future competition. These would include the following:

- Predatory Pricing / disciplining existing rivals
- Actions that make it difficult for potential entrants to enter (exclusionary / anti-competitive behaviour)

4.5.0 Key questions for adjudication on abuse of dominance could include:

- How will the practice harm competition?
- Will it deter or prevent entry?
- Will it reduce incentives of the firm and its rivals to compete aggressively?
- Will it provide the dominant firm with an additional capacity to raise prices?
- Will it prevent investments in research and innovation?
- Do consumers benefit from lower prices and/or greater product and service availability?

4.5.1 Predatory Pricing

Predatory pricing is defined as the situation where a firm with market power prices below cost so as to drive competitors out of the market and, in this way, acquire or maintain a position of dominance. Here again there is a danger of confusing pro-competitive pricing with predatory behaviour. In reality, predation is only established after the fact i.e. once the rival has left the market and the predator has acquired a monopoly position in the market. However, any law to prevent is meaningful, only if it takes effect before the fact i.e. before the competitor has left the market.

4.5.2 An important issue, therefore, is the identification of predatory pricing. According to theory, a price below marginal cost is indicative of predatory pricing. A practical alternative is to use the average variable cost as a substitute since marginal costs are not generally available. In some cases, as in a judgement of the US Supreme Court (UTAH PIE case), a price below the full cost was taken to be predatory. The problem is that if this were the only criterion, any firm making losses could potentially be accused of predation. In fact the case is only made, once the firm has recouped its first period losses and in the second period, when it functions as a monopolist. If it does not, then there may well be a gain in social welfare through the lower prices charged by the firm. It is in this context that an alternative two-stage test is suggested where, in the first instance, the market structure should be analysed and it must be established that the market is one where predation can be successful, before a comparison of price and cost is made at the second stage. Thus if it is clear *ex ante* that the market is one where predation cannot be successful as a result of new entry, re-entry, foreign competition or some other factor, then even if a firm is charging "predatory" prices in current period, it is not a cause for concern.

4.5.3 In view of the difficulties, the Committee feels that the issue of predatory pricing is best left to the Competition Law Tribunal (Competition Commission of India) itself which can draw its own regulations and also revise it from time to time based on its own experience.

4.5.4 Distinguishing predatory behaviour from legitimate competition is difficult. The distinction between low prices which result from predatory behaviour and low prices which result from legitimate competitive behaviour is often very thin and not easily ascertainable.

4.5.5 Indeed, it is sometimes argued that predatory behaviour is a necessary concomitant of competition. To quote Professor Jagdish Bhagwati from his book "A stream of Windows":

> *"Clyde Prestowitz, former US trade negotiator and an ally of Mr. Fallows in the angst over Japan is doubly wrong when he asserts that "Japan plays a different game" and that therefore the United States cannot have a beneficial trade with it under a rules-based multilateral trading regime…*
>
> *What then about the view, often ascribed to Chalmers Johnson professor at the University of California at San Diego, that Japanese Companies believe in "predatory" competition ?*
>
> *The notion that American Companies, by contrast, compete in a benign fashion is faintly romantic and fully foolish. What the Cambridge economist Joan Robinson used to call the "animal spirits" of capitalist entrepreneurs surely are manifest in both countries. The successful always appear more predatory. This was exactly the*

stereotype of British entrepreneurs during the nineteenth century and of the ugly American in the 1950s and 1960s. With success, one gets one's share of envy and resentment" (Bhagwati, Jagdish, 1999).

4.5.6 However, a sizeable section of the members of the Committee felt that predatory pricing is a pernicious practice warranting it being identified under the "*per se* illegal category".

4.5.7 After considerable discussions, it was agreed that having regard to the practical difficulties involved in its categorisation and interpretation, it is better to treat predatory pricing as an abuse, only if it is unambiguously established and indulged in by a dominant undertaking.

4.5.8 Exclusionary practices

One class of exclusionary practices involves vertical agreements. Such arrangements are common business practices and infringe the law only, if they reduce competition. These have been discussed in the previous section. In this section only those vertical restraints that have the potential for foreclosing competition by hindering entry into the market are discussed. These could result from the following types of arrangements:

- **Exclusive Dealing and Purchasing.** Under such arrangements a retailer agrees to purchase or deal in the goods of only one manufacturer making entry difficult for new manufacturers.

- **Exclusive / Selective Distribution.** Under such arrangements the manufacturer supplies one or a selected number of retailers making entry difficult for other retailers.

- **Tie-in Sales, Full-line Forcing, Quantity Forcing and Fidelity Discounts.** Tie-in sales make the purchase of one product conditional on the sale of another (tied) product. Full-line forcing is an extreme form of the former where the retailer must stock the full range of the manufacturer's products. Under quantity forcing the retailer is required to purchase a minimum quantity of a certain product. Under fidelity discounts, the retailer receives discounts based on the proportion of its sales coming from the manufacturer. Such arrangements could make entry difficult for both manufacturers and retailers.

- **Slotting Fees.** This requires the manufacturer to pay a fee to get its product stocked. Such arrangements could make entry difficult for manufacturers.

- **Non-linear Pricing and Franchise Fees.** These involve payment of non-cost-related discounts to existing retailers or franchise fees, thus raising the sunk cost of entry and making entry difficult for other retailers.

4.5.9 To attract the provision of the law, in all these cases it needs to be established whether the restraints create a barrier to new entry or force existing competitors out of the market. The key issue is the extent to which these arrangements foreclose the market to manufacturers (inter-brand rivalry) or retailers (intra-brand rivalry) and the extent to which these raise rivals' costs and/or dampen existing competition. The costs of such arrangements need to be weighed against the benefits. For example, some of these restraints help to overcome the free-rider problem and allow for the exploitation of scale economies in retailing.

4.6.0 Thus, in the context of abuse of dominance, the efficacy of the law hinges on the following questions:

- Do the provisions of the law make it too easy for a firm to be classified as dominant?
- Does the law protect potential entrants from exclusionary behaviour by the incumbent firm(s)?
- Does the law seek to control the prices charged by dominant firms?
- Is there a suitable test for predatory pricing?
- Is there scope for applying the "rule of reason" to exclusionary vertical arrangements?

D. MERGERS, AMALGAMATIONS, ACQUISITIONS AND TAKE-OVERS (MERGERS FOR SHORT)

4.6.1 As in the case of agreements, mergers are typically classified into horizontal and vertical mergers. In addition, merger between enterprises operating in different markets are called conglomerate mergers. <u>Mergers are a legitimate means by which firms can grow and are generally as much part of the natural process of industrial evolution and restructuring as new entry, growth and exit.</u> From the point of view of Competition Policy it is ***horizontal mergers*** that are generally the focus of attention. As in the case of horizontal agreements, such mergers have a potential for reducing competition. In rare cases, where an enterprise in a dominant position makes a ***vertical merger*** with another firm in a (vertically) adjacent market to further entrench its position of dominance, the merger may provide cause for concern. ***Conglomerate mergers*** should generally be beyond the purview of any law on mergers.

4.6.2 A merger leads to a "bad" outcome only if it creates a dominant enterprise that subsequently abuses its dominance. To some extent the issue is analogous to that of agreements among enterprises and also overlaps with the issue of dominance and its abuse discussed in the previous sections. Viewed in this way, there is probably no need to have a separate law on mergers. The reason that such a provision exists in most laws is to pre-empt the potential abuse of dominance where it is probable, as subsequent unbundling can be both difficult and socially costly.

4.6.3 Thus, the general principle, in keeping with the overall goal, is that mergers should be challenged only if they reduce or harm competition and adversely affect welfare.

4.6.4 Horizontal Mergers

The following issues need to be considered, while assessing the permissibility of horizontal merger.

- First, as in the case of horizontal agreements, it must first be established as to what the relevant market is. This requires a focus on the demand side to establish whether the products are close enough substitutes or not. On the supply side, it is important to identify the market shares of the firms. Clearly, it is not enough to go on current market shares. It is important to assess how the relevant market is likely to evolve in the near future. This would depend on whether entry is easy and whether there are potential entrants that could easily enter, if profitability in the sector increases, how foreign competition is likely to evolve and the growth (or decline) of other incumbent firms.

- The second important step is to establish whether the higher concentration in the market resulting from the merger will increase the possibility of collusive or unilaterally harmful behaviour. Collusion is more likely in industries producing relatively homogeneous products and characterised by small and frequent transactions, the terms of which cannot be kept secret. The merger is likely to be unilaterally harmful when the two merging firms produce similar products in a concentrated differentiated product market.

- The third issue is regarding potential contestability. Even if no potential entrants are immediately visible, a large enough price increase (or high enough profitability) could encourage entry. So, it needs to be established, how high the expected price increase is likely to be. Following this, it is important to consider, whether entry is really likely, how quick it will be and whether it will be sufficient enough to make up for the reduced competition resulting from the merger.

- Fourth, the case can be made that even mergers that lead to an uncompetitive outcome could result in certain "efficiencies" that more than make up for the welfare loss resulting from this. The Russian law has such a provision. The US law has generally been balanced in favour of competition. However, the "failing firm" defence has, at times, been accepted by courts. If a firm is, indeed failing and likely to go out of business, it is not clear what social welfare loss would occur, if this firm's assets were taken over by another firm.

4.6.5 The question to be asked here is what rules should the law evolve such that monopolies may be prevented and competition is preserved. Obviously, merely choosing market shares for the purposes of deciding the cut off point is fraught with problems.

4.6.6 We can consider two extreme examples to clarify this point. Suppose that two firms each having a significant market share of say 5% each merge, the law cannot suppose that the firms have the objective of monopoly profits in mind. Such mergers can only improve efficiency and, as such need not be struck down. On the other hand, if two larger firms merge, there is the possibility of this having an adverse affect on competition and justifies investigation. It is obvious that as the composite market share increases, the issue of the tradeoff between welfare and efficiency becomes more relevant and depends on other market conditions. The analytical foundations for the rules should be derived from the market conditions.

4.6.7 Vertical Mergers

Competition Law must not normally have any objections to vertical. Vertical mergers are measures for improving production and, distribution efficiencies. The process internalises the benefits of supply chain management and, as such cannot be perceived as injuries to competition. Vertical mergers can be treated, as a process by which there is a transmission of a good or a service across departments such that the commodity can be sold in the market without much adaptation. This implies that firms choose to bypass market transaction in favour of internal control.

4.6.8 For the purposes of competition law, integration ought to imply only that administrative direction rather than a market transaction forms the basis of the cooperation between two or more individuals engaged in productive or distributive activity. The firm chooses, on the basis of relative costs, whether to perform the activity by itself, subcontract it to others, or to sell a finished or semi finished product to other firms who in turn sell it to the market with or without further processing, as the case may be. The law should understand that the definition of a firm should imply that the entity constitutes the area of operations within which administration rather than market process coordinates work.

4.6.9 The prevailing wisdom has obfuscated the distinction between a market transaction with administrative direction, and replaced the latter with the former. It would be naive for the law to suppose that vertical mergers create less efficiency rather than internal growth. The only difference is a question of historicity. Vertical growth is usually the result of efficiencies that have been present within the firm in the past. Vertical mergers on the other hand, are the result of as yet unrealised efficiencies, which the firm attempts to attain through structural change.

4.7.0 There could, however, be some specific objections to vertical integration,[9[9]] for example.

- ***Fear of Foreclosure***

  It is supposed that, through vertical integration, a firm can create captive distribution channels. This will foreclose the rival firms from the market, represented by the captive distribution network. This may be a problem, if it threatens competition in general.

- ***Entry Blocking***

  Monopolies can have the ability to prevent the entry of firms into the market. Sometime it is claimed that even competitors can come together to prevent a potential entrant. This is sometimes referred to as collective foreclosure. If through integration, firms are able to internalise different levels of production, artificial barriers to entry could be created. This implies that because of the size of the incumbent, a potential entrant's capital requirements will be high.

- ***Price Squeezes***

  Vertical mergers and integration internalise the process of production and enable a firm to perhaps reduce costs. This will result in reduction in output prices, which is usually interpreted as a price squeeze. The law should question only those monopolies resulting from vertical mergers (integration) that lead to output restriction rather than preventing vertical integration.

4.7.1 Conglomerate Mergers

A conglomerate merger is a merger that is neither horizontal nor vertical. For example, a merger between a car manufacturer and a textile firm is a conglomerate merger. The theories for "restraining" vertical and horizontal mergers are well formulated. There however is no clear mechanism for similar restraints on conglomerate mergers except those that are based on

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[9[9]] There is some overlap between what is discussed next and what has been discussed in earlier sections in this Chapter.

folklore. There is sufficient evidence to suggest that conglomerate mergers do not pose any threat to competition. Conglomerate mergers are objected to on several grounds.

4.7.2 Some of the objections to conglomerate mergers are,

a. They create deep pockets which enables that firm to devastate the rivals.
b. Lower costs below the marginal cost of the industry.
c. Raise barriers to entry
d. Engage in reciprocal dealing to the disadvantage of the rivals.
e. Eliminate potential competition

4.7.3 We examine some of these objections.

- ***The theory of deep pockets***

It is believed that firms operating in many markets can devastate their rivals through their potentially infinite capital resources. This suggests that conglomerates can engage in predatory pricing. However, law cannot presume that possession of capital can lead to harmful pricing practices even though predatory pricing is a discredited theory. An objection based on the fact of possession of capital cannot be construed as a serious objection.

- ***Raising barriers to entry***

Conglomerate mergers help in pooling the capital resources. It is believed that conglomerate mergers can lead to the erection of entry barriers. If a firm that had for example, a limited promotional budget might now make use of the other firm's promotional expertise. However, if competition is equated with consumer welfare then, one should really ask why is it not a valuable efficiency to bring capital to a firm that can use it ? Why is it not good for the consumers, if the single product firm shared on the cost savings in advertising and promotion that normally accrue to a multi-product firm ?

- ***Loss of potential competition***

Two arguments are proposed to support this position. First, it is believed that because of the merger, there is less "space" for new firms. Second, if instead of the merger the larger firm had tried to enter a market on its own, the threat of entry would have forced the existing firms to become more competitive and efficient.

4.7.4 Pre-Notification

One important issue with regard to mergers that needs to be addressed is regarding the requirements for prior notification. There are two possibilities. The first is that approval or disapproval of the merger may be obtained (possibly within a specified time) before going ahead with the merger. This will be subject to a threshold requirement based on assets or market share. The second option is that no notification of permission is required and that the threat of action in case of a violation should generally enforce legal behaviour. Although both the US and EU laws require prior approval for mergers above certain thresholds, they also impose a timeliness requirement on the relevant authority, with delays being subject to limitation. There is no pre-notification requirement in the existing U.K.law.

