FIGHTING CARTELS: THE CASE OF PAKISTAN

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DEDICATION

I dedicate this work

to my Aunt, Parents, and Brother for their

support throughout my educational career.

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SARA ASHRAF KALYAR

ABSTRACT

FIGHTING CARTELS: THE CASE OF PAKISTAN

by

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Supervisor: Professor Kishwar Khan

It is internationally accepted that cartelization is the most harmful violation of competition law. This is why the fight against cartels is given priority in all jurisdictions with the enforcement of anti trust/ competition laws for detection, investigation and prosecution of cartels. Present research work 'Fighting Cartels: the case of Pakistan' highlights the importance to deal with cartels in Pakistan while thoroughly looking into the law and the enforcement structure with a view to offer strategies to win the fight against cartels.

In free market economies, competition encourages firms to improve productivity and innovation, while consumers benefit from lower prices and higher quality products. However, when the market fails due to cartelization or monopolistic practices, the competition policy/ law is the tool to correct the situation.

Competition policy encompasses all the government policies and actions that influence competition in markets and behavior of the market players. Competition law is the legal framework to give effect to this policy. The basic objective of competition law is to promote competition by regulating agreements between firms that lead to anti-competitive behaviour either through explicit cartel or through tacit collusion. Such policies also deal

with abuse of monopoly power and with mergers and acquisitions. Primary objective of competition law is to eliminate anti-competitive practices - those practices through which businesses restrict competition to maintain or increase their relative market position and profit without necessarily improving efficiency. Business practices such as cartelization allow cartel members to use their market position to the disadvantage of competitors and consumers who face higher prices, reduced output, less available choices, loss of economic efficiency and misallocation of resources. This Study will explore only the issues related to cartelization.

Business practices that are considered to be anti-competitive and as violating competition law vary on a case-by-case basis. Generally, however, certain practices are per se illegal while others are subject to the rule of reason i.e., the pro-competitive features of a restrictive business practice against anticompetitive effects are weighed to decide whether or not the practice be prohibited. Some market restrictions, which prima facie give rise to competition issues, may on further examination be found to have valid efficiency enhancing benefits. Similarly the standards for determining whether or not a business practice is illegal may also differ across countries.

Cross country examination of competition laws shows that prohibited restrictive business/ trade practices are broadly divided into two categories: firstly, horizontal restraints such as cartels, price discrimination and price fixing. A cartel is an agreement whereby cartel members may agree on such matters as prices, total industry output, market shares, allocation of customers, allocation of territories, bid rigging, etc. Second category includes vertical restraints i.e., supplier-distributor relationships such as exclusive dealing, geographic market restrictions, refusal to deal/ sell, resale price maintenance and tied selling.

The question arises, if cartels are bad, then why these are formed. The answer can be found in the classical work i.e., the cartels are formed for the mutual benefit of member firms as Adam Smith observed in his book "An Inquiry in to the Nature of the Wealth of Nations "...that people of the same trade seldom meet together even for merriment, sad diversion, but when they meet the conversation ends in a conspiracy against the public, or in some contrivance to raise prices..."

During this research work, it was also observed that, in all the jurisdictions, distinction is drawn between public and private cartels. Public cartels are enforced by the government for setting prices and output such as export and crisis cartels. Many competition laws exempt such agreements from the prohibitions provided that the cartel does not lead to injurious effects on competition in the domestic market.

Private cartels, on the other hand are viewed as illegal by competition agencies in all the jurisdictions such as USA and India. Study of various laws show that Competition law is enforced to protect consumers from anti competitive practices that result in raising prices and reduce output. It is recognized that developing countries like Pakistan tend to be more vulnerable to anti-competitive practices due to the strength of the businessmen as compared to general public and weak regulatory infrastructure.

Relevant law dealing with cartels, in case of Pakistan is the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance (MRTPO) that was promulgated in February 1970. The broad objective of the Law is to provide for measures against undue concentration of economic power, unreasonable monopoly power and unreasonably restrictive trade practices. The Law spells out contravening situations, legal process and remedial measures to correct the situations. The administration of the Law is in the hands of the Monopoly Control Authority (MCA) - a quasi-judicial statutory organisation.

The Law defines 'unreasonably restrictive trade practice' as any practice that unreasonably prevents restrains or lessens competition. The practices which are presumed to be trade restrictive include agreements between actual or potential competitors to fix prices, divide markets, limit production, distribution, technical development or investment or to boycott competitors. The list also includes the fixing of minimum resale prices requiring wholesalers or retailers not to sell below a certain stipulated price and tying arrangements requiring a customer to purchase one product in order to obtain a different one. In addition to these enumerated practices, the MCA may identify and prescribe other such circumstances. It may be pointed out that "Agreement" includes any arrangement or understanding whether or not in writing and whether or not it is or is intended to be legally enforceable. This means

that unwritten collusive arrangements would fall within the definition of the word "Agreement". This is an important provision because such arrangements are settled between competitors by "word of mouth" thus making it difficult to detect the cartel.

The Law also sets out instances in which restrictive trade practices may be justified i.e., the practices that contribute substantially to efficiency, technological progress or larger exports. The remedies provided in the Law include 'Orders' requiring firms to discontinue such practices and to take affirmative actions to restore competition.

Considering the above-mentioned background, the issues relating to detection, investigation and prosecution of cartels in Pakistan have been thoroughly examined in this Study. Key observation is that the cartels continue to exist as a result of weak enforcement and inadequate penalties provided in the Law. This situation is detrimental to public interest and economic wellbeing. It is, therefore, necessary to strengthen the enforcement regime i.e., the Law and the administering organization.

Experience of other countries suggests that several tools and ways have been identified to deal with the menace of cartels. These include strong powers for searches and raids, high penalties, criminal sanctions on employees of cartel member companies. Another effective tool is "leniency program" i.e., obtaining evidence of a cartel from "insiders" or cartel participants by offering them amnesty and reduced fines.

As mentioned above, MCA is the institution that deals with cartelization in Pakistan. In this research work, the effectiveness and experience of MCA, since its inception in 1971 till to date has been examined with reference to cartelization. The case studies of various sectors of the economy have been conducted. An attempt has been made to identify the exact problem area - is it the Law, the administering institution, enforcement mechanism or the inadequate penalties that fall short to prevent cartels? After examination of national experience and cross-country analysis, recommendations have been chalked out to effectively win fight against cartels in Pakistan. A strategy to win this fight briefly includes a packaged approach combining actions at all the relevant fronts i.e., improvement in the legal provisions, enforcement mechanism, investigative tools, staffing and tough penalties.

CHAPTER 1

COMPETITION POLICY AND LAW: OBJECTIVES, LEGAL PROVISIONS AND ENFORCEMENT MECHANISMS

1.1. INTRODUCTION

The concept of 'Competition' is generally defined as the 'object' that is fostered, protected and promoted by competition policy and law. In real market situations, it has to be taken as a workable and effective competition that serves as a base for efficiently working market economy. According to Adam Smith "competition is the precondition that protects freedom of decision and action of self-interested individuals from leading to anarchy or chaos but rather to economically optimal, socially fair and desirable market results".[1] Competition reduces prices of goods and services and also has a deflationary effect by reducing the general price level. It protects consumers against producers, producers against other producers to win the consumers' patronage and even consumers against consumers.[2]

The competition process runs smoothly and leads to above mentioned desirable results subject to following prerequisites:

- Free market entry and exit.
- Freedom of trade and contract.

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[1] United Nations Conference on Trade and Development, '*The Development Dimension of Competition Law and Policy*', by W. Lachmann, Part 1, Fundamentals, Page No. 3, Geneva, 1999.

[2] For instance, in the healthcare sector in the USA. For details see, Competition Laws, by Sam Vaknin, See http://samvak.tripod.com/nm035.html. Last visited 25th May 2006.

- Protection from restrictive business practices.
- The existence of positive and negative sanctions.
- Transparency of the market.

For competition to be effective from consumers' side, it is necessary that there exists certain responsiveness i.e., consumers are well informed about markets; are free to choose; have enough purchasing power; and react to competitive acts i.e., are not brand loyal.

Competition on the supply side of the economy exists when suppliers and producers:

- Are free in their decision-making.
- Pursue profit maximization through competition and not by indulging in restrictive/anti-competitive business practices.
- Possess technical, economic and other necessary resources required for production.
- React without time loss to changes in market signals i.e., consumers' demand and competitors' actions.

In case, these preconditions are met, competition works effectively as engine of growth that leads to technological progress and innovation as all the businesses try to be efficient and cost minimizers.[3]

1.1.1. Benefits of Promoting Competition

Competition is the process of rivalry between firms striving to gain sales and make profits. The motive sounds like self-interest, and it is, but the effects are generally beneficial for society. Effective competition means use of most efficient production methods and continuing incentives for innovation to increase productivity. Thus, the consumers benefit from lower prices, better quality and greater variety of goods and services to choose from.[4]

Increasing interest, during past decade, on competition policy and law can be attributed to many factors. Some of these are noted below:

- Privatization and deregulation is being pursued in numerous developing countries. Still, certain state-owned enterprises enjoy monopolistic powers. As these are privatized without first having a competition policy and adequate regulatory mechanism, this will simply mean transfer of monopoly power from public to the private sector. This is expected to damage the interests of consumers.

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[3] *Supra* Note. No. 1, Page No. 3-4.

[4] See http://www.enterprise-impact.org.uk/word-files/HowtoPromoteCompetitionLawPolicy.doc. Last visited 29th June 2006.

- Awareness is growing that after a decline in governmental barriers through trade negotiations, the trade restrictions and distortions resulting from the anti-competitive practices of businesses will gain more importance.
- Much linked with this argument is the phenomena of globalisation as a result of growing trade liberalization and foreign direct investment (FDI). Consequently, anti-competitive practices attain an increasingly global facet, affecting a number of countries and at times the whole world.[5] International anti-competitive practices can injure countries without effective competition laws. Evidence supports that international cartels intended to limit competition in international trade do exist that are disadvantageous to world's economic development.[6]
- An additional influence has been the growth of international rules, at bilateral, regional and multilateral levels, that protect interests of foreign companies working within a country's territory.[7]
- Lastly, competition law is often the appropriate legal means for addressing anti-competitive practices of enterprises.

