REPORT

OF

THE

WORKING GROUP

ON

COMPETITION POLICY

Planning Commission
Government of India
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Contents

FOREWORD

After years of following a strategy of state planned economic development, involving myriad controls and licenses, India embarked upon the road to a market driven economy. Amongst wide ranging reforms undertaken since then, was the enactment of the Competition Act, 2002 which represented a landmark in the reforms process. The Act, a modern competition legislation, seeks to prohibit anticompetitive activities by enterprises in the market place.

The decades of government controls have resulted in a very weak competition culture in the economy. Besides, there are several areas of the economy which are still subject to a variety of government controls; in these sectors a truly competitive market is still to evolve. Thus, while competition law seeks to prevent the market from being undermined by enterprises, competition policy seeks to remove the anticompetitive effects of the government and regulatory policies.

For a long time, the national planning process has focused on the allocation of government resources and on the implementation of government projects. However, in a market driven economy, the bulk of economic activity would arise from private entrepreneurship. It is, therefore, gratifying that the Planning Commission has sought to recognize the role of market forces in the planning process and has therefore set up a Working Group on Competition Policy for the Eleventh Five Year Plan. This represents a welcome development in the planning process.

This Working Group has been broadly constituted and represents a wide range of expertise and experience. It has benefited greatly from the concerted efforts put in by its members. I would personally like to thank all of them and particularly those who were members of the sub-groups that prepared written materials for different chapters or parts of the report of the Working Group.

On behalf of the Working Group, I should place on record our gratitude to the Planning Commission for this opportunity to make a small contribution towards a big cause, and offer our thanks particularly to Shri Anwar-ul-Hoda, Member, Planning Commission, Shri R.C. Jhamtani, Adviser (Industry) and Dr. S.C. Lahiry, Joint Adviser in the Planning Commission in providing full support to the Working Group.

I should also like to record my appreciation for the assiduous work undertaken by Shri Amitabh Kumar, Member Secretary of the Working Group, who is also Director General in the Competition Commission of India, and by other officers and staff of the Competition Commission of India.

(Vinod Dhall)
Chairman of the Working Group
&
Member, Competition Commission of India

ACRONYMS

ACA	AUSTRALIAN COMMUNICATION AUTHORITY
CAT	COMPETITION APPELLATE TRIBUNAL
CCI	COMPETITION COMMISSION OF INDIA
CERC	CENTRAL ELECTRICITY REGULATORY AUTHORITY
CoAG	COUNCIL OF AUSTRALIAN GOVERNMENTS
FDI	FOREIGN DIRECT INVESTMENT
FTC	FEDERAL TRADE COMMISSION
GATS	GENERAL AGREEMENT ON TRADE IN SERVICES
GATT	GENERAL AGREEMENT ON TARIFFS AND TRADE
GDP	GROSS DOMESTIC PRODUCT
GFC	GLOBAL FINANCE CORPORATION
ICN	INTERNATIONAL COMPETITION NETWORK
ICPAC	INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE
IPR	INTELLECTUAL PROPERTY RIGHTS
IRDA	INSURANCE REGULATORY AND DEVELOPMENT AUTHORITY
LPG	LIQUIFIED PETROLEUM GAS
MRTP	MONOPOLIES AND RESTRICTIVE TRADE PRACTICES
NCP	NATIONAL COMPETITION POLICY
OECD	ORGANISATION FOR ECONOMIC CO-OPERATION & DEVELOPMENT
PNCE	NATIONAL PROGRAMME OF ECONOMIC COMPETITION
PPP	PUBLIC PRIVATE PARTNERSHIP
PRC	PEOPLE'S REPUBLIC OF CHINA
PSE	PUBLIC SECTOR ENTERPRISE
RTO	ROAD TRANSPORT OFFICE
SAFTA	SOUTH ASIAN FREE TRADE AREA
SERC	STATE ELECTRICITY REGULATORY COMMISSION
SME	SMALL AND MEDIUM ENTERPRISE
SSI	SMALL SCALE INDUSTRY
TAMP	TARIFF AUTHORITY FOR MAJOR PORTS
TNC	TRANS NATIONAL CORPORATION
TRAI	TELECOM REGULATORY AUTHORITY OF INDIA
TRIMs	TRADE RELATED INVESTMENT MEASURES

TRIPS	TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS
UNCTAD	UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT
UPA	UNITED PROGRESSIVE ALLIANCE
USO	UNIVERSAL SERVICE OBLIGATION
VAT	VALUE ADDED TAX
WTO	WORLD TRADE ORGANISATION

Chapter- I

Introduction

1.1 Constitution and Terms of Reference of the Working Group

1.1.1 The Planning Commission constituted a Working Group on Competition Policy vide its order no. I& M-3(32)/2006 dated 5th June, 2006 in the context of formulation of the Eleventh Five Year Plan. The terms of reference of the Working Group are as follows:

a. To recommend, taking into account the best international practices, a set of comprehensive policy instruments and strategic interventions to effectively generate a culture of competition to enhance competition in the domestic markets, with the involvement of all stakeholders.
b. To recommend ways of enhancing the role of competition and competitive markets in Government policymaking at the Central and State levels.
c. To advise on the most effective and workable institutional mechanism for synergized relationship between sectoral regulators and the CCI.

1.1.2 The composition of the Working Group reflects wide representation of different stakeholders. The composition of the Working Group is at Annex 1.1.

1.2 Approach of the Working Group

The methodology/approach adopted by the Working Group on Competition Policy was to consult various stakeholders, e.g. professionals, professional bodies, industry bodies, government departments/agencies, policy makers, regulators, civil societies etc. with the objective of assimilating all dimensions of the subject under consideration. To focus on various issues involved, sub-groups were constituted which submitted relevant material for the report.

1.3 Meetings of the Working Group

The Working Group held its meetings on 30-6-2006, 28-7-2006, 5-9-2006 and 5-01-2007 in New Delhi. The list of persons who attended the meetings is at Annex 1.2.

1.4 Plan of the Report

The Report consists of 8 chapters dealing with the issues under consideration keeping in view the assigned terms of reference. The Conclusions and Recommendations of the Report are separately set out in Chapter VIII. A select bibliography has also been given for further reading to interested readers, who might want to delve deeper into the issues pertaining to competition. Competition policies of select countries have been annexed for the sake of illustration. A copy of the Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices adopted by the United Nations Conference in April, 1980 has also been provided for the facility of information and reference.

Chapter- II

Aspects of Competition

2.1 Meaning and Significance of Competition

Competition Defined

2.1.1 Generally in economics, competition is seen as rivalry among firms for a larger share of the market, which leads to internal efficiency and lower prices for the consumers. Competition can be defined as a process by which cost efficient production is achieved in a structure where entry and exit are easy, a reasonable number of players (producers and consumers are present) and close substitution between products of different players in a given industry exists.

Competition and Growth

2.1.2 A review of cross-country literature suggests that there is a positive association between GDP growth and level or degree of competition. Many empirical studies of select industries in several OECD countries suggest that competition enhances productivity at industry level, generates more employment and lowers consumer prices.

Bayoumi *et al*. (2004)[1] have estimated that the differences in levels of competition can account for over half of the current gap in GDP per capita between the Euro area and the United States. They conclude that more intense product market competition could help in achieving higher growth and increasing employment rate.

2.1.3 Aghion *et al* (2001)[2], through an endogenous growth model, show that competition has a positive effect on growth. Dutz and Hayri (1999)[3] also indicate that the pro-competitive policy environment is positively associated with long-run growth. Cross-country experiences in the retailing sector show

[1] Bayoumi, T. Laxton D. and Pesenti P. (2004), "Benefits and Spillovers of Greater Competition in Europe: A Macroeconomic Assessment", Working Papers.

[2] Aghion, P., Harris, C., Howitt, P. and Vickers, J. (2001), "Competition, Imitation and Growth with Step-by-Step Innovation," *Review of Economic Studies* 68.

[3] Dutz, M. and Hayri A., (1999), "Does more Intense Competition lead to Higher Growth?" CEPR Discussion Paper, No. 2249.

that employment in the Netherlands and Germany increased [Pilat, D. (1997)][4] and prices in Sweden and Japan declined [Pilat (1997), OECD (1997)][5] on account of competition. Koedijk and Kremers (1996)[6] find a clear negative relationship between government regulation and economic performance in 11 European countries.

2.1.4 Ahn (2002), reviewing the existing literature, concludes that the positive impact of competition-enhancing polices cannot be fully appreciated by measures of static efficiency gains alone in the short run since competition has pervasive and long-lasting effects on economic performance by affecting economic actors' incentive structure, by encouraging their innovative activities, and by selecting more efficient ones over time.

Benefits of Competition in India

2.1.5 The effect of competition on price and accessibility is perhaps best illustrated with an example from Indian telecommunications. Tele-density in India has risen from mere 2.32 in 1999 to 11.32 in December 2005[7]. Also, there has been a dramatic fall in telecom tariffs from Rs. 16 per minute to Rs. 1 per minute with increased competition in this sector. Thus intense competition amongst the various service providers has resulted in improvement in availability of service at affordable price to the consumers. Similarly, consumers have benefited from competition in other sectors such as civil aviation, automobiles, newspapers and consumer electronics.

2.2 The Raison d'etre of Competition Policy

2.2.1 Competition policy is a critical component of any overall economic policy framework. Competition Policy is intended to promote efficiency and to maximize consumer/social welfare. It also helps to promote creation of a business environment which improves static and dynamic efficiencies, leads to efficient resource allocation and in which abuse of market power is prevented/curbed.

2.2.2 There are two components of a comprehensive Competition Policy. The first component involves putting in place a set of policies that enhance competition or competitive outcomes in the markets, such as relaxed industrial policy, liberalized trade policy, conducive entry and exit conditions, reduced controls and greater reliance on market forces.

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[4] Pilat, D. (1997), "Regulation and Performance in the Distribution Sector", OECD Economic Department, Working Paper, No. 180.

[5] OECD (1997), "The OECD Report on Regulatory Reform," Volume II Thematic Studies, Paris.

[6] Koedijk, K. and Kremers J. (1996), "Market Opening, Regulation and Growth in Europe", *Economic Policy*, No. 23.

[7] Economic Survey (2005-06), Ministry of Finance, Government of India.

2.2.3 The other component of Competition Policy is a law and its effective implementation to prohibit anti-competitive behaviour by businesses, to prohibit abuses conduct by dominant enterprise, to regulate potentially anti-competitive mergers and to minimize unwarranted government / regulatory controls.

2.2.4 To strengthen the forces of competition in the market, both competition law and competition policy are required. The two complement each other. Competition law prohibits and penalizes anti-competitive practices by enterprises functioning in the market; that is, it addresses market failure. The aim of competition policy is to create a framework of policies and regulations that will facilitate competitive outcomes in the market.

2.3 Global Scenario

2.3.1 Canada was the first country to enact a competition law in 1889 followed by the United States of America in 1890. The number of countries with Competition laws increased phenomenally in the past 25 years from 32 in 1980 to 105 in 2006[8]. Many more countries are in the process of enacting competition laws and the numbers are slated to increase further in the coming few years. Many countries have modernized their competition regimes in the recent past and India belongs to the family of such nations.

2.3.2 Broadly, most competition laws seek to increase economic efficiency, enhance consumer welfare, ensure fair trading, prevent abuse of market power.

2.3.3 The three areas of enforcement that are provided for in most competition laws are–

(i) anti-competitive agreements
(ii) abuse of dominance, and
(iii) mergers which have potential for anti-competitive effect.

2.3.4 The reasons for adoption of competition laws vary across countries; these are usually on account of concerns about high level of concentration, formation of cartels, state monopolies, privatization and deregulation, meeting with requirement of bilateral and plurilateral trade agreements and in addition, to take care of cross border competition dimensions or concerns. It is important to note that proliferation of competition law has taken place irrespective of the stage of economic development of the country including economic, social and political policies pursued by it. It is also important to note that some countries have adopted a competition policy but do not have a specific competition law.

[8] UNCTAD -Directory of Competition Authorities, 2006.

2.3.5 Though competition law has a history of more than 100 years[9], adoption of a comprehensive competition policy is a recent phenomenon. Australia, to the best of our knowledge, is the first country in the world to adopt a broad-based formal comprehensive competition policy in 1995. Since then some other countries like Botswana, Hong Kong (of PRC), Malawi & Mexico have adopted a comprehensive competition policy. In some jurisdictions, elements of Competition Policy emanates from case law developed therein.

Select Countries[10]

Australia

2.3.6 In 1995, the Council of Australian Governments (CoAG), which comprises the federal and the provincial governments, adopted the National Competition Policy. The policy was based on the report of the Independent Committee of Inquiry into a National Competition Policy for Australia (headed by Professor Fred Hilmer) which CoAG had commissioned in 1992.

2.3.7 The inquiry resulted from a widening understanding by Governments in Australia that significant economic benefits would flow from enterprises, whether publicly or privately owned, being able to operate in a nationwide market, that any strictures on competition had to pass a tougher public interest test and that reform had to be nationally coordinated.

2.3.8 It is important to note that the competition policy in Australia is in no way prescriptive in relation to other public policy areas. Critically, social (e.g. education, employment, and health) and environmental objectives can override economic objectives, in terms of determining the public interest. Further, their competition policy recognises that intervention in markets, to achieve social and environmental objectives, can be entirely appropriate.

2.3.9 A review of regulation and public ownership of enterprises or delivery of services is required to be undertaken by all the governments. Further, the competition policy reforms in Australia provide a legislated right of third party access to essential facilities.

2.3.10 Another interesting aspect of the Australian Competition Policy is the provision of 'competition payments' to provincial governments as an incentive to adopt pro-competitive measures. [11]

[9]The Canadian competition law was enacted in 1889.

[10] This part of the report draws heavily from Pradeep S Mehta (ed.), "Competition Regimes in the World – A Civil Society Report, CUTS INTERNATIONAL, Jaipur, 2006.

[11] This is somewhat like the compensation payments on account of the Valued Added Tax structures, where the Government of India reimburses the state governments for loss of revenues.

Botswana

2.3.11 The Government of Botswana adopted its competition policy in 2005 though it is yet to adopt a competition law. The decision to formulate a competition policy came about as a result of, *inter alia*, the Government's concerns about the likelihood of private anti-competitive practices emerging after economic liberalisation, which could undermine its reform objectives. This competition policy of the Government of Botswana aims to provide a coherent framework that integrates privatisation, deregulation, and liberalisation of trade and investment, into a strategy for promoting a dynamic market led economy[12].

Malawi

2.3.12 In 1990s, the Malawi Government adopted a policy of economic liberalisation to promote competition in the economy. In 1997, it adopted a competition policy for the country with a broad policy objective to promote economic efficiency and protect consumer interest, comprising of three broad strategies, namely, lowering barriers to entry; curbing restrictive business practices; and protecting the consumer[13].

Mexico

2.3.13 In Mexico, the Federal Competition Commission issued the National Programme of Economic Competition (PNCE) 2001-2006, which is regarded as the basic instrument of competition policy. It represents the first effort aimed at formulating a document establishing the objectives, strategies and guidelines that will govern the actions of CCI and contribute to the achievement of the National Development Plan's objectives with regard to competition policy. It also takes into account harmonisation with other programmes of the Ministry of Economics, such as Foreign Trade and Promotion of Investment 2001-2006.