4.7.5 Prior approval is likely to lead to delays and unjustified bureaucratic interventions. This is likely to hamper the vital process of industrial evolution and restructuring and is, thus, not recommended. In any case, all mergers have to be approved by the High Court and shareholders' interests are protected in this way. The complete absence of a pre-notification requirement could lead to more post-merger unscrambling with high social costs. For this reason, a pre-notification requirement for mergers above a certain threshold level may be considered. The Committee is of the view that the threshold limit may be fixed on the basis of assets rather than market share, as the latter may not be an appropriate barometer to determine affectation adversely of competition. For instance, a firm with a high market share of 60% may not be in a position to affect competition, if the remaining 40% is held by a competitor. The Committee further suggests that the threshold limit may be fixed at the asset value of the merged entity of Rs.500 crores or more or, the asset value of the group to which the merged entity belongs of Rs.2000 crores or more both linked to Wholesale Price Index. The expression "group" as presently defined in the MRTP Act, 1969 may be adopted for the purposes of merger.

4.7.6 **It may also be stipulated that if no reasoned order is received within a time limit, say of 90 days, prohibiting the merger, the merger should be deemed to have been approved.**

4.7.7 Any concern about mergers stems from a concern for the possible adverse affects that this could have on competition and welfare as a result of the merged entity abusing its position of dominance. It could, therefore, be argued that the law should ignore mergers and focus only on abuse of dominance if and when this arises. In spite of this, the competition laws of most countries have a provision for notification and investigation of mergers. The reason for this is that scope for post-merger actions may be limited and the cost of unscrambling may be socially high. In view of this, it is extremely important that the law regarding mergers be very carefully framed and the provisions regarding prohibition of mergers be used very sparingly. This is particularly important at the current stage of India's corporate development. Relative to the size of major international companies, Indian firms are still small. With the opening of trade and Foreign Direct Investment, Indian firms need to go through a period of consolidation in order to be competitive. Any law on merger regulation must take account of this reality.

4.7.8 The Committee, however, would like to raise a note of caution regarding the monitoring of mergers by the Competition Law Authority (Competition Commission of India/Mergers Commission). At present, very few Indian companies are of international size. In the light of continuing economic reforms, particularly the opening up of trade and foreign investment, a great deal of corporate restructuring is taking place in the country. Thus there is a need for mergers, amalgamations and takeovers as part of the growing economic process before we can be on an equal footing to compete with global giants. The Committee is concerned that premature implementation of Competition Law in this area could act as a disincentive for necessary mergers. Such a result would harm the potential competitiveness of Indian companies and therefore hurt competition itself. It may also be mentioned that mergers and take-overs are also subject to other laws such as the Companies Act and the Securities and Contracts Regulation Act (SCRA) as governed by Securities Exchange Board of India (SEBI). Thus mergers in India are already subject to a substantive legal process. Competition Law in this area is only concerned with the effect of mergers on competition.

4.7.9 There is also an administrative aspect concerned with the implementation of Competition Law governing mergers. The experience of other countries in the monitoring of mergers from the view of competition shows that a very small proportion of mergers notified are actually restrained in any way. Thus the scrutiny of as many as a 100 mergers may result in some action on only 2 or 3 of them. A great deal of relatively expert staff time is taken up in this process of scrutiny, apart from the uncertainty injected into the merger process from the point of view of firms. If the Competition Law Authority is to monitor mergers in India, it will have to be suitably equipped with adequate staff with relevant expertise in law, commerce, economics, and other relevant disciplines. Such expertise will inevitably take time to be developed as we are already seeing in the case of the new regulatory authorities that have been set up recently in the various infrastructure sectors.

4.8.0 The Competition Law Authority (Competition Commission of India/Mergers Commission) should also have the power to advise a demerger or severance of interconnection between undertakings or division of undertakings on the lines of Sections 27, 27A and 27B of the present MRTP Act, 1969 with suitable modifications. This power needs to be essentially advisory in character and it should be left to the Government to take a final view on a demerger/severance of interconnection/division of undertakings.

4.8.1 Time Frame

Taking the above overall aspects into consideration, the Committee recommends that the Government may consider a suitable time frame after which these merger recommendations can be implemented. This time period may be utilised to assemble a suitably qualified expert staff and for their training.

4.8.2 The conclusions from the above discussion are as under :

- The test of whether a merger is to be permitted or not should be based, inter-alia on the following :
  - The expected impact of the merger on market power and competition in the *relevant market.*
  - Given the size and growth of the market and the presence or absence of entry barriers, an assessment of how the market is expected to evolve.
  - Do the markets of the merging entities overlap? There should be limited cause for concern in case they do not, unless one of the firms has market power.
  - Is the market susceptible to collusive behaviour?

- The threshold for pre-merger notification should be based on asset value of the merged entity. The suggested threshold value of assets of the merged entity is Rs.500 crores or more and of the group to which the merged entity belongs is Rs.2000 crores or more.

- Potential efficiency losses from the merger should be weighed against potential gains.

- Pre-notification of mergers above the specified threshold should be sufficient and necessary, as it would, most likely, reduce the social cost of potential post-merger unscrambling.

- If within a specified time period of 90 days the Tribunal (Mergers Commission) does not, through a reasoned order, prohibit the merger, the merger should be deemed to have been approved.

4.8.3 With a view to assisting the Competition Law Authority (Competition Commission of India/Mergers Commission) to arrive at a decision within the time frame of 90 days, the Committee suggests that appropriate detailed "merger guidelines" may be prepared and laid down for observance.

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4.8.4 Competition Law and Competition Law Authority

For implementing the Competition Policy/Law, it is necessary to establish a Competition Law Authority (Competition Commission of India) with adequate powers for advocacy of competition policy, adjudication, and effective enforcement of the Law and for implementation of its decisions. The following principles are desirable in designing and implementation of Competition Law.

1. The Competition Law should provide a system of checks and balances by ensuring due process of law with provisions for appeal and review.

2. The Competition Law Authority should be a multi-member body comprised of eminent and erudite persons of integrity from the fields of Judiciary, Economics, Law, International Trade, Commerce, Industry, Accountancy, Public Affairs and Administration. Having an appropriate provision for their removal only with the concurrence of the Apex Court may ensure their independent functioning.

3. The Competition Law Authority should be independent and insulated from political and budgetary controls of the Government.

4. Competition Law should separate the investigative, prosecutorial and adjudicative functions.

5. Competition Law should have punitive provisions for punishing the offenders besides other remedial methods (reformatory).

6. The proceedings of the Competition Law Authority should be transparent, non discriminatory and rule-bound.

7. The Competition Law Authority should have a positive advocacy role in shaping policies affecting Competition.

4.8.5 The gains sought through Competition Law can only be realised with effective enforcement. Weak enforcement of Competition Law is perhaps worse than the absence of Competition Law. Weak enforcement often reflects a number of factors such as inadequate funding and inadequate staffing of the enforcement authority. The Government should provide the required infrastructure and funds to make the Competition Law Authority an effective

Tribunal to prevent, if not eliminate anti-competition practices and also to play its role of Competition advocacy.

4.8.6 Review of the structure of competition authorities in other countries shows that, in addition to the procedures governing the selection of Members of such authorities, great care has to be taken in the staffing of such an authority. Our tendency is to staff such authorities with civil servants on deputation from the normal administration. Efficient functioning of the Authority will require recruitment of specialists in the relevant fields from the open market. Consequently adequate compensation structures will also have to be designed.

4.8.7 The Competition Law Authority (Competition Commission of India) should be located at a city outside Delhi with permanent Benches in the Metropolitan centres of Delhi, Calcutta, Mumbai and Chennai.

This has been dealt with in detail in Chapter VI.

4.8.8 Summary

1. The State Monopolies, Government procurement and foreign companies should be subject to the Competition Law. The Law should cover all consumers who purchase goods or services, regardless of the purpose for which the purchase is made.

2. Bodies administering the various professions should use their autonomy and privileges for regulating the standard and quality of the profession and not to limit competition.

3. If quality and safety standards for goods and services are designed to prevent market access, such practices will constitute abuse of dominance/exclusionary practices.

4. Certain anti-competitive practices should be presumed to be illegal. Blatant price, quantity, bid and territory sharing agreements and cartels should be presumed to be illegal.

5. Abuse of dominance rather than dominance needs to be frowned upon for which relevant market will be an important factor.

6. Predatory pricing will be treated as an abuse, only if it is indulged in by a dominant undertaking.

7. Exclusionary practices which create a barrier to new entrants or force existing competitors out of the market will attract the Competition Law.

8. Mergers beyond a threshold limit in terms of assets will require pre-notification. If no reasoned order, prohibiting the merger is received within 90 days it should be deemed to have been approved. In adjudicating a merger, potential efficiency losses from the merger should be weighed against potential gains.

9. The Competition Law should be designed and implemented in terms of principles enunciated, supra, in this Chapter.

Chapter V

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ANTI-COMPETITION PRACTICES RELEVANT UNDER THE WTO REGIME AND ITS VARIOUS AGREEMENTS

5.1.1 It is axiomatic that the domestic Competition Law should not discriminate between Indian Companies and Foreign Companies. However, it is generally felt that Competition Policy / Law needs to have necessary provisions and teeth to examine and adjudicate upon anti-competition practices that may accompany or follow developments arising out of the implementation of WTO agreements. These are broadly discussed below.

5.1.2 Foreign Investment

Consequent on liberalisation and globalisation, there is an increase in the flow of foreign investment to the developing countries, like India. Three broad factors determine where and to what extent foreign investments are made :

- The policies of host countries
- The pro-active measures, countries adopt to promote and facilitate investments
- The characteristics of their economies

5.1.3 The relative importance of different location-specific foreign investment determinants depends upon the motive and type of investment, the industry in question and the size and the strategy of the investor. Domestic policies relating to foreign investments are generally underpinned by the country's political philosophy, ethos, goals and objectives. The Expert Group (1999) on the Interaction between Trade and Competition Policy appointed by the Ministry of Commerce has suggested in its report, that "there should be enough flexibility in the foreign investment policy of a country to reckon not only the competition policy but also its development dimensions, national priority and its special and differential needs" (para 7.4.1 of the report). In other words, the Competition Policy to be framed needs to specify exemptions and exceptions in applying it to the investment policy. In the interests of fair and free trade and in the context of the desire to achieve a market driven environment , it is suggested that a short negative list be notified by the Government by way of exceptions and exemptions from Competition Policy. In other words, only investments in the sectors notified in the negative list will require pre-entry approval of the Government. Investments in all other sectors will be free from any competition control. In fact, there should be no need to even secure the approval of the Foreign Investment Promotion Board. The negative list may include sectors covered by the sovereign functions of the State like defence, atomic energy, currency etc and such sectors considered core and critical in National interest.

5.1.4 The Competition Law should be able to deal with enterprise behaviour by prohibiting restrictive business practices which dilute, distort or prevent competition. Such practices would include, inter-alia, competition restricting horizontal agreements and acquisitions, abuses of dominant position and competition restricting vertical distribution agreements.

5.1.5 Foreign investments which take the route of horizontal or vertical mergers, amalgamations, acquisitions and take-overs may have to be under the surveillance of Competition Policy/Law to ensure that such investments do not result in some kind of mere ownership or management take-over and constitute abuse of dominance. The objective behind the foreign investment should inhere a development dimension which can be manifested in better productivity, better quality, economies of scale and increased choice for the consumer.

5.1.6 Intellectual Property Rights

India is a signatory to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). TRIPS Agreement covers nine categories of Intellectual Property :

- Copyright and related rights
- Trade marks including service marks
- Geographical indications
- Industrial designs
- Lay-out designs of integrated circuits
- Trade secrets
- Patents
- Patenting of micro-organisms and
- New plant varieties (seeds and other propagating material)

5.1.7 All forms of Intellectual Property have the potential to raise Competition Policy/Law problems. Intellectual Property provides exclusive rights to the holders to perform a productive or commercial activity, but this does not include the right to exert restrictive or monopoly power in a market or society. Undoubtedly, it is desirable that in the interest of human creativity, which needs to be encouraged and rewarded, Intellectual Property Right needs to be provided. This right enables the holder (creator) to prevent others from using his/her inventions, designs or other creations. But at the same time, there is a need to curb and prevent anti-competition behaviour that may surface in the exercise of the Intellectual Property Rights.

5.1.8 There is, in some cases, a dichotomy between Intellectual Property Rights and Competition Policy/Law. The former endangers competition while the latter engenders competition. There is a need to appreciate the distinction between the existence of a right and its exercise. During the exercise of a right, if any anti-competitive trade practice or conduct is visible to the detriment of consumer interest or public interest, it ought to be assailed under the Competition Policy/Law.

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5.1.9 Subsidies, Countervailing Duties and Anti-Dumping Measures

Subsidisation is a common practice, which aims at enhancing competitiveness of the products of a country. It is a kind of negative tax and figures as an expenditure item in the budget of the country. But it is frowned upon by modern trade theory, as it is likely to distort competition in the market. Where the distortion takes the form of adverse effects on or material injury to a country's domestic industry, it can levy countervailing duties on the imported subsidised products.

5.2.0 But subsidies have an important role in the development and growth of trade, particularly in the developing countries. Public interest and trade needs govern policies of Governments on subsidisation. The Agreement on Subsidies and Countervailing Measures (SCM) of the WTO is to prohibit or restrict the use of subsidies that have trade-distorting effects. SCM categorises subsidies into those that are prohibited, those that are permitted but are actionable and those that are permitted but are not actionable. The Expert Group (1999) on Interaction between Trade and Competition Policy appointed by the Ministry of Commerce, in its report, has suggested that Governments of developing countries need to choose a plan of action for providing better infrastructure facilities, assistance for research, etc., which are benefits that do not fall under the actionable category (para 8.10.1) and that it is equally important for developing countries like India to adopt trade and foreign exchange policies that will reduce the need for export subsidies (para 10.19.2).

5.2.1 Because of the asymmetry in the economic and social development of different regions in a country, the Government thereof may pursue a policy of encouraging regional development --- the development of regions which remain undeveloped or under developed. Governments grant subsidies to attain policy objectives of this nature. For instance, subsidies are made available to promote the development of new industries, to promote the establishment of industries in the backward regions, to encourage investment and to assist industries in the export development etc. The general raison d'être behind the grant of subsidies by Governments is to subserve their developmental and social objectives. An industry or entity is deemed to have received a subsidy where benefit is conferred as a result of:

i) direct transfer from the Government of funds like grants, loans or equity infusion or Government guarantees relating to payment of loans.
ii) the Government foregoing the revenue that should otherwise have been collected.
iii) the Government providing goods or services or purchasing goods or services.