1.2. COMPETITION POLICY

Where market operates freely and effectively, competition is expected to bring benefits. However, when markets fail, competition policy and law are the tools used to bring about the efficient working of markets by alleviating market failures, manipulations and distortions. [8]

Competition process has always to be protected. As enterprises are uncomfortable with it, therefore, they tend to evade it. Competition is considered to be a cultural plant that needs constant government attention for it to grow. Competition has to be cultivated in national markets first if a company is to be competitive in the international market. For this reason, governments have to prepare competition framework to create a competitive atmosphere.[9]

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[5] See http://www.jurisint.org/pub/06/en/doc/C23.pdf. Last visited 25th June 2006.

[6] Levenstein, Margaret and Valerie Suslow, "*Private International Cartels and their Effect on Developing Countries*", unpublished background paper for the World Bank, World Development Report *2001*, 9 January 2001. See http://www.unescap.org/pdd/publications/bulletin2002/ch7.pdf. Last visited 15th May 2006.

[7] *Supra* Note No. 5.

[8] UNCTAD, Communication from Consumers International, Asia Pacific Office, "*Competition Policy and Law in the Consumer and Development Interest*", by Rachagan S.S., Part 1, Page No. 3, 2-4 July 2003.

[9] *Supra* Note No. 1, Part 4, '*The Role of Government in Fostering Competition*', Page No. 19, 1999.

Competition policy covers all government policies affecting competition in markets.[10] In general, it can be defined as a set of governmental measures that may stimulate competition, protect consumers against monopolies, etc. Policy areas that fall in its purview include control of abusive practices of dominant market positions, review of mergers to prevent monopolization, and control of anti-competitive behaviour including cartels.

The product of competition i.e., competitiveness – is defined as the set of skills and qualities required in order to engage in competition effectively. These may relate to production, management or marketing targeting more and more market share. In another contrasting case, market players may resort to restrictive business practices to confine or get rid of their competitors, rather than getting an upper hand through lower prices, better quality, improvement and modernization. Competition policy and law is also necessary to protect nation's welfare gains brought about by national and international competitiveness.[11] Accordingly, competition policy is generally designed to boost consumers' sovereignty, choices and enterprises' market access, their efforts to achieve static and dynamic efficiency gains in the short and long terms, respectively.[12]

Liberalization of trade and investment combined with imported competition is creating multiple challenges for competition policy. Therefore, countries need to have a strong competition regime to deal with anti-competitive practices of enterprises especially large transnational companies. [13]

1.3. COMPETITION LAW

Competition law is the legal framework to give effect to the competition policy. By competition or antitrust law, economists usually mean government interventions for securing market competition.[14] Generally, these interventions are operated through competition agency with powers to regulate markets and ensuring free market entry and exit. With

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[10] *Supra* Note No. 8.
[11] *Supra* Note No. 1, Page No. 6.
[12] See http://www.adb.org/Documents/Books/ADO/2005/part030300.asp. Last visited 26th June 2006.
[13] See http://www.unescap.org/pdd/publications/bulletin2002/ch7.pdf. Last visited 20th June 2006.
[14] *Supra* Note No. 8.

reference to cartels, this is done by preventing anti-competitive and collusive agreements between competitors. Trade dimension of competition law faces a dilemma since only national consumers are protected from monopolies and restrictive trade practices; foreign consumers subject to such acts are ignored as this is not covered in the competition law nor is a part of trade strategy.[15] According to the United Nations Conference on Trade and Development, 2002 (UNCTAD) the following situations are covered in most competition laws:[16]

- Provisions banning cartels or allowing them subject to certain 'waivers' covering e.g. cooperation for research and development.
- Provisions relating to abuse of dominant position by one or more firms.
- Provisions prohibiting predatory pricing and attempts to oust competitors.

Some characteristics of competition laws, including Pakistan's competition law, are as follows:

- Competition law exists at the national level only. Besides having national laws, it is at single market level also in case of EU.
- The criterion for determining anti competitive behavior and welfare assessment is done with reference to national stakeholders only. Thus, anti-competitive acts affecting foreigners are not considered.
- Presently, there is no mandatory international competition framework.[17]

1.3.1. The Nature of Competition Law

The nature of competition law is such that the approach of "one size fits all" is not applicable. In case of cartel control strategies, every competition regime has to tailor its competition law to its own specific set of needs and conditions. The most important factor is that the law should be realistic and enforceable. Introducing a law that cannot be properly implemented is useless and may turn out to be counterproductive. For instance, if the competition agency is seen as being incapable of discharging its role, for whatever reasons, then consumers and businesses may lose faith in the effectiveness of competition law and competition process as a whole.

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[15] *Supra* Note No. 2.
[16] See website http://www.adb.org/Documents/Books/ADO/2005/part030300.asp. Last visited 29th June 2006.
[17] *Supra* Note No. 8, Page No. 3-4.

1.4. OBJECTIVES OF COMPETITION POLICY AND LAW

As explained by OECD, the core goal of competition policy and law is to safeguard and encourage competition as a means of ensuring efficient distribution of resources in an economy. Competition policy and law helps to create a conducive environment for businesses by lowering market entry barriers into an industry.[18] This law ensures that businessmen behave in a reasonable fashion to gain market power or to maximize their profits.[19] Achieving greater economic efficiency has remained the primary aim of competition policy and law. Successful enforcement of this law contributes enormously to the efficient and equitable functioning of progressive market economy. In the long term, it results in producers' benefit, consumers' welfare and economic development.[20]

Although many objectives have been attributed to competition policy during the past whole century or so, certain key themes are yet prominent. The most common of the objectives cited is the maintenance of the competitive process or free competition, or the protection and promotion of effective competition. In some countries, such as Germany, freedom of individual action is viewed as the economic equivalent of a democratic constitutional system. In France, on the other hand, economic freedom is secured by means of freedom to compete.[21] However, all countries did not nor they are motivated by the same objectives while adopting competition policies. Some aim to protect market processes, grant equal opportunities to engage in trade while others may intend to foster economic development.[22]

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[18] Organization for Economic Cooperation and Development, by Khemani R.S, '*A Framework for the Design and Implementation of Competition Law and Policy*', Washington, World Bank, 1998. See http://www.unescap.org/pdd/publications/bulletin2002/ch7.pdf. Last visited 25th June 2006.

[19] '*Objectives of Competition Policy*', Chapter prepared by principal team member Shyam Khemani with input from members of the Competition Law and Policy Committee of the Organization for Economic Co-operation and Development in *Supra* Note No. 18.

[20] *Supra* Note No. 8, Executive Summary, Part1, Page No. 2-3.

[21] *Supra* Note No. 19.

[22] *Supra* Note No. 12.

1.4.1. Supplementary Objectives of Competition Policy and Law

While addressing socio-political aspects, some other objectives of competition policy have been recognized i.e., other than economic efficiency and consumer welfare. These include:

- protecting small businesses;
- preserving free enterprise system;
- effects of business practices say mergers on employment;
- regional development; and
- efficient allocation of resources. The poorer the country, the less resources it has - the more it is in need of competition. Only competition can ensure the appropriate and most efficient use of its limited resources, a maximization of output and welfare.

The priority assigned to these objectives of competition policy varies across economies. In any case, the intention of competition policy is to guard competition by striking down or preventing those private and where possible, public business restraints that impede competitive process.[23] The goal of the law is to "protect the process of competition and free market access by the prevention and elimination of monopolies, monopolistic practices and other restrictions to the efficient functioning of markets".[24] The competition laws promote fair-play in commercial conduct of competitors. Experience - later buttressed by research - established the following principles:

- There should be no entry barriers of new market players.
- Economies of scale are introduced by a larger scale of operation (and as a result lower prices). A competitive price will be comprised of a minimal cost plus an equilibrium profit that does not encourage either an exit of firms (because it is too low), nor their entry (because it is too high).

In the absence of competition regulation, businesses may tend to knock down competitors by predation, buy them out or collude with them to raise prices, tying arrangements, boycotts, territorial divisions, non-competitive mergers, price discrimination, exclusive dealing, unfair practices and methods – all these actions hamper competition and affect producers and consumers. Competition law corrects such unfair actions.[25]

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[23] *Supra* Note No. 19.
[24] See http://www.oecd.org/dataoecd/58/20/2486119.pdf. Last visited 17th June 2006.
[25] *Supra* Note No. 2.

1.4.2. The Role of Competition Agencies to Achieve the Objectives of Competition Policy and Law

Experience of various jurisdictions show that the application of competition policy is more reactive than proactive in nature. Competition agencies actually react to market developments such as mergers or price-fixing agreements to protect the competitive process though an action can be taken to prevent such situations. Public perceive competition agencies as if they are law enforcement bodies only. To achieve major objectives of competition policy, such agencies need to adopt much broader role in the economy and need to modify their perception for public at large. This could be done by promoting competition i.e., by tackling not only contraventions to law but also institutional measures and such public policies that impede proper functioning of markets i.e., strong competition advocacy. Through measures consistent with free market requirements, the role of competition policy as an effective instrument of overall economic management policy of the government could be established.[26]

Having investigative and adjudicative roles vested in a single agency also has its own peculiar benefits. For instance, it raises coordination and reduce burden from the judicial system for settlement of competition cases especially in developing countries where judiciary is not well versed with complex competition concepts. In case, competition agency performs both these functions, the process becomes speedier due to availability of expert knowledge within the agency. In countries having a deep-rooted competition culture, these concerns could be addressed by having specialized competition tribunal within the judicial system; this is being done in some jurisdictions.[27]

1.4.3. Competition Culture as Means and End to Achieve Objectives of Competition Policy and Law

A good legislation will not meet its objectives of competitive market without having a supportive healthy competition culture. Creation of a sustainable competition culture, in

[26] *Supra* Note No. 19.
[27] *Supra* Note No. 24.

1.5.1. The Scope of Competition Law

Competition law is an essential element in the economic foundation of free market economic system. It should, therefore apply to all market transactions covering all entities engaged in commercial activities irrespective of ownership or legal form. In any case, exceptions and 'waivers' should be explicitly identified in the law to eradicate chances of confusion.