Hong Kong

2.3.14 In November 1997, the Hong Kong Government accepted the need for a competition policy to promote international competitiveness and economic efficiency. However, the Government rejected the idea of a comprehensive competition law and an independent agency to administer such a law. The Government considers that competition is best nurtured and sustained by allowing free play of market forces, keeping intervention to the minimum. This is in line with the 'free trade' policy and open market approach, characteristic of Hong Kong. Thus, the Government adopted a comprehensive competition policy. The objective of the Government's competition policy is to enhance economic efficiency and the free flow of

[12] See Annex 1.3 for more details.
[13] See Annex 1.4 for more details

trade, thereby improving consumer welfare[14]. It is believed that the Government is now considering the introduction of a competition law.

2.4 Global Forums

2.4.1 In a globalised world, policies, laws and practices at national level are not the only factors that determine competition in a national market. Competition in national markets is also affected by multilateral and bilateral agreements/rules. The WTO has been discussing the issue of interaction between competition and trade for sometime though the adoption of a multilateral agreement in this regard is not on the agenda now. Interaction between trade and competition was first included in the WTO's agenda through the Singapore Ministerial that was held in 1996. However in July 2004 the General Council of the WTO decided that negotiations on trade and competition would not form part of the Doha Work Programme and therefore no negotiations have taken place since as part of the Doha Round of multilateral trade negotiations.

WTO

2.4.2 Although there is no multilateral agreement on trade and competition policy, the issue is very much present in many of the provisions of the existing WTO Agreements. The agreements that refer to competition issues are:

- General Agreement on Trade in Services (GATS),
- Trade-Related Aspects of Intellectual Property Rights (TRIPS), and
- Trade-Related Investment Measures (TRIMs).
- Agreement on Safeguards, Article XVII of GATT 1994 and some other provisions also deal with some of the competition issues.

Although the WTO Agreements touch a number of competition issues directly as well as indirectly, such issues have not been developed into any framework. It should, however, be noted that general liberalisation of trade and tariff reduction in particular has definitely made a big contribution to competition.

2.4.3 The inclusion of services in the multilateral trade regime has serious implications for competition and regulatory framework at national level in various services sectors like telecommunications, banking, insurance, professional services like accountants, architects, legal services etc. The GATS agreement has a reference paper on Pro-Competitive Regulatory Principles, which govern competition issues in the telecom sector.

2.4.4 TRIMs are an important issue both for transnational corporations (TNC) and for national development strategies. TRIMs are often used to deal with various anti-competitive practices of big TNCs. As has been noted before, the policy on intellectual property rights has significant bearing on competition. By

[14] See Annex 1.5 for more details

prescribing the standards of IPR policy in a country, TRIPS has also envisaged the nature of IPR policy to be adopted at the national level.

UNCTAD

2.4.5 The issue of control of restrictive business practices figured on the agenda of UNCTAD II, and again at UNCTAD IV, where a decision was made for starting a work programme at the international level, which led to negotiations under the auspices of UNCTAD. In December 1980, the UN General Assembly adopted, by resolution, a Set of Multilaterally Equitable Agreed Principles and Rules for the Control of Restrictive Business Practices[15]. This instrument was the result of a demand by the international community, after the code on control of restrictive business practices was abandoned in the negotiations on the GATT in 1948.

2.4.6 The adoption of the Set was an extremely far-sighted move by the international community and has stood the UNCTAD in good stead in helping developing countries in adopting comprehensive competition laws. The Vth Review Conference in November 2005 indicated increased consensus on the contributions of the Set and on UNCTAD's role. UNCTAD has become very active in providing technical assistance in the area of competition to developing countries.

OECD

2.4.7 The OECD is an influential organisation with 30 member states, the rich countries of the world. It has a Standing Committee on Competition Policy and Law, which has its regular 30 member countries as members, besides five observers, Argentina, Brazil, Israel, Lithuania and Russia.

2.4.8 The OECD has been regularly cooperating with a variety of non-OECD countries to provide capacity building. With the advent of the OECD's Global Forum on Competition, it claims, its cooperation with non-OECD countries extends beyond capacity building to include high-level policy dialogue to build mutual understanding, identify 'best practices', and provide informal advice and feedback on the entire range of competition policy issues. The GFC meets annually & serves as a platform for exchange of views & experiences.

Commonwealth

2.4.9 The Commonwealth which has over 50 countries as Members has also evolved a "Model Law on Competition" for guidance of its Member Countries.

[15] The set is at Annex 1.6

It has recently reviewed the Model Law to meet the changed requirements and challenges.

International Competition Network (ICN)

2.4.10 The concept of the International Competition Network (ICN) has evolved from the recommendations of the International Competition Policy Advisory Committee (ICPAC). ICPAC was commissioned to think broadly about international competition in the context of economic globalisation and focused on issues like multi-jurisdictional merger review, the interface between trade and competition, and the future direction for cooperation among competition agencies.

2.4.11 ICN is intended to encourage the dissemination of competition experience and best practices, promote the advocacy role of competition agencies and facilitate international cooperation. ICN is not intended to replace or coordinate the work of other organisations. It does not exercise any rule-making functions. However, it works as an informal platform for promoting cooperation and exchange of information among the competition authorities.

2.5 Competition & Democracy

2.5.1 The basic tenets of democracy and of market competition are ingrained in the same value system - freedom of individual choice, abhorrence of concentration of power, decentralized decision making and adherence to the rule of law.

2.5.2 The common goal of both democracy and market competition is the same- to ensure public welfare. While the nature of market mechanism is judged by its 'allocative efficiency', the democratic institutions are judged by the degree of equity they create. The concepts of working for the benefit of the weaker sections and the greater good of greater numbers are of prime importance in both democracy and competitive market mechanism. The concepts of 'consumer sovereignty' in economic literature and 'voter rights' in democracy have the same philosophical groundings. 'Equality of opportunity' and the 'freedom to trade' are treated as sacrosanct in both the systems and any infringement is seriously viewed.

2.5.3 The constitution of India guarantees certain basic freedoms that include the fundamental right to carry on any occupation, trade or business under Article 19(1)(G). Competition law reinforces this fundamental right by prohibiting unreasonable restraints on the exercise of this right through anticompetitive practices. Many regard competition law as the economic analogue of political democracy and in some countries competition law is accorded the status almost of an economic constitution.

2.5.4 Amartya Sen has consistently maintained that a democratic state makes it much harder for the ruling government to be unresponsive to the needs and values of the population at large, unlike the dictatorships. It is crucial to understand the interdependence between competitive markets and governments, if market mechanism is to be used in the best interests of the public. A democratic government will be more concerned that the market produces certain desirable results and restrains it from bringing any undesirable outcome so as to protect the interests of public. Competitive markets and democratic governments are, therefore, considered complementary and need to interact in a manner that maximizes the larger public interest. The complementary action of a democratic government in correcting market imperfections is considered the most ideal relationship for achieving the goal of ensuring basic freedoms for its citizens[16].

2.5.5 Joseph Stiglitz also believes in the necessary complementarities of markets and democratic governments to achieve social and economic justice[17]. He advocates intervention of the government in the markets which restrict competition and an active role in protecting consumers against unsafe products and monopoly practices. Stiglitz believes that there are market failures and a democratic government has to intervene to protect the interests of the society. However, he also maintains that there are 'government failures' also as there are 'market failures' and as markets need to be made more efficient, the governments also needs to be made more effective.

2.5.6 The modern view of liberal democracy is not that of simply having an elected government 'by the people, of the people and for the people' but having a whole gamut of democratic institutions (government as one of them) with adequate checks and balances to achieve the greater good of greater numbers. Similarly, the present economic thinkers do not blindly believe in the self-correcting virtues of the invisible hand of market mechanism; but a system of institutional regulations and guarded interventions to keep the market on the right track for the common good. The need for safeguards to prevent the society from both 'market failure' and 'government failure' are uppermost in the minds of the civil society. Thus both democracy and competition are seen to strengthen each other with the mechanism of corrective action.

2.6 **Competition & Governance**

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[16] Dreze, Jean & Sen, Amartya, (1995) "India- Economic Development and Social Opportunity", Oxford University Press.

[17] Stiglitz, Joseph E., (2003) "The Roaring Nineties- Why we're paying the Price for the Greediest Decade in History", Penguin Books.

2.6.1 World Bank study[18] for evaluation of governance of various nation states, identified six parameters of governance which are: (i) the extent to which its citizens are free to choose the government and have freedom to express its opinion (ii) political stability and absence of violence (iii) the quality of public services and the credibility of the government in policy making and implementation (iv) the ability of government to formulate and implement regulations to promote private sector development (v) rule of law, in particular, the quality of contract enforcement, the police and the courts and (vi) the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as, "capture" of the state by elite and private interest.

2.6.2 The quality of governance of the state is now being watched very closely by the citizens, investors and the international community. As more freedom is available to businesses to choose from various countries for investment, the competing governments are also conscious about the role of governance in attracting investment. The state of governance in a country is one of the decisive parameters for the FDI inflows. Any perception that the environment is not conducive to competition and the state has been captured by a few big businesses certainly affects the global investment decisions of firms. The same is also true of the governance within different provinces in a country as same considerations are used by the firms in making investment decisions while choosing locations for establishment of an industry.

2.6.3 The issue of governance is becoming increasingly crucial as the markets are expanding beyond national boundaries creating trans-national corporations having cross-border transactions. The issue of corporate governance which is a sub set of governance is not just limited to the internal affairs of the company but its wide implications for the shareholders, the lenders and the employees have come into the limelight. The cascading effects of the failure of corporate governance are felt beyond the industry and the economy.

2.6.4 The quality of corporate governance and the degree of competition also seems to have a positive correlation. In a market structure, where firms face weak competitive pressures and the profits and prices are predictable, the firms have little or no incentive to use resources efficiently. Khemani & Leechor[19] feel that firms, which are insulated from competition, incur costs which are higher than possible under the best technical and managerial practices (X-inefficiency). The firms continue to earn excess profits in the markets protected from competition, whereas the public bears the burden of higher prices and lower availability of products. The firms which face

[18]Kaufmann Daniel, Kraay Aart: and Mastruzzi Massimo (2006), "Governance Matters V: Aggregate and Individual Governance indicators for 1996-2005," World Bank.

[19] Khemani, R Shyam and Leechor, Chad, (1999) "Competition Boosts Corporate Governance." World Bank.

competition have no other means but to improve the business processes and corporate governance to bring the required efficiency in the system.

2.6.5 According to Khemani and Leechor, available data show a positive association between competitive markets and the quality of corporate governance. With the depth of the securities market as a proxy to quality of governance – their analysis shows that countries with more competitive markets have been more successful in deepening the securities market.

2.6.6 Competition law and policy is also a tool towards better governance since it advocates lesser control and discretionary powers in the hands of Government functionaries. At the level of the enterprises, compliance with competition law is akin to good corporate governance. Corporate governance, as normally understood, is ethical conduct within the internal environment of the company. Similarly, compliance with competition law is akin to ethical conduct in the external environment of the company, principally in the market place.

Chapter-III

Background of Competition Policy & Law in India

3.1 Context of Economic Reforms

3.1.1 India pursued the strategy of planned economic development since the early 1950s. In the industrial sector, the main objectives of the strategy were the development of a broad industrial base with a view to achieve speedy self-reliance and promotion of social justice.

3.1.2 Under the industrial policy, the commanding heights of the economy were to be in the public sector. The Industrial (Development & Regulation) Act, 1951 and the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act), *inter alia,* gave the State, comprehensive control over the direction, pattern and quantum of investments. There were also extensive reservations and concessions in favour of small-scale industry.

3.1.3 The trade policy provided a high level of protection to domestic industry and a number of products were subjected to price and distribution controls. A major part of the financial sector was also kept under government control.

3.1.4 Although the country did witness industrial growth and diversification during this period, the complex network of controls and regulations fettered the freedom of enterprises. Administrative delays and rent seeking opportunities spawned an inefficient industrial structure, which was beset with problems of sub-optimal scales of operation, capacity under-utilization, lack of technological up gradation and high levels of industry concentration.

3.1.5 The Industrial Policy Statement of 1980 focused attention on the need for promoting competition in the domestic market, technological up gradation and modernization. The reforms initiated since 1991 were on a much broader scale and scope. The Industrial Policy Statement of 1991 emphasized the attainment of technological dynamism and international competitiveness. It noted that the Indian industry could scarcely be competitive with the rest of the world if it had to operate within an over regulated environment.

3.1.6 The reforms since 1991 have covered a broad spectrum such as further liberalization of industrial licensing, dispensing with the requirement of prior government approval before effecting expansion by undertakings, registered under the MRTP Act, 1969 progressively diluting the monopoly of the public sector industries, except where security and strategic concerns still dominate, abolition of levy and non levy price system, and reducing purchase preference for public sector enterprises.

3.1.7 Further reform of trade policy substantially reduced the tariff & non-tariff barriers to domestic industry. The exchange rate regime was relaxed and rationalized particularly on current account. The rules relating to foreign direct investment and foreign technology agreements have also been liberalized. In the financial sector, banking, stock market, insurance and other areas witnessed major policy reforms.

3.1.8 The common thread running through the economic reforms, particularly those since 1991, has been to free the economy and the sector from the governmental controls and allow market forces to determine economic activity.

3.1.9 Pursuant to Singapore Ministerial Declaration in 1996, an Expert Group was set up by the Union Ministry of Commerce in October, 1997 to study issues relating to the interaction between trade and competition policy, including anti-competitive practices and the effect of mergers and amalgamations on competition, in order to identify areas that may merit further consideration in the WTO framework. The Expert Group, in its report submitted in January 1999, suggested enactment of a new competition law. The expert group recommended a sincere attempt on the part of the Government in working towards harmonization of competition principles, competition policy, objectives and competition law enforcement efforts.

3.1.10 Taking a cue from this report, Hon'ble Finance Minister of India in his Budget Speech on 27th February, 1999 stated that:

"The Monopolies and Restrictive Trade Practices Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. The Government has decided to appoint a commission to examine this range of issues and propose a modern competition law suitable for our conditions."[20]

Raghavan Committee Report (2000)

3.1.11 This led to the constitution of a High Level Committee on Competition Policy and Law in October, 1999 also known as the "Raghavan Committee[21]". The terms of reference of the Committee *inter alia* included recommending a suitable legislative framework relating to competition law, changes relating to legal provisions in respect of restrictive trade practices and suitable administrative measures required to implement the proposed recommendations. The Raghavan Committee in its report *inter alia* submitted to the Government in May 2000, observed that the Government needs to address the pre-requisites for a Competition Policy as it is an instrument to achieve efficient allocation of resources, technical progress, consumer welfare

[20] Budget Speech of Shri Yashwant Sinha, Finance Minister, GOI, 27th Feb, 1999 (Union Budget 1999-2000).

[21] Report of the High Level Committee on Competition Policy and Law, Government of India, 2000.

and regulation of concentration of economic power. It also noticed that the MRTP Act is limited in its sweep and in the present competitive milieu it fails to fulfil the needs of a competition law. This Committee went into the modalities of bringing into existence a law and a law enforcement authority in the form of the Competition Act and the CCI respectively.

3.1.12 The Raghavan Committee Report states that the essence and spirit of competition should be preserved positioning the competition policy and laid stress on the need to harmonize the conflict between the competition policy and other government policies. It also highlighted that the Competition Policy has, as its central economic goal, the preservation and promotion of the competitive process, a process which encourages efficiency in the production and allocation of goods and services, and over time, through its effects on innovation and adjustment to technological change, a dynamic process of sustained economic growth. In conditions of effective competition, rivals have equal opportunities to compete for business on the basis and quality of their outputs, and resource deployment follows market success in meeting consumers' demand at the lowest possible cost. The report also emphasised that the formulation and implementation of government policies should take into account competition principles.