5.2.2 In determining whether a particular measure, constitutes subsidisation and consequently impairs competition in the markets, the concept of benefit is crucial. Government action that is not consistent with commercial considerations confers a benefit.

5.2.3 In the interest of regional development and in the interest of reducing asymmetry in the extent of development in different regions in the country, it is quite justifiable if an appropriate subsidy policy is adopted by the Government. Competition policy may be allowed to permit such subsidisation / benefit schemes for promoting regional development as long as they are not limited only to certain enterprises but are generally available to all enterprises or industries. Thus, if a subsidy scheme is available generally to all enterprises set up in backward areas, subsidies given thereunder would be deemed to be non-specific, since they are granted to all units set up in that area and are aimed at the development of the area. Such subsidies should be outside the pale of competition actionability.

5.2.4 Incentives provided to industries for R&D purposes should also be non-actionable. All other subsidies and incentives will be actionable under the Competition Law.

5.2.5 Anti-dumping measures are sometimes resorted to, as protectionist measures to favour the domestic industries. Such protectionist approach is anti-thetical to Competition Policy and Law. Anti-dumping and Competition Policy/Law do not share the same motion of what constitutes a fair competition.Anti-dumping policies are based on a *per se* condemnation of injurious price discrimination whereas, Competition Policy/Law is based on the need to foster a free market designed to enhance the interest of consumers.

5.2.6 An apprehension has been voiced by some of the Chambers of Industries and Commerce, and industrialists that if Competition Policy/Law is allowed to prevail over anti-dumping measures, the domestic industries could be prejudicially affected and that many of them could face extinguishment, thus generating retrenchment of labour and unemployment, besides loss of capital etc.

5.2.7 Sanitary and Phytosanitary Measures

Setting standards for goods and services generally benefits consumers and can make markets operate more efficiently. Standards inform consumers of important product characterstics, they facilitate the compatibility of products that are complements and they can be used to establish minimum level of quality necessary to protect consumer health and safety. Although the adoption of standards will exclude non-conforming products or services from the market, that effect by itself is not a sufficient basis for condemning the practice as anti-competitive. The benefits of standardisation may far outweigh the loss of competition. Competition Policy/Law must focus on competition, not on protecting individual competitors.

5.2.8 Still, standards can have anti-competitive consequences. Standards setting may protect supra-competitive pricing by raising the costs of rivals, excluding them from competing effectively or by raising unwarranted barriers to entry. For example, members of an industry may use standards to protect a price-fixing conspiracy by deliberately excluding innovative or lower priced products through the adoption of restrictive standards.

5.2.9 Transition from regulation to reliance on Competition Policy is likely to engender facilitation of access to market by foreign suppliers. Some regulations or regulatory situations may have adverse effects on competition and trade. One such situation can be seen in the sanitary and phytosanitary requirements that limit entry unnecessarily or serve as disguised tool for excluding competing suppliers.

5.3.0 Anti-competitive effect arises because of certain countries setting national technical and sanitary and phytosanitary measures at levels much higher than the generally accepted international levels. While such measures are adopted with the ostensible objective of safety of or protecting human, animal or plant life, they provide a certain definite protection to the domestic industries by insulating them to some extent, from outside competition. The protectionist effect of these measures becomes even more telling, when viewed in the context that the involvement of the developing countries is still rather minimal in international standards-setting organisations.

5.3.1 While one may not cavil at the desirability of adequate standards to be set for safeguarding the health of consumers and for preserving global resources, any attempt to block trade, particularly the exports of developing countries cannot be countenanced by using the ploy of high and restrictive sanitary and phytosanitary standards.

5.3.2 Competition Policy/Law should take care of anti-competitive effects of the kind mentioned above which are protectionist in nature.

5.3.3 Technical Barriers to Trade

Many countries impose barriers of a technical nature essentially to protect their domestic industries. Such technical barriers distort trade. There are a number of instances of imposition of standards by some developed countries that are either beyond the technical competence of developing countries like India or do not take into account fundamental climatic or geographical factors in such countries. Such technical standards are emerging as one of the major non-tariff barriers to market access. Competition Policy/Law needs to provide for dealing with situations, in which anti-competitive effects may surface when technical barriers come in the way of the country's export trade and affect competition in the export market. This naturally involves the extra-territorial reach of Competition Law.

5.3.4 In the Indian Legislation like the "Prevention of Food Adulteration Act", which is the mother legislation in India on food safety and food quality, there are certain restrictions which find no place in the legislations in most developed and developing countries. Such restrictions may result in barriers to import of quality processed food which are freely sold in the international market. The Committee recommends to the Government that the existing laws in this regard may be examined with a view to removing technical barriers to trade which are essentially anti-consumer in character.

5.3.5 Government Procurement

The rules of General Agreement on Tariffs and Trade specifically exempt purchases made by Governments and the agencies controlled by them from the National Treatment rule. Government agencies importing their requirements are not obliged to extend Most Favoured Nation Treatment to external suppliers of such products but only to give them fair and equitable treatment. These provisions permit purchasing agencies to buy their requirements, if they so wish, from domestic producers, even though products of comparable quality are offered for sale by foreign suppliers at lower prices.

5.3.6 The WTO Agreement on Government Procurement requires its member countries to accord National and Most Favoured Nation Treatment to Government purchases. But this Agreement, however, is plurilateral and WTO member countries are not obliged to join. Presently, the members who are party to the Agreement are predominantly developed countries. India is not a signatory to the Agreement.

5.3.7 The Competition Policy/Law for India should not give any purchase or price preferences in favour of Government owned departments/enterprises and public enterprises. The only limit that may be built into this stipulation is that such preferences may be given in Government procurement of certain commodities like rice, wheat and cereals designed to cater to the Public Distribution System and the weaker sections of the society. In other words, the sovereignty of the Government in laying down and implementing a policy for the weaker sections of the society, should not be subject to any externalities like limitations of Competition Policy/Law. Another rider that could be built into Competition Law is that in respect of Government procurement, the application of National Treatment rule and Most Favoured Nation Treatment rule to foreign suppliers may not be made mandatory (in line with the rules of General Agreement on Tariffs and Trade).

5.3.8 Extra-Territorial Reach

Some anti-competitive practices may have extra-territorial origin or extra-territorial impact. For instance, some mergers and acquisitions may have significant effects beyond the borders of the country in which the merging parties are based or have production facilities. In such matters, the concept of "relevant market" for Competition Law purposes will come into play (see the section on mergers in the previous Chapter, supra).

5.3.9 The applicability of domestic Competition Law to arrangements entered into outside a country's borders, so long as such conduct has significant effects in the country, is important to the control of anti-competitive practices. However, it needs to be noted that extra-territorial application of national laws entails some potential for conflicts between jurisdictions. International co-operation and, in particular, agreements incorporating principles of "positive comity" can be useful in minimising the actual extent of such conflicts between countries participating in such arrangements. A caveat which has justification is that, if a country wants to have extra-territorial reach of its Competition Law, it should allow other countries to have extra-territorial reach of their Competition Laws in its soil.

5.4.0 The Indian Monopolies and Restrictive Trade Practices Act, 1969 has a provision that where any practice substantially falls within monopolistic, restrictive or unfair trade practices relating to production, storage, supply, distribution or control of goods of any description or the provision of any services and any party to such practice does not carry on business in India, the Monopolies and Restrictive Trade Practices Commission can make an order under the Act with respect to that part of the practice which is carried on in India. This extra-territorial reach provision may be appropriately retained in the Competition Law under consideration and design.

5.4.1 Summary

Competition Policy/Law needs to have necessary provisions and teeth to examine and adjudicate upon anti-competition practices that may accompany or follow developments arising out of the implementation of WTO Agreements. In particular, agreements relating to foreign investment, intellectual property rights, subsidies, countervailing duties, anti-dumping measures, sanitary and phytosanitary measures, technical barriers to trade and Government procurement need to be reckoned in the Competition Policy/Law with a view to dealing with anti-competition practices. The Competition Law should have extra-territorial reach.

Chapter VI

COMPETITION COMMISSION OF INDIA

6.1.1 Administration and enforcement of the Competition Law requires an administrative set up. This administrative set up should be more proactive than reactive for the administration of the Competition Policy. This is not a mere law enforcement agency. This administrative set up should take a proactive stand to be specified and adopted to promote competition by not only proceeding against those who violate the provisions of the Competition Law, but also by proceeding against institutional arrangements and public policies that interfere with the fair and free functioning of the markets. It is in this context that a Competition Law Authority should have the following two basic functions:

a) Administration and enforcement of Competition Law and Competition Policy to foster economic efficiency and consumer welfare.

b) Involvement proactively in Governmental policy formulation to ensure that markets remain fair, free, open, flexible and adaptable.

6.1.2 Specialised Courts

In many countries, enforcement of Competition Law is entrusted to the judiciary. The Competition Law Authority makes an application to the appropriate law courts seeking orders to implement its decisions. In most statutes, appeals against the Competition Law Authority's decisions may lie to the judicial courts at the highest or near highest level. The parties involved will have the right for preferring such appeals. In many Competition Laws, private parties and victims of prohibited trade practices have the right to institute competition cases before the Competition Law Authority or a law court.

6.1.3 In many developed countries and economies in transition, the judiciary therein may be inexperienced in dealing with free market problems. Such problems relating to free and fair trade and relating to restrictive and other prohibited trade practices like abuse of dominance, require a certain level of specialised knowledge in economics, trade and the relevant law for adjudication. Even if the judiciary has the reputation and exposure to commerce and market-related matters, the Competition Law administration will be better handled, if a specialised agency is set up for the purpose. With due respect to the judiciary around the world and in particular India, it needs to be underscored that, in the era of specialisation, Competition Law would be better administered and consumer welfare better subserved, if placed in the hands of a specialised agency.

6.1.4 It is therefore recommended that for the administration and enforcement of Competition Law in India, a Specialised Court/Tribunal which can be christened "COMPETITION COMMISSION OF INDIA" may be established. The Competition Commission of India (CCI) will hear competition cases and also play the role of competition advocacy. The composition of the CCI needs to be tailored to the requirements of the Competition Policy and the Competition Law. CCI should be empowered to adopt procedures and rules of evidence specifically suited to competition cases.

6.1.5 Principles Governing Competition Law And Authority

a) CCI should be a multi-member body comprised of eminent and erudite persons of integrity and objectivity from the fields of Judiciary, Economics, Law, International Trade, Commerce, Industry, Accountancy, Public Affairs and Administration.

b) CCI should be independent and insulated from political and budgetary controls of the Government. The independent functioning of the CCI members needs to be ensured by having appropriate provision for their removal, only with the concurrence of the Supreme Court.

c) CCI should separate the investigative, prosecutorial and adjudicative functions.

d) The proceedings of CCI should be transparent, non-discriminatory and rule-bound.

e) CCI should have a positive advocacy role in shaping policies affecting competition.

To ensure the above, Competition Law should:

(i) provide a system of checks and balances by ensuring due process of law with provisions for appeal and review.

(ii) have extra-territorial reach.

(iii) have punitive provisions for punishing the offenders besides other remedial methods (reformatory).
(See Chapter IV also)

6.1.6 Competition Commission - A Framework of the Administrative Structure

It may be noted that in the view of the Committee, the Competition Commission of India should be the sole recipient of all complaints regarding infringement of the Competition Act from whatsoever sources it may be; an individual, a firm or an entity or the Central or State Governments. The Competition Commission will also have suo motu powers for initiating action against any perceived infringement.

6.1.7 Keeping in view the above principles, a suggested framework of CCI is described below. Under the extant MRTP Act, there is a requirement for registration of agreements relating to restrictive trade practices. It is not clear from experience as to what purpose the registration serves, apart from adding to unnecessary paper work. The new Competition Law should scrap the registration requirements altogether.

6.1.8 Investigation, Prosecution, Adjudication, Mergers Commission And Competition Advocacy

A) Investigation and Prosecution

Prosecutorial wing should be separated from the investigative wing. At the apex level of the investigative and prosecutorial wings, there may be only one official who may be designated as Director General (Investigation & Prosecution). The Director General will not have suo motu powers of investigation. He will only look into the complaints received from the Competition Commission of India and submit his findings to the Competition Commission of India. But the two wings under this functionary should be independent so that each wing is not burdened with the functions and responsibilities of the other wing. For instance, investigators should be solely responsible for making enquiries, for examining documents, for making investigations into complaints and for effecting interface with other investigative agencies of the Government including Ministries and Departments. The investigators should not be burdened with prosecuting the cases in the CCI after investigation, which means attending the Tribunal's hearings, constructing pleadings, counter pleadings etc. and advancing arguments before the Benches of the CCI. Likewise, the prosecuting agency should be solely responsible for conducting prosecutions in the CCI, which implies court work and attending the Tribunal's hearings.

6.1.9 The investigation staff need to be chosen from among those, who have expertise in investigation and who have deductive and exploratory skills and are known for their integrity and objectivity. They should not be drawn routinely from those working in the Department of Company Affairs. The prosecutorial wing, similarly, should comprise of advocates, chartered accountants, cost accountants and company secretaries who are well experienced in Competition Law matters and International Trade and who are known for their integrity and objectivity. The prosecutorial wing need not be a permanent staff based unit but should consist of a panel of prosecutors drawn as mentioned above. As and when cases come up for prosecution, the prosecutors may be assigned briefs. The Director General (Investigation and Prosecution), by virtue of his unified command, can very well co-ordinate the functioning of the two wings.

6.2.0 Depending on the load, the committee recommends that the Government should create Deputy Director Generals in all the cities where Benches of CCI are situated. They will investigate the cases referred to them from the regional Benches and submit their findings to the regional Benches direct without necessarily routing it through Director General at Headquarters.

6.2.1 It is desirable to prepare guidance manuals spelling out the nature, scope and manner of investigation. By and large, these manuals should be followed by the investigation staff and any departure therefrom must have the prior approval of the Director General (Investigation and Prosecution). This is to ensure that there are no “fishing and rowing” enquiries designed to threaten and harass corporates. The Committee recommends that every company through its Board of Directors should nominate a “Compliance Officer” who should be responsible for ensuring compliance with the requirements of Competition Law. He/she will face the consequences for its breach, if any. The Whole-time Directors including the Managing Director/Chief Executive Officer will also be responsible for breach of Competition Law.