1.5.2. Definitions

The competition law should define common terms to be used in the law. These definitions should be used consistently in its provisions, this will help to construe and understand the law.

1.5.3. Abuse of a Dominant Position

The competition law should unambiguously define: dominant position and the situations that lead to an abuse of this dominant position; the criteria and standard to determine such an anti competitive conduct. Exceptions to the dominant position of a firm should be clearly identified in the legislation because the specified conduct by a dominant firm may not always be abusive or anti-competitive.[30]

1.5.4. Restrictive Agreements

Certain types of horizontal agreements, generally known as cartel agreements, are subject to a rather strict control than other types of agreements. In many countries, this distinction is not found in the legal provisions but it is embodies in the enforcement practice. Countries that adopted competition laws recently, however, tended to make distinction explicitly in the laws. This sends the message to the enterprises that violating cartel prohibitions is a serious legal issue.

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[30] OECD, Special Project of the Competition Law and Policy Division, Hewitt Gary, John Clark and Bernard Philips prepared an annexure on the Framework for Competition Law, 1998.

Like abuse of dominance, all horizontal agreements are not necessarily cartel agreements. Competitors may pool their operations and resources to achieve greater efficiency, and the result may be pro-competitive in the end. Agreements such as joint ventures, joint research and development, and setting common standards that benefit consumers are obvious examples of pro-competitive agreements. Finally, such horizontal and vertical agreements that may be harmful to competition but that, at the same time, generate efficiencies, thus making them beneficial on balance also need to be explicitly identified in the legislation.[31]

1.5.5. Mergers and Acquisitions

Merger raises the size of the business and the ability of the emerging entity to dictate its terms to other market players. It can compel others to join the cartel activity or else could resort to predatory pricing, of course depending upon the peculiarities prevailing in the markets. Therefore, merger activities need to be watched vigilantly.[32]

1.5.6. Organizational and Enforcement Matters: Specialized Courts and Rights of Appeal

The skeleton of the competition law should also involve the judiciary in enforcing competition laws besides the competition agency itself. The competition agency may be required to apply to the court for orders that would implement its decisions. More commonly, the parties involved may appeal the competition agency's decisions to the courts. Because the judiciaries in transition/ developing economies are inexperienced in dealing with free market problems, it is advisable to set up specialized courts to hear competition cases. Such courts could hear commercial disputes or be specialized to only

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[31] *Ibid.*

[32] Mergers may be allowed except that the competition agencies can show that they will significantly limit competition. Only large mergers, which are most likely to present a threat to competition, should be subject to 'pre-merger notification' requirements. Requiring notification of all mergers would unduly burden the agencies and impose unreasonable costs and delays on the merging parties. Competition laws to prohibit anti-competitive mergers provide both structural and behavioral remedies but the competition office should favor structural remedies. Behavioral remedies are generally ineffective unless they are easy to monitor and the competition office has effective means of ensuring compliance.

competition cases. Specialized competition courts could adopt procedures and rules of evidence specifically suited to competition cases.

1.5.7. Private Enforcement for Redress

In some laws, private actions to rectify infringements resulting from violations of the competition law are instituted before appropriate courts and tribunal by consumers. These private actions raise the level of confidence among general public regarding benefits of enforcing competition law. Also competition agency is relived from obtaining redress on behalf of private parties.

1.5.8. Relationship between Competition Agency and other Government Bodies

It is understandable that competition agency's decisions may very well affect interests of well-established businesses having strong influence in certain government organs. Therefore, 'independence' from other organs of the government is important for proper functioning of competition agency. Competition agency should be free from political influence of rent seekers and interest groups relating to 'regulatory capture'. Though being organizationally independent from government organs, it is necessary that competition agency should have the option to participate in such government decisions that affect competition. This may be done preferably in the form of recommendations presentations and advocacy of competition concerns.[33]

1.5.9. Prohibition and Remedial Orders

The competition law should empower the competition agency to prohibit anti-competitive conduct and to redress the harm from it. A suitable remedy for many anti-competitive practices is to direct the offending party to stop engaging in such conduct and take effective actions to eradicate the effects of the illegitimate practice. Resorting to punishment is also required if the conduct is egregious.

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[33] *Supra* Note No. 30.

1.5.10. Fines and Penalties

Finally, the competition agency should have the authority to impose fines for cartel agreements and other violations of the law. It is considered that to discourage cartel agreements, fines must be considerably larger than the extra benefits earned by the firms through illegal behavior. It is generally recognized that the deterrent effect of penalties is enhanced if anti competitive practices are declared a criminal offence and by making individuals liable to pay the penalties besides the enterprises involved.

1.5.11. Interim Injunctions

The authority to issue interim injunctions or temporary orders to stop anti-competitive practice is necessary, in case an investigation is likely to take longer time. Interim injunctions are useful in merger cases when it is difficult to break apart merged entity after consummation of the merger transaction. It is useful in cases where prohibition orders are issued to eliminate or prevent anticompetitive practices.[34]

1.5.12. Enforcement Guidelines and Advance Rulings

Voluntary compliance requires that stakeholders subject to the applicability of law should be assisted to understand and follow the law. This could be done through the publication of enforcement guidelines explaining as to how the competition agency will apply the law. Another way is to publish reasoned reports and prohibition orders/ decisions imposing sanctions. Also the law may introduce a process whereby parties can obtain advance rulings and seek advice from the competition agency concerning their future action. This raises transparency of the system as well as its predictability.

1.5.13. Investigative Powers

To ensure effective enforcement, the competition agency needs information and investigative capability. The agency should have the powers to ask the stakeholders to

[34] *Ibid.*

produce documents, submit statements and answers to questions and oral testimony. These days, the competition agency is considered to have the search and raid power to discover evidence. These powers could be made meaningful with severe fines for willful destruction or withholding of evidence. Such powers should, however, be subject to strict procedural safeguards. In most countries, searches can be conducted only after authorization of a court or tribunal when the competition agency shows probable cause with a level of certainty.[35]

1.5.14. Protection of Confidential Information

To get the confidence and cooperation of the business sector, the competition agency should keep all nonpublic information as confidential. To strengthen these provisions, fines and possible dismissal should be introduced, if agency's employees who willfully disclose confidential data or engage in conflicts of interest.[36]

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[35] The interests of the businesses also need to be protected in the process.
[36] *Supra* Note No. 30.

CHAPTER 2

CARTELIZATION

2.1. INTRODUCTION

Generally, the 'competition policy' incorporates all policies pertaining to competition in markets, including trade policy, regulatory policy and policies adopted by governments to address anti-competitive practices of enterprises, whether private or public. In the narrower sense, the term is used to cover the last-mentioned aspect.

Consumer welfare is often cited as the sole purpose of anti-trust this is why it is said that the function of antitrust laws is to protect competition, not competitors. This means that the antitrust laws should not be used to prohibit efficiency-enhancing transactions, agreements and such conduct even if they damage competitors. For that reason, competition must not be defined in terms of enmity or rivalry, but as "the process by which market forces operate freely to assure that society's resources are employed as efficiently as possible to maximize total economic welfare."[1] Using this definition, main concern of anti-trust law comes out to be fighting hard-core cartels that harm competition the most and cause severe efficiency losses.[2]

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[1] See, e.g., William J. Kolasky, *'What is Competition?'*, Address at the Netherlands Ministry of Economic Affairs, (October 28, 2002) (transcript available on U.S. Department of Justice Antitrust Division website, www.atrnet.gov), also available at http://www.usdoj.gov/atr/public/speeches/200446.htm. Last visited 25th June 2006.

[2] Global Competition, *'Prospects for Convergence and Cooperation'*, Remarks by William J.Kolasky, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Before the American Bar Association Fall Forum, Washington, D.C, November 7, 2002. Also available at http://www.usdoj.gov/atr/public/speeches/200446.htm. Last visited 25th May 2006.

2.2. FORMS OF ANTI-COMPETITIVE BUSINESS PRACTICES

There are the following four main types of business practices having anti-competitive effects:

- Horizontal restraints;
- Vertical restraints;
- Abuse of a dominant position;
- Mergers and acquisitions.[3]

2.2.1. Restrictive Trade Practices

Generally, restrictive trade practices fall into two broad categories:

- Horizontal Restraints involving arrangements between competing firms manufacturing more or less similar products to hold back competition in the market and include specific practices such as cartels and pricing behavior such as predatory pricing, price discrimination and price fixing.
- Vertical Restraints i.e., anti-competitive arrangements between firms along the production-distribution chain including practices such as exclusive dealing, geographic market divisions, refusal to deal /sell, resale price maintenance and tied selling.[4]

2.2.1.1. Hard-Core Cartels as one of the Horizontal Restraints

The leading challenge in the fight against cartels is the clear-cut identification of illegal behaviour that is considered hard-core cartel conduct. The fundamental concept of a cartel found in almost all statutes is: a cartel is described as an agreement between competitors to limit competition.[5]

The term "hard-core cartels" refers to the most detrimental type of collusive practices such as price or quantity-fixing, bid-rigging and market allocation. Such practices move up prices and restrict supply, consequently making goods expensive or even unavailable to consumers. World Development Report, 2001 estimated that "the cartel-affected imports

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[3] See http://www.jurisint.org/pub/06/en/doc/C23.pdf. Last visited 25th July 2006.

[4] The OECD, *'Glossary of Industrial Organisation, Economics and Competition Law'*, Compiled by Khemani R.S and D.M.Shapiro, definition No.10.

[5] *'Building Blocks for Effective Anti-Cartel Regimes'*, A Report prepared by the ICN Working Group on Cartels at ICN 4th Annual Conference, Bonn, Germany, 6 - 8 June 2005. Also available at http://www.internationalcompetitionnetwork.org/bonn/Cartels_WG/SG1_General_Framework/Effective_Anti-Cartel_Regimes_Building_Blocks.pdf. Last visited 25th May 2006.

contribute to approximately 6.7 per cent of all imports (worth US$ 81 billion) by developing countries and cost developing countries approximately US$ 20 billion to 25 billion in 1997, depending on the percentage of the price mark-up." These estimates are based on only 16 products sold by known cartels, as revealed by competition agencies in Europe and the United States. It may be inferred from this that the actual figures could be even higher.