The Parliamentary Standing Committee on Home Affairs

3.1.13 The Department Related Parliamentary Standing Committee on Home Affairs to which the Competition Bill, 2001 was referred for examination, concluded that the rigidly structured MRTP Act also necessitate its repeal in view of Government's policy of being facilitator rather than regulator[22]. It also noted that the objective of economic policy is to sustain competition culture in the country for economic efficiency and maximisation of public / consumer interest. Further, sustenance of competition culture could be ensured by free and fair competition amongst economic enterprises.

Mid-Term Appraisal – The Ninth Five Year Plan[23]

3.1.14 The Planning Commission recognized the urgent need for articulating a National Competition Policy (NCP) in India, which should fully reflect the national resolve to accelerate economic growth, improve both the quality of life of the people of the country, national image and self-respect. It further desired that the NCP brings about a competition culture amongst economic entities to maximize economic efficiency, protect consumer interests and improve international competitiveness.

National Common Minimum Programme

[22] Ninety Third Report on Competition Bill, 2001 (Department Related Parliamentary Standing Committee on Home Affairs) Para 6.3

[23] Ninth Five Year Plan, Planning Commission, Govt of India.

3.1.15 The National Common Minimum Programme 2004 of the UPA Government stated that the Government desires to strengthen all regulatory institutions to ensure that competition is free and fair.

3.2 Competition Law in India

3.2.1 Keeping in view the economic developments that have resulted in opening up of the Indian economy, removal of controls and consequent economic liberalisation which required that the Indian market be geared to face competition from within the country and outside, the Competition Act, 2002 was enacted[24] pursuant to Raghavan Committee's Report.

Principal Elements of Competition Law

3.2.2 The Competition Act, 2002 seeks to :

i) Prohibit anti-competitive Agreements ;
ii) Prohibit abuse of dominant position by enterprise; and
iii) Regulate Combinations exceeding threshold limits in terms of prescribed turnover or assets.

Besides the three enforcement areas of Commission, a fourth and unique focus area of the Act is on competition advocacy. The Act also makes it incumbent on CCI to take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues. This is discussed in detail in Chapter V.

3.2.3 As recognized by the Raghavan Committee Report, the three enforcement areas are not mutually exclusive, and there would be considerable overlap between them. The reason for delineating them as broad areas are in order to organize the approach in dealing with each situation. The Competition Act defines what kind of situations could arise under each of the categories, and provides the principles to be adopted while examining the same. The Act elaborates the factors that need to be considered for analyzing each of the concepts of abuse of dominance, analyzing combinations and assessing whether agreements between enterprises can be considered anti-competitive. The scheme laid down under the law places emphasis on case by case analysis or the 'Rule of Reason' for determining violation of the Act. The 'Rule of Reason' test means that only combinations and agreements that cause or are likely to cause appreciable adverse effect on competition in the relevant market are subject to action under the Act and that size and dominant position is not in itself bad. There are only a few, very specific circumstances which are 'presumed' to have appreciable adverse effect on competition in market.

3.2.4 While the Competition Act provides the fundamental framework for governing competition, the development of jurisprudence on application of the

[24] No. 12 of 2003 vide notification on 14th January 2003.

Competition Act will determine to a large extent how it is interpreted and applied. Countries with well-developed Competition law regimes, such as the United States of America, the European Union and Australia, have each had to develop several sector and issue-specific guidelines to enable better application of the Competition law. While the experience of other countries can be a guiding factor, given that competition law is specific to a particular socio-economic milieu, CCI would need to incrementally develop the law based on experience gained. The development of jurisprudence through case laws will help clarify the manner in which each of these concepts need to be addressed.

Anti-competitive agreements

3.2.5 The Competition Act provides that an anti-competitive agreement shall be void and prohibits an enterprise or a person from entering into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services which causes or is likely to cause an appreciable adverse effect on competition in India.

Agreements entered into between enterprises or association of enterprises or persons or association of persons engaged in identical or similar trade in 'goods' or 'services' which directly or indirectly determine purchase or sale prices; limit or control production, supply, markets or technical development, investment or provision of services; directly or indirectly results in bid rigging (which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process of bidding) or collusive bidding; shares the market or source of production by way of allocation of geographical area of markets or the type of goods or services or the number of customers in the market or in any other similar way, are presumed to have an appreciable adverse effect on competition between parties engaged in identical or similar trade.

3.2.6 Efficiency enhancing joint ventures are excluded from the presumption of having an appreciable adverse effect on competition. Therefore, where the parties are able to prove that the joint venture results in enhancing efficiency, the onus would then be shifted back on CCI to prove that the efficiencies created do not sufficiently offset the adverse effect on competition. Tie in arrangements , exclusive supply agreements, exclusive distribution agreements, refusal to deal, resale price maintenance agreements causing or likely to cause an appreciable adverse effect on competition in India are considered anti-competitive. These are types of 'vertical agreements' which have to examined and analysed by Commission on 'Rule of Reason' test.

3.2.7 Exclusions from the applicability of Section 3 have been provided to persons seeking to protect their intellectual property rights as well as agreements for the export of goods. However, CCI would still be empowered to look into the reasonableness of the restraint while exercising intellectual property rights.

Abuse of dominant position

3.2.8 The Raghavan Committee, in its analysis of 'dominant position' emphasized that it is important to distinguish between product superiority and/or efficiency leading to a larger market share and the wilful acquisition and maintenance of market power. 'Dominance' in itself, is not a matter of concern. Only specified acts that constitute an '*abuse of* dominance' are in contravention of the Act. The acts specified are exhaustive and conclusive.

3.2.9 Dominant Position has been defined position of strength in the relevant market which enables the enterprise to operate independently of competitive forces prevailing in that market, or affect its competitors or consumers or the relevant market in its favour. Abuse of dominant position has been defined in the Competition Act to include directly or indirectly imposing unfair or discriminatory conditions or prices in purchase or sale of goods or services; restricting or limiting production of goods/services or market or limiting technical or scientific development relating to goods or services to the prejudice of consumers; indulging in practices resulting in denial of market access; using dominance in one market to move into or protect other markets.

3.2.10 Certain factors such as market share, size and resources of enterprise, size and importance of competitors, economic power of the enterprise, vertical integration of enterprises, sale and services networks of enterprises, entry barriers, countervailing buying powers, market structure etc. would have to be given due regard by the CCI in determining 'dominant position' of enterprise in the relevant market.

Regulation of combinations

3.2.11 The Competition Act seeks to regulate 'combinations' which include acquisitions or mergers or amalgamations of enterprises. Acquisition of one or more enterprise by one or more persons or merger or amalgamation of enterprises is a combination if it meets the jurisdictional thresholds based on total value of assets or turnover. Higher thresholds of assets or turnover have been prescribed when parties to combination belong to 'group' or have assets or turnover outside India.

3.2.12 The Competition Act prohibits enterprises from entering into combinations that cause or are likely to cause an appreciable adverse effect on competition within the relevant market in India.

3.2.13 Any person or enterprise seeking to enter into a combination, has the option under the Act to give notice to the Commission. Upon its own knowledge or information or on receipt of notice from parties or on a reference from statutory authority, CCI would initiate an investigation/enquiry when it is convinced, prima facie, that it has or likely to cause appreciable adverse effect on competition in the relevant market.

3.2.14 Various factors such as market concentration, entry barriers, degree of countervailing power, efficiency gains have been listed which CCI has to take into account for determining whether a combination will or is likely to have an appreciable adverse impact on competition in India. A combination, which in the opinion of the Commission, has or is likely to have an appreciable adverse effect on competition, the parties are required to publish the details of the combination. The Commission, after due inquiry into the combination, is required to pass an order thereon within ninety working days, failing which the combination is deemed to be approved.

Extra-Territorial Jurisdiction

3.2.15 The Competition Act, explicitly recognises the fact that the state of competition in India may be affected as a result of acts taking place outside India. Accordingly, the Act provides that CCI shall have power to inquire into such agreement or abuse of dominant position or combination on the same lines as if such act originates in India. The Act further empowers the CCI to enter into any memorandum of understanding or arrangement with the prior approval of the Central Government, with any agency of any foreign country for the purposes of Act. Entering into a cooperation agreement with foreign agencies complements the extraterritorial jurisdiction conferred on Commission by the Act.

Penal Provisions, Recoveries, Remedies and Enforcement

3.2.16 The Act empowers CCI to order remedial measures including prohibitory direction to cease & desist, impose penalties, award compensation, direct modification of agreements, recommend division of a dominant enterprise and pass such other order as it may deem fit. The Act also provides for penalties for contravention of the orders, failure to comply with directions of Commission or furnishing of false information or suppression of material information etc. In case the delinquent enterprise is a company, its directors and officers are also liable for their deliberate acts of contravening the provisions of the Act.

3.2.17 The range of powers given to CCI allow it to structure remedies to the facts of each case and the need thereof to be used judiciously.

3.3 Competition Commission of India

3.3.1 The CCI has been entrusted with the duty to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interest of consumers and ensure freedom of trade carried on by other participants in India. The Competition (Amendment) Bill, 2006 envisages

establishment of a Competition Appellate Tribunal to hear appeals arising from the orders of CCI and to award compensation.

3.3.2 The CCI is a body corporate having perpetual succession and a common seal with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract and shall, by the said name, sue or be sued.

3.3.3 The Act provides that CCI shall consist of a Chairperson and also prescribes the minimum as well as maximum number of Members and sets the qualifying criteria for their appointment.

3.3.4 The Act envisages a number of roles to be performed by CCI which, apart from the above mentioned regulatory and advocacy functions, also includes rendering of opinions on a reference on competition issues or on Competition Law or Policy, received from a statutory authority or the Central Government respectively.

3.3.5 The Act provides that CCI can inquire into any alleged contravention of the provisions contained in Section 3 & 4 of the Act either on its own motion or on -

I. receipt of a complaint from any person, consumer or their association or trade association; or
II. a reference made to it by the Central Government or a State Government or a Statutory Authority.

The Act also prescribes the procedure for investigating and enquiring into combinations when notified by parties or on its own information.

3.3.6 The Act provides that statutory authority may refer a competition issue to CCI for an opinion. The coordination between CCI & the sectoral regulators is discussed in Chapter VII. The Act further prescribes the factors to which CCI must give due regard while determining various economic concepts/issues, e.g. relevant product market, relevant geographical market, appreciable adverse effect on competition, dominance etc..

3.3.7 The Competition (Amendment) Bill 2006, introduced by the Government on 9.03.2006 in the Parliament, proposes various changes to the Competition Act 2002, including establishment of a Competition Appellate Tribunal to hear appeals from the orders of the CCI and to determine applications for award of compensation.

3.3.8 **Standing Committee on Finance**

The Competition (Amendment) Bill, 2006 was referred to Standing Committee on Finance on 17.04.2006 for examination and report thereon. The said Committee has since presented its Report and its recommendations suggests

Government to further strengthen the Act and the Commission. The Report of the Standing Committee is under consideration of the Government.

Chapter-Ⅳ

Competition, Policy Instruments & Plan Objectives

4.1 Existing Policy Instruments

4.1.1 There are complex inter-relationships between competition policy and other public economic policies. This has a direct bearing on the extent to which competition policy objectives can be pursued without being constrained by or conflicting with other public policy objectives. Different government policies that may encourage or adversely affect competition and hence consumer welfare, particularly, in the context of the present globalising environment would include, though not be limited to:

- Trade policy
- Industrial policy
- Privatisation policy
- Regulatory reform policy
- Investment and tax policy
- Intellectual property policy
- Regional development policy
- Labour policy
- Consumer policy
- Environment policy

4.1.2 In addition sector-specific policies on health, electricity, telecommunications, financial services etc., also affect competition in the economy.[25]

Trade Policy

4.1.3 Trade policy is often considered to be the most potent instrument to promote competition in the market. India started the trade liberalisation process in the 1980s. Its commitment to trade liberalisation became much high since 1991 when it embarked on a policy of autonomous tariff reduction. It was further deepened after it signed the WTO agreements in 1994. A major milestone towards trade liberalisation was achieved when it removed all quantitative restrictions on imports in 2001. India is a member of SAFTA and has signed bilateral trade agreements in recent years with Nepal, Sri Lanka, MERCOSUR, Thailand and Singapore, which have liberalisation commitments. Meanwhile,

[25] World Bank & OECD, (1999) "A Framework for the Design and Implementation of Competition Law and Policy," Washington D.C.

the rupee was made partially convertible in 1992-93, fully convertible on the trade account in 1993-94, and fully convertible on current account in 1994-95. The exchange rate of the rupee is now determined primarily by demand and supply conditions in the foreign exchange markets. India now has a fairly liberal trade and foreign currency exchange regime.

Industrial Policy

4.1.4 Industrial policy essentially regulates the entry and establishment of business in a country and hence is important for competition. India had a very restrictive industrial policy regime in which entry and growth of firms were subject inter alia to four sets of licensing policies: capacity licensing; monopoly control; small-scale industry reservations; and activities reserved for the public sector.

4.1.5 With the industrial policy reforms launched in July 1991, licensing requirements were abolished for all except a few industries due to their strategic and environmentally sensitive nature or their exceptionally high import content. The need for prior permission for investment and expansion by firms under the MRTP Act was also abolished in 1991 except the restriction on acquisition of share by or in dominant undertaking were shifted to the Companies Act, 1956. However, the reservation policies in the small-scale industrial (SSI) sector have not undergone any major change since 1991. Although number of products were taken out of the reserved list, there are still 506 products reserved for the SSI sector. There seems little justification for product reservation since reserved items can be produced by large foreign enterprises and imported into India. The number of areas reserved for the public sector was reduced from 17 to three, which are mainly those involving strategic and security concerns.

However, the problem relating to poor bankruptcy or insolvency laws, which do not allow easy exit to enterprises which have turned sick, continues.

Foreign Investment Policy

4.1.6 In general, until the early 1980s, India's policy towards FDI was restrictive and selective. However, the policy has evolved over time and FDI policy is increasingly made investor friendly as a part of liberalised initiative.

4.1.7 A synergy exists between investment liberalisation and the effective application of competition policy. An effective competition policy does not only remove obstacles to entry, but can also facilitate foreign investment flows by providing a predictable legal and regulatory environment that reduces the scope of arbitrary decision-making. Regulation of the business practices of investors through competition law is less restrictive and distortive than other policy instruments. On the other hand, foreign direct investment can increase competition in local markets, particularly in investments of the greenfield type. The takeover of local enterprises can also have such effects. However, there is a possibility that over time such takeovers may make the markets increasingly concentrated and

become characterised by one or a small number of dominant players.[26] This suggests that proper application of competition policy or law can be vital for ensuring that the potential benefits of FDI for the country are maximised.

Taxation Policy

4.1.8 Taxation policy can have significant implications for competition particularly in a country like India where state governments also have the authority to tax. Indeed, India did not have a uniform tax policy and different state governments imposed taxes at different rates so much so that this segmented the national market and India hardly can claim having common integral internal market. However, the situation is changing fast. Most of the states have now adopted 'value added tax' (VAT) with harmonized rates. The country has plans to move towards a uniform goods & services tax policy, which would go long way in integrating the national market.