Directors-simplicitors or part-time Directors should not ordinarily be prosecuted, unless their liability is clearly established on record.

B) Adjudication

6.2.2 Central to effective implementation and enforcement of Competition Policy and Competition Law is an appropriate competent and effective adjudicative body, in the instant case, the Competition Commission of India. CCI will have to be a quasi judicial body with autonomy and administrative powers. It should be an independent statutory body without any political or budgetary control of the Government. Like the Supreme Court of India, the CCI should be free to control its budget, after the Parliament votes its budgetary subvention. The remuneration of the Chairperson and Members of the CCI and all other expenditure should be a charge on the Consolidated Fund of India.

6.2.3 CCI will be a multi-member body with its Chairperson and Members chosen for their expertise, knowledge and experience in Judiciary, Economics, Law, International Trade, Commerce, Industry, Accountancy, Public Affairs and Administration. It is imperative that those selected have a record of unimpeachable probity, integrity and solvency.

6.2.4 The number of Members of CCI is obviously relatable to its work load. <u>It needs to be kept in view that the Mergers Commission (see below) will be a part of CCI and at least two Members will have to be detailed to deal with cases of mergers, amalgamations, acquisitions and take-overs.</u> It is suggested that the Headquarters may have two Benches of two members each, of which one will be the Mergers Commission Bench. The Headquarters of the CCI may be located at a Metropolitan centre outside Delhi.

6.2.5 There will be three Benches, in addition to the Headquarters Benches and they may be located at Delhi, Calcutta, Mumbai and Chennai. Later depending upon the workload and experience, more Benches may be created at other places. This means that CCI (including Mergers Commission) should have not less than ten Members including the Chairperson. The Headquarters will have one Bench of two members as Mergers Commission. It will also have another Bench of two members to deal with the competition matters. All the other three metropolitan cities will have one Bench of two members each to deal with the competition matters, in addition to the Headquarters Bench.

6.2.6 Each Bench must have a judicial member, as it will have the power of imposing sentences of imprisonment, in addition to levying fines. A judicial member will be one who is a sitting or retired Supreme/High Court judge or one who is qualified to be a Supreme/High Court judge.

C) Mergers Commission

6.2.7 In Chapter IV, mergers, amalgamations etc. were given a treatment under the competition perspective and the recommendations therein would have to be kept in view in suggesting an agency for having surveillance over them. For those cases of mergers, amalgamations etc. which need to be examined on the touchstone of competition, before the event takes place, it is desirable to have a Mergers Commission, which will be a part of the Competition Commission of India, but which will be a separate Bench to handle pre-merger scrutiny cases. This is to ensure that there is no avoidable delay in dealing with such scrutiny, as delays can prevent bodies corporate from being competitive globally. An appropriate rider in the merger provisions should be that, if the Mergers Commission does not finally decide against a merger within a stipulated period of say ninety days, it would be deemed that approval has been accorded.

6.2.8 In this connection, the existence and regulations of the Securities Exchange Board of India (SEBI) have to be taken into account. This Board has made an effort to put in place a regulatory framework to ensure equal opportunities and interests of the investors and to create deeper capital markets. Regulations dealing with unfair practices, like insider dealing, have been enforced to international standards. The Board has laid down a take-over code to ensure competitive bids and free transferability of company shares so that shareholders get the choice as well as the right price for their shares. The idea behind the code is to provide greater transparency in the acquisition of shares and the take-overs of a company.

6.2.9 It is recommended that the take-over code provisions and the regulations relating to acquisition of the Securities Exchange Board of India may be continued to be administered by that Board itself and need not be made a part of Competition Law. However, appeals against the decisions of the Securities Exchange Board of India may lie to the CCI and the Mergers Commission will deal with such appeals. This implies that the SEBI Act may have to be amended appropriately to provide for appeals to CCI.

6.3.0 Presently the Companies Act, 1956 provides for consideration and approval of compromises and arrangements including mergers and amalgamations in Sections 391 to 396 thereof. Furthermore, Sections 108A to 108H of the Companies Act, 1956 also provide for approval of the Central Government in respect of acquisition and transfer of shares including acquisition / transfer of shares by dominant undertakings or which will lead to dominant undertakings.

6.3.1 The Committee feels that the provisions covering mergers and amalgamations and acquisition and transfer of shares may be continued in the Companies Act, 1956, as there are issues other than Competition that enter consideration by the High Court or the Authorities concerned. The only matter that requires consideration is the definition of "Dominant Undertakings" which expression occurs in Sections 108 A to 108H of the Companies Act, 1956. The definition of "Dominance" in the new Competition Law under discussion in this report leading to a draft law should govern "Dominant Undertakings" for the purposes of the Companies Act, 1956.

6.3.2 Reverting to the Mergers Commission, the Committee emphasises the fact that only mergers and amalgamations beyond a threshold limit – Rs.500 crores or Rs.2000 crores group in terms of combined assets after Merger both linked to Wholesale Price Index - in respect of which pre-notification is compulsory will come up before the Mergers Commission. If the Mergers Commission prima-facie comes to the conclusion that the merger will have the effect of creating a monopoly or affecting or restricting competition, it must pass a reasoned order within a period of 90 days, calling upon the merging companies not to proceed with the merger. If no such order is passed, approval of the Commission will be deemed to have been granted for the merger.

6.3.3 Selection of Chairperson and Members of CCI

In order to ensure competent and effective implementation of Competition Policy and Competition Law, it is important and imperative to select suitable persons, suitability having been described in the earlier paragraphs. Stress has been made of the need for the CCI to be free of political control. While, it is practically difficult to eliminate political favouritism, it can be minimised to a great extent by resorting to what may be described as a "Collegium Selection Process". An appropriate Collegium needs to be stipulated which will collectively undertake and discharge the task and responsibility of choosing a suitable person for the posts of Chairperson and Members of the CCI.

6.3.4 The Collegium for choosing the Chairperson and Members may consist of the following:

1. Chief Justice of India
2. Speaker of the Lok Sabha
3. Finance Minister
4. Concerned Minister (of the administrative Ministry dealing with CCI)
5. Governor of the Reserve Bank of India

<u>The decisions and choice of the Collegium will be binding on the Government.</u>

6.3.5 Status of the Chairperson & Members of CCI

The Chairperson of CCI will hold the rank and be entitled to the pay and perquisites of a Judge of the Supreme Court. Similarly, the Members of the CCI will hold the rank and be entitled to the pay and perquisites of a Judge of the High Court. The term of the Chairperson and Members of CCI may be five years at a time. The Committee feels that for the Chairperson the maximum age limit may be fixed at 70 years and 65 years for the Members. The Chairperson of the CCI can be from any of the fields/disciplines listed earlier in this Chapter, as the Competition Law is a socio-economic legislation and is not just a judicial body to try adversarial cases. In other words, it should not be mandatory that the Chairperson should be only from the judiciary. As the Chairperson should be one who has considerable exposure and knowledge in International Trade, Commerce and complicated issues relating to Trade, the net needs to be cast very wide in order that an appropriate person is selected for this post.

6.3.6 The Chairperson and Members of the CCI may be removed from office by the Government only with the concurrence of the Supreme Court, if he/she

a) has been adjudged an insolvent
b) has been convicted of an offence involving moral turpitude
c) has acquired financial or other interest, as is likely to affect prejudicially his/her functions
d) has become physically or mentally incapable of discharging his/her functions.

6.3.7 In order to protect the Chairperson and Members of CCI from prosecutions and claims, full immunity needs to be given to them when carrying out their functions. A bar may be created for the Chairperson and Members of the CCI from holding any appointment in or being connected with the management or administration of any industry or undertaking for a period of three years after their demitting office.

6.3.8 A code of ethics needs to be stipulated for observance by the Chairperson and the Members of the CCI on lines similar to the one that governs the higher judiciary. The Chairperson of the CCI may be empowered to lay down an appropriate code of ethics for this purpose.

6.3.9 Benches

Instead of being an unitary Tribunal, as is the case with the MRTP Commission, it is suggested that the CCI should have Benches in the metropolitan cities of the country. The Committee suggests that the Headquarters of the CCI may be located in a city outside Delhi. Permanent Benches may be constituted at Delhi, Calcutta, Mumbai and Chennai and further Benches in other metropolitan centers may be decided by the Government from time to time based on the workload and experience. For important cases and review matters, the Chairperson should have the power to constitute Benches larger than two Members and list them at the Headquarters or any metropolitan centre.

6.4.0 Appointment of Staff

There should be a Registrar for the CCI, who should be well versed in court procedures. He will look after the Registry and court requirements in all aspects. The CCI should be given the power to appoint its staff including its Registrar. Rules and regulations for such appointment need to be prescribed in detail. The Director General (Investigation and Prosecution), however, may be left to the Government to appoint. The CCI will have the power to initiate suo motu inquiries relating to anti-competition practices. In such cases, the prosecutorial and adjudicative wings will have to be the same. This exception is inevitable in the context of the fact that the CCI is not only an adjudicative body but also a watchdog against anti-competition practices. In suo motu cases, the CCI will require the Director General (Investigation and Prosecution) to conduct prosecutions on behalf of the Commission through the members of the panel of prosecutors. This particular facet of enquiries has been mentioned here, as there is intrinsically, an overlap of prosecutorial and adjudicative functions of the CCI.

6.4.1 Powers and Rules of Procedure

The CCI will have the power to formulate its own rules and regulations to govern the procedure and conduct of its business and also its administration. It will have the power to issue orders for interim relief and to impose fines and sentences of imprisonment against those who violate any provision of Competition Law. In particular, it should have powers to impose recoveries, award penalties and award compensation in cases of abuse of dominance. Even in respect of other violations, there should be a provision for awarding compensation to the victims. Details in this regard are incorporated in the draft Competition Law in this report. There should be provisions for treble damages and exemplary fines against frivolous and vexatious complaints. Appeals against the decisions of the CCI will lie only to the Supreme Court of India. CCI will also have the power to review its own orders, as is presently available to the MRTP Commission under the MRTP Act, 1969.

6.4.2 CCI should have powers not only to formulate own rules and regulations to govern the procedures and conduct of its business and administration, but should also have the powers to frame 'Regulations' which could supplement the provisions of competition law. Since some of these regulations which will supplement the competition law will have to have a direct bearing with prevalent economic conditions, the CCI could from time to time review and amend these regulations. This would have the added benefit of ensuring consistency and would minimise the risk of uneven application of law that emerge as a result of following a case by case basis of examination. Most importantly, these regulations would put trade and industry at advance notice on how the competition commission was likely to look at certain aspects of their conduct and behaviour, <u>i.e. what is acceptable and what is not acceptable</u>. All policy directions by the Government should be binding on the Competition Commission.

6.4.3 The trial before the CCI should be summary in nature. All evidence should be by way of affidavits unless, in exceptional cases, the CCI would like cross examination of the witnesses by the other side or would like to seek clarifications from those who have sworn the affidavits. By and large, the Code of Civil Procedure, 1908 should not be made applicable and the procedure to be followed may be made by the CCI itself through Regulations. CCI should have the power to co-opt experts, where it deems fit.

6.4.4 CCI should be clothed with powers of contempt in respect of non-compliance of its orders. However, the Committee feels that the powers of contempt of the Commission itself may not be necessary to be provided in the Competition Law.

6.4.5 The CCI should have powers under the Competition Law to review the orders of other regulatory authorities on the touchstone of Competition.

6.4.6 Advance Ruling

Parties subject to Competition Law, should be helped to comply with it and to plan their activities accordingly. Much of this assistance could come through the publication of enforcement guidelines articulating how the CCI will interpret and apply the law. In addition, while protecting confidentiality, the CCI should be required to publish all prohibition orders and decisions imposing sanctions, fines and imprisonment with supporting reasons. There is also a need for a process whereby parties can attain advance rulings from the CCI, concerning planned courses of action.

6.4.7 Competition Advocacy

The mandate of the CCI needs to extend beyond merely enforcing the Competition Law. It needs to participate more broadly in the formulation of the country's economic policies, which may adversely affect competitive market structure, business conduct and economic performance. The CCI therefore, needs to assume the role of competition advocate, acting proactively to bring about Governmental policies, that lower barriers to entry, promote de-regulation and trade liberalisation and promote competition in the market place. There is a direct relationship between competition advocacy and enforcement of Competition Law. The aim of competition advocacy is to foster conditions that will lead to a more competitive market structure and business behaviour without the direct intervention of the Competition Law Authority, namely, the CCI.

6.4.8 A successful competition advocacy can be viewed in terms of the following :

1. CCI must develop relationship with the Ministries and Departments of the Government, regulatory agencies and other bodies that formulate and administer policies affecting demand and supply positions in various markets. Such relationships will facilitate communication and a search for alternatives that are less harmful to competition and consumer welfare.

2. CCI should encourage debate on competition and promote a better and more informed economic decision making.

3. Competition advocacy must be open and transparent to safeguard the integrity and capability of the CCI. When confidentiality is required, CCI should publish news releases explaining why.

4. Competition advocacy can be enhanced by the CCI establishing good media relations and explaining the role and importance of Competition Policy/Law as an integral part of the Government's economic framework.

6.4.9 Important Requirement

At the cost of repetition, it needs to be emphasised, that weak enforcement of Competition Law is worse than the absence of Competition law. More often than not, weak enforcement has a causal factor, namely, inadequate funding of the enforcement authority, in this case, the CCI. The Government should provide the required infrastructure and funds to make the CCI an effective Tribunal to prevent, if not eliminate anti-competition practices and also to play its role of competition advocacy.

6.5.0 Summary

1) A Competition Law Authority christened "COMPETITION COMMISSION OF INDIA" (CCI) may be established to implement the Indian Competition Act. It will hear competition cases and also play the role of competition advocacy.

2) CCI should be a multi-member body comprised of eminent and erudite persons of integrity and objectivity from the fields of Judiciary, Economics, Law, International Trade, Commerce, Industry, Accountancy, Public Affairs and Administration. The investigative, prosecutorial and adjudicative functions will be separate.

3) The CCI will be the sole recipient of all complaints against infringement of the Indian Competition Act from any source whatsoever be it, it may be an ordinary citizen, business firm or any other entity including the Central and State Governments. There will be no suo motu powers for the Director General to initiate any action of investigation. He will only investigate cases referred to him by the Competition Commission.