Worldwide cartels continue to dodge respective national competition laws by operating secretly in several countries. Hardcore cartels undermine the benefits of trade liberalization and bring costs, especially for developing countries that do not possess resources and capacity to deal with them.[6] According to European Union, a multilateral framework on competition needs to have two elements in relation to cartels: (a) a national competition law with a provision to forbid hard-core cartels, and (b) a cooperative framework for exchange of information regarding cartels. This proposal is built on the non-binding Organization for Economic Co-operation and Development (OECD) Council's Recommendation Concerning Effective Action against Hard Core Cartels adopted in 1998. The recommendation provided OECD members to assist each other in implementing the law and to make sure that they successfully deter cartels.[7]

Core objective of antitrust enforcement is the fight against hardcore cartels.[8] In simplest terms, a cartel is an agreement between businesses not to compete with each other. The agreement is usually secret, verbal and often informal. Cartel are formed for the common benefits of member firms as Adam Smith observed in his book 'An Inquiry into the nature of the wealth of nations' "....people of the same trade seldom meet together even for merriment sad diversion, but when they meet the conversation ends in a conspiracy against the public or in some contrivance to raise prices....."[9]

Typically, cartel members may agree on:

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[6] Kishwar Khan, 'Competition issues within and outside WTO' paper presented in the 'Experts Advisory Cells' WTO Experts Moot, August 24th, 2004, Islamabad.

[7] *'Competition Policy in WTO: How to Make It a Developing Countries Agenda'*, Deunden Nikomborirak, Paper submitted to the UNESCAP Thailand for the High-level Trade Officials Meeting in Bangkok, 9-12 June 2003.

[8] See http://www.internationalcompetitionnetwork.org/cartels.html. Last visited 19th May 2006.

[9] *Supra* Note No. 4, definition No. 25.

- prices
- output levels
- discounts
- credit terms
- which customers they will supply
- which areas they will supply
- who should win a contract.

All the above types of agreements are prohibited in competition laws generally as criminal offence. Cartels can be formed in any industry and may involve goods or services at the production, distribution or retail levels. Some sectors are more exposed to cartels than others due to industrial structure. For instance, where:

- there are a small number of competitors;
- the products have similar characteristics, there are less chances of competing on quality, etc;
- communication between competitors are there;
- industry is suffering from excess capacity or there is general recession.[10]

Unlike cartel, collusion does not essentially need a formal agreement. Collusion refers to such conspiracies or agreements among competitors that increase or fix prices and to decrease production to increase profits. In any case, economic effects of collusion and cartel are the same and at times the terms are used as synonyms. Collusive behavior is glaring in those oligopolistic industries, where companies are dependent on each other in their pricing and production decisions because actions of each company impact others and creates a counter response by others.[11] In such cases, companies may take their competitors' actions into account and behave as if they were a cartel without an explicit agreement. This is also described as "Conscious Parallelism". Before proceeding further, it may be noted that in American Jurisprudence, price fixing agreements may fall into three broad categories:

- Horizontal price fixing: agreement or cartel among actual or probable competitors.

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[10] See http://www.oft.gov.uk/Business/Cartels/what+is+a+cartel.htm. Last visited 11th July 2006.

[11] *'Objectives of Competition Policy'*, Chapter prepared by principal team member Shyam Khemani with input from members of the Competition Law and Policy Committee of the Organization for Economic Co-operation and Development.

- Vertical price fixing: agreement among manufacturers and wholesalers or distributors, or among manufacturers and retailers, or among wholesalers or distributors and retailers.
- Predatory pricing: agreement among competitors intended to oust or eradicate other competitors from market.[12]

Antitrust laws in most countries forbid cartels, still, they continue to exist nationally and internationally, formally and informally.[13]

2.3. CARTELIZATION AND MODEL COMPETITION LAWS OF OECD AND THE UNCTAD

There are currently two sets of definition for hard-core cartels found in the non-binding agreement concerning cartels.[14] Views diverge about a definition yet, there is consensus that the main element of hard-core cartel conduct is the disbelief of consumer as if he is purchasing in a competitive market whereas, in reality, conspirators had secretly agreed not to compete.[15]

2.3.1. OECD's Definition

The OECD's 1998 Recommendation identified four types of conduct as falling within the definition of a hard-core cartel and defined it as under:

> "A "hard core cartel" is an anticompetitive agreement or anticompetitive concerted practice by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce . . ."

This Recommendation was the result of extensive negotiation and to have a consensus view about cartels. Agreements for cost reduction or output-enhancing efficiencies were excluded directly or indirectly from the prohibition. The Recommendation noted that all exclusions of what would otherwise be hard-core cartels should be transparent and be

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[12] Judgment of Lahore High Court, Lahore in the matter of Dandot Cement Company Limited vs. MCA alongwith similar Appeals filed by the Undertakings under Section 20 of the MRTPO, 1970 against the Orders of the MCA dated October 27, 2005.

[13] See http://www.reference.com/browse/wiki/Cartel%20%20<!-%20internal%20wiki%20template. Last visited 12th June 2006.

[14] *Supra* Note No. 7.

[15] *Ibid.*

evaluated periodically.[16] OECD recognized that hard-core cartels are detrimental to national and international trade and they should be rigorously penalized as they undermine a "level playing field". As a result of negotiations, many OECD countries have improved their enforcement against cartels.[17]

2.3.2. UNCTAD's Definition

The other definition can be found in the non-binding recommendations for the control of restrictive business practices, in particular cartels, issued by the United Nations Conference on Trade and Development (UNCTAD). The definition of hard-core cartels according to this includes – in addition to the four types of collusive practices specified in the OECD Recommendation – concerted refusal to supply potential importers, collective denial of access to an arrangement or association, and collective action to enforce a cartel arrangement, such as refusal to deal.

The possible definitions of hard-core cartels have been explored above. Several developing countries consider that domestic and international cartels must be treated differently because of the difference in the size of domestic markets and the global market. Majority of developing countries also think that export cartels should be considered as international cartels as their practices lead to export restrictions. As a result, developing countries may like to have a right to exempt cartels consisting of small/ medium-size enterprises. There has been no consensus about this but it is clear that governmental and government mandated cartels would not be covered by a possible multilateral competition framework.

A review of extensive discussions taking place at UNCTAD shows that certain UNCTAD members did not believe that a national competition law will be adequate to solve cross-border cartel issues as they operate beyond the reach of national competition law. Due to legal complexities, it is difficult to fine them unless the companies involved have assets in

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[16] *Supra* Note No. 5.

[17] Report of the Rapporteur by Simon J. Evenett, Director, Economic Research World Trade Institute, University of Bern. See http://www.evenett.com/chapters/evenettreportonoecdmeeting.pdf. Last visited 10th May 2006.

the importing country or affected party is an important customer, even then, national competition agencies or courts can hardly do anything if imported products have no suitable substitutes.[18]

2.3.3. Per se vs. Rule of Reason Prohibitions for Cartels and Model Competition Laws

The UNCTAD, OECD and the World Bank (WB), recognize five major types of restrictive agreements as follows:

- Price fixing
- Quantity fixing
- Market allocation
- Refusal to deal or supply
- Collusive bidding/ tending

With the exception of collusive bidding, each of the above agreements can occur either horizontally or vertically. While both the WB-OECD and UNCTAD model competition laws agree on types of restrictive agreements, there are differences in their approach for horizontal vs. vertical restrictive agreements; and per se vs. rule of reason prohibitions. These differences are explored further in the sections to follow.

1. A Threshold Criterion

a) For competing firms (i.e. horizontal agreement) the restrictive agreement cannot be found to considerably limit competition unless shares of cartel members collectively exceed 20 per cent of market affected by the agreement.

b) For non- competing firms (i.e. vertical agreement)- the restrictive agreement cannot be found to substantially limit competition unless:

- At least one of the parties holds a dominant position in a market affected by the agreement: or
- The limitation of competition results from the fact that similar agreements are widespread in a market affected by the agreement.

[18] *Supra* Note No. 7.

2. A Cost-Benefit Comparison

To asses the clear position of a cartel i.e., prohibited or falling within the waivers, a cost-benefit comparison is generally made for its real effects either on total welfare by giving equal weight to consumers and competitors or only on consumers' welfare. On the other side are the assessments of loses to the consumers and competitors. A final decision depends on the cost-benefit comparison of these assessments. The rule of reason also relates to the exemption of restrictive agreements with the provision that "the burden of proof lies with the parties seeking the exemption".

UNCTAD's model competition law provides a list of forbidden restrictive agreements but these may be exempted or authorized if they generate 'net public benefit'. The UNCTAD's law does not make the distinction between horizontal and vertical agreements and between per se and rule of reason, such differences are to be considered in the context of country specific experiences. Briefly, these experiences show that market allocation agreements are considered to be per se illegal say in USA and UK. The agreement that amounts to refusal to deal is per se illegal in Australia. Collusive bidding is per se illegal in USA and Kenya. In Pakistan, all these agreements are subject to rule of reason.

In the perception of cartels advocated by the WB- OECD, the distinction between cartel and non-cartel horizontal agreements is a significant one. Accordingly, certain types of horizontal agreements i.e., cartel agreements are subjected to stricter control than other types. In several countries this distinction is not found in the law itself but it is there in enforcement practice and regulations.[19]

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[19] *'The World Bank-OECD and UNCTAD Approaches Compared'*, Cassey Lee, Faculty of Economics and Administration, University of Malaya, 19 July 2004; UNCTAD, *'Model Law on Competition'*, United Nations, Geneva, 2003; World Bank (2002), World Development Report, Washington, D.C, 2002; World Bank and OECD, *'A Framework for the Design and Implementation of Competition Law and Policy'*, Washington, D.C, 1999.

2.4. TYPES OF CARTELS

Cartels could broadly take three forms:

- Import cartels and related arrangements;
- Export cartels and related arrangements;
- International cartels.