Privatisation (Disinvestment) Policy

4.1.9 The public sector in India was expected to be the engine of the economy through the setting-up and development of heavy industries (basic metals and capital goods) and infrastructure (power, transport, telecommunications, etc). The expected surpluses were to be invested for further development of the economy. However, the public sector grew in a haphazard manner and extended itself into non-core areas, which were not a part of the original plan. Sick private industrial units were nationalised, with a view to protect employment.[27] With the onset of economic reforms, the need for privatisation was felt. The government has attempted to disinvest shares of public sector undertakings in order to release resources and raise the level of ownership participation by the general public in these undertakings. This process needs to be geared up. However, there is an immense need to take into account competition issues in the privatization policy and procedures.

Regulatory Reform Policy

4.1.10 With the opening up of different sectors like telecom, electricity, etc., to private players, introduction of economic regulatory frameworks became necessary. These regulatory bodies are essentially meant to stimulate competitive outcomes even when there is no competition. Keeping these in view, several regulatory bodies have been established. Although, economic regulation is not a new issue in India, autonomous and independent regulatory authorities started coming up only in the 1990s. Although price regulation for pharmaceuticals by the relevant government department had been a long practice, an autonomous regulatory body, the National Pharmaceuticals Pricing Authority, was established in 1995. The Telecom Regulatory Authority of India

[26] Pradeep S. Mehta and Nitya Nanda, (2003) "Competition Issues With International Dimensions" in CUTS (ed), *Competition Policy & Pro-poor Development*, CUTS, India.

[27] Ahluwalia, Isher Judge, (1993) *"Industrial Policy Reform of Public Sector Enterprises and Privatisation in India*," paper presented at the conference on '*India – The Future of Reforms'*, Merton College, Oxford.

(TRAI) and the Tariff Authority for Major Ports (TAMP) were established in 1997. In 1998, the electricity sector also came under regulation, as the Central Electricity Regulatory Commission (CERC) was established. The sector is regulated at the state level as well and by now most of the states have State Electricity Regulatory Commissions (SERCs). Regulatory authorities for petroleum and gas, railways, etc. are at various stages of establishment or consideration, the office of the Controller of Capital Issues was abolished in 1992, leading to freer pricing of equity issues. Private sector mutual funds and Foreign Institutional Investors (FII's) were permitted to trade in equities, increasing competition on the demand side of the equities market, and reducing the importance of publicly owned financial institutions. Competition in exchanges was enhanced with the setting up of the National Stock Exchange. All these necessitated a regulatory framework and hence the Securities and Exchange Board of India was established in 1992. While banking continues to be regulated by the Reserve Bank of India, a regulatory authority for the insurance sector, the Insurance Regulatory and Development Authority (IRDA) has also been established. There are several areas in which more competition needs to be infused.

4.1.11 The effectiveness of these regulators in promoting competition or stimulating competitive outcomes varies across sectors. The regulatory regimes in financial sectors (banking, insurance, stock exchanges) are considered to be more mature than those in the infrastructure sectors (electricity, transport and communication). In the telecom sector, though the regulator has limited powers & independence, the sector has performed reasonably well. However, in the power sector, though regulators are comparatively more independent, the broad perception is that sectoral performance has not been as expected. The banking sector regulator, which has a long history is, however, in good grip of the situation and has even managed crisis situations pretty well.

Intellectual Property Policy

4.1.12 The relationship between Intellectual Property Rights (IPRs) and competition policy has been a complex and widely debated one. The complexity of IPRs has deepened since the adoption of legislative reforms as a commitment under the WTO Agreement on TRIPS in 1995. While the importance of IPR in promoting innovation is well recognised, by providing legal monopoly status it also raises competition concerns and in certain areas diffusion of intellect property should have precedence over incentive to create. Obviously, an ideal IPR policy must have adequate safeguards to deal with such concerns. The TRIPS agreement also recognises this aspect.

4.1.13 IPR laws in India have provisions to take care of these potential IPR related competition abuses, including the provision for compulsory licensing. The Competition Act, 2002 does have a specific provision to deal with anti-competitive behaviour arising out of unreasonable restraint imposed by a holder of intellectual property beside being a factor to be considered while determining 'dominance of an enterprise' attained under a statute in the relevant market. .

Regional Development Policy

4.1.14 Regional development concerns are taken into account in resource transfer from the Centre to the States. Incentives to enterprises based on investment in designated backward areas raise competition concerns. From competition perspective, it may be more prudent to address the issue of regional development through resource transfer rather than through varied tax rates and concessions, because, such concessions skew the competitive process. It seems that the Government is seriously thinking in this direction.

Labour Policy

4.1.15 The 'organised' sector in the context of the Indian economy consists of industrial establishments with 10 or more workers (or 20 or more workers if no power is used) and government services. It employs a very small proportion of the total labour force. Under the Industrial Disputes Act, 1947, the closure of a factory in the organised sector and the retrenchment of labour is practically impossible. Except for the regulation of minimum wages, regulations are applicable only to the organised sector, which, as noted, is small as compared to the unorganised or the informal sector.

4.1.16 The labour market continues to be inflexible with high exit barriers. It has led to disproportionate growth of informal sector where labour laws are not applicable or enforceable. Thus a few people enjoy high degree of protection, while the overwhelming majority has no protection at all.

Consumer Policy

4.1.17 There is a convergence between the objectives of consumer protection policy and competition policy. The main objective of competition policy and law is to preserve and promote competition as a means to ensure efficient allocation of resources in an economy, thereby maximizing consumer welfare. Consumer welfare is at the centre stage of consumer protection policy and law. There is a strong complementarity between the two policies in that both primarily attempt to promote consumer welfare.

4.1.18 India does not have a formal comprehensive consumer policy as on date. Nevertheless, several elements of consumer welfare and protection are embodied in different policies and laws. Importantly, however, there is a unique consumer protection law in India which seeks to provide simple, speedy inexpensive redressal to aggrieved consumers. It is considered to be a good model. Despite several constraints, it is protecting all consumers in a significant way.

4.2 Need for a National Competition Policy for India

4.2.1 The reforms initiated since 1991 recognized the need for removing fetters on trade and industry with the view to unleash the competitive energies. The Industrial Policy Statement of 1991 emphasized the attainment of technological dynamism and international competitiveness. It noted that the Indian industry could scarcely be competitive with the rest of the world if it had to operate within an over regulated environment. To enhance competition in the domestic markets and to generate/promote a culture of competition in the country is part of this broader agenda of reforms. Further reforms would be facilitated by means of a comprehensive overarching national competition policy.

4.2.2 There are several policies and laws that can have significant bearing on competition. These are often not competition-friendly, sometimes by design and often due to ignorance; such policies are anachronistic in the present economic milieu and adversely affect the competitive forces and the competition culture in the economy. This situation can be addressed only by adopting a comprehensive National Competition Policy and harmonizing all other polices keeping in view competition dimensions.

4.2.3 The economic reforms undertaken by the Government have been generally on sector by sector basis and the progress across sectors has not been uniform. The sector by sector approach also carries the risk of inconsistency between sectoral policies. A broad based, overarching National Competition Policy will promote coherence in the reforms and establish uniform competition principles across different sectors. This will ensure that the competition dimension is taken into account while formulating various policies and consistency is maintained across all sectors.

4.2.4 The national Competition Policy will facilitate creation of a national market. The competition policy recognises the need for removing the barriers on trade of goods and services across all states. It will help integrate the national market and create a uniform level playing field across the country.

4.2.5 The Raghavan Committee on competition policy also highlighted the need for a competition policy in its report. In fact, it regarded it as the fourth cornerstone of Government economic framework policies along with monetary, fiscal and trade policies.

4.3 **Competition & Plan Objectives**

4.3.1 The Approach Paper for the Eleventh Five Year Plan outlines objectives and challenges, and sets targets for various sectors. The main objectives/ targets of the Eleventh Five-Year Plan *inter-alia* are to[28]:

- Raise GDP growth to 9%
- Achieve growth which is inclusive and broad based
- Provide access to basic facilities such as health, education and clean drinking water
- Reduce poverty at a faster rate
- Improve infrastructure

4.3.2 Relatively weak competitive pressure exists in a number of sectors in India. Further reforms are necessary to promote competition, which should boost growth as well as generate more employment. Thus to attain multiple objectives of the Eleventh Five Year Plan, competition can be strengthened in several sectors.

Agriculture

4.3.3 There is huge potential to advance competition in the agricultural sector both from the demand as well as from the supply side. On the demand side, the model Agricultural Produce Marketing Committee Act is likely to provide a framework, which will abolish the 'mandi' tax and permit the farmers to sell their produce outside the 'mandi' so that the farmers will get a legitimate share in the final value of their produce. It will also facilitate free movement of agricultural produce between the States. This is expected to help the agriculture sector to grow faster and also augment rural income and employment.

4.3.4 On the supply side, competition in supply of inputs such as seeds, fertilizers, pesticides and credit may be augmented which will facilitate timely, effective and adequate supply of agricultural inputs in the country and will lead to greater efficiency through more realistic pricing, conservation of input use and more rational crop selection.

Industry/Manufacturing

4.3.5 In comparison with its Asian peers, manufacturing in India makes a relatively low contribution to the GDP. It is said that the major barriers to India's emergence as a diversified global manufacturing hub are in the realm of its policy. Some of the concerns are labour market inflexibility, small-scale industry (SSI) reservation, public good and merit good and poor infrastructure.

Labour Market

[28] Planning Commission (2006), "*Towards Faster and more Inclusive Growth – An Approach to the Eleventh Five Year Plan*, "Government of India.

4.3.6 Labour market rigidity has been alluded to above. Presently an employer, employing more than 100 workers, has to seek permission from the State government to lay off workers. While the employees have certain rights that must be fully protected and there should be provisions for compensation & labour welfare, market efficiency requires that workers can be hired or retrenched as the demand for their particular skills expands or contracts. Labour market rigidities constrain large industrial investments, lead to undesired fragmentation and limit the growth potential of an industry. Thus they also constrain the expansion of employment opportunities.

SSI Reservation

4.3.7 The policy of reservation of products for production only by the small-scale sector more often results in support of weak and inefficient producers. It hinders the assimilation of technology and perpetuates sub-optimal scales of production. It also leads to extreme fragmentation which prevents producers from availing of benefits of economies of scale.

Infrastructure: Power

4.3.8 Indian industries pay extremely high prices for power (when they do) for inordinately low quality power (when they receive it). This obviously imposes a severe constraint on production and inevitably affects the investment decisions. The Electricity Act (2003) was perceived as a good step forward to solve the country's power shortage problem. Three premises – open access system, abolition of entry and exit barriers, and reform of the provision of free or subsidized power to select groups – were central to the roadmap envisaged by the Electricity Act. However, three years after the passage of the Act, the ground-level situation has not significantly changed. Therefore, there is pressing need to enhance competition in the system, particularly through enforcement of open access and consumer choice of electricity provider.

Transport

4.3.9 The road transport sector for goods and passenger transport is heavily regulated. Progressive economic de-regulation in this area can promote competition, improve efficiency and productivity and bring about substantial consumer gains. There is also need to undertake at the state level rationalization of motor vehicle taxation and bring about some uniformity in RTO rules. There is a wide variation in the taxation rates among States and Union Territories leading to irrational pricing of services and loss of revenue to the States. The system of inter-state check posts poses hindrance to timely movement of goods. The system can be improved by having a uniform road tax which will help in speedy clearance of movement of vehicles at the State entry and exit points. This will not only lead to faster turnaround time but also help to improve road economics.

Health Care

4.3.10 Competition in this sector will lead to better provision of and access to health services presently, the availability and quality of public health services in India are poor and deteriorating, which is inducing consumers to spend on private provision. For the same service delivered, private providers typically charge more. Competition in this sector can be initiated by considering a system of 'health voucher' for the poor to avail of private health services. The health voucher may pay for a standardized package of health services including hospital care, doctor visits and cost of medicines. The health voucher would give freedom to the user for choosing the hospital or clinic as per the quality of service provided. This would encourage competition among private hospitals and clinics to improve their services for attracting customers holding health vouchers.

Education

4.3.11 India aspires to be the next knowledge capital. Like health, 'education voucher' for the poor to avail of better education may be considered in this sector in order to generate more competition & better facilities. The education voucher would pay for the tuition fee and empower poor parents to choose from various schools. As it will give freedom of choice to poor students to attend better schools, the schools will compete among themselves to improve their education delivery system for attracting students having education vouchers. As far as higher education in the country is concerned, there is an acute shortage of skilled people and professionals. Quality university and research centres are necessary to meet the demand for a skilled labour force. By allowing foreign universities to operate from India with sufficient safeguards, competitive elements in this segment can be introduced.

Drinking Water

4.3.12 Drinking water supply is one of the six components of '*Bharat Nirman'*, which has been conceived as a plan to be implemented in four years from 2005-06 to 2008-09. The Approach Paper to the Eleventh Five Year Plan emphasises full and timely realisation of *Bharat Nirman* targets. Competition in this utility service segment can be introduced through Public-Private Partnership (PPP) mode. Competitive tendering for the provision of drinking water would make the assessment of cost and benefits easier and more market based. This will result in better access to drinking water.

Chapter V

Dimensions of National Competition Policy

5.1 Objectives of National Competition Policy

5.1.1 The broad objectives of the broad based, overarching National Competition Policy should be:

i. to preserve the competitive process, to protect competition, and to encourage competition in the domestic market so as to optimize efficiency & maximize consumer welfare. This would also make domestic firms competitive globally,
ii. to promote, build and sustain strong competition culture within the country through creating awareness, imparting training and consequently capacity building of stakeholders including law makers, judiciary, policy makers, business, trade associations, consumers and their associations, civil society etc.,
iii. to achieve harmonization in policies, laws and procedures of the Central Government, State Governments and sub-State Authorities in so far as the competition dimensions are concerned with focus on greater reliance on well functioning markets,
iv. to ensure competition in regulated sectors and to ensure institutional mechanism for synergized relationship between the sectoral regulators and the CCI,
v. to strive for single national market as fragmented markets are impediments to competition,

5.2 Principles of National Competition Policy

5.2.1 The Competition Policy should endeavour to give effect to the principles set herein below which should be applicable across all sectors of the economy:

(i) The Competition Act, 2002 prohibits anti- competitive agreements and combinations which have or are likely to have appreciable adverse effect on Competition. It also seeks to prohibit abuse of dominant position by an enterprise. There should be effective control of anti-competitive conduct which causes or is likely to cause appreciable adverse effect on competition in the markets within India. The Act establishes the CCI as the sole national body to enforce the provisions of the Act.
(ii) Competitive neutrality requires treatment of all alike; any discrimination or preferential treatment on the basis of ownership or otherwise goes

against the spirit of fair competition. Every policy should be competitively neutral amongst all players, whether these be private enterprises, public sector enterprises or government departments engaged in non- sovereign commercial activity.

(iii) Procedures should be rule bound, transparent, fair and non-discriminatory.

(iv) There should be institutional separation between policy making, operations and regulation.

(v) Where a separate regulatory arrangement is set up the functioning of the regulator should be consistent with the principles of competition as far as possible.

(vi) Control over essential facilities by dominant enterprises undermines competition by denying access to new entrants. Third party access to essential facilities on reasonable fair terms will ensure effective competition and, therefore, should be provided in law. However, what constitutes an essential facility may differ on a case to case basis.

Deviations from Principles of Competition Policy

5.2.2 Any deviation from the principles of competition should be only to meet desirable social or other national objective, which should be clearly spelt out. The deviations should adhere to the following rules:-

- the desirable objective be well defined,
- should be decided in a transparent and rule bound manner,
- should be non–discriminatory between public & private enterprises and also between domestic and overseas enterprises,
- the mode, manner and extent of deviation should have the least anti-competitive effect.