4) There will be a collegium for choosing the Chairperson and Members of the CCI. The Chairperson can be from any of the fields/disciplines listed above and should be an eminent

person who has considerable exposure and knowledge in International Trade, Commerce and complicated issues relating to Trade. For the Chairperson, the maximum age limit may be fixed at 70 years and for the Members, 65 years. The terms of the Chairperson and Members of the CCI may be five years at a time. The Chairperson will hold the rank and be entitled to the pay and perquisites of a judge of the Supreme Court and the Members, those of a judge of the High Court. They can be removed from the office by the Government only with the concurrence of the Supreme Court. A code of ethics needs to be stipulated for observance by them.

5) The Committee suggests that the Headquarters of the CCI may be located in a city outside Delhi with permanent Benches at Delhi, Calcutta, Mumbai and Chennai with further Benches to be decided by the Government from time to time.

6) Two members of the CCI will constitute the Mergers Commission. CCI will have not less than 10 members including the Chairperson. The Headquarters will have one Bench of two members as Mergers Commission. It will also have another Bench of two members to deal with the competition matters. All the other three metropolitan cities will have one Bench of two members each to deal with the competition matters, in addition to the Headquarters Bench.

7) Each Bench must have a judicial member.

8) CCI will have the power to formulate its own rules and regulations to govern the procedure and conduct of its business and also its administration. It will have powers to impose fines and sentences of imprisonment, to award compensation and to review its own orders.

9) The trial before the CCI should be summary in nature. It will have limited powers of contempt. It will also have powers to review the orders of other regulatory authorities on the touchstone of competition. There will be a provision for advance ruling. The investigative and prosecutorial wings will be separate but headed jointly by The Director General (Investigation & Prosecution).

10) The Competition Commission will be the sole authority to receive complaints against the infringement of Competition Law from individuals, business firms, entities, Central or State Governments.

11) The Director General will not have suo motu powers of investigation. He will examine only such complaints received from the Competition Commission.

Chapter VII

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RELEVANCE OF THE MRTP ACT IN A COMPETITIVE MILIEU

7.1.1 This Chapter addresses two issues, namely

A. Whether it is desirable to amend the existing Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act for short) or to enact a new Competition Law.
B. Whether the jurisdictions under the MRTP Act and the Consumer Protection Act, 1986 (CPA) overlap and if so, what ought to be done.

While the aforementioned two issues are disparate, they are also inter-linked in the sense that irrespective of whether ultimately the recommendation will be to enact a new law or to amend the existing MRTP Act, the provisions in the CPA will have to be kept in view so that there is no avoidable overlap. It is therefore, proposed to deal with these two issues separately under two sections - A and B - and make recommendations for both the issues conjointly.

A. Amendment to MRTP Act or Enactment of a new Law

7.1.2 Many countries like Australia, Canada, U.K. European Community have Competition Laws. U.S.A. covers competition in more than one statute. India has a Competition Law -- if at all, it can be called so - in the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act).

7.1.3 Unlike the Competition Laws of the countries mentioned above, which address engendering competition in the market and trade, and which address anti-competition practices, the existing Indian Competition Law, namely, the MRTP Act falls considerably short of squarely addressing competition and anti-competition practices. One could argue that the restrictive trade practices listed in the MRTP Act are all anti-competitive practices and thus it constitutes the country's Competition Law. But the extant MRTP Act, in comparison with Competition Laws of many countries is inadequate for fostering competition in the market and trade and for reducing, if not eliminating, anti-competitive practices in the country's domestic and international trade.

7.1.4 Specifically the expression "Competition" figures in section 2(o) of MRTP Act. The said section defines a restrictive trade practice. Section 2(o) of the Act reads as under:

Section 2(o): "restrictive trade practice" means a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular, ______

(i) which tends to obstruct the flow of capital or resources into the stream of production, or

(ii) which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions."

7.1.5 Yet another section that refers to "Competition" is in fact a gateway or an escape valve from indictment by the MRTP Commission. Section 38(1)(h) of the Act states that if a particular restrictive trade practice "does not directly or indirectly restrict or discourage competition to any material degree in any relevant trade or industry and is not likely to do so", it can pass through this gateway and escape a cease and desist order by the MRTP Commission.

7.1.6 This last mentioned gateway provision section 38(1)(h) can be pleaded by an offending party which has indulged in a restrictive trade practice on the ground that the said restrictive trade practice has no material effect on competition in the relevant trade and industry.

7.1.7 Present Law

The present extant law in India, namely the MRTP Act, lacks provisions to deal with anti-competition practices that may accompany the operation and implementation of the WTO agreements. Many of the anti-competition practices will have to be spelt out instead of having to rely on section 2(o) of the MRTP Act which merely speaks of prevention, distortion, or restriction of competition in a very broad general sense. Specific provisions may be necessary to deal with identifiable anti-competition practices that may accompany international trade in the WTO regime.

7.1.8 Furthermore, during the administration of the MRTP Act over the last 30 years, there have been a large number of binding rulings of the Supreme Court of India and also Bench decisions of the MRTP Commission. These decisions have interpreted the various provisions of the MRTP Act from time to time and have constituted a precedent for the future. Thus, where the wording of the existing law has been considered inadequate by judicial pronouncements, it may necessary to redraft the law to inhere the spirit of the law and the intention of the lawmakers. It may therefore be apposite to enact a new law instead of attempting a large number of amendments and enacting a large number of new provisions and incorporating them in the existing law.

7.1.9 A perusal of the MRTP Act will show that there is no definition nor even a mention of certain offending trade practices which are restrictive in character. Some illustrations of these are:

- Abuse of Dominance
- Cartels, Collusion and Price Fixing
- Bid Rigging
- Boycotts and Refusal to Deal
- Predatory pricing

7.2.0 One could argue that many of the anti-competition practices or restrictive trade practices may be covered by one or other of the clauses of section 33(1) of the MRTP Act. But experience shows that there has been a plethora of decisions on some of the clauses of the section 33(1) of the Act, often at variance with one another. For instance, in dealing with concessions, benefits, discounts etc. there has been a string of decisions not necessarily in consonance with each other. Cartels, to give another illustration, are not mentioned or defined in any of the clauses of section 33(1) of the MRTP Act, though the MRTP Commission has attempted to fit such offences under one or more clauses of section 33(1) by way of interpretation of the language used therein.

7.2.1 Another argument that could be advanced is that section 2(o) of the MRTP Act may cover all anti-competition practices, as it is a general definition dealing with prevention, distortion or restriction of competition. While complaints relating to anti-competition practices can be tried under the generic definition of restrictive trade practice (which prevents, distorts or restricts competition), the absence of specification of identifiable anti-competition practices always gives room to different interpretations by different courts of law, with the result that the spirit of the law may escape being captured and enforced. While a generic definition may be necessary and may form the substantive foundation of the law, it still will be necessary to identify specific anti-competition practices and define them so that the scope for a valve or opening on technical grounds for the offending parties to escape indictment may not obtain.

7.2.2 It has been noted earlier that a large number of anti-competition practices that may accompany trade practices, during the implementation of the WTO agreements will have to be drafted and incorporated in the Competition Law. Amendment of the MRTP Act, in the context of the requirements outlined above, may, therefore will have to be very extensive, tantamounting to enacting a new Law. On balance, it appears eminently desirable to enact a new Competition Law without tinkering with the existing MRTP Act.Furthermore, as would be seen in the next section of this chapter, the entire provisions relating to unfair trade practices will have to be taken out of the MRTP Act as they figure in the Consumer Protection Act, 1986. Mergers, Amalgamations etc. will have to be brought within the contours of Competition Law afresh. For all these reasons, a new law is warranted.

7.2.3 Another dimension to be kept in view is the dynamic context of international trade and market as well as the domestic trade and market. When the 1969 Act was drafted, the economic and trade milieu prevalent at that time constituted the premise for its various provisions. There has been subsequently a sea change in the milieu with considerable movement towards liberalisation, privatisation and globalisation. The law has to yield to the changed and changing scenario on the economic and trade front. This is yet another reason why a new Competition Law may be framed instead of making an effort to amend the existing MRTP Act. Many countries like the U.K., Canada, Australia and the European Community have, in line with this thinking, enacted new Competition Laws and repealed their earlier laws governing fair trading, etc.

B. MRTP ACT AND CONSUMER PROTECTION ACT OVERLAP

7.2.4 One of the terms of reference for the Committee on Competition Policy/Law is to examine the jurisdictions of the MRTP Commission under the MRTP Act, 1969 and the Consumer Courts under the Consumer Protection Act, 1986 and recommend measures for ensuring clear demarcation between them and for avoiding any overlap. This section addresses the issues relevant to this term of reference.

7.2.5 Monopolies And Restrictive Trade Practices Act, 1969 (MRTP Act)

The genesis of the MRTP Act, 1969 is traceable to Articles 38 and 39 of the Constitution of India. The Directive Principle of State Policy in those Articles lays down, inter-alia that the 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 the national life, and the State shall, in particular, direct its policy towards securing:

1. that the ownership and control of material resources of the community are so distributed as best to subserve the common good; and

2. that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

7.2.6 The thrust of the MRTP Act is directed towards

a. prevention of concentration of economic power to the common detriment
b. control of monopolies
c. prohibition of monopolistic trade practices
d. prohibition of restrictive trade practices and
e. prohibition of unfair trade practices.

7.2.7 Major amendments were effected to the MRTP Act in 1991. Provisions relating to concentration of economic power, pre-entry restrictions with regard to prior approval of the Central Government for establishing a new undertaking, expanding an existing undertaking, amalgamations, mergers and take-overs of undertakings were all deleted from the statute through the amendments. The causal thinking in support of the 1991 amendments is contained in the Statement of Objects and Reasons appended to the 1991 amendment bill in the Parliament, extract in part of which, runs as follows:

"With the growing complexity of industrial structure and the need for achieving economies of scale for ensuring higher productivity and competitive advantage in the international market, the thrust of the industrial policy has shifted to controlling and regulating the monopolistic, restrictive and unfair trade practices rather than making it necessary for certain undertakings to obtain prior approval of the Central Government for expansion, establishment of new undertakings, merger, amalgamation, take over and appointment of Directors. It has been the experience of the Government that pre-entry restriction under the MRTP Act on the investment decision of the corporate sector has outlived its utility and has become a hindrance to the speedy implementation of industrial projects. By eliminating the requirement of time-consuming procedures and prior approval of the Government, it would be possible for all productive sections of the society to participate in efforts for maximisation of production. It is, therefore, proposed to re-structure the MRTP Act by omitting the provisions of Sections 20 to 26 and transfer the provisions contained in Chapter III-A regarding restrictions on acquisition and transfer of shares to the Companies Act, 1956. The schedule to the MRTP Act is also consequently to be transferred with modification to the Companies Act, 1956.

7.2.8 It is also proposed to enlarge the scope of inquiry by the MRTP Commission with a view to taking effective steps to curb and regulate monopolistic, restrictive and unfair trade practices which are prejudicial to public interest. It is also proposed to provide for deterrent punishment for contravention of the orders passed by the MRTP Commission and the Central Government and empower the Commission to punish for its contempt. Certain other consequential changes are also found necessary in the MRTP Act.

7.2.9 The criteria for determining dominance, applicable to acquisition and transfer of shares under newly inserted sections 108-A, 108-B and 108-C of the Companies Act, 1956, is proposed to be determined only on the basis of market share of 25% of the total goods produced, supplied, distributed or services rendered in India or substantial part thereof."

7.3.0 With the restructuring of the MRTP Act through the 1991 amendments, the thrust of the Act is on curbing monopolistic, restrictive and unfair trade practices with a view to preserving competition in the economy and safeguarding the interest of consumers by providing them protection against false or misleading advertisements and/or deceptive trade practices.

7.3.1 Consumer Protection Act, 1986 (CPA)

The Consumer Protection Act, 1986 has the objective of providing simplified, inexpensive and speedy remedy for the redressal of the grievances of the consumers in regard to defects in goods purchased by them and/or deficiency in services hired or availed of by them and of providing better protection of the interest of consumers. CPA has provisions for the establishment of Consumer Councils and for the setting up of quasi-judicial machinery at the District, State and Central levels with power to give relief to the consumers and to award compensation for the loss or injury suffered by them.

7.3.2 There is substantial overlap in the coverage of the two enactments, namely, the MRTP Act and the CPA. However, there are several distinctive features of the two enactments in regard to the constitution of the adjudication machinery, jurisdiction, type of persons who may seek relief, nature and scope of relief, administrative procedure etc.

7.3.3 Some important features of difference between the two enactments are:

1. Under the MRTP Act, the MRTP Commission is the only Authority to enquire into the allegations of restrictive and unfair trade practices. Under the CPA, there is a three tier set up, namely, District Forum, State Commission, and National Commission with each of the three Authorities having its own original pecuniary jurisdiction. The State Commission and the National Commission under the CPA have appellate jurisdiction. An appeal against the order of the MRTP Commission under the MRTP Act or the National Commission under the CPA lies to the Supreme Court.

2. The provisions of the MRTP Act do not apply to a banking company, SBI or an insurer as relate to matters in respect of which specific provisions exist in the Reserve Bank of India Act, State Bank of India Act, or Insurance Act, as the case may be. Such an exemption for the banking or insurance companies is not provided in the CPA.

3. Under the MRTP Act, the definition of restrictive trade practice is broad and covers a trade practice which has or may have the effect of preventing, distorting or restricting competition. Certain trade practices are statutorily declared as restrictive in nature. Under the CPA, restricted trade practice relating to a tie-in arrangement indulged in by a trader can only become the subject matter of complaint.

4. A buyer who obtains goods for resale or for a commercial purpose is not regarded as a consumer for the purposes of the CPA and therefore cannot become a complainant thereunder. There is no such bar for invoking the jurisdiction of the MRTP Commission. (Because of judicial interpretation, the definition of consumer in the CPA has been adopted by the MRTP Commission and this difference no longer subsists).

5. Under the CPA, the Central or State Government cannot make a reference for enquiry whereas under the MRTP Act, there is a specific provision enabling them to do so. A further difference is that the CPA redressal Authority cannot suo motu initiate any enquiry into restrictive or unfair trade practice, whereas the MRTP Commission can do so. Unlike in the MRTP Act, there is no office or Authority in the nature of Director General of Investigation and Registration under the CPA to act as the advocate of public interest. There are also differences in regard to the right of a trade association or a consumer association to move the Authorities with complaints under the two enactments.

6. An investigation machinery is available with the MRTP Commission in the form of an office in the nature of Director General of Investigation and Registration who can be required by the Commission to investigate into a complaint and submit a report to it. There is no such machinery under the CPA.