2.4.1. Import Cartels and Related Arrangements

Import cartels formed by domestic importers or buyers and similar measures are an area of concern from market access viewpoint. Some other issues are exclusion of foreign competitors from trade associations' membership or to have discriminatory terms for them. In many jurisdictions, import cartels are allowed if importers face dominating foreign suppliers and if domestic competition is not considerably restrained. Other cooperative agreements such as standard-setting and joint purchasing are often subject to a rule-of-reason analysis.[20]

2.4.2. Export Cartels and Related Arrangements

Many competition statutes exempt agreements to charge a particular export price and/or to divide export markets provided that there are no detrimental effects on competition in domestic market. The reason is the generation of net welfare gains arising from cooperative penetration in foreign markets, transfer of income from foreign consumers to domestic producers and finally a favourable balance of trade.[21]

Export cartels can be divided into two groups as under:

- 'Pure' export cartels that affect foreign markets only.
- 'Mixed' export cartels that restrain competition in the home market as well as in foreign markets.

Pure export cartels are outside the most countries' competition laws as they are considered to be outside the jurisdiction of domestic competition laws. Generally, mixed

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[20] *'Trade and Competition Policy'*, Chapter 23, Page No. 287, Overview of the main issues under discussion in the WTO Working Group 35 [Report (1998) of the Working Group on the Interaction between Trade and Competition Policy to the General Council. (WTO, WT/WGTCP/2, 8 December 1998)].

[21] *Supra* Note No. 4, definition No. 82.

export cartels are subject to the same requirements or absolute prohibitions as cartels that affect the domestic market alone, although several countries provide special exemptions on grounds of export promotion.

2.4.3. International Cartels

International cartels involving two or more countries are considered to be like horizontal price-fixing and other collusive arrangements within a single country. The reason being, competition is restricted, prices are increased, production is controlled, and markets are allocated for the benefit of cartel members. Another important type of horizontal agreements is that of cooperative arrangements for research and development, these also tend to have implications for exercise of market power in international markets especially where the competition laws allow such R & D joint ventures; these may be put into strategic use. Nevertheless, it has been recognized that such arrangements should not be granted blanket exemptions from competition law rather there should be periodic reviews of innovation and technology enhancement.[22]

Regarding international cartels, it is interesting to note that USA prosecuted sixteen major transnational cartels during the last few years in industries such as animal feed additives, vitamins, graphite electrodes for steel mills, and fine arts auction houses. These cartels affected over $55 billion in worldwide commerce and resulted in mark-ups as high as 100 per cent in some cases. According to an estimate, USA's anti trust agency collected almost $2 billion fines and sentenced 20 senior corporate executives to jail for more than one year, the maximum sentence being ten years. USA's leniency program [23] offers complete amnesty to a whistle blower, subject to certain conditions. During the last few years major international cartel cases were exposed through leniency program. In 2001, the European

[22] *Supra* Note No. 3.

[23] U.S. Department of Justice, Antitrust Division, and Corporate Leniency Policy. Available at http://www.usdoj.gov/atr/public/guidelines/lencorp.htm. Last visited 25th May 2006.

Commission also imposed fines of 1.9 billion Euros on 40 companies for their involvement in multinational cartels.[24]

2.4.3.1. Common Characteristics of Multinational Cartels

Common characteristics of selected multinational cartels prosecuted in some jurisdictions are discussed in this section:

1) Blatant Nature of Cartels

The most stunning feature of multinational cartels is their boldness. At times, cartel members use code names, meet secretly, create false legal covers for meetings, use home phone numbers for contacts and give instructions to destroy evidence of conspiracy i.e., "no notes leave the room".

2) Involvement of Senior Executives

The second most important aspect is the involvement of the most senior executives of cartelizing firms i.e., those who have important responsibilities to comply with antitrust laws.

3) Fixing Prices Globally

To manipulate prices globally and exploit consumers around the world is another common attribute of international cartels, for instance, the case of lysine videotapes. USA's experience with vitamin, citric acid and graphite electrode cartels further firms up this view. In all cases, the price was fixed on a worldwide, region or on a country-by-country basis. The prices fixed were on diverse basis i.e., a range of price to be charged, setting a minimum price, a specific price, etc. Each case resulted in customers paying more because of the

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[24] *'Antitrust Compliance Programs: The Government Perspective'*, Address by William.J. Kolasky, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Before the Corporate Compliance 2002 Conference, Practicing Law Institute (PLI), San Francisco, CA, July 12, 2002. See, e.g., *'U.S. and EU Competition Policy: Cartels, Mergers, and Beyond'*, An Address Before the Council for the United States and Italy Bi-Annual Conference, New York, N.Y, January 25, 2002. Available at http://www.usdoj.gov/atr/public/speeches/9848.htm. Last visited 25th June 2006.

artificially high and overstated prices worked out by the cartel members. The losses inflicted by such cartels are significant in developing countries, according to an estimate, for instance due to the vitamin cartel, Pakistan suffered a loss of US$36.82 m.[25]

4) Compensation Schemes

Cartel members use compensation or reimbursement schemes to discourage cheating. Typical example is that of the lysine cartel where balances were to be cleared at the end of the calendar year. Accordingly, any firm that sold more than its allocated market share had to compensate the under budget firm by purchasing an equal amount of lysine over-sold by it. This reimbursement scheme reduced the incentive to cheat.

5) Budget Meetings

Sales are reported by cartel member on a worldwide, regional, and/or country-by-country basis. These are then compared as per volume allocation agreement or quotas. Cartel members generally use the term "over budget" and "under budget" while comparing sales and allocations.

6) Retaliation Threats -- Policing the Agreement

Research has shown that successful cartels share unique characteristics for concurrence, coordination and compliance amongst cartel members. It means that the cartel members were able to discover infringements of their agreement and to punish the violators with sanctions. Perhaps, this is the reason that the cartels tend to break down over a period of time as it is quite difficult to maintain these conditions.[26] To preserve their agreement and block violations, the cartel members come up with ways e.g., reacting temporary price cuts or increases in sales volumes to financially harm the violators. The threat to use surplus

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[25] Consumers Unity and Trust Society, *'Pulling up our Socks- A Study of Competition Regimes of Seven Developing Countries of Africa and Asia: the 7-up Project'*, Consumers India, 2003. See www.cuts-international.org. Last visited 11th May 2006.

[26] *Supra* Note No. 4, definition No. 23.

production capacity by the leading cartel members is another way to discipline the violators.[27]

7) The Structure of Cartels

As observed by George Stigler[28] cartels adopt a particular form according to the possibility of detection by balancing the comparative cost of reaching and enforcing their collusive agreement. For instance, the vitamin cartel, included price-fixing, bid rigging, customer and territorial allocations and also coordinated total sales.

2.5. THE INCENTIVES TO CARTELIZE

Theoretically, a market economy is based on the model of consumers' sovereignty. In reality, this is not the case and consumers face several limitations to choose from alternatives. Competitors have clear and rationale reasons for not competing. This behaviour allows market players to increase price from the competitive level to the monopoly level. Total profit is increased regardless of reduced quantity sold. Practical examples establish that lack of competition – or the nonexistence of it – normally lets sellers to charge higher prices. Therefore, the profit-maximising motive is clearly one of the motives to limit or eliminate competition.

The case may be other way round when lack of competitive pressure result into increasing costs, organisational slack, x-inefficiency, lack of innovation and thereby reducing profits despite excessive pricing. In this case, the outcome of competitive restraints may be normal profits only understandably, the efficiency-enhancing behaviour may generate higher profits.

Profit maximization is not the only goal for cartel members, a variety of factors may motivate price fixing conspiracies:

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[27] In lysine, ADM, which had substantial excess capacity, repeatedly threatened to flood the market with lysine if the other producers refused to agree to a volume allocation agreement proposed by ADM. Available at http://www.usdoj.gov/atr/public/speeches/11534.htm. Last visited 10th June 2006.

[28] *See* Stigler, George J, '*A Theory of Oligopoly*', Journal of Political Economy, Vol. 72, 1964, pp. 44-61. Also available at http://www.usdoj.gov/atr/public/speeches/11534.htm. Last visited 14th June 2006.

a) **Power to increase and maintain high price:** Cartel will be successful and companies will have incentives to remain in the conspiracy if there are market entry barriers or substitutes are not available. This will help to increase and maintain high prices.

b) **Cartel members do not fear detection of conspiracy:** In that case, the profits from cartel may be considerably higher than the costs of fines and loss of reputation.

c) **Low cost to maintain cartel:**. If enforcement and monitoring costs of the conspiracy are low, then it may be easy to form and maintain cartel.

d) **Homogeneous products:** Cartels are easier to form for like products. If products are heterogeneous on the basis of quality or other attributes, then consumer may have brand loyalty, in that case, uniform price agreements are difficult to make. Also, it is difficult for cartel embers to identify if sales variations are due to buyer preferences or cheating in the form of secret price cuts to increase sales volume.

e) **Few large companies having larger market share**. The cost of cartelization is low, when the number of companies is few. In this situation, it is also easier to identify the violator.

f) **The role of trade association**: manufacturers' groups and trade associations provide a basis for coordinating activities and a platform to exchange information thereby facilitating cartel activities.[29]

2.6. HARMFUL EFFECTS OF HARDCORE CARTELS

It has been explained above that cartels have harmful effects on economic efficiency and are detrimental to consumers as they lead to inefficiency in markets that would otherwise

[29] For further details see Canon D.W and Perloff D.A, '*Modern Industrial Organization*', Scott, foresman/little brown.Glenview.2, 1990, ch.9; F.M.Scherer and D.Ross, '*Industrial Market Structure and Economic Performance*', Houghton Mifflin Co, Boston, Chapters 7 and 8, 1990; GJ Stigler *'A Theory of Oligopoly'*, Journal of Political Economy, vol.72 (1), Page No. 44-61, 1964.

be competitive.[30] The detrimental effects of cartels are categorized below:

- The most injurious effect is the decrease of total production. This may be due to output reducing agreement in the short run and due to inefficiency in the long run. These may be called static and dynamic effects of anti-competitive conduct. These include diminishing research and development to develop existing products or introduce new ones, decreased motivation for costs saving, etc; such injurious effects are less observable initially;
- Non-availability of product: Market sharing arrangements by definition stop customers from accessing certain sources of supply. The product may not be available to those customers who can only pay competitive price but not more than this.[31]
- Cartels increase price, this is generally most instant and direct effect of horizontal agreements that co-ordinate pricing.[32]

2.7. INVESTIGATION OF CARTELS

Cartel members are aware of what they are doing is against the law. Even then they are not scared of the consequences, considering that the fine imposed by the competition agency will only be a fraction of profits accrued through cartelization.[33] Competition agencies keep on trying prosecuting cartels, they also understand that it is a difficult task to spot and discover secret cartels. To detect cartels successfully, it's essential to equip competition agencies with ample, sufficient and necessary investigative tools.[34]

Investigation of cartel needs serious efforts to:

- Detect agreements between competitors.