5.2.3 There should be accountability in the process so that deviations are not made without adhering to the accepted principles. As a general rule any deviation should be an exception with pre-determined tenure. There should be an inbuilt sun-set clause to ensure its continuation only until it is necessary. Any deviation should be made after only considering views of the Competition Commission.

5.3 Central Government Initiatives

5.3.1 The following broad policy initiatives are needed to effectively generate a culture of competition and to enhance competition in the domestic markets with the involvement of all the stakeholders:

i. Several existing policies, statutes and regulations of the Central Government restrict or undermine competition. A review of such policies, statutes and regulations from the competition perspective (this is referred to as ‘competition audit’ in several countries) should

be undertaken with a view to remove or minimize their competition restricting effect.

ii. Proposed policies, statutes, regulations that affect competition should be subject to competition impact assessment through an internal mechanism. Similarly, any privatization attempt should take into account the competitive dimension. The expert assistance of the CCI should be utilized in this exercise.

iii. Where a regulatory regime is found to be justified, it should provide that the principles of competition would be taken into account in the regulation. Regulation needs to be diluted progressively as competition becomes effective in the regulated sector. Regulatory impact analysis should be a pre-condition for imposing regulation in any sector.

iv. All the substantive provisions of the Competition Act need to be made effective soon as delay is depriving the country of the benefits of competition.

v. The CCI needs to be functionally autonomous and financially independent. In order to assure financial independence, CCI may be provided with an initial corpus by way of grant of an appropriate amount to enable it to perform its duties without being subjected to the annual budgetary constraints & uncertainties. The CCI needs to be run professionally[29] so as to attain the highest standards.

vi. To enable CCI to discharge the duty cast upon it by the Act to promote competition, the Act should allow CCI to *suo moto* render its opinion on impact of any existing or proposed legislation, regulation or policy on competition.

vii. Building strong competition culture is imperative not only to reap the benefits of competition but also to achieve higher level of economic growth. The Act mandates CCI to undertake competition advocacy, public awareness and training on competition issues. The role of CCI in this respect needs to be strengthened and adequate resources need to be made available to it.

viii. In order to ensure effective competition, third party access to essential facilities owned by dominant enterprise on reasonable and fair terms should be statutorily provided if it is feasible and efficiency enhancing.

[29] "All regulatory institutions will be strengthened to ensure that competition is free and fair. These institutions will be run professionally" – National Common Minimum Programme of the Government of India, May 2004.

ix. India has entered into bilateral trade agreements & regional trade agreements with some countries. More such bilateral and regional trade agreements are likely to be entered into in future. Incorporation of competition clauses in bilateral and regional trade agreements will go a long way to check anti-competitive behaviour and potential anti-competitive cross-border transactions/ mergers.

x. Ministries/Departments which have set up regulatory authorities should consider rationalizing their manpower.

5.4 State Government Initiatives

5.4.1 The process of economic reform is incomplete unless it permeates to the level of State Governments. The initiatives at the State Government level would require undertaking pro-competition reforms keeping in mind the principles of the National Competition Policy.

5.4.2 There are many economic areas of state legislations, regulations and policies that impact or inhibit competition in the relevant markets. Pro-competitive reforms will enhance consumer welfare.

a. There exist barriers, both fiscal and otherwise, which hinder inter-state trade. These restrictions tend to fragment the national market which not only heightens the possibility of indulgence in trade practices adversely affecting competition but also dent freedom of trade.
b. The State Governments may volunteer to undertake a review of existing policies, laws or regulations from the competition perspective and also undertake a competition impact assessment of proposed policy, law and regulations before these are finalized
c. As part of its advocacy function, CCI has made a noticeable beginning and has been interacting with the State Governments. The Commission's efforts and resources in this area need to be strengthened. The States also, on their own, need to come forward to avail of the benefit of the expert advice of CCI in undertaking competition audit of their legislations, regulations and policies.
d. The concerned Departments of the State which have set up regulatory authorities should consider rationalizing their manpower.

5.5 Sub-State Authority Initiatives

5.5.1 A sub-State authority is extended arm of the Government. It has wider connotation and includes municipalities, housing boards, universities, professional institutes, roadways, corporations which are created by statutes but are engaged in production, supply, distribution of goods or provision of services.

5.5.2 The statutes, the laws, the procedures which govern the sub-State authorities need to be reviewed so as to align them with the broad principles of the Competition Policy.

5.5.3 Such authorities may be encouraged to consult CCI on contemplated changes in the rules and procedures to ensure that competition is not undermined.

5.6 Oversight Mechanism of Competition Policy

5.6.1 Once a comprehensive National Competition Policy has been adopted and announced by the Government, which should also be reviewed periodically, it should be incumbent upon the organs of Government to abide by the elements of the National Competition Policy. Similarly, at the state and sub-state levels, it is expected that the policy would be duly respected. However, given the wide canvas of the National Competition Policy, it would be necessary to set up an institutional arrangement for monitoring the progress of the implementation of the policy. It is suggested that a Competition Policy Oversight Council may be set up. The task of the Competition Policy Oversight Council would be to monitor the progress in the implementation of the National Competition Policy such as reviews of laws and policies, and the competition impact assessment of new laws and policies.

5.6.2 Since the Competition Policy is concerned both with private anticompetitive practices as well as with government measures or instruments that affect the state of competition in markets for an effective and credible competition policy, the Competition Policy Oversight Council should be autonomous in its functioning. For this purpose it should be provided secretarial assistance and adequate funding. The Standing Committee on Finance, Lok Sabha Secretariat, to which the Competition (Amendment) Bill, 2006 was referred for examination and report thereon, has observed that CCI is an expert body to deal with complex competition issues and that the knowledge and experience in this field is scarce in India. It will be appropriate, if secretarial assistance to the Council is rendered by the Commission. The Council should be appropriately positioned in the Government, to enable it to best discharge its role of monitoring progress of the implementation of the Competition Policy. Such arms length relation is intended to ensure fairness among market participants and simultaneously foster the true objectives of the Competition Policy.

5.6.3 It is suggested that a Competition Policy Oversight Council may consist of independent experts, representatives of the concerned ministries, State Governments, industry, consumer welfare organizations and other civil society organizations. It should be headed by an eminent person from a relevant field such as economics, business or trade. The task of the Competition Policy Oversight Council would be to monitor the progress in the implementation of the Competition Policy such as reviews of laws and policies, and the competition impact assessment of new laws and policies and it would recommend the release of financial incentives to the State Governments based on the progress in the implementation of the policy.

5.6.4 It is recommended that an incentive scheme may be instituted under which financial grants may be given to State Governments linked to the progress in aligning their policies and laws with the principles of the National Competition Policy. The grants could be released based on recommendations received from the Competition Policy Oversight Council regarding the progress made by the various State Governments.

Chapter VI

Competition Advocacy

6.1 Definition

6.1.1 Advocacy is the act of influencing or supporting a particular idea or policy. Public Policy advocacy is geared towards changing particular public policy and involves taking position on specific policy issues.

6.1.2 "*Competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanism, mainly through its relationship with other governmental entities by increasing public awareness of the benefits of competition"*[30].

6.1.3 Successful implementation of competition policy and law largely depends upon the willingness of the people to accept these. Advocacy plays a vital role in securing the willingness and acceptability of competition policy and law.

6.1.4 Competition advocacy can also be looked at as law enforcement without intervention. It has maximum impact with least intervention and an effective way to garner support to attain competition policy objectives.

6.2 Need for Competition Advocacy

6.2.1 The importance of competition advocacy arises partly in relation to regulation. Regulation can be an efficient response to imperfect markets or market failures such as the existence of natural monopoly, imperfect information, etc. "Nonetheless, it is important to recognize that, notwithstanding its avowed aims, regulation often thwarts rather than promotes efficiency and economic welfare. This is likely to be the case, for example, where it imposes restrictions on entry, exit and/or pricing in non-natural monopoly industries". [31]

6.2.2 While the Competition Act, 2002 covers within its ambit commercial activities of government departments and government bodies, many government interventions are outside competition law. For example, consumer protection law, unfair trade laws like anti-dumping, government policies on registration of new business, taxation, corporate governance oversight, trade and FDI policies, etc. fall outside the purview of the Act but have profound impact on the state of competition in the economy. It is necessary to be able to influence in the formulation of these policies to ensure that competition dimensions are considered by the policy makers. Competition advocacy, therefore, assumes

[30] First Annual ICN Conference, September (28-29, 2002), Naples, Italy.
[31] Anderson & Jenny (2002) quoted in Asian Development Outlook, 2005.

importance in the realm of government intervention in the market through policy instruments.

6.2.3 While anti-competitive behaviour of business can be addressed by law enforcement, it is often considered necessary to raise the level of awareness of economic agents to ensure better compliance, thus obviating the need for intrusive action by the Commission.

6.2.4 The main beneficiaries of competition policy and law are supposed to be the consumers, whose welfare is its avowed objective. Raising the level of awareness among the public is an important step towards creating a competition culture within the country. It is bound to assist not only in law enforcement but also in pro-competitive policy making since better informed citizens would be able to provide vital inputs to both the law enforcers and the policy makers.

Raghavan Committee Report

6.2.5 The Raghavan Committee had envisaged the following:-

The mandate of 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 Commission, therefore, needs to assume the role of a competition advocate, acting proactively to bring about Government policies that lower barriers to entry, promote de-regulation and trade liberalization and promote competition in the market place. There is a direct relationship between competition advocacy and enforcement of competition law. The aim of competition is to foster conditions that will lead to a more competitive market structure and business behaviour without the direct intervention of the CCI[32].

6.2.6 For a competition advocacy programme to be successful, the Raghavan Committee had recommended the following[33]: -

- 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 search for alternatives that are less harmful to competition and consumer welfare.

[32] Report of the High Level Committee on Competition Policy and Law, 2000 Para 6.4.7
[33] Report of the High Level Committee on Competition Policy and Law, 2000 Para 6.4.8

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

6.3 Advocacy in the Competition Act, 2002

6.3.1 In recognition of the importance of the various stakeholders, the Act lays emphasis on competition advocacy initiatives of CCI at three levels, namely; the policy makers (Central and State Governments), sectoral regulators and the public at large.

6.3.2 Law provides for reference to CCI by the Central Government as well as State Governments[34] to refer any matter on competition policy to CCI for its opinion. However, the law falls short of expressly enabling CCI from giving its opinion on competition policy on its own, i.e. without any reference from the government.

6.3.3 While most economic policies are likely to impact the state of competition, reference can only be made on a policy on competition and this severely restricts CCI in carrying out competition advocacy with the government.

6.3.4 Advocacy initiatives with the sectoral regulators have not been expressly provided in the law although there exists a provision for case based reference to CCI for a non-binding opinion either at the behest of the party to a dispute with the regulator or by the regulators itself on a competition issue. The law envisages that the sectoral regulation will take decision after receipt of an opinion from the CCI. Advocacy is therefore, an important tool with the competition authorities in most jurisdictions for fostering competition in regulated sectors. There is thus need to have specific provision in the law to make it mandatory for the regulators to inform the CCI of any proposed regulations/guidelines so as to enable it to provide its opinion on the competition dimensions.

6.3.5 The Act specifically provides for competition advocacy for creating awareness and imparting training about competition issues amongst various stake-holders. Besides consumers and consumer organizations, such initiatives could target the business, professionals, media, the law makers, bureaucrats and the judiciary.

6.3.6 The role of other stakeholders is equally important in effectively generating a culture of competition in the country. Other stakeholders like consumer

[34] Reference by State Governments is proposed in the Competition (Amendment) Bill, 2006

organisations, industry bodies, trade associations, professional bodies, research institutions and other civil society organizations will be encouraged to supplement the efforts of the CCI.

6.4 Tools of Advocacy

6.4.1 Various competition advocacy tools are available and have been effectively utilized by competition authorities in other jurisdictions. Seminars and workshops are effective tools for targeted audience. Published brochures, guidelines, articles and posting them on website are able to carry the message far and wide. An important tool is the ability of many competition authorities to give opinion on proposed legislation and public policy on their own, so that the law makers and policy makers consider the competition dimensions and give reasons for deviating from them for the benefit of the public. While law making and policy making strictly lie in the realm of legislature and the government respectively, it is the right of the public to know what kind of public interest persuaded these authorities to deviate from competition principles. Competition authorities also carry out market studies to understand state of competition in various sectors in order to advise the concerned authorities to make necessary changes so as to usher more competition or to usher competition where there is weak competition or no competition, as the case may be. Wide dissemination of results of market studies is an important tool of competition advocacy. The CCI should also continue to carry out market studies to understand the state of competition in various sectors in order to advise the concerned authorities to make necessary changes so as to usher greater competition.

6.4.2 Cooperation in competition advocacy through the trade treaties will boost the effort in this direction in terms of content, quality, scope and extent.

6.4.3 Competition agencies worldwide are increasing their advocacy role to promote a market structure which is more supportive of competition. Advocacy allows competition agencies to expand its reach and play an important role in areas where its role is usually ignored. Advocacy can give a competition authority a window in the design of restructuring of industries before privatization or in the grant of concessions or in the way access rules are set. It is necessary not to restrict the canvass of CCI in its advocacy initiatives, which alone can foster a competition culture in our economy.

6.4.4 The Standing Committee on Finance of the 14th Lok Sabha in its 44th report has observed that the CCI would make sincere efforts to utilise its expertise to pinpoint such policies of the Government which are inconsistent with the principles of competition.[35] It is, therefore, necessary that the Competition Act, 2002, should have a provision allowing the CCI to give its opinion *suo moto* to

[35] Forty-Fourth Report, Standing Committee on Finance (2006-07), Lok Sabha Secretariat.

the Government on any economic policy substantially impacting competition within India.

6.4.5 It is imperative to incorporate an explicit provision in the Competition Act, 2002 to enable CCI to formulate, publish and post in the public domain guidelines covering various dimensions related to competition law for enhancing public awareness. Such guidelines help enterprises by bringing greater clarity about the provisions of the competition law and the manner of its enforcement.

6.4.6 The concept and the role of competition are relatively new to the Indian business community. There is therefore a pressing need to increase the level of awareness about the benefits of competition and the contribution of the competition law in this respect amongst the public, more particularly amongst the business community. The CCI has been given, under the Act, the mandate to generate public awareness. It is important that CCI upscales its public awareness programme for this purpose and it should also be provided sufficient funds for such a programme.

Chapter VII

Coordination between Competition Commission & Sectoral Regulators

7.1 Introduction

7.1.1 Competition law seeks to promote efficient allocation and utilisation of resources, which are usually scarce in developing countries. A good competition law lowers the entry barriers in the market and makes the environment conducive to promoting entrepreneurship. It also ought to be acknowledged that each sector has its own set of issues and problems unique to them and efficient management of sector specific issues / problems at a micro level is equally critical in ensuring effective competition in the market. In fact the Report of the High Level Committee on Competition Policy and Law, 1999, emphasized that although it does not directly form part of the competition law, legislation regarding various regulatory authorities falls under the larger ambit of competition policy, and that rationalization in this regard was an aspect to be addressed.[36]

7.1.2 Regulations are public constraints on market behaviour or structure. They usually refer to a diverse set of instruments by which governments set requirements on businesses and citizens[37]. Regulations can be categorised as under:

(i) Economic Regulations – which intervene in market decisions such as pricing, competition and entry/exit.
(ii) Technical Regulations: which regulate the technical aspects which are distinct and unique to the sector.
(iii) Social regulations – which protect public interest such as health, safety, environment.
(iv) Administrative regulations – administrative formalities through which government collects information and intervenes in individual economic decisions.