7. The definition of "goods" in the CPA is narrower than that in the MRTP Act. For instance "goods" in the MRTP Act cover shares and stocks including issue of shares before allotment. CPA does not cover shares and stocks. Similarly "service" in the MRTP Act covers a Chit Fund but not in the CPA. Likewise, real estate is covered under "service" in the MRTP Act whereas, only housing construction is covered under "service" in the CPA.

8. Even though both the enactments provide for a cease and desist order by the Tribunal concerned, the power of the MRTP Commission includes issuance of directions for corrective advertisements etc., whereas such a power is not available for the CPA Tribunals.

9. Both the enactments provide for award of compensation. Under the CPA, compensation can be awarded only to consumers whereas under the MRTP Act, compensation can be awarded to consumers, traders and even State and Central Governments.

10. MRTP Commission has powers of injunction whereas the Tribunals under the CPA do not have such a power.

11. CPA has a limitation period of 2 years within which a consumer has to lodge a complaint. There is no limitation period under the MRTP Act.

12. Under the CPA, a time frame has been fixed for the National Commission for disposal of a complaint/appeal. There is no such time frame under the MRTP Act.

13. Under the MRTP Act, the Commission has power to review its order whereas such a facility is not available under the CPA.

14. For violations or contraventions of orders passed by the Tribunal concerned, the punishment is different in the two enactments.

15. Under the CPA, there is a provision for exemplary costs for frivolous or vexatious complaints. There is no such provision in the MRTP Act.

7.3.4 Discussion

Despite the differences in the MRTP Act and the CPA listed above, there is indeed a significant overlap in their provisions and jurisdictions. For instance, the definition of "unfair trade practice" is literally the same in both the enactments. There is now a total overlap in the jurisdiction of the MRTP Commission and the redressal agencies set up under the CPA in regard to curbing of unfair trade practices. An aggrieved consumer can thus approach the MRTP Commission or the Consumer Redressal Agency set up under the CPA for redress of his/her grievance.

7.3.5 CPA as originally framed in 1986 did not cover complaints against restrictive trade practices and did not provide redressal to the consumers against such practices. The CPA was however, amended in 1993, when the jurisdiction of the Act was extended by covering the restrictive trade practice relating to tie-in sales. In so far as the restrictive trade practice relating to tie-in sales is concerned, now there is concurring jurisdiction in the MRTP Commission and the Consumer Disputes Redressal Authorities set up under the CPA. Thus, an aggrieved person can approach any of these two fora for redressal of his/her grievance.

7.3.6 In this connection it is worth while to reproduce section 4(1) of the MRTP Act.

S. 4. Application of other laws not barred.

(1) Save as otherwise provided in sub-section (2) or elsewhere in this Act, the provisions of this Act, shall be in addition to, and not in derogation of, any other law for the time being in force.

7.3.7 The purpose of the above section in the MRTP Act is to declare that the provisions of the said Act have to be applied harmoniously with the provisions of other enactments. In other words, if anything is expressly provided in the MRTP Act, it would override other laws. But the provisions of other statutes will continue to apply with full force where the said provisions are not in conflict with the MRTP Act. The Consumer Protection Act is essentially designed to provide protection to the consumer and redressal in case the consumer is a victim of essentially unfair trade practices. The consumer also gets protection and redressal in regard to one of the restrictive trade practices namely tie-in sales. In as much as the definition of unfair trade practices is the same in both the enactments, it does not make much sense to have two different fora for redressal of the grievances of a consumer victim of unfair trade practices. The redressal Agencies under the CPA have a three tier pecuniary jurisdiction for handling the grievances of consumer victim of unfair trade practices. This implies that irrespective of the amount claimed as compensation for having suffered injury or loss as a consequence of unfair trade practices, a consumer has a specific redressal forum under the CPA. There is therefore no need for an additional forum in the form of an MRTP Commission for redressal of grievances relating to unfair trade practices.

7.3.8 The entire provisions relating to unfair trade practices may perhaps be deleted from the MRTP Act without any loss to the consumers. Further more, unlike the unitary MRTP Commission which is located at Delhi, the Consumer forum at its lowest tier, is available in the District Headquarters proximate to the consumer's place of residence. Needless to add, for the individual consumer, it is inexpensive and more convenient to knock at the doors of the District Consumer Forum or even the State Consumer Forum rather than knock at the doors of the MRTP Commission which has its office only in Delhi.

7.3.9 In respect of the single restrictive trade practice of tie-in sales, perhaps, the minor overlap in the jurisdictions under the two enactments may be allowed to stay for the simple reason that there are suppliers of goods who resort to the practice of tie-in or tie-up sales. There are a number of other restrictive trade practices covered in the extant MRTP Act, which are greatly relevant to the Competition Law now under formulation by the Committee. The particular provision relating to tie-in sales needs to be retained in the Competition Law. It will not therefore be appropriate to exclude the provision relating to tie-in sales from the MRTP Act (or the new Competition)

7.4.0 We recommend that the MRTP Act, 1969 be repealed and the MRTP Commission wound up. A new Competition Law, christened the Indian Competition Act be enacted. Government needs to take necessary action regarding the existing staff of the MRTP Commission. We further recommend that the staff to be attached to the CCI should be professional and comprise experts in the desired fields.

7.4.1 Pending Cases – Transition Arrangements

Presently the MRTP Commission has a large number of pending cases (about 5000) relating to Restrictive Trade Practices (RTP), Unfair Trade Practices (UTP), and Monopolistic Trade Practices (MTP). With the CCI coming into being, the MRTP Commission will have to be wound up. The pending UTP cases may be transferred to the concerned Consumer Courts under the Consumer Protection Act, 1986. The pending MTP and RTP cases may be taken up for adjudication by the CCI from the stages they are in. (Cases relating to tie-in sales/purchases pending before the MRTP Commission will also go before the CCI. This is specifically mentioned, as such cases can also be considered by the Consumer Courts under the Consumer Protection Act, 1986)

7.4.2 Summary

1) A new law called the Indian Competition Act may be enacted on the lines recommended in the report.

2) The MRTP Act, 1969 may be repealed and the MRTP Commission wound up. The provisions relating to unfair trade practices need not figure in the Indian Competition Act as they are presently covered by the Consumer Protection Act, 1986.

3) The pending UTP cases in the MRTP Commission may be transferred to the concerned Consumer Courts under the Consumer Protection Act, 1986. The pending MTP and RTP cases in MRTP Commission may be taken up for adjudication by the CCI from the stages they are in.

Chapter VIII

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COMPETITION POLICY AND PROFESSIONAL SERVICES

8.1.1 Recognising the importance of professional services in a globally competitive milieu, it has been decided to devote a separate chapter on what ought to be done in respect of such services, with the competition regime likely to impact them significantly. During the interaction between the Committee and the Professional Institutes, Chambers of Commerce and the Bar Associations, the need for an appropriate strategy for enhancing the competitiveness of the professional services in the global context was emphasised almost unanimously. The sole attributable factor for this emphasis is the coming into being of the WTO Agreement known as General Agreement on Trade in Services (GATS).

8.1.2 GATS is the first ever set of multilateral, legally-enforceable rules covering International Trade in Services. It was negotiated in the Uruguay Round discussions, when the World Trade Organisation (WTO) came into being. The Agreement incorporates the principles of "Most Favoured Nation" status and "National Treatment" and deals with market reforms, with a view to removing all barriers to trade in services. It further deals with specific subjects like financial services, transport, telecommunications and natural persons.

8.1.3 A comprehensive definition of trade in services is incorporated in the Agreement, in terms of four different modes of supply:

Mode 1: Cross border supply of services - under this mode, the service crosses the sovereign national barriers much like the international trade in goods (eg. international telephone calls)

Mode 2: Consumption abroad - this involves the supply of a service in the territory of one member country to the service consumer of another member country (eg. tourism or a student joining an educational institute abroad)

Mode 3: Commercial presence - under this mode, the supply of a service is rendered through the commercial presence of a foreign supplier in the territory of a member country (eg. establishing branch offices to deliver services such as banking, legal advice or communications)

Mode 4: Movement of natural persons - temporary movement of natural persons falls under this mode. In this category, the provider of the service crosses the border (eg. consultants)

8.1.4 Eleven basic service sectors plus a twelfth category for miscellaneous services constitute the classification of services in GATS. This is based on the United Nations Central Product Classification system. One of the twelve services recognised is designated as business services which include professional and computer services. India has great interest in professional and computer services, as it has a large reservoir of highly skilled and experienced professionals like Lawyers, Chartered Accountants, Cost Accountants, Company Secretaries and Computer and Electronics based Scientists/Technicians, Information Technology/Communications Scientists/Technicians, Engineers, Doctors etc, (there are other categories of professionals and non-mention of them does not mean any reflection on their importance for the country or global competition).

8.1.5 The demand for professional services is a derived demand. Accounting services, for instance, originates in the requirement of a client to meet either statutory requirements or management needs. The dominant mode of supply for accounting services is through commercial presence (mode 3). This is because, accounting professionals prefer to serve their clients through personal contact and development of intimate knowledge of local market conditions.

8.1.6 The next important mode is movement of natural persons (mode 4). Inconclusive negotiations in the Uruguay Round in 1994 primarily focused on securing commitments to allow a larger movement of individual qualified professionals. This category is regarded by many countries, particularly, the developing countries to include many categories of skilled persons like construction workers etc.

8.1.7 India's competitiveness lies more in services rather than in the manufacturing sector. It has a distinct advantage in terms of the second largest English speaking skilled (technically) population after the US. India has a large reservoir of technically skilled population for all levels and sectors. Needless to add, that this advantage will be exploited via GATS negotiations on professional services in future. India's Competition Policy and Competition Law need to be in the perspective that subserves the above mentioned advantage, the country is enjoying, in terms of its professionals and skilled persons.

8.1.8 The mode 4 commitments undertaken by developed countries are rather modest. India is making a demand for higher commitments of movement of natural persons, particularly professionals. The barriers to higher levels of movement are often created by developed countries through one or more of the following:

- Additional tariff/tax on the nationals of foreign countries that do not apply to one's own nationals.
- Other regulatory restrictions on the nationals of foreign countries.
- Quantitative limits of temporary movement of natural persons (eg. H 1B visas).
- Fees/charges applicable for providing social security net to temporary movement of natural persons.
- Non-tariff barriers on the movement of natural persons.

The Competition Policy/Law needs to deal with such anti-competitive practices.

8.1.9 Liberalisation and Professions

With liberalisation, privatisation and globalisation emerging gradually in all economic activities, the importance of professions has become more than ever before, important, if not critical for their survival and growth. Financial lending decisions, mergers and acquisitions, privatisation of State-owned enterprises, valuation of public assets, stock market developments, issues relating to Foreign Direct Investment and the like require professionals in the area of law, accountancy and finance. Those operating in multi-national environment desire integrated solutions to support decision making. Electronic commerce is opening up entirely new areas, which requires a high degree of interaction between accountants and software professionals.

8.2.0 Professions in India

It is not proposed to give a treatment to all professions in this section or Chapter. Suffice it to give a treatment to the professions of accountancy and law, by way of illustration and mutatis mutandis, the conclusions and suggestions can apply to almost every profession.

8.2.1 The accountancy sector is regulated in India through a combination of both law and professional self-regulation. The Chartered Accountants Act, 1949 governs the profession of chartered accountancy in the country. Likewise, the Cost and Works Accounts Act,1959 governs the profession of cost accountancy. The Advocates Act, 1961 governs the profession of lawyers. The Chartered Accountants Act, 1949 and the regulations thereunder impose certain restrictions in forming partnership firms. There are restrictions on the trade name having a nexus with individual or group of individuals (abstract names are not allowed), on the number of partners (restricted to twenty) and on the number of statutory audits of companies (not more than twenty per partner). For reason of reciprocity, the Institute of Chartered Accountants does not recognise any foreign qualification. This reciprocity factor is grounded on National honour, professional self-respect and the desire of the Institute to use it as a bargaining chip. While these considerations have some justification, they affect adversely the employment of Indian professionals abroad.

8.2.2 The regulations under the Chartered Accountants Act, 1949 prohibit an accountant from advertising, soliciting custom, paying commission, brokerage or share of profits to anybody other than another accountant. An implication of these restrictions has been that there is in existence today of a rather fragmented market for the professional services. Except a few (may be 5 or 6), there are almost no all India firm of accountants. This structure handicaps the Indian accountant professionals from taking full advantage of the potential global market in accountancy services.

8.2.3 While there can be no two opinions that interests of maintaining quality will have to be paramount, yet it is a fact that there is an inherent and covert desire on the part of established elements in the profession, to limit competition by restricting new entrants.

8.2.4 The restrictions on incorporation and size of partnerships tend to limit the size of growth of the profession and professionals. Similarly, the restriction on statutory audits brings about a limitation on the size of the clientele. These restrictions are hampering the growth of the profession and are also anti-competitive in character, as the consumers are prevented from selecting a professional firm with reasonable freedom of choice. While one would respect some degree of restraint in marketing professional services, the restriction on professional firms on informing potential users as to the range of their services and potential is a case in point, wherein competition is injured. For instance, a professional firm cannot issue brochures to inform consumers, it cannot even indicate the firm's name in articles contributed to journals nor can it hold seminars to promote and disseminate knowledge among potential clients. In other words, the professional regulations are perhaps protecting the weak producers of professional services at the cost of information being made available to consumers. It is ironic that Indian firms are not permitted even to mention the existence of their collaboration agreements with foreign accounting firms.

8.2.5 The legislative restrictions in terms of law and self-regulation have the combined effect of denying opportunities and growth to professional firms, restricting their desire and ability to compete globally, preventing the country from obtaining the advantage of India's considerable human expertise and precluding consumers from the opportunity of free and informed choice.

8.2.6 The profession of lawyers is governed by the Advocates Act, 1961. Like the accountancy profession, the lawyer profession is governed by the said statute and self-regulation stipulations. If the Indian legal system has to integrate internationally, an appropriate regulatory system must be in place which ensures that,

a) there is a general reciprocity of rights and non-discrimination,

b) foreign lawyers/firms are subject to the same disciplinary jurisdiction as Indian lawyers,

c) there are greater opportunities for the future development of the legal profession in India, and

d) Indian law professionals can move abroad for rendering legal services.

8.2.7 It is in this context, when existing barriers based on citizenship or nationality are increasingly becoming irrelevant, that it is necessary to promote competitive quality in legal services and full accountability therefor on the part of the lawyers. It is desirable to promote large partnerships of lawyers to enable them to be globally competitive in efficiency and quality of services rendered. Very few firms in India provide what is called the "single window services" which means providing not only legal but accountancy, financial and other advice to their clients. Rules should provide for multi-disciplinary partnerships (lawyers, accountants and other professionals) which would permit delivery of composite services, as desired by the clients.