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[30] Josef Bednář, Chairman of the Office for the Protection of Competition of the Czech Republic, *'Cartel Enforcement'*. Also available at http://www.compet.cz/English/Aktuality/CartelEnforcem.htm. Last visited 25th June 2006.

[31] Centre for Co-operation with Non-members. Directorate for Financial, Fiscal and Enterprise Affairs, OECD Global Forum on Competition, '*How Enforcement against Private Anti-Competitive Conduct has Contributed to Economic Development*' (Background note by the Secretariat), and this note was submitted for discussion under Session IV of the Global Forum on Competition held on 12-13 February 2004.

[32] The results are reported in '*Fighting Hard-Core Cartels: Harm, Effective Sanctions and Leniency Programs*', (OECD 2002), and *'Hard Core Cartels: Recent Progress and Challenges Ahead'*, (OECD 2003). These Reports, as well as many other OECD Documents and Recommendations relating to Competition Policy can be found at the Competition Page of the OECD Web site available at www.oecd.org/competition. Last visited 25th June 2006.

[33] *Supra* Note No. 30.

[34] *On the Evidences of Conspiracy of Cartels through two cases of TFTC*, by Wen-hsiu Lee, Legal department of TFTC. Also available at http://www.apeccp.org.tw/doc/APEC-OECD/2005-8/010.pdf. Last visited 25th May 2006.

- Identify cartel members.
- Discover the nature of cartel agreement i.e., if it is price fixing, production limitation agreement or any other.

Administration of cartel activity is a tough task too. Cartel members try to conceal their conduct from competition agency and public eye. An important step in cartel detection is to know exactly as to how a cartel works. Generally, cartels only involve one of the following things:

1. Pricing cartel agreements consist of:

- making price higher or stable.
- fixing price through a formula.
- following the already published price.
- keeping a stable ratio among prices of competing products, in this case price need not remain the same.
- Reducing price by same amount.
- Consulting cartel members before price changes.

2. Supply or production related cartel agreements cover:

- fixing quantity of production or sales.
- appointing single selling agent for selling cartel members' products.

3. Customer allocation among cartel members in such a way that increasing price by a cartel member could shift the customer to another competitor. This will reduce chances of violating fixed prices by the cartel agreement.

4. Share market product, in such a way that only a small number of cartel members could sell their products to customers. This reduces the risk of customers switching to other competitors as they are also cartel members.[35]

5. Geographical area distribution among competitors so that only a small part of them who want to sell their product to customers are in one area.

In case of international cartels, it is understandable that the detection is even more difficult as cartel members have resources abroad (branches, spin-off companies), etc. As a result of this, the proofs on international cartels are difficult to be collected on a national level only. Witnesses are located in various countries with various jurisdictions. It also involves existence of a legal cover to competition agency in carrying out required

[35] See http://www.apeccp.org.tw/doc/APEC-OECD/2005-8/005.pdf. Last visited 25th June 2006.

investigation and impose sanctions on foreigeners.[36] Important aspects relating to investigative tools for cartel detection are discussed further in the last chapter.

2.8. DIRECT AND INDIRECT PROOF ABOUT CARTELS

It is hard to get hold of direct evidence on actions that determine the working of implicit understanding. Importance of forensic investigation increases to collect and combine comprehensively the scattered pieces of indirect evidence as a proof. This is a tricky and complicated task that cannot be accomplished without necessary investigative tools. Existence of cartels can be determined by direct evidence or can be inferred indirectly; this is discussed below:

2.8.1. Direct Proof about Cartel

- Copies of written cartel agreement or notes exchanged by companies.
- Statement or interview from witness of cartel members' deal or meeting.
- internal memorandum or communication in a company showing minutes of meeting with competitors or reporting results of meeting.
- Notes about telephone calls among competitors with reference to cartel agreement.
- Statement or interviews from someone who was motivated or pressurized by cartel members to join them.[37]

2.8.2. Indirect Proof about Cartel

Indirect proof of the cartel can be deduced from the circumstances and facts of the case placed before the competition agency. Such circumstances may include price increase by competitors in a deliberate and orderly manner. Care must be taken to rely on such evidence because such parallel prices change cannot independently establish cartelization unless there is supplementary or additional evidence. For instance, the Indian Commission relied upon the decision of the US Supreme Court in the case of Theatre Enterprises, Inc. Vs. Paramount Film Distributing Corporation and others to rule that price parallelism per se does

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[36] *Supra* Note No. 30.

[37] See http://www.apeccp.org.tw/doc/APEC-OECD/2005-8/010.pdf. Last visited 25th July 2006.

not establish a cartel.[38] The Indian Monopolies Restrictive Trade Practices (MRTP) Commission further held:

> "We must admit that the price parallelism practiced extensively coupled with only a feeble attempt on the part of the respondent at justification of parallel price increase, does appear highly suspicious and we find it hard to believe that the frequent and equal increases in prices could have been carried out without some prior understanding. Suspicion, however, strong is no substitute for proof...."[39]

2.8.2.1. Proof about Price Fixation and the Principle of "Conscious Parallelism" and "Plus" Factors

At times, same fixed price is considered to be another type of indirect proof about the existence of cartel. However, it is only informative and not conclusive proof of the existence of cartel. [40] The question remains whether a parallel or similar price increase by itself is adequate to establish contravention or violation of law? American case law is reviewed to resolve this crucial question. The US Supreme Court considers broad principle of "conscious parallelism" to be such behaviour of actual or potential competitors that occurs in parallel say parallel prices increase.[41] US Supreme Court was of the view that this parallel behaviour was insufficient to establish a violation of law. In a case of horizontal price fixing, Williamson Oil Company Inc. and other Vs Philip Morris USA and others, when cigarette manufacturers were accused of fixing cigarette prices at unnaturally high levels by means of collusion. The Court of Appeals observed the basic distinction between "collusive price fixing" and "conscious parallelism", the former is prohibited under the Sherman and Clayton

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[38] See the case of Theatre Enterprises, Inc. vs. Paramount Film Distributing Corporation and others (1954) 346 US 537.
[39] See the case of Alkali and Chemical Corporation of India Ltd. vs. Bayar (India) Ltd. (1984) 3 Comp LJ 268, pg. 277.
[40] *Supra* Note No. 3.
[41] *Supra* Note No. 38.

Acts whereas the later is not. The Court further held that as a matter of law, the following three conditions were necessary to indirectly establish price fixing agreement:

- establish a pattern of parallel behaviour.
- besides parallel behaviour, one or more "plus factors" to rule out the likelihood that the suspected conspirators acted separately.
- if the first two conditions are satisfied, the suspected conspirators could "rebut the inference of collusion by presenting evidence establishing that no reasonable fact finder could conclude that they entered into a price fixing conspiracy". [42]

In another case of horizontal price fixing, in 1999, the US Court of Appeals gave its decision. It is cited as Re: Baby Food Antitrust Litigation. The Court of Appeals observed in this case:

> "Because the evidence of conscious parallelism is circumstantial in nature, courts are concerned that they do not punish unilateral, independent conduct of competitors...they therefore, require that evidence of a defendant's parallel pricing be supplemented with "plus factors"...the simple term "plus factors" refers to additional facts or factors required to be proved as a prerequisite to finding that parallel action amounts to a conspiracy...they are necessary conditions for the conspiracy inference...They show that the allegedly wrongful conduct of the defense was conscious and not the result of independent business decisions of the competitors. The plus factors may include, and often do, evidence demonstrating that the defendants: (1) acted contrary to their economic interests, and (2) were motivated to enter into a price fixing conspiracy." [43]

The following principles could be drawn from the above mentioned decisions of the US courts:

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[42] Williamson Oil Company Inc. and other vs. Philip Morris USA and others. This was a 2003 decision of the 11th Circuit US Court of Appeals.

[43] Decision of the US court of Appeals for the 3rd Circuit that is cited as Re: Baby Food Antitrust Litigation, 1999. Also available at http://www.ftc.gov/os/2001/01/heinze.pdf#search=%22Third%20Circuit%E2%80%99s%20opinion%20in%20In%20re%20Baby%20Food%20Antitrust%20Litigation%2C%20166%22. Last visited 1st November 2006.

- A violation of the Sherman Act can be established both by direct or indirect evidence drawn from the facts and circumstances of the case such as business behaviour is acceptable circumstantial evidence to establish a cartel.
- In case of indirect inference, the alleged conspirators must be identified while indicating as to how they worked.
- Conscious parallelism is not enough to indirectly establish cartel.
- "Plus" factors are required to substantiate indirect proof of cartel.
- If parallel business behaviour and "plus" factors are found to exist, the alleged conspirators can nevertheless deny the inference of collusion by presenting evidence establishing that it could not reasonably be concluded that they entered into a price fixing conspiracy. [44]

To use above mentioned conclusion from the US cases for developing countries, it is necessary to consider first the major differences between the two sets of competition agencies i.e., USA has a well-established competition culture and an elaborate system of evidence gathering (involving even the FBI). Competition agencies of developing and transition economies at best draw inferences of cartel activity from the proof of the same fixed price. Therefore, these competition agencies need to find more tools and weapons to detect cartels in order to win their fight against them.

2.9. PROVISIONS RELATING TO CARTELIZATION CONTAINED IN COMPETITION LAWS OF DIFFERENT COUNTRIES

2.9.1. USA's Antitrust Laws

There are three major Federal antitrust laws: the Sherman Antitrust Act, the Clayton Act and the Federal Trade Commission Act. The Sherman Antitrust Act is there since 1890 as the principal law in United States to have a free market economy in which competition is free from private and governmental restraints. The Sherman Act outlaws all contracts, combinations and conspiracies that unreasonably restrain interstate and foreign trade. This includes agreements among competitors to fix prices, rig bids and allocate customers. The Act makes it a crime to monopolize any part of interstate commerce. According to this Act, an unlawful monopoly exists when only one firm controls the market for a product or

[44] *Supra* Note No. 12.

service, and it has obtained that market power, not because its product or service is superior to others but by suppressing competition with anticompetitive conduct.