7.1.3 With regards to economic regulation, the role of sectoral regulators is critical since they generally apply an *ex ante* prescriptive approach while competition authorities, except in the important area of merger review, generally apply an *ex post* enforcement approach. This essentially happens because sector-specific regulators typically engage on a moment to moment basis with the

[36] Report of the High Level Committee on Competition Law and Policy, 2000.
[37] OECD Reviews of Regulatory Reform: Background Document on Regulatory Reform in OECD Countries, OECD (2004d)

sector they are responsible for and intervene more frequently based on a constant flow of information reporting from regulated entities. At the same time competition agencies generally rely more on complaints and gather information only when necessary in connection with possible infringements of the law.

7.2 Regulatory Regime in India

7.2.1 The reduction of direct State intervention in the economy through privatization as well as elimination of price controls and licensing necessitated change in the mode of intervention and gave rise to the concept of a "regulatory State". This concept means that the State is still responsible for the economy and Society, however, it is tending towards an arm's length relationship with the citizens and the economy. Consequentially many public utilities were separated from the government, either through corporation and/or privatization. The responsibility for State intervention to ensure the welfare of its citizens is now upon sectoral regulators, which came to be established in several sectors. It is not unusual even in the industrialized nations to have sectoral regulators in the utility and network industries, specially if Universal Service Obligation (USO) is an objective.

7.2.2 Regulation may be justified or warranted in sectors which have natural monopolies or network industries; more so where a universal service obligation exists. However, regulation may not be required where these features do not prevail. Such sectors should ideally be left to the forces of competition. Even sectors where regulation is required, it should be competition based or competition driven. One of the objectives of the regulation, incorporated in the sectoral regulatory law, should be to create a competitive market in so far, as this is feasible. As competition in the regulated sectors expands, the regulation should hopefully become lighter and lighter and ultimately economic regulation may become no longer necessary. Therefore, sunset clause based on considered timelines appropriate to the regulated sector may be considered in all economic regulatory laws so as to leave the industry to market forces once effective competition is achieved.

7.2.3 The objective of a sectoral regulator is to provide good quality service at affordable rates, but the promotion of competition and prevention of anti-competitive behaviour may not be high on its agenda or the laws governing the regulator may be silent on this aspect. It is not uncommon for sectoral regulators to be more closely aligned with the interest of the firms being regulated, which is also known as 'regulatory capture'. Besides, a sectoral regulator may not have an overall view of the economy as a whole and may tend to apply yardsticks which are different from the ones used by the other sectoral regulators. In other words, there is a possibility of the lack of consistency across sectors. On the other hand, the CCI will be able to apply uniform competition principles across all sectors of economy.

7.2.4 The sectoral regulators are meant to have the requisite skills and expertise required to engage with scientific and technical aspects unique to that sector.

In fact, most of the sector regulators are manned by personnel taken either from the Ministry responsible for the sector or the public sector incumbent. The objective of the regulator is to provide a level playing field between sectoral participants. Though some of the laws regulating a sector[38] specifically provide for promotion of competition and prevention of anti-competitive behaviour, many regulatory laws and regulations remain silent on the issue. The CCI is well-suited for the tasks of market definition and prevention of anti-competitive behaviour across all sectors of the economy. It may require expertise on technical aspects unique to a sector having bearing on competition.

7.2.5 The conflicts between CCI and the sectoral regulators could be caused by legislative ambiguity or jurisdictional overlap or legislative omission. Interpretational bias of the bureaucracy involved could further aggravate the conflicts. Conflicts between two may be generated by the market players and legal arbitrators for obvious reasons. Conflicts are bound to hurt consumers and the uncertainties that go with them can increase risk of investment. Conflict resolution by a court of law may perhaps be time consuming, and therefore, be only the last alternative.

7.2.6 The Competition Act, 2002, provides for interface between such sectoral regulators and the Commission. The relevant provision stipulates that where in the course of a proceeding before any statutory authority an issue is raised by any party that any decision which such statutory authority has taken or proposes to take is or would be, contrary to any of the provisions of this Act, then such statutory authority may make a reference in respect of such issue to the Commission. The Competition (Amendment) Bill, 2006, provides additionally that "any statutory authority, may, *suo moto,* make such a reference to the CCI." A statutory authority may also make a reference to CCI for an enquiry relating to an anti-competitive agreement, an abuse of dominant position or a combination. CCI can pass such directions/orders as are contemplated in the Act

7.2.7 The interface of CCI *vis-à-vis* sectoral regulators is critical. The basic premise to be recognized is that sectoral regulators have domain expertise in their relevant sectors. The Commission, on the other hand, has been constituted with a broad mandate to deal with competition for which certain very specific parameters are laid down under the Act. A formal mechanism for coordination between CCI and the sectoral regulators is therefore of key importance.

7.2.8 In essence a framework for an interface between a competition regulator and a sectoral regulator should deliver the following benefits:

a) appropriately identify issues of concern
b) ensure appropriate channelisation of various concerns to the appropriate forum and obtaining corrective action at the earliest;
c) establish a framework that avoids duplication of effort;

[38] For example section 60 of the Electricity Act, 2003.

d) conserve the Commission's resources and limit its ambit only to matters of competition; and
e) promote capacity building and developing expertise both at the level of the competition regulator and the sectoral regulator.

7.2.9 A policy for CCI to cooperate with agencies of state and local governments would also further its existing statutory mandate of protecting the public against anti-competitive behaviour.

7.2.10 In applying a framework for the relationship between CCI and the sectoral regulators in India one can draw upon the lessons learnt from other countries to evolve a model best suited for Indian conditions.

7.3 Examples from Other Jurisdictions

Australia

7.3.1 In Australia, the competition authority has frequent information exchanges with a variety of economic and technical regulators through regular liaison meetings and the exchange of publications and other information. The competition authority also has a significant public and business education role. In addition, chairpersons of various Commonwealth and State economic regulators[39] are associate members of the competition authority; and certain members of the competition authority are appointed as associate members of the Australian Communications Authority and the Australian Broadcasting Authority. This helps to bridge the 'knowledge gap' that can arise when competition, economic and technical regulators are separate bodies. Further, in conjunction with a number of Commonwealth and State regulatory agencies and policy advisers, the Competition Authority publishes a quarterly newsletter, the *Public Utility Regulators Forum*. The *Forum* was established in recognition of the need for co-operation among the various state-based regulators. It aims to focus understanding of similar issues and concepts faced by different regulators; minimise regulatory overlap for large users operating across jurisdictions; provide a means of exchanging information; and enhance the prospects for consistency in the application of regulatory functions. For example, some telecommunications issues involve areas of overlap between the Australian Communications Authority ("**ACA**") and the competition authority. In general, where one agency has responsibility for a particular issue that may overlap with the other agency, there are legislative requirements for consultation and notification. While the ACA is generally responsible for specifying technical standards, where such standards are integral to competition within the market, the competition authority may assume primary responsibility for the issue. Moreover, given that telecommunications access regime is inextricably linked to technical matters within the industry, the competition authority must consult with

[39] Such as the Australian Broadcasting Authority, the New South Wales Independent Pricing and Regulatory Tribunal and the Victorian Office of the Regulator General.

the ACA on various matters, such as the model terms and conditions to apply to telecommunications services subject to an access code.

United States of America

7.3.2 In the US, the Federal Trade Commission[40] ("**FTC**") conducts liaison with other federal entities to avoid duplication of effort and unnecessary expenditure of public funds. The FTC's policy in this respect recognises that liaison is of particular importance when other federal agencies, such as the Department of Justice, the Postal Service, and the Food and Drug Administration have concurrent or overlapping jurisdiction with the FTC. Liaison is also conducted to obtain advice and assistance, e.g., expert witnesses, from other federal agencies, to exchange information and generally to coordinate activities of the agencies as may be necessary. To facilitate liaison, members of the staff have been designated as liaison officers for each federal agency whose activities may relate to the work of the FTC. Contacts between the CCI staff and the staff of other agencies are ordinarily initiated through the designated the CCI liaison officer, although informal, continuing contacts are allowed to be maintained properly by appropriate staff members directly.

7.4 Suggestions

7.4.1 Formal schemes for coordination have been considered in various countries, for example:

a) the right to participate/observe proceeding before the other;
b) formal referrals;
c) appeal to a common authority;
d) non-interference in other's jurisdiction;
e) delineation of jurisdiction; and
f) presence of competition authority on sectoral regulator agency.

7.4.2 As a matter of policy, we should encourage formal and informal exchanges between various sectoral regulators and CCI. The consultation process could be at two levels, one, at the policy level and two, in respect of individual cases.

7.4.3 At the policy level, a forum should be created where the CCI and the sector regulators could meet on regular basis with a view to promote policy level coordination and make sector regulation as much competition driven as possible. This mechanism could also help in evolving principles for sharing information and determining the jurisdiction in different categories or types of cases.

[40] The US Department of Justice has its own "Antitrust Division Manual" which sets out the DoJ's policy for working with other law enforcing agencies.

7.4.4 At the level of individual cases, mandatory consultation in an appropriate form and manner between the CCI and sectoral regulators may be provided for in the Competition Act and the sector regulatory laws. The consultation provision should have due regard to the need for expeditious disposal of cases.

7.4.5 Other mechanisms for coordination should also be explored such as:

(a) use of experts from each other for facilitating enquiry/investigations.
(b) exchange of personnel on deputation or internship basis.
(c) participation in each others' training programmes, workshops, seminars, etc.
(d) conducting regular training programmes by CCI for representatives of the sector regulators so that they are in a better position to appreciate various competition issues.

Chapter-VIII

Conclusions and Recommendations

8.1 This report recommends a set of comprehensive policy instruments and strategic interventions to effectively generate/promote a culture of competition in the domestic markets; to enhance the role of competition and competitive markets in Government policy making, and to suggest an institutional mechanism for synergized relationship between sectoral regulators and the Competition Commission of India (CCI).

8.2 A review of cross country literature suggests that there is a positive association between GDP growth and competition. Empirical studies have suggested that competition enhances productivity at industry level, generates more employment and lowers consumer prices. It has been shown that a pro-competitive policy environment is positively associated with long run growth. Competition enhancing policies have pervasive and long lasting effects on economic performance by affecting economic actors' incentive structure, by encouraging their innovative activities and by selecting more efficient ones from less efficient ones over time. The positive effects of competition are well illustrated by the recent experiences in India in several sectors such as telecommunications, automobiles, newspapers & consumer electronics, where there has been a fall in real prices/tariffs and marked improvement in the quality of goods/services. This experience demonstrates the benefits of ensuring competition in other sectors of the economy.

8.3 The constitution of India guarantees certain basic freedoms that include the fundamental right to carry on any occupation, trade or business under Article 19(1)(G). Competition law reinforces this fundamental right by prohibiting unreasonable restraints on the exercise of this right through anticompetitive practices. Many regard competition law as the economic analogue of political democracy and in some countries competition law is accorded the status almost of an economic constitution.

8.4 Competition law and policy is also a tool towards better governance since it advocates lesser control and discretionary powers in the hands of Government functionaries. At the level of the enterprises, compliance with competition law is akin to good corporate governance. Corporate governance, as normally understood, is ethical conduct within the internal environment of the company. Similarly, compliance with competition law is akin to ethical conduct in the external environment of the company, principally in the market place.

8.5 To strengthen the forces of competition in the market, both competition law and competition policy are required. The two complement each other. Competition law prohibits and penalizes anti-competitive practices by enterprises functioning in the market; that is, it addresses market failures. The aim of competition policy is to create a framework of policies and regulations that will facilitate competitive outcomes in the market.

8.6 Competition policy is a critical component of any overall economic policy framework. Competition Policy is intended to promote efficiency and to maximize consumer/social welfare. It also helps to promote creation of a business environment which improves static and dynamic efficiencies, leads to efficient resource allocation and in which abuse of market power is prevented/curbed.

8.7 The reforms initiated since 1991 recognized the need for removing fetters on trade and industry with the view to unleash the competitive energies. The Industrial Policy Statement of 1991 emphasized the attainment of technological dynamism and international competitiveness. It noted that the Indian industry could scarcely be competitive with the rest of the world if it had to operate within an over regulated environment. To enhance competition in the domestic markets and to generate/promote a culture of competition in the country is part of this broader agenda of reforms. Further reforms would be facilitated by means of a comprehensive overarching competition policy and it is recommended that Government formulate and announce such a competition policy, which may be termed the “National Competition Policy”.

8.8 The economic reforms undertaken by the Government have been generally on sector by sector basis and the progress across sectors has not been uniform. The sector by sector approach also carries the risk of inconsistency between sectoral policies. There are several policies and laws that can have significant bearing on competition. These are often not competition-friendly, sometimes by design and often due to ignorance; such policies are anachronistic in the present economic milieu and adversely affect the competitive forces and the competition culture in the economy. This situation can be addressed only by adopting a comprehensive National Competition Policy and harmonizing all other polices keeping in view competition dimensions. A broad based, overarching National Competition Policy will promote coherence in the reforms and establish uniform competition principles across different sectors.

8.9 The broad objectives of the National Competition Policy should be: to preserve the competitive process and to encourage competition in the domestic market so as to optimize efficiency & maximize consumer welfare; to promote, build and sustain strong competition culture within the country; to achieve harmonization in policies, laws and procedures regarding competition dimensions at all levels of governance; to ensure competition in regulated sectors and to ensure institutional mechanism for synergized relationship between the CCI and sectoral regulators; and to strive for a single national market.

8.10 The National Competition Policy should be based on the well defined principles: there should be effective control of anticompetitive conduct which undermines competition in markets in India; there should be competitive neutrality among all players, whether these be private enterprises, public sector enterprises or government departments engaged in non-sovereign commercial activity; the procedures should be rule bound, transparent, fair and non-discriminatory; there should be institutional separation between policy making, operations and regulation; where a separate regulatory arrangement is set up, it should be consistent with the principles of competition; third party access to essential facilities on fair terms should be provided; any deviation from the principles of competition should be only to meet desirable social or other national objectives which are clearly defined, transparent, non-discriminatory, rule bound and having the least anti-competitive effect. The above principles of competition should be applicable across all sectors of the economy.

8.11 The broad policy initiatives needed to achieve the objectives of National Competition Policy extend to the levels of the Central Government, State Government and sub-state authorities.

8.12 At the Central Government level, the substantive provisions of the Competition Act, 2002 need to be made effective immediately as further delay would elude the benefits of competition to the nation. The CCI needs to be autonomous and independent, without being subjected to the annual budgetary constraints & uncertainties by providing initial corpus by way of a grant. CCI needs to be run professionally so as to attain the highest standards.

8.13 Several existing policies, statutes and regulations of the Central Government restrict or undermine competition. A review of such policies, statutes and regulations from the competition perspective (this is referred to as 'competition audit' in several countries) should be undertaken with a view to remove or minimize their competition restricting effects. Proposed policies, statutes, regulations that impact competition should be subject to competition impact assessment through an internal mechanism. Regulatory impact analysis should be a pre-condition for imposing regulation in any sector. Any privatization attempt should take into account the competition dimension. The expert assistance of the CCI should be utilized in this exercise[41]. Incorporation of competition clauses in bilateral and regional trade agreements will go a long way to check anti-competitive behaviour and potential anti-competitive cross-border transactions/ mergers.

8.14 The initiatives at the State Government level would require undertaking pro-competition reforms keeping in mind the principles of the National Competition Policy. There are many economic areas of state legislations, regulations and policies that impact or inhibit competition in the relevant markets. These restrictions also tend to fragment the national market and dent freedom of

[41] Forty-Fourth Report, Standing Committee on Finance (2006-07), Lok Sabha Secretariat.

trade. The State Governments should be encouraged to undertake a review of existing policies, laws or regulations from the competition perspective and also undertake a competition impact assessment of proposed policy, law and regulations before these are finalized; the expert assistance of CCI could be utilized by the State Governments.