8.2.8 If the legal profession desires to grow and serve in foreign soil, freedom of movement must be built into the Competition Policy/Law. Unnecessary barriers will have to be removed to facilitate professional development and improvement in the quality of services besides building an environment for easy movement of legal professionals outside the country.

8.2.9 Having listed the restrictions on professionals which limit competition and their growth, it has to be mentioned that this should not be construed that all regulations must be removed. <u>Regulations are necessary with regard to professional qualifications on the basis of which such services can be rendered.</u> The professional bodies need to regulate the qualifications and need to discipline the conduct of the members who are rendering professional services. Equally legitimate is the regulation which precludes attempts at blatant advertising. Likewise, setting accounting standards and performance practices is a legitimate regulation. But those regulations which disallow normal promotional activity, which deny the consumers the benefit of full unrestricted and informed profile about professional firms and deny the consumers of the choice of firms should have no place. Finally, regulations that limit the size of a professional firm should have no place, if the Indian professional firms have to compete globally in the market.

8.3.0 Summary

1. The statutes governing professions need to be amended to be GATS compatible.

2. A positive approach is necessary on the part of the Government and the professional institutes/bodies to ensure that the Indian professionals and Indian professional firms grow to become globally competitive.

3. A profession enjoys certain monopoly rights of practice in its designated field and the body administering the profession enjoys considerable autonomy in its administration. <u>These monopoly rights and autonomy should be used for regulating quality of the profession, the standards of entry and discipline and accepted norms of performance. They should not be used to limit competition.</u>

4. Professions should not be denied normal opportunities of associations and promotion to preclude opportunities for growth and development, to prevent the use of firm names on narrow technical considerations and to act in a manner which insulates them not only from global competition but also from the opportunity for global contact and interaction. Having accepted globalisation, the advantages and disadvantages consequent thereon, must be accepted in the stride.

5. Professional bodies should not utilise their rights of autonomy to counter the normal challenges of global integration. It is illogical to have a totally protected profession in an environment of global industrial integration.

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ABBREVIATIONS

ARC	-	Act against Restraints on Competition (German Act)
BIFR	-	Board of Industrial and Financial Reconstruction
CEE	-	Central and Eastern Europe
CPA	-	Consumer Protection Act, 1986
EOU	-	Export Oriented Unit
EXIM	-	Export and Import
FERA	-	Foreign Exchange Regulation Act, 1973
FII	-	Foreign Institutional Investor
FIPB	-	Foreign Investment Promotion Board
GATS	-	General Agreement on Trade in Services
IDA	-	Industrial Disputes Act, 1947
IDR Act	-	Industrial (Development and Regulation) Act, 1951
IO	-	Industrial Organisation
MRTP Act	-	Monopolies and Restrictive Trade Practices Act, 1969
NBFC	-	Non-Banking Financial Companies
OGL	-	Open General Licence
QR	-	Quantitative restrictions
SCM	-	Subsidies and Countervailing Measures
SEBI	-	Securities Exchange Board of India
SICA	-	Sick Industrial Companies Act, 1986
SIL	-	Special Import Licence
TRIPS	-	Trade Related Aspects of Intellectual Property Rights
WTO	-	World Trade Oganisation

Supplementary Note

FROM DR. S. CHAKRAVARTHY

During the deliberations of the Committee, I had articulated some issues with my own logic and perceptions. I deem it necessary to record those issues by way of this supplementary note.

While the need for a competition policy including competition law as a complement to and reinforcement for trade policy and trade law is generally welcomed by the developed and the developing countries, there are many who have voiced their apprehensions whether the introduction of the competition policy and the competition law may visit the developing countries with consequences of an adverse nature like injury to the domestic industry, producers and suppliers. Representatives of Chambers of Commerce, the Bar Associations and experts, with whom the Committee had discussions, echoed the apprehension. They contend that while entry barriers need to be removed, they should be done over a period of time and not suddenly. In removing the barriers, they suggest that the Government should as far as possible accurately determine the supply and demand of products and services in the relevant market and also identify the existence of competition. Industrial policies, according to them, should be harmonised with competition policies, in order to strengthen competitiveness. They caution that tangible effects of economic development should become noticeable before competition law and policy are implemented aggressively. They advise that it is desirable to give sufficient time to educate and persuade the businesses and consumers of the need for competition in the market, particularly international competition. Strengthening the enforcement of competition laws, after going through such process of public education, will help to successfully establish a competition regime.

Brusick (1997) suggests that discussions on competition "should take into account the need for specific treatment for developing countries……."

While there may be some force in the concern voiced by the domestic industries, I do not believe that domestic industries should be protected merely to help them survive against international competition.

Analysing the consequences that competition policies would have for developing countries, Scherer (1996) has noted that they have been slower than their already advanced counter-parts to enact laws seeking to maintain 'vigorous competition' in their domestic markets. Purchasing power being low in such countries, markets for goods and services are "characteristically thin". He adds that "to achieve low cost domestic production despite weak demand, a high degree of seller concentration, perhaps bordering on monopoly, may be necessary in industries subject to appreciable economies of scale. Even in highly industrialized nations, the fear that scale economies might be sacrificed has often kept strong anti-merger and monopoly divestiture provisions out of competition policy laws. ……. On the other hand, if domestic producers are allowed to enjoy the fruits of a highly concentrated market structure by pursuing monopolistic pricing policies, resource allocation may be distorted, income distribution will be skewed and perhaps most importantly, entrepreneurs may opt for a 'quiet life' from which tight cost controls and vigorous innovation are absent". He suggests that domestic industries should be subjected to competitive pressure as is consistent with the realisation of scale economies. He concludes that the special needs of developing countries need to be accommodated.

Gail Omvedt (1998) does not agree that Indian businesses should be protected from multinational competition but helped to become significant players on a global scale as such protection constitutes "dangerous forms of repression".

Having given anxious consideration to the varied opinions on the subject of competition policy/law versus protection to domestic producers and suppliers, I am of the view that while competition policy/law is a desirable objective and instrument for subserving consumer interest and consumer welfare, there is a need to bring about this competition environment gradually than in one stroke. In other words, till the domestic producers and suppliers get educated and exposed to competition and thereby address themselves towards enhanced efficiency, economies of scale and subserving of the consumer interest (in the broadest sense of the term), the competition policy/law should be gradually strengthened and implemented. For this purpose, I suggest a transition period during which the implementation of competition policy/law is steadily but in a step by step manner strengthened, in its application to the market.

It is also essential that in areas like food security and defence, the Government should have enough flexibility to apply competition policy/law in a limited manner. This is grounded on the fact that in India, there is a large section of vulnerable people who have to be provided food and other essential commodities for their survival by Governmental agencies. Such sections of people should not be placed at the risk of competitive forces in action as the net result may be no food and thus no survival. It may be argued that the public distribution system is inefficient, corrupt and some times does not permit reaching every member of the weak and vulnerable section of society. But yet, despite the deficiencies in the system, it has served a purpose and cannot be eliminated from the policy package in the name of competition. What this implies is that competition policy/law should not only be phased in its introduction and in its implementation but also inhere adequate flexibility to cater to the specific needs of the country. Defence is one such need.

An example in support of the suggested flexibility is the welfare need of the small scale industrial sector. While I accept the theory that inefficient firms even in the small scale industrial sector should exit from the market, they should be given an opportunity to face the challenge of competition and improve their performance and efficiency over a transition period after which no special consideration need be given to them. To put them on notice and to give them this transition period is a desirable caveat to govern competition policy/law. I make this recommendation, conscious of the fact that this tantamounts to some dilution of the spirit and concept of competition, but yet I am alive to the risk that unbridled competition may prove disastrous in India, wherein certain sections of people and sectors of industry, need the umbrella of Governmental protection. Such protection, in selected areas and sectors should be operational for a limited span of time of say 7 to 10 years, which may be called the transition period.

Even this suggested flexibility and transition period should be applied only if serious adverse effects are noticed in the domestic economy (resulting from application of competition policy/law). Otherwise the enforcement of competition policy/law should be immediate and effective.

I further suggest that to make the domestic producers and suppliers competitive internationally, they need to be provided with cheaper credit by banks and financial institutions, as expensive credit (as in

India) renders them not competitive in the global market as many countries particularly the developed ones provide cheap credit to their producers and suppliers. Indian policy makers need to analyse India's competitive advantages and adverse factors rendering its products not competitive in the global market and address them with a view to laying down a level-playing field for its domestic producers and suppliers qua their global competitors. Level playing field is a sine qua non for competition to release and play its potential for the benefit of consumers in particular and the public at large.

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Supplementary Note

FROM DR. RAKESH MOHAN

Working on this Committee has been a most difficult experience for me. And as the Chairman has noted in his introductory remarks I am no stranger to government committees! Why has it been difficult? The problem has been that, whereas there is little in substance or in principle that I can disagree with in the Committee's recommendations on the contours of competition policy, I have had a continuous sinking feeling that I am contributing to something that could possibly stop the growing Indian economy in its tracks. The diagnosis has perhaps been done accurately, and too late as he has himself noted, by my esteemed colleague Sudhir Mulji. Like him, in setting out to work on this Committee I had thought that I would be contributing to a framework which enhances competition in the Indian economy and energises it further. Indeed, this is precisely what the early chapters, particularly "The Need for Competition" and "Prerequisites for Competition" set out to do. It seemed to be a continuation of the general new thrust that economic policy has taken since 1991.

But then why do I have this sinking feeling? In most other policy developments over the past decade we have tried to free the entrepreneurial spirits of the long repressed Indian entrepreneur to foster higher growth and greater competition. Another feature of our new policies has been the progressive reduction in discretion of the government authorities. This has been true of new policies in all areas of the economy: industrial policy, foreign investment policy, technology policy, fiscal policy, monetary policy, exchange rate policy, capital market policy and the like. In policy actions in each of these areas we have eliminated existing restrictive regulations and we have curbed the discretionary powers of government authorities. What makes me feel uncomfortable in this activity is that not only are we recommending the creation of a new powerful governmental authority but we are also vesting it with tremendous discretionary powers. Yet, I am not in disagreement with the propositions outlining the various kinds of anti-competitive practices that need to be kept in check. The root of the problem is that modern competition policy and the kind of law that enforces it *has to be discretionary in its essential characteristics.* Removal of discretion through enlargement of categories of *per se illegality* would be worse than the cure.

As has been mentioned in the text, we have recommended the rule of reason in adjudicating on the various restraints to competition, which have been listed. This is essential since, for example, there are no hard and fast rules on what constitutes dominance and then what constitutes its abuse. Normal operations of the market where different participants seek to establish a position of ascendancy should not be restrained. In taking any action, determination will have to be made that the alleged practice is restrictive, that it is detrimental to economic efficiency and limits contestability. Cognisance would have to be taken of what is the relevant market, what is the potential effect on existing and potential competitors, and whether overall economic welfare is affected by a particular offensive action. These are all difficult determinations to be made. International experience in even the most developed economies suggests that great difficulties are encountered in the actual adjudication of such laws. In India we simply do not have enough experience yet to plunge headlong into such activity. I am apprehensive that an authority that is vested with such enormous discretionary power could easily function in such a way that it starts coming in the way of Indian entrepreneurship rather than promoting competition.

What then is the way out? My suggestion is two fold. First, I believe that this report on competition policy be put in the public domain. The contours of competition policy proposed need to be debated at length in the country in a systematic manner over some period of time. This would have various benefits. It would help in improving and sharpening the recommendations made in this report. It would also familiarise all stakeholders with the dimensions of what a modern competition policy look like and then make it easier to draft a law that has wide acceptability and understanding. Second, it would provide more time to digest the experience in other countries, particularly in developing countries where such laws are relatively new.Third, the Competition Commission proposed should, in the first instance, be charged with only an advocacy role for a period of 3-5 years. During this period the Commission should strive to achieve the pre-requisites of competition policy as proposed in this report and also prepare a draft law in the light of wide ranging discussions that would take place during this period. This time should also be taken to undertake recruitment and training of staff who would eventually administer the competition law once it comes into operation. If this is not done we will inevitably end up with a rigid bureaucratic structure that merely reflects prevailing attitudes and styles of functioning. We can also expect some maturing of the economy in such a period and the introduction of greater competition. That we have survived without such a law over the past decade without any perceivable ill effects suggests that not much would be lost if we bought some time to gain experience and better understanding. Meanwhile, the full opening of trade will also have taken place by April 2001 injecting greater competition in the whole economy.

Note of Dissent

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FROM SUDHIR MULJI

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In the preamble to the terms of reference to this Committee the Government specifically described its purpose as being "for shifting the focus of the law from curbing monopolies to promoting competition and to suggest a modern competition law in line with international developments to suit Indian conditions" (Order dated 25.10.99 issued by the Department of Company Affairs.). Although the government had in fact placed no restrictions on the scope of the proposed new competition law, the order was from the outset misunderstood by the Members of the Committee. They assumed wrongly that the government intended to introduce a law on the same lines as competition laws in other countries.

Unfortunately competition laws in other countries – and we were reminded ad nauseam that 80 countries had enacted such laws – do not have as their aim a shifting of the focus from curbing monopolies to promoting competition. On the contrary the laws of other nations are primarily concerned with issues relating to monopolies and restrictive practices. This is because the so-called developed nations already enjoy free competition – in fact it is the basis of their political economies. In India on the other hand that is not the case. Here long years of a totally planned regime have established a different kind of political economy. Members of the Committee readily accepted this analysis of the past, and indeed they recorded that in the earlier chapters. But they failed to see the logical consequence that followed, namely that the anti-monopoly laws of eighty countries had very little relevance to Indian conditions.

For myself I interpreted matters differently; to my way of thinking the government was seeking to shift the focus from curbing monopolies to promoting competition and were doing so in order to shift the economy away from planning and towards a free economy. The Competition Laws of other countries were therefore wholly inappropriate models for a competition law in this country.

In other societies the need has been to curb excessive rivalry and strife – which is the meaning of competition – while in India social and economic behaviour is characterised by a "lack of combative spirit among rivals" – as one committee member said to me in a casual conversation.

Now combative or aggressive rivalry is not perhaps a desirable characteristic in human beings. That may be a reason for repressing it in social behaviour. However in economics such behaviour has positive outcomes by way of innovation and efficiency." Further, competitive markets are a source of information; they reveal consumer preferences and that in turn enables producers to improve products. Finally it should not be denied that victory over the vanquished is an important source of pleasure for human beings. There would be no great joy in coming first if you were the sole combatant. This is a powerful force that can be harnessed for social welfare.