Sherman Act violations involving agreements between competitors usually are punished as being criminal offence. The Department of Justice is empowered to bring criminal prosecutions under the Sherman Act. For offenses committed before June 22, 2004, individual violators can be fined up to $350,000 and sentenced up to 3 years in Federal prison for each offense, and corporations can be fined up to $10 million for each offense. For offenses committed afterwards, the individual violators can be fined up to $1 million and sentenced up to 10 years in Federal prison for each offense, and corporations can be fined up to $100 million for each offense. Under some circumstances, the maximum fines can go even higher than the Sherman Act maximums to twice the gain or loss involved.[45] The Sherman Act prohibits agreements between companies that have an unreasonable anticompetitive effect on a relevant market e.g. horizontal price-fixing, customer allocation and other "hard-core" cartel activities. "Hard core" cartel conduct is a per se violation of the antitrust laws, meaning that it is illegal even without requiring proof of its actual effect on competition. Agreements and joint activities that are less harmful to competition are assessed under "rule of reason" standard; pro-competitive benefits are balanced against the anticompetitive effects to determine violation of the Act.[46]

The Clayton Act is a civil statute, it has no criminal penalties. It was passed in 1914 and was significantly amended in 1950. The Clayton Act prohibits such mergers or acquisitions that are expected to lessen competition or to increase prices to consumers. All mergers or acquisitions above a certain size have pre-merger notification requirement both at the Antitrust Division and the Federal Trade Commission. The Act covers other business practices that under certain circumstances may damage competition.

The Federal Trade Commission Act disallows unfair methods of competition in interstate commerce but carries no criminal penalties.

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[45] See http://www.usdoj.gov/atr/public/div_stats/211491.htm. Last visited 25th June 2006.

[46] Business Law Today, September/October 2001, Volume 11, Number 1, *'Sharing before the Deal is done Information Exchanges and Antitrust'*, by Debra J. Pearlstein and Adam C. Hemlock. See website http://www.abanet.org/buslaw/blt/bltsept01_pearlhem.html. Last visited 25th May 2006.

The Department of Justice uses other laws to fight illegal activities, such as laws prohibiting false statements to Federal agencies, perjury, obstruction of justice, conspiracies to defraud the United States and mail and wire fraud. Each of these crimes carries its own fines and imprisonment terms that are added to the fines and imprisonment terms for antitrust law violations.

2.9.1.1. Enforcement of Antitrust Laws in USA

There are three ways in which the Federal antitrust laws are enforced:

- criminal and civil enforcement actions brought by the Antitrust Division of the Department of Justice;
- civil enforcement actions brought by the Federal Trade Commission; and
- lawsuits brought by private parties asserting damage claims.

The Department of Justice uses several tools to investigate and prosecute criminal antitrust violations. Department of Justice attorneys work at times with Federal Bureau of Investigation (FBI) or other investigative agencies to obtain evidence. The Department may use court-authorized searches of businesses and secret recordings by informants of telephone calls and meetings. The Department may grant exemption from prosecution to individuals or corporations who give timely information that is needed to prosecute antitrust violations.

Under the Clayton Act, private aggrieved parties can sue in federal court for three times their actual damages plus court costs and attorneys' fees. State attorneys general may bring civil suits under the Clayton Act on behalf of injured consumers in their states, and groups of consumers often bring suits on their own. Such civil suits also serve as an additional deterrent to criminal activity.

The Justice Department's number one antitrust priority is criminal prosecution of cartels because of the harm these violations cause. The Department has looked into price-fixing, bid-rigging and customer-allocation convictions in the soft drink, vitamins, trash hauling, road building and electrical contracting industries, among others. One important example of successful antitrust enforcement--the Antitrust Division's criminal cases against vitamins producers. The Division began an investigation in the late 1990's into a worldwide vitamins cartel affecting over $5 billion in U.S. commerce. The evidence showed that the

cartel members worked out every detail i.e., how much product each company would produce, prices to be charged and customers to be supplied. The victims from the cartel activity included companies such as General Mills, Kellogg, Coca-Cola, Tyson Foods, and Procter & Gamble. Infact, every US consumer who took a vitamin, drank a glass of milk or had a bowl of cereal-ended up paying more.

The vitamins investigation led to the conviction of U.S., Swiss, German, Canadian and Japanese firms, among others, and a number of top executives went to jail. In 1999, over $850 million fine was imposed on members of the vitamins cartel, including a record $500 million fine imposed on F. Hoffmann-La Roche, Ltd. and a $225 million fine imposed on BASF AG. Imposition of unprecedented fines against foreign firms and jail sentences against foreign nationals sends a clear deterrent message about vigorous antitrust enforcement.

Law enforcement officials also rely on complaints and information from consumers and competitors.

2.9.2. India

Section 3 of the Competition Act, 2002 contains the provisions regarding prohibition of certain anti competitive agreements. It provides that no enterprise or association of enterprises or person or association of persons shall enter 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 within India.

Any anti competitive agreement entered into in contravention of the provisions of law shall be void. Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-

(a) Directly or indirectly determines purchase or sale prices;

(b) Limits or controls production, supply, markets, technical development, investment or provision of services;

(c) Shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) Directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition.

The exception to these provisions is any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

For the purpose of this provision, bid rigging means any agreement, between enterprises or persons engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

Where after inquiry the commission finds that any agreement referred to in section3 is in contravention of section 3, it may pass under section 27 of the competition act, 2002 all or any of the following orders, namely:

(a) Direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such anti competitive agreement to discontinue and not to re-enter such agreement as the case may be.

(b) Impose such penalty, as it may deem fit that shall be not more than ten percent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises that are parties to such agreements.

Provided that in case any agreement referred to in section 3 has been entered into by any cartel, the commission shall impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty equivalent to three times of the amount of profits made out of such agreement by the cartel or ten percent of the average of the turnover of the cartel for the last preceding three financial years, whichever is higher.

(c) Award compensation to parties. Section 34 of the competition act 2002 states that any person may make an application to the commission for an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by such person as a result of any contravention by such enterprise of the provisions contained in section 3 of the Act.

(d) Direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the commission.

(e) Direct the enterprises concerned to abide by such other orders as the commission may pass and comply with the directions, including payment of costs, if any.[47]

2.9.3. European Union

Article 81 of the EC Treaty constitutes a general prohibition on agreements between undertakings, decisions by associations of undertakings, and practices that may distort competition in the common market. This provision aims to guarantee that every enterprise take independent decisions concerning its business strategy. To apply article 81(1), there must be some form of collusion between undertakings that could distort competition within the common market and may also influence trade between member states. [48]

The focus of antitrust laws is horizontal agreements between competitors. Horizontal agreements have been defined as agreements between undertakings working at the same level of the production/distribution chain (e.g. research, improvement, production, purchase, or sale of a good or service). Article 81 does not oppose all forms of cooperation between competitors. Therefore, all agreements restrictive of competition do not deserve the same level of condemnation. Enforcement practice has led to a view that price fixing, quotas, and market allocation agreements are most damaging to competition. These are generally termed

[47] See The Competition Act, 2002 (No.12 of 2003) the Gazette of India, Part 2, Section 1.

[48] '*Competition Law of the EC and UK*' by Mark Furse, Senior Lecturer in Law, University of Glasgow, Fifth Edition, August 2006.

as hard core cartels, and in evaluating them there is normally no need to study their effects on competition: they are presumptively illegal.

1) Price Fixing

One of the prohibited agreements mentioned in Article 81(1) is direct or indirect fixing of prices or any other trading conditions. This is usually the subject of high fines. Likewise, horizontal agreements on trading conditions other then price can have the same result as price-fixing agreements. Therefore, such agreements have also been condemned under Article 81 for instance, setting common terms of sales, including fixed sale dates, prohibiting deliveries on certain days, and fixed minimum purchase by customers.

2) Quotas and Output Restriction

Agreement to limit output is comparable of agreements to raise prices, and have usually been treated accordingly by the Commission. For instance, producers agree to coordinate their plant downtime to control supply and increase prices.

On the other hand, agreements to limit production have been approved in a number of cases considering reorganization or restructuring of industries suffering from structural overcapacity. Example is cited about the Dutch brick industry, where the Commission approved an agreement between sixteen producers to jointly finance the closing of seven production units definitively and irreversibly and to refrain from bringing any new capacity on stream for five years.

3) Market Sharing, Customers Allocation and Allocation of Territories

Agreements having as their aim or result of dividing markets, market share or customers, fixing of production or sale quotas have always been considered illegal. There have been numerous decisions imposing fines for customer allocation agreements and direct or indirect territorial allocation agreements.[49]

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[49] *Ibid.*

EXCLUSIONARY PRACTICES

(1) Collective Exclusive Dealing

Collective exclusive dealing agreements can be defined as agreements in which a group of competitors decide to buy from or sell through specified distribution channels. Such agreements violate Article 81as being per se illegal. Collective exclusive dealing agreements have been accepted only in exceptional cases.

(2) Collective Refusal to Supply

Another practice that violates Article 81 is the collective decision by group of competitors not to deal with certain customers or suppliers. For instance, the Commission condemned an agreement between tobacco manufacturers in Belgium and Luxembourg not to supply distribution firms that refused to stock minimum product ranges. In Papers peints de Belgique, a decision of the Belgian wallpaper producers' association to cease supplying a distributor that had supplied a retailer who refused to comply with association's restrictions on price and advertising was prosecuted.

(3) Cooperative Agreements

1. Joint Research and Development

Joint research and development agreements relating to improvement and development of products are more likely to have adverse competitive effects if strong competitors are involved and if the arrangement includes joint production and/or marketing. In that case, it is more likely to apply article 81(1) and more rigorous will be the Commission's Article 81(3) analysis. Projects to develop new products are assessed under Article 81(3) using the following criteria:

- Economic benefits of the agreement. Most R&D collaborations are likely to satisfy this requirement.[50]

[50] *Ibid.*

- Whether the restrictions in the agreement are necessary for achieving these economic benefits.
- Article 81(3) exemption will not be possible if the cooperation eliminates competition in a relevant market.