8.15 The sub-state authorities include municipalities, housing boards, universities, professional institutes, corporations, which are created by statutes as extended arms of the State but are engaged in production, supply and distribution of goods or provision of services. Such authorities may be encouraged to consult CCI on contemplated changes in the rules and procedures to ensure that competition is not undermined.

8.16 Once a comprehensive National Competition Policy has been adopted and announced by the Government, it should be incumbent upon the organs of Government to abide by the principles of the National Competition Policy. Similarly, at the state and sub-state levels, it is expected that the policy would be duly respected. However, given the wide canvas of the National Competition Policy, it would be necessary to set up an institutional arrangement for monitoring the progress of the implementation of the policy. It is suggested that a Competition Policy Oversight Council may be set up which would be autonomous in its functioning. The task of the Competition Policy Oversight Council would be to monitor the progress in the implementation of the National Competition Policy such as reviews of laws and policies, and the competition impact assessment of new laws and policies.

8.17 It is recommended that an incentive scheme may be instituted under which financial grants may be given to State Governments linked to the progress in aligning their policies and laws with the principles of the National Competition Policy. The grants could be released based on recommendations received from the Competition Policy Oversight Council regarding the progress made by the various State Governments.

8.18 Successful implementation of competition policy and law largely depends upon its acceptance by the people. Competition advocacy plays a vital role in securing the willingness and acceptability of a competition policy and law. Competition advocacy can also be looked at as law enforcement without intervention. An important tool of advocacy is the ability of many competition authorities to give an opinion on proposed legislation and public policy on their own, so that the law makers and policy makers consider the competition dimension and give reasons for deviating from them for the benefit of the public. The CCI should also continue to carry out market studies to understand the state of competition in various sectors in order to advise the concerned authorities to make necessary changes so as to usher greater competition.

8.19 The Competition Act, 2002, should have a provision allowing the CCI to give its opinion *suo moto* to the Government on any economic policy of the Government substantially impacting competition in India.

8.20 It is imperative to incorporate an explicit provision in the Competition Act, 2002 to enable CCI to formulate, publish and post in the public domain guidelines covering various dimensions related to competition law for enhancing public awareness. Such guidelines help enterprises by bringing greater clarity about the provisions of the competition law and the manner of its enforcement.

8.21 The concept and the role of competition are relatively new to the Indian business community. There is therefore a pressing need to increase the level of awareness about the benefits of competition and the contribution of the competition law in this respect amongst the public, more particularly amongst the business community. The CCI has been given, under the Act, the mandate to generate public awareness. It is important that CCI upscales its public awareness programme for this purpose and it should also be provided sufficient funds for such a programme.

8.22 The role of other stakeholders is equally important in effectively generating a culture of competition in the country. Other stakeholders like consumer organisations, industry bodies, trade associations, professional bodies, research institutions and other civil society organizations will be encouraged to supplement the efforts of the CCI.

8. 23 The interface of CCI *vis-à-vis* sectoral regulators is critical. The basic premise to be recognized is that sectoral regulators have domain expertise in their relevant sectors. The CCI, on the other hand, has been constituted with a broad mandate to deal with competition for which certain very specific parameters are laid down under the Act. A formal mechanism for coordination between the CCI and the sectoral regulators is therefore of key importance.

8.24 The objective of a sectoral regulator is to provide good quality service at affordable rates, but the promotion of competition and prevention of anti-competitive behaviour may not be high on its agenda or the laws governing the regulator may be silent on this aspect. It is not uncommon for sectoral regulators to be more closely aligned with the interest of the firms being regulated, which is also known as 'regulatory capture'. Besides, a sectoral regulator may not have an overall view of the economy as a whole and may tend to apply yardsticks which are different from the ones used by the other sectoral regulators. In other words, there is a possibility of the lack of consistency across sectors. On the other hand, the CCI will be able to apply uniform competition principles across all sectors of economy.

8.25 Regulation may be justified or warranted in sectors which have natural monopolies or network industries; more so where a universal service obligation exists. However, regulation may not be required where these features do not prevail. Such sectors should ideally be left to the forces of competition. Even sectors where regulation is required, it should be competition based or competition driven. One of the objectives of the regulation, incorporated in the sectoral regulatory law, should be to create a competitive market in so far as

this is feasible. As competition in the regulated sectors expands, the regulation should ideally become lighter and ultimately economic regulation may not be necessary. Therefore, sunset clause based on considered timelines appropriate to the regulated sector may be considered in all economic regulatory laws so as to leave the industry to market forces once effective competition is achieved.

8.26 The possibility of divergence or even conflict of views between the CCI and sectoral regulators cannot altogether be ruled out. To minimize such a possibility, the coordination and cooperation between the CCI and sectoral regulators should be maximized. Such cooperation and coordination can be visualized at two levels. At the policy level, a forum should be created where the CCI and the sector regulators could meet on regular basis with a view to promote policy level coordination and make sector regulation as much competition driven as possible. This mechanism could also help in evolving principles for sharing information and determining the jurisdiction in different categories or types of cases.

8.27 At the level of individual cases, mandatory consultation in an appropriate form and manner between the CCI and sectoral regulators may be provided for in the Competition Act and the sector regulatory laws. The consultation provision should have due regard to the need for expeditious disposal of cases. In addition, other mechanisms for coordination should also be explored such as exchange of personnel, participation in training programmes and workshops.

Annex – 1.1

COMPOSITION OF THE WORKING GROUP

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9.	Shri Shaktikant Das Secretary Industries Deptt. Govt. of Tamil Nadu Secretariat Chennai, Tamil Nadu	Member
10.	Dr. Subir Gokarn Chief Economist CRISIL Hindustan Times House, 9th Floor, K.G. Marg, New Delhi	Member
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Annex 1.2

PERSONS WHO ATTENDED THE MEETINGS OF THE WORKING GROUP

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Annex 1.3

Competition Policy of Botswana

The main objectives of Competition Policy of Botswana are to maintain and promote competition, in order to achieve efficient use of resources, protect the freedom of economic action of firms and, as the ultimate goal, to promote consumer welfare. The Competition Policy thus provides a framework for preventing anticompetitive practices and conducts by firms, and creates a business friendly environment that encourages competition and efficient resource allocation.

The Competition Policy in Botswana has highlighted certain measures which include, *inter alia*, the:

(i) adoption of liberal international trade and investment policies;

(ii) repeal or amendment of Government laws and regulations that unjustifiably limit competition, e.g., legislated entry barriers, professional licences, minimum price laws, land policies, and exclusive licensing in certain sectors;[42]

(iii) access to essential services, e.g. telecommunications and broadcasting, electricity and water;

(iv) reform of existing public monopoly structures through, amongst other means, privatisation;

(v) competitive neutrality; and

(vi) removal of state subsidies that distort competition;

(vii) separation of industry regulations from industry operations

(viii) Prohibition of anticompetitive conduct through a comprehensive competition law; and

(ix) adoption of a comprehensive approach that applies to all government policies affecting competition in all sectors of the economy, taking into account the possible exemption of certain sectors that are of public interest to the economy.

[42] The government has already identified 62 laws that may require some changes.

Annex 1.4

Competition Policies of Malawi

The Competition Policy of Malawi focused on four specific areas, namely:

- First, on uncompetitive business behaviour (fixing, collusive tendering or customer allocation and tied sales) aimed at eliminating or reducing competition.
- Second, unfair business practices aimed at taking unfair advantage of consumers.
- Third on market structures which permit abuse by a dominant enterprise; and
- Fourth is on Government legislation, which may impact on the free market.

Specifically, the policy called for:

- Creation of an autonomous CCI whose role will be to administer restrictive business practices legislation and consumer protection legislation; and

- Establishment of a specialised tribunal to e contentious issues in certain specific fields subject to judicial resolve review on matters of law.

The Competition Policy in Malawi gave birth to two laws in the country: Competition and Fair Trading Act (1998), which was brought into legal force on January 28, 2000, and the Consumer Protection Act (2003). The Competition and Fair Trading Act (CFTA) aims at encouraging competition in the economy by prohibiting anticompetitive trade practices; providing for the establishment of the Competition Commission; regulating and monitoring monopolies and dominant firms; protecting consumer welfare; strengthening the efficiency of production and distribution of goods and services; securing the best possible conditions for the freedom of trade; and facilitating the expansion of the base of entrepreneurship among others.

Annex 1.5

Competition Policies of Hong Kong

The Competition Policy framework of Hong Kong has the following aspects:

- Established a Competition Policy Advisory Group (COMPAG), in December 1997 chaired by the Financial Secretary and with a membership comprising senior bureau chiefs to review existing government policies and their anticompetitive effect and other competition matters;

- Issued a policy statement (in May 1998) on the objectives of promoting competition and discouraging restrictive practices;

- Required all government bureaux to state the implications for competition on all major policy submissions to the Executive and Legislative Councils, and to review existing regulations and policies, to minimise barriers to market contestability and to refrain from restrictive practices;

- Requested the Trade Practices Division of the Consumer Council to continue to monitor, and review, potentially unfair trade practices; and

- Urged the Consumer Council to help businesses prepare pro-competitive codes of practice.

Annex 1.6

The Set of Multilaterally Agreed Equitable Principles & Rules for the Control of Restrictive Business Practices[43]

The United Nations Conference on Restrictive Business Practices,

Recognizing that restrictive business practices can adversely affect international trade, particularly that of developing countries, and the economic development of these countries,

Affirming that a set of multilaterally agreed equitable principles and rules for the control of restrictive business practices can contribute to attaining the objective in the establishment of a new international economic order to eliminate restrictive business practices adversely affecting international trade and thereby contribute to development and improvement of international economic relations on a just and equitable basis,

The United Nations Set of Principles and Rules on Competition

Recognizing also the need to ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting international trade, particularly those affecting the trade and development of developing countries,

Considering the possible adverse impact of restrictive business practices, including among others those resulting from the increased activities of transnational corporations, on the trade and development of developing countries,

Convinced of the need for action to be taken by countries in a mutually reinforcing manner at the national, regional and international levels to eliminate or effectively deal with restrictive business practices, including those of transnational corporations, adversely affecting international trade, particularly that of developing countries, and the economic development of these countries,

Convinced also of the benefits to be derived from a universally applicable set of multilaterally agreed equitable principles and rules for the control of restrictive business practices and that all countries should encourage their enterprises to follow in all respects the provisions of such a set of multilaterally agreed equitable principles and rules,

Convinced further that the adoption of such a set of multilaterally agreed equitable principles and rules for the control of restrictive business practices will thereby facilitate the adoption and strengthening of laws and policies in the area of restrictive business practices at the national and regional levels and thus lead to improved conditions and attain greater efficiency and participation in international trade and development, particularly that of developing countries, and to protect and promote social welfare in general, and in particular the interests of consumers in both developed and developing countries.

[43] The Set of Principles and Rules was adopted by the United Nations Conference on Restrictive Business Practices as an annex to its resolution of 22 April 1980 (see section II above).

Affirming also the need to eliminate the disadvantages to trade and development which may result from the restrictive business practices of transnational corporations or other enterprises, and thus help to maximize benefits to international trade and particularly the trade and development of developing countries,

Affirming further the need that measures adopted by States for the control of restrictive business practices should be applied fairly, equitably, on the same basis to all enterprises and in accordance with established procedures of law; and for States to take into account the principles and objectives of the Set of Multilaterally Agreed Equitable Principles and Rules,

Hereby agrees on the following Set of Principles and Rules for the control of restrictive business practices, which take the form of recommendations:

A. Objectives

Taking into account the interests of all countries, particularly those of developing countries, the Set of Multilaterally Agreed Equitable Principles and Rules are framed in order to achieve the following objectives:

1. To ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries;

2. To attain greater efficiency in international trade and development, particularly that of developing countries, in accordance with national aims of economic and social development and existing economic structures, such as through:

(*a*) The creation, encouragement and protection of competition;

(*b*) Control of the concentration of capital and/or economic power;

(*c*) Encouragement of innovation;

3. To protect and promote social welfare in general and, in particular, the interests of consumers in both developed and developing countries;

4. To eliminate the disadvantages to trade and development which may result from the restrictive business practices of transnational corporations or other enterprises, and thus help to maximize benefits to international trade and particularly the trade and development of developing countries;

5. To provide a Set of Multilaterally Agreed Equitable Principles and Rules for the control of restrictive business practices for adoption at the international level and thereby to facilitate the adoption and strengthening of laws and policies in this area at the national and regional levels.

B. Definitions and scope of application

For the purpose of this Set of Multilaterally Agreed Equitable Principles and Rules:

(i) *Definitions*

1. "Restrictive business practices" means acts or behaviour of enterprises which, through an abuse or acquisition and abuse of a dominant position of market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries, or which through formal, informal, written or unwritten agreements or arrangements among enterprises, have the same impact.

2. "Dominant position of market power" refers to a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods or services.

3. "Enterprises" means firms, partnerships, corporations, companies, other associations, natural or juridical persons, or any combination thereof, irrespective of the mode of creation or control or ownership, private or State, which are engaged in commercial activities, and includes their branches, subsidiaries, affiliates, or other entities directly or indirectly controlled by them.

(ii) *Scope of application*

4. The Set of Principles and Rules applies to restrictive business practices, including those of transnational corporations, adversely affecting international trade, particularly that of developing countries and the economic development of these countries. It applies irrespective of whether such practices involve enterprises in one or more countries.

5. The "principles and rules for enterprises, including transnational corporations" apply to all transactions in good and services.

6. The "principles and rules for enterprises, including transnational corporations" are addressed to all enterprises.

7. The provisions of the Set of Principles and Rules shall be universally applicable to all countries and enterprises regardless of the parties involved in the transactions, acts or behaviour.

8. Any reference to "States" or "Governments" shall be construed as including any regional groupings of States, to the extent that they have competence in the area of restrictive business practices.

9. The Set of Principles and Rules shall not apply to intergovernmental agreements, nor to restrictive business practices directly caused by such agreements.

C. Multilaterally agreed equitable principles for the control of restrictive business practices

In line with the objectives set forth, the following principles are to apply:

(i) *General principles*

1. Appropriate action should be taken in a mutually reinforcing manner at national, regional and international levels to eliminate, or effectively deal with, restrictive business practices, including those of transnational corporations, adversely affecting international trade, particularly that of developing œuntries and the economic development of these countries.

2. Collaboration between Governments at bilateral and multilateral levels should be established and, where such collaboration has been established, it should be improved to facilitate the control of restrictive business practices.

3. Appropriate mechanisms should be devised at the international level and/or the use of existing international machinery improved to facilitate exchange and dissemination of information among Governments with respect to restrictive business practices.

4. Appropriate means should be devised to facilitate the holding of multilateral consultations with regard to policy issues relating to the control of restrictive business practices.

5. The provisions of the Set of Principles and Rules should not be construed as justifying conduct by enterprises which is unlawful under applicable national or regional legislation.

(ii) *Relevant factors in the application of the Set of Principles and Rules*

6. In order to ensure the fair and equitable application of the Set of Principles and Rules, States, while bearing in mind the need to ensure the comprehensive application of the Set of Principles and Rules, should take due account of the extent to which the conduct of enterprises, whether or not created or controlled by States, is accepted under applicable legislation or regulations, bearing in mind that such laws and regulations should be clearly defined and publicly and readily available, or is required by States.