The government, (or at least those in it who came to select persons like me to be on this Committee) had finally recognised that those disastrous years of control, regulation and protection have made India an economically soft state. That was the reason why they asked us to implement a shift away from monopolies and to promulgate competition; but regrettably this was not explicitly emphasised, couched as it was in the customary vague language of government communications. As a result committee members interpreted their role as being broadly to revise the existing MRTP Act and bring it in line with the Monopolies legislation of other countries.

It is unfortunate that this set of legislation in other countries should go under the garb of Competition Law. In fact it has nothing to do with competition, its purpose being to prevent the kinds of excesses that can emerge in a competitive process. For a long time, indeed almost until the end, I was puzzled by the inaccuracy of referring to Monopoly and Restrictive Trade Practices Law as "a Competition Law". I know from my own experience that the Anglo-Saxon world attaches great importance to words and their meanings In this case the use of the word "Competition" is highly misleading; and it certainly misled us.

The concept of "Competition" may well not be familiar to non-economists. That fact became clearer to me on reading "Competition: Understanding the 1998 Act" written by two English barristers Flynn & Stratford. They point out

"It is also helpful to bear in mind the distinction between a restriction on *competition* (an economic concept) and a restriction on *conduct* (a concept which lawyers find easier to understand), especially since such restrictions can be discerned from contractual terms without deeper consideration of the underlying circumstances."

It then dawned on me for the first time that we were not deliberating about issues connected with the economic concept of competition at all, but were concerning ourselves with the conduct and behaviour of economic agents. We were exhibiting that familiar "nanny syndrome" of wanting an authority to approve or disapprove of our behaviour and punish or reward us accordingly. I saw it as a reversion to the license-permit Raj.

But these ideas came to me too late in the day. At this point it was impossible to rescue the deliberations of the Commission. The Chairman had various deadlines to meet and the commission had, like Ibsen's wild duck, "dived down to the bottom –as deep as she can get- and bitten fast hold of the weed and tangle and all the rubbish that is down there, and it would need an extraordinarily clever dog to dive after and fish her up again."

I fear I was not a clever enough dog to bring about the rescue. By concentrating on the various Competition Laws of other countries, we had become caught like the wild duck and the Commission had no prospect of being able to shift the focus from monopolies to the promotion of competition. Whether this could ever have been achieved, I do not know. All I can say is that our deliberations would have been quite different if we had been clear about our terms of reference.

As it was, economic concepts dealing with competition were scarcely analysed. Instead various ways of curbing or restricting supposedly undesirable competition were examined; but the science of economics is not concerned with such concepts. It may be a flaw in the subject, but economics has nothing to say about unfair or undesirable competition. When the Biblical David defeated Goliath the contest was not equal or fair. Goliath was a giant Philistine pitted against a puny David. But it was this unequal contest that brought out David's innovative skill with the slingshot that felled Goliath. Economists would applaud this example of unfair combat as an example of how competition produces the best in innovative skills.

Further it is my belief that regulating economics through law particularly statute law is most unwise. I am reminded of the warning that the great Victorian writer Charles Dickens gave to the world in his novel “Bleak House”- “The one great principle of the English law is to make business for itself”. It is my earnest hope that competition will not come to exhibit this great principle of English Law, although I am cynical enough to suspect that it will.

Further I do not find the argument that eighty nations have passed laws regulating competitive behaviour an intellectually compelling one. These eighty countries have simply copied or adapted American legislation. America brought in this legislation for particular reasons arising out of her own history, which may not be relevant elsewhere. However Pax Americana today rules the world, and it is but natural that their concerns should be echoed throughout the world.

As my views were so fundamentally different from those of the majority on the Commission, I should perhaps have resigned on the grounds that the Commission was not addressing itself to what I believed was its main purpose. However I recognised that I might have been misguided in my assumption. The government is a monolith organisation and it is rare for it clearly and unequivocally to adopt any one single purpose.

Besides the Chairman, in his kindness, expressed reluctance at my leaving the Commission. He agreed to a note of dissent from me but endeavoured to persuade me by quoting the 63rd stanza of the 18th chapter of the Bhagvadgita.

“iti te jnanamakhyatam gubyadguhayatram maya
vimr saitadassena yathecchasi tatha kuru”
(I have related to you this most subtle knowledge.Think about it thoroughly and then do as you wish.)

Had I knowledge of Sanskrit I should have quoted back to him
The first lines of the 47th and 48th stanza of the second chapter in the Gita

“karma ny evadhikaraste ma phalesu kadacana
yogasthah kuru karmani sangam tyaktva dhananjaya”
(You should only have the right to perform actions never to their fruits Perform your actions without attachment treating success and failure equally)
It is my duty to express my reasoned dissent as an obligation to those in the government who chose me for this Committee when my views on these matters were already well known through my public writings. I must therefore put it on record that I do not believe that our deliberations have dwelt on the subjects we ought to have been considering. I would not wish those whose views I represent to think I have let them down

Finally my conclusion is therefore that the Law and Policy that must emerge from the proposals of this Commission are wholly inappropriate for India at this present juncture of her development. What we should be promoting is freedom of the markets and we should even tolerate excesses. The release of what economists call animal spirits among Indian businessmen is the first and the most difficult task of policy makers. It is for me sad that after two hundred years of colonial rule, we have been emasculated from thinking about issues on first principles and continue to imitate the ideas of others.

I believe that the policy makers should scrap all monopoly laws until we can see where the competitive spirit is harmful. That certainly is not the case today and may not be the case for many years to come in this country.

Sudhir Mulji

Comment of Dissent

FROM P.M. NARIELVALA

The majority report recommends premerger notification above certain specified limits. We are in respectful disagreement with this requirement.

In many countries whose laws we have referred to, growth has already taken place and the anxiety is that mergers and amalgamations should not go so far as to destroy competition. In India, the position is exactly the opposite. Our companies are by and large extremely small and the tempo of mergers and amalgamations has not kept pace with the need for large companies to counter the threat of competition from foreign giants abroad. We therefore need, not only to permit and facilitate mergers and amalgamations, we also need to push companies in this direction. A provision for prior notification may have the opposite effect.

As against the few mergers and amalgamations which have taken place there are also a large number of cases of composite companies splitting up due to family or other reasons. Indian industry would find it very difficult o compete if this trend is not reversed and if fresh mergers and amalgamations do not take place.

Most mergers and amalgamations are effected under section 391ff of the Companies Act. When the matter goes to the Court, it is entirely possible that arguments based on competition will be urged in the court and in any case, any "aggrieved party" has the opportunity of doing so. It is also possible that the Competition Commission may itself intervene if it sees the need to do so.

It is also necessary to remember that several mergers and amalgamations are between companies in the same group. Such mergers and amalgamations have no economic significance and therefore, have little or no effect on competition irrespective of the size of the merger.

We have repeatedly emphasised that dominance by itself is not to be frowned upon, only dominance which is abused. At the worst, a merger or amalgamation could lead to dominance but at the time of the merger, there is no way to determine whether the dominance would be abused. If the resulting dominance does lead to abuse, there are remedies to deal with the abuse at that time.

It is significant that no premerger notification is required in the UK. This seems to us to be a good example to follow because of the similarity in the laws and business situation in India and the UK.

For the foregoing reasons, it is our opinion that no premerger notification is necessary.

P.M. Narielvala

LETTER FROM FEDERATION OF ASSOCIATIONS OF SMALL INDUSTRIES OF INDIA

14th May 2000

FAX : 8224690

Sri. S.V.S. Raghavan
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Dear Sir,

Sub : Small Industries and Competition Policy

There are two major concerns, which have apparently influenced the setting up of the committee. Firstly, there is the problem of domestic industry/production being put under pressure from unchecked imports, consequent upon the WTO related reforms in the name of competition. Secondly there is the new fashion of 'market orientation", privatization of key PSUs irrespective of their role in curbing private monopolies and cartels and reduction in the role of state intervention in favour of the weaker and disadvantaged sectors of the society.

It is therefore necessary for the SSIs not only to educate policy makers and the committee about the operational handicaps of the SSI that have a bearing on Competition, but also launch a vigorous program of creating awareness amongst legislators about the true significance of the earlier policies of active promotion and development of the sector.

SSI are by their very nature individualistic and fiercely competitive as they are entrepreneur and not absentee owner / capital oriented. In their fight for survival first and growth later the small scale entrepreneurs have to be economically competitive. Their size and area of operation and the segmentation of the markets they are in ensure that they can never be monopolistic or indulge in cartelisation. The spirit of individual enterprise putting man at the center of development ensures that the small scale has the best market orientation, in giving the customer the widest choice at reasonable prices. Since they cannot afford advertisement, publicity and expensive promotion campaigns they do not unfairly influence customers or offer unjustified inducements. In fact, their marketing is mainly based on establishing confidence amongst customers on the basis of quality and price. Excepting for specialised craft type of activity that addresses a small market of discriminating elitist customers they operate in a sellers market.

As most entrepreneurs are self-employed the price and competitiveness is dictated purely by the necessity of survival. They also do not enjoy the fall back support of institutions like banks (that is enjoyed by larger industries) and, therefore, cannot withhold supplies or indulge in hoarding. While this is the position of Small producing units whether traditional or modern, the situation is even worse in the case of the so called protected units.

There are two types of so called protection that SSI are supposed to enjoy. One relates to reservation and the other to ancillary status. The free market wallahs have been arguing that the reservation of production is a protection, promotes inefficiency, delays technological developments, and denies the customer the choice of the best product at the best price. Even though one would like to argue the case of the SSIs on social costs basis and their pivotal role in providing access to economic activity to the largest number with relatively poorer endowments living in neglected areas and needing some meaning to their life. A quick look at the list of reserved items would show that they pose no threat to large units. In fact, the case for reservation was built on the premise that in a decentralized production regime it is possible to produce a variety of products fitting a particular description that would increase customer choice a range of price that would suit the purse in a stratified / segmented market. The large have with impunity broken the rules of the game. In many cases there has been in a sense reverse engineering in copying the products of small enterprises and trying to dominate the market on the basis of volumes, distribution and finance muscle power and expensive advertisement.

In fact in the citadel of free markets there is an attempt to break the cartels. Therefore there is no justification in tampering with the principles of reservation on the grounds of promoting competition. Any review should be technical and should aim at equipping small to upgrade products and quality. Quite often the charge of poor quality is laid at the door of the small for the sins of the large. The small has often been the victim of unfair trade practices, the guilty being the large, be it suppliers or buyers. The distribution of essential raw materials at fair prices was undertaken by the state and parastatal agencies only because the small buyer would not get supplies of small quantities. SSIs were always charged more and were denied credit facilities, enjoyed by their competitors in the large sector. The whole system is designed to eliminate competition from small enterprises. One of the grievances of small traders has been that the large and MNC manufacturers of consumer goods charge lower prices in the case of supermarket chains, and the small traders are put to serious hardships. This discrimination has been in existence for a long time and justified on the grounds of transaction costs.

A study conducted by NSIC in 1979/80 showed that the SSI suffered a disadvantage of not less than 15% in input costs alone. The MRTP did not improve matters. To add to this is the high costs of distribution and marketing of small volumes. Though sympathies were expressed about the plight of the small, nothing has been done by the organised industry to whom small is a matter of convenience and not conviction.

The case of ancillaries is even more depressing. The ancillarisation programme was promoted to achieve :

a. Rapid indigenization given the relatively small volumes initially considered by the large manufacturers - it was established that India possessed unique entrepreneurial skills in scaling down, develop indigenous tools and capital goods at low costs that produced low volumes at very low costs. (It is necessary to mention atleast one from among hundred examples of this initiative. In the early seventies a moulded plastic shoe making plant with a capacity of 1000 pairs a shift was imported at a cost of about Rs. 10 lakhs. A Delhi entrepreneur scaled down the plant to produce 100 pairs a shift at a cost of Rs. 20000 making it possible for a large number to enter this industry)

b. Lowering the risks of capital losses due to changes in design and technology.

c. Lower costs due to the SSI being an entrepreneur cum employee establishment hiring very few outsiders.

d. Minimizing the threat of organised labour.

e. Advantage of concessions and tax waivers given to the small accrued to the large.

Eventually this system of procurement on a tied basis was taken advantage of only by family promoted ancillaries.

In actual operations over a number of years the system has been milked by the large to the impoverishment of the small.

By way of illustration :

1. The small is the balancing entry in cash management. Despite all the noise, legislation etc., the small is the creditor for the large-sometimes for months. If pressure is brought schedules can be cut, materials can be rejected and a whole host of terrorist measures are let loose. That this rank dishonesty is known and like many other things we have learnt to live with it.

2. In many cases small was asked to develop components with considerable cost in time, labour and tooling. Very few compensated the SSI for this. On the other hand the developer did not have the exclusive right to supply. If he did not accept the terms the supplies were ordered to be stopped on one pretext or the other.

3. The SSI is often asked to supply not only for the OE requirement but also the spares market. The SSI is squeezed for prices on the plea that the principal has to be competitive. OK. The supplies for the spares market are also paid at the same rates whereas the OE manufacturer marks up the price several fold. They are prohibited from selling to the spare market. In one classic case the entrepreneur who had developed a product on his own was not even allowed to use one for his own use but asked to buy from the OEM dealer at market prices. The harassment of ancillaries takes several forms. In one case the ancillary was asked to pay for the raw materials supplies at prices higher than that of the component, in another the scrap was charged at prices higher than the producer prices for the parent material (Steel).

These illustrations would point out to the necessity for recognizing that apart from social costs, (anathema to neoclassical) development, expansion and Modernisation of small sector is an essential component in any strategy for promoting competition.

Specifically :

a. The policy of active promotion of SSIs should continue.

b. The involvement of the state should not be seen as curbing freedom and competition.

c. Concessions, easier credit, infrastructural support, purchase preference and low cost access to competent services - be it technical or managerial-should be enlarged and their costs are to be treated as a state obligation and not a subsidy.

d. The active promotion of co-operative /joint or participatory organisations exclusively for the small and the strengthening and deepening of their associations should be considered as measures to establish a genuine competitive economy.

It should not be misconstrued that these are retrograde or putting the clock back. Wisdom lies in marrying the advantages of modern ideas with the basic justice and goodness of the old concepts as enunciated by the founding fathers of our constitution.

Thanks & regards,

Sd/-

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