(iii) *Preferential or differential treatment for developing countries*

7. In order to ensure the equitable application of the Set of Principles and Rules, States, particularly developed countries, should take into account in their control of restrictive business practices the development, financial and trade needs of developing countries, in particular of the least developed countries, for the purposes especially of developing countries in:

(a) Promoting the establishment or development of domestic industries and the economic development of other sectors of the economy, and

(b) Encouraging their economic development through regional or global arrangements among developing countries.

D. Principles and Rules for enterprises, including transnational corporations

1. Enterprises should conform to the restrictive business practices laws, and the provisions concerning restrictive business practices in other laws, of the countries in which they operate, and , in the event of proceedings under these laws, should be subject to the competence of the courts and relevant administrative bodies therein.

2. Enterprises should consult and co-operate with competent authorities of countries directly affected in controlling restrictive business practices adversely affecting the interests of those countries. In this regard, enterprises should also provide information , in particular details of restrictive arrangements, required for this purpose, including that which may be located in foreign countries, to the extent that in the latter event such production or disclosure is not prevented by applicable law or established public policy. Whenever the provision of information is on a voluntary basis, its provisions should be in accordance with safeguards normally applicable in this field.

3. Enterprises, except when dealing with each other in the context of an economic entity wherein they are under common control, including through ownership, or otherwise not able to act independently of each other, engaged on the market in rival or potentially rival activities, should refrain from practices such as the following when, through formal, informal, written or unwritten agreements or arrangements, they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries:

(a) Agreements fixing prices, including as to exports and imports;
(b) Collusive tendering;
(c) Market or customer allocation arrangements;
(d) Allocation by quota as to sales and production;
(e) Collective action to enforce arrangements, e .g. by concerted refusals to deal;
(f) Concerted refusal of supplies to potential importers;
(g) Collective denial of access to an arrangement, or association, which is crucial to competition.

4. Enterprises should refrain from the following acts or behaviour in a relevant market when, through an abuse[44] or acquisition and abuse of a dominant position of market power, they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries:

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44 Whether acts or behaviour are abusive or not should be examined in terms of their purpose and effects in the actual situation, in particular with reference to whether they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries, and to whether they are:
(*a*) Appropriate in the light of the organisational, managerial and legal relationship among the enterprises concerned, such as in the context of relations within an economic entity and not having restrictive effects outside the related enterprises;
(*b*) Appropriate in light of special conditions of economic circumstances in the relevant market such as exceptional conditions of supply and demand or the size of the market;
(*c*) Of types which are usually treated as acceptable under pertinent national or regional laws and regulations for the control of restrictive business practices;
(*d*) Consistent with the purposes and objectives of these principles and rules.

(a) Predatory behaviour towards competitors, such as using below cost pricing to eliminate competitors;

(b) Discriminatory (i.e. unjustifiably differentiated) pricing or terms or conditions in the supply or purchase of goods and services, including by means of the use of pricing policies in transactions between affiliated enterprises which overcharge or undercharge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprises;

(c) Mergers, takeovers, joint ventures or other acquisitions of control, whether of a horizontal, vertical or a conglomerate nature;

(d) Fixing the prices at which goods exported can be resold in importing countries;

(e) Restrictions on the importation of goods which have been legitimately marked abroad with a trademark identical with or similar to the trademark protected as to identical or similar goods in the importing country where the trademarks in question are of the same origin, i. e. belong to the same owner or are used by enterprises between which there is economic, organizational, managerial or legal interdependence and where the purpose of such restrictions is to maintain artificially high prices;

(f) When not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service:

(i) Partial or complete refusals to deal on the enterprise's customary commercial terms;
(ii) Making the supply of particular goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods;
(iii) Imposing restrictions concerning where, or to whom, or in what form or quantities, goods supplied or other goods may be resold or exported;
(iv) Making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier or his designee

E. Principles and Rules for States at National, Regional and Subregional levels

1. States should, at the national level or through regional groupings, adopt, improve and effectively enforce appropriate legislation and implementing judicial and administrative procedures for the control of restrictive business practices, including those of transnational corporations.

2. States should base their legislation primarily on the principle of eliminating or effectively dealing with acts or behaviour of enterprises which, through an abuse or acquisition and abuse of a dominant position of market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on their trade or economic development, or which through formal, informal, written or unwritten agreements or arrangements among enterprises have the same impact.

3. States, in their control of restrictive business practices, should ensure treatment of enterprises which is fair, equitable, on the same basis to all enterprises, and in accordance with established procedures of law. The laws and regulations should be publicly and readily available.

4. States should seek appropriate remedial or preventive measures to prevent and/or control the use of restrictive business practices within their competence when it comes to the attention of States that such practices adversely affect international trade, and particularly the trade and development of the developing countries.

5. Where, for the purposes of the control of restrictive business practices, a State obtains information from enterprises containing legitimate business secrets, it should accord such information reasonable safeguards normally applicable in this field, particularly to protect its confidentiality.

6. States should institute or improve procedures for obtaining information from enterprises including transnational corporations, necessary for their effective control or restrictive business practices, including in this respect details of restrictive agreements, understandings and other arrangements.

7. States should establish appropriate mechanisms at the regional and subregional levels to promote exchange of information on restrictive business practices and on the application of national laws and policies in this area, and to assist each other to their mutual advantage regarding control of restrictive business practices at the regional and subregional levels.

8. States with greater expertise in the operation of systems for the control or restrictive business practices should, on request, share their experience with, or otherwise provide technical assistance to other States wishing to develop or improve such systems.

9. States should, on request, or at their own initiative when the need comes to their attention, supply to other States, particularly developing countries, publicly available information, and, to the extent consistent with their laws and established public policy, other information necessary to the receiving interested State for its effective control of restrictive business practices.

F. International measures

Collaboration at the international level should aim at eliminating or effectively dealing with restrictive business practices, including those of transnational corporations, through strengthening and improving controls over restrictive business practices adversely affecting international trade, particularly that of developing countries, and the economic development of these countries. In this regard, action should include:

1. Work aimed at achieving common approaches in national policies relating to restrictive business practices compatible with the Set of Principles and Rules.

2. Communication annually to the Secretary-General of UNCTAD of appropriate information on steps taken by States and regional groupings to meet their commitment to the Set of Principles and Rules, and information on the adoption, development and application of legislation, regulations and policies concerning restrictive business practices.

3. Continued publication annually by UNCTAD of a report on developments in restrictive business practices legislation and on restrictive business practices adversely affecting international trade, particularly the trade and development of developing countries, based upon publicly available information and as far as possible other information, particularly on the basis of requests addressed to all member States or provided at their own initiative and, where appropriate, to the United Nations Center on Transnational Corporations and other competent international organizations.

4. Consultations:

(a) Where a State, particularly of a developing country, believes that a consultation with another State or States is appropriate in regard to an issue concerning control of restrictive business practices, it may request a consultation with those States with a view to finding a mutually acceptable solution. When a consultation is to be held, the States involved may request the Secretary-General of UNCTAD to provide mutually agreed conference facilities for such a consultation;

(b) States should accord full consideration to requests for consultations and, up on agreement as to the subject of and the procedures for such a consultation, the consultation should take place at an appropriate time;

(c) If the States involved so agree, a joint report on the consultations and their results should be prepared by the States involved and, if they so wish, with the assistance of the UNCTAD secretariat, and be made available to the Secretary-General of UNCTAD for inclusion in the annual report on restrictive business practices.

5. Continued work within UNCTAD on the elaboration of a model law or laws on restrictive business practices in order to assist developing countries in devising appropriate legislation. States should provide necessary information and experience to UNCTAD in this connection.

6. Implementation within or facilitation by UNCTAD, and other relevant organizations of the United Nations system in conjunction with UNCTAD, of technical assistance, advisory and training programmes on restrictive business practices, particularly for developing countries:

(a) Experts should be provided to assist developing countries, at their request, in formulating or improving restrictive business practices legislation and procedures;

(b) Seminars, training programmes or courses should be held, primarily in developing countries, to train officials involved or likely to be involved in administering restrictive business practices legislation and, in this connection, advantage should be taken, *inter alia*, of the experience and knowledge of administrative authorities, especially in developed countries, in detecting the use of restrictive business practices;

(c) A handbook on restrictive business practices legislation should be compiled;

(d) Relevant books, documents, manuals and any other information on matters related to restrictive business practices should be collected and made available, particularly to developing countries;

(e) Exchange of personnel between restrictive business practices authorities should be arranged and facilitated;

(f) International conferences on restrictive business practices legislation and policy should be arranged;

(g) Seminars for an exchange of views on restrictive business practices among persons in the public and private sectors should be arranged.

7. International organizations and financing programmes, in particular the United Nations Development Programme, should be called upon to provide resources through appropriate channels and modalities for the financing of activities set out in paragraph 6 above. Furthermore, all countries are invited, in particular the developed countries, to make voluntary financial and other contributions for the above-mentioned activities.

G. International Institutional Machinery

(i) *Institutional arrangements*

1. An Intergovernmental Group of Experts on Restrictive Business Practices operating within the framework of a Committee of UNCTAD will provide the institutional machinery.

2. States which have accepted the Set of Principles and Rules should take appropriate steps at the national or regional levels to meet their commitment to the Set of Principles and Rules.

(ii) *Functions of the Intergovernmental Group*

3. The Intergovernmental Group shall have the following functions:

(a) To provide a forum and modalities for multilateral consultations, discussion and exchange of views between States on matters related to the Set of Principles and Rules, in particular its operation and the experience arising therefrom;

(b) To undertake and disseminate periodically studies and research on restrictive business practices related to the provisions of the Set of Principles and Rules, with a view to increasing exchange of experience and giving greater effect to the Set of Principles and Rules;

(c) To invite and consider relevant studies, documentation and reports from relevant organizations of the United Nations system;

(d) To study matters relating to the Set of Principles and Rules and which might be characterized by data covering business transactions and other relevant information obtained upon request addressed to all States;

(e) To collect and disseminate information on matters relating to the Set of Principles and Rules to the overall attainment of its goals and to the appropriate steps States have taken at the national or regional levels to promote an effective Set of Principles and Rules, including its objectives and principles;

(f) To make appropriate reports and recommendations to States on matters within its competence, including the application and implementation of the Set of Multilaterally Agreed Equitable Principles and Rules;

(g) To submit reports at least once a year on its work.

4. In the performance of its functions, neither the Intergovernmental Group nor its subsidiary organs shall act like a tribunal or otherwise pass judgement on the activities or conduct of individual Governments or of individual enterprises in connection with a specific business transaction. The Intergovernmental Group or its subsidiary organs should avoid becoming involved when enterprises to a specific business transaction are in dispute.

5. The Intergovernmental Group shall establish such procedures as may be necessary to deal with issues related to confidentiality.

(iii) *Review procedure*

6. Subject to the approval of the General Assembly, five years after the adoption of the Set of Principles and Rules, a United Nations Conference shall be convened by the Secretary-General of the United Nations under the auspices of UNCTAD for the purpose of reviewing all the aspects of the Set of Principles and Rules. Towards this end, the Intergovernmental Group shall make proposals to the Conference for the improvement and further development of the Set of Principles and Rules.

Select Bibliography

1. Aghion, P., Harris, C., Howitt, P. and Vickers, J. "Competition, Imitation and Growth with Step-by-Step Innovation," *Review of Economic Studies* 68, 2001.

2. Ahluwalia, Isher Judge, 'Industrial Policy Reform of Public Sector Enterprises and Privatisation in India", paper presented at the conference on 'India – the Future of the Reforms, Merton College, Oxford, June 1993.

3. Anderson & Jenny (2002) quoted in Asian Development Outlook, 2005.

4. Basant Rakesh and Sebastian Morris, "Competition Policy in India: Issues for a Globalising Economy", IIM, 2000.

5. Bayoumi, T., Laxton, D. and Pesenti P., "Benefits and Spillovers of Greater Competition in Europe: A Macroeconomic Assessment", Working Papers, 2004.

6. Bhattacharjea, A. "Amendment to the Competition Law", EPW, September, 2006.

7. Bhattacharjea, A. "Competition Policy: India and the WTO", Economic and Political Weekly (EPW), December 22, 2001.

8. Bhattacharjea, A. "India's Competition Policy: An Assessment", EPW, August 23, 2003.

9. Budget Speech of Shri Yashwant Sinha, Finance Minister, GOI, 27th Feb, 1999. Union Budget 1999-2000.

10. Department Related Parliamentary Standing Committee on Home Affairs, Ninety-Third Report on Competition Bill, 2001.

11. Dreze, Jean & Sen, Amartya, "India- Economic Development and Social Opportunity", Oxford University Press, 1995.

12. Dutz, M. and Hayri A., "Does more Intense Competition lead to Higher Growth?" CEPR Discussion Paper, No. 2249, 1999.

13. Economic Survey (2005-06) Ministry of Finance, Government of India.

14. First Annual ICN Conference, Naples, Italy, September 28-29, 2002.

15. Forty-Fourth Report, Standing Committee on Finance (2006-07), Lok Sabha Secretariat. .

16. Hope, E. and Maeleng P. (eds) "Competition and Trade Policies: Coherence or Conflict", Routledge, London and New York, 1998.

17. Kaufmann Daniel, Kraay Aart: and Mastruzzi Massimo, “Governance Matters V: Aggregate and Individual Governance Indicators for 1996-2005,” World Bank, 2006.

18. Khemani, R. Shyam and Leechor, Chad “Competition Boosts Corporate Governance”, World Bank 1999.

19. Koedijk, K. and Kremers J., “Market Opening, Regulation and Growth in Europe”, *Economic Policy*, No. 23, 1996.

20. Mukherjee, A. & Patel N. (2005), “FDI in Retail Sector – India,” Academic Foundation, ICRIER and Government of India.

21 OECD Reviews of Regulatory Reforms: Background Document on Regulatory Reform in OECD Countries, OECD, 2004d

22. OECD, “The OECD Report on Regulatory Reform,” Volume II, Thematic Studies, Paris, 1997.

23. National Common Minimum Programme of Govt. of India, May 2004.

24. Ninety Third Report on Competition Bill, 2001, Department Related Parliamentary Standing Committee on Home Affairs.

25. Ninth Five Year Plan, Planning Commission, Govt. of India.

26. Pilat, D.,“Regulation and Performance in the Distribution Sector”, OECD Economic Department, Working Paper No. 180, 1997.

27. Planning Commission, “*Towards Faster and more Inclusive* Growth – An Approach to the Eleventh Five Year Plan,” Government of India, June, 2006.

28. Pradeep S. Mehta (ed), “Competition Regimes in the World – A Civil Society Report”, CUTS INTERNATIONAL, Jaipur 2006.

29. Pradeep S. Mehta and Nitya Nanda, “Competition Issues With International Dimensions” in CUTS (ed), Competition Policy & Pro-poor Development, CUTS, India, 2003.

30. Report of the High Level Committee on Competition Policy and Law, Government of India, 2000.

31. Scherer, F.M. (ed), “Competition Policy, Domestic and International”, Edward Elgar, 2000.

32. Scherer, F.M. (ed), “International Competition policy and Economic Development”, Edward Elgar, 2000.

33. Stiglitz, Joseph E., “The Roaring Nineties- Why we’re paying the Price for the Greediest Decade in History”, Penguin Books, 2003.

34. UNCTAD, Directory of Competition Authorities, 2006

35. World Bank & OECD, “A Framework for the Design and Implementation of Competition Law and Policy,” Washington D.C., 1999.