2. Production and Specialization Agreements

Production agreements may raise competitive issues when they result in coordination of competitors' behavior. If parties to such agreement are not actual or potential competitors, the agreement would fall under Article 81(1). Production agreements do not restrict competition if they are the only commercially feasible options for entering a new market, launching a new product, or carrying out a specific project.

3. Purchasing Agreements

Purchasing agreements between companies not active in the same downstream market will fall under Article 81(1) only if the purchasing group accounts for a large percentage of total purchases of the relevant product. The Commission may consider that purchasing agreements are not pro-competitive if the purchasers together have market power on the downstream (selling) markets or when their buying power threatens to raise downstream rivals' costs.

The Guidelines offer an estimate of what will amount to market power in purchasing markets; market power is unlikely to exist when the combined market share of the parties is below 15% on both the purchasing market and the selling market, market shares over 15% are likely to bring the parties to joint buying agreement under Article 81(1) and necessitate an assessment under Article 81(3). Accordingly, the Commission investigates whether the arrangement creates economic benefits, restrictions not indispensable to achieving these economic benefits, and threatens to eliminate effective competition. [51]

[51] *Ibid.*

4. Commercialization Agreements

These agreements involve cooperation between competitors in sale, distribution, or promotion of their products. They can involve joint selling, marketing, distribution, service, or advertising. Distribution agreements between competitors qualify for block exemption only in limited circumstances. These are subject to possibility that such arrangements can be used for market divisions or collusion. Commercialization agreement with price fixing can be exempted under Article 81(3) if it creates significant efficiencies that benefit consumers.

5. Standardization Agreements

The standardization agreements limit competition when they grant parties joint control over production and/ or innovation, thus obstructing their capability to compete on product characteristics. As far as horizontal Agreements are concerned, assessment of standardization agreements under Article 81(3) takes into consideration the economic benefits created by the agreement. If the agreement is more restrictive than necessary to achieve these economic benefits, and in case, the agreement eliminates effective competition in the relevant market, it is a violation of the law.

6. Environmental Agreements

Article 81(1) applies to environmental agreements that restrict the parties' ability to design or produce products. As a general rule, the Commission takes a positive attitude towards the use of environmental agreements that do not serve as tools for concealing cartel behavior. [52]

7. Exchange of Information

Information exchanges may assist collusive behavior by allowing firm to monitor their competitors' activities in a better manner. In a number of decisions it has been held by the Commission that exchange of information concerning individual prices, output and sales

[52] *Ibid.*

or terms of sale, delivery and /or payment violate Article 81(1). Such agreements between competitors can reduce natural elements of competition such as risk and uncertainty. The Commission has no objection to exchange information about industry's aggregated statistical information obtained directly from competitors or through trade associations, or through reporting agencies. This is regarded as harmless and unobjectionable, or even pro-competitive. For example, in CEPI- cartonboard case, the Commission accepted statistical exchange system covering sales forecasts, past production and capacity figures as it did not cover confidential, individual information on prices or production forecasts.[53]

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[53] *Ibid.*

CHAPTER 3

REGULATION OF CARTELS IN PAKISTAN

3.1. INTRODUCTION

In the era of sixties, Pakistan was vigorously following a policy to boost economic development through private business and enterprise system. This led to rapid industrialisation based on the initiatives of the private sector. Major industries were set up in the textile and engineering sectors. Several big industrial groups were in a position to misuse their economic and market power. It was, therefore, strongly recognized and observed that completely unregulated private sector businesses tend to result into concentration of wealth, creation of monopolies and formation of cartels which are disadvantageous to the consumers' interest and social well being.[1] The significance and desirability of having a competition regime was, thus, acknowledged by Pakistan more than four decades ago. In 1963, the Government constituted an Anti-Cartel Laws Study Group to carry out a thorough study into trade, commerce and industry of the country and market analysis. A comprehensive report was prepared by the Group that pointed out existence of concentration of economic power and existence of monopolies and cartels in the economy.[2] As a result of these findings, Government decided to frame a law to control and prevent these economic

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[1] Organization for Economic Co-operation and Development, 09-Feb-2005, Directorate for Financial and Enterprise Affairs Competition Committee, '*Roundtable on Bringing Competition into Regulated Sectors*', Contribution from Pakistan, Session I of the Global Forum on Competition held on 17 and 18 February 2005. Also available at http://www.oecd.org/dataoecd/38/12/34448577.pdf. Last visited 11th June 2006.

[2] '*Competition Policy, Competitiveness and Investment in a Global Economy*: *The Asian Experience*', May 19, 2004, Sri Lanka, '*Anti-Competitive Business Conduct: Cases and Experience of Pakistan*', Presented by Muhammad Arshad Parwaiz, Member Monopoly Control Authority, Islamabad. Also available at http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/Conferences_CompetitionPolicy_Muhammad+Arshad+Parwaiz.prn _Muhammad+Arshad+Parwaiz.prn.pdf. Last visited 25th June 2006.

evils, to ensure economic development and to protect consumers. Consequently, a draft anti-monopoly and anti-cartel law was published for public opinion in 1968-69. The final outcome was the promulgation of 'Monopolies and Restrictive Trade Practices (Control & Prevention) Ordinance' (MRTPO) in February, 1970. To administer this law, Monopoly Control Authority (MCA) was constituted under its provisions in 1971. The MCA controls situations of undue concentration of economic power, unreasonable monopoly power and unreasonably restrictive trade practices by conducting investigations about firms, sectors and markets. Based on the findings of these investigations appropriate remedial measures are issued in the form of Orders.[3]

It is necessary to mention that immediately after the formation of MCA, a paradigm change took place when major businesses were nationalized on a massive scale in 1972. This practically marginalized the role of MCA because under the law all public sector enterprises (and some others) fell outside its jurisdiction.[4] The Economic Reform Order of 1972 resulted in nationalisation of thirty-two large scale-manufacturing units including chemicals, automobiles, iron, steel, petrochemicals, heavy and light engineering, oil refining, cement and fertilisers. All heavy industry was placed under public sector. The Board of Industrial Management (BIM) was created with ten corporations and thirty-two nationalized industries under its control. Subsequently, life insurance, banking, vegetable oil processing, cotton ginning, grain milling, and oil distribution companies in the private sector were also taken under state control. Afterwards, private sector industry was further placed under pressure through introduction of the Price Control and Prevention of Profiteering and Hoarding Act 1977.

Under the provisions of Section 25 of MRTPO all nationalised enterprises enjoyed exemption from application of monopolies law. This hindered competition and private sector initiatives. In 1976, Government promulgated Foreign Private Investment (Promotion and Protection) Act to 'promote' and 'protect' foreign private investments in the country. This Law provided protection to foreign investors with respect to their 'industrial undertakings'

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[3] *Supra* Note No. 1.
[4] *Supra* Note No. 2.

established in Pakistan in or after September 1954. In 1981, the MCA and the Securities and Exchange Authority were combined and placed under the umbrella of a newly created organisation – the Corporate Law Authority (CLA). The Chairman and Members of the CLA were concurrently notified as Chairman and Members of MCA for performing functions under MRTPO. Under this arrangement, the other corporate laws, viz. Company Law, Securities and Exchange law, Modaraba Law, enjoyed first priority. Another notable feature of industrial policy was that permission was required from Government before establishment of large-scale industries. These included various kinds of restrictions and many other steps such as investment licensing, import restrictions on capital and intermediate inputs, location clearances, and the pace of industrial investment. However, in 1984, the number of industries requiring these licenses was reduced and by the year of 1992, all these restrictions were eventually removed.[5] This situation continued till late 1980s when Government once again adopted a policy to encourage and increase the role of private sector. Essential outcome of this policy was privatization of public sector units.[6]

De-regulation and privatisation policy was started in 1988. Consequently, the financial sector was deregulated; leading banks and financial institutions were sold to employees and private parties. This economic liberalization was helpful for creation of new banks, financial institutions, leasing companies, housing finance, investment companies and foreign banks that created a competitive environment.

In another development, the Capital Issues (Control and Continuance Act, 1947) was repealed in 1992 leading to freer pricing issues. In the 90's, public ownership in manufacturing, banking, telecommunication, and electricity generation was divested. A high powered Privatisation Commission and later a Ministry of Privatisation was set up. The Privatisation Commission Ordinance, 2000, was promulgated to accelerate the process of privatisation.[7] During the period from November, 2002 to August, 2006 privatisation

[5] *Supra* Note No. 1.
[6] *Supra* Note No. 2.
[7] *Supra* Note No. 1.

proceeds of Rs. 284.902 billion were realized from 35 transactions.[8] The sick units were reviewed for rehabilitation and/or closure. Sectoral regulatory authorities were established during 1996 onwards. These include Pakistan Telecommunication Authority, National Electric Power Regulatory Authority (NEPRA), Oil & Gas Regulatory Authority (OGRA), etc.[9]

The first instance of anti-competitive business conduct emerged in the shape of a cartel-like situation in 1992 in the cement sector after privatization of a few cement-manufacturing units. This gave rise to widespread concern that de-nationalization will result in conversion of state monopolies into private sector monopolies and cartels which would be detrimental to the public interest. "Public interest" is the focus of the competition law; therefore, the new situation prompted interest of Government and the masses in competition issues. In-depth exercises to strengthen MRTPO through suitable amendments to cater to the complex challenges, including those posed by globalization were made and the same is currently in-hand as well.

It is significant to note that the jurisdiction of MCA has always remained rather limited. In the first two decades of its establishment, the reason was a larger state owned sector, which was outside the purview of the law. After privatization, sectoral regulatory authorities had exclusive jurisdiction over various sectors e.g. oil and gas, telecommunication, power, electronic media, etc. There are however, some grey areas of jurisdiction between the MCA and the Sectoral Regulators; though, these areas need to be probed and reconciled.[10]

3.2. PAKISTAN'S EXPERIENCE RELATING TO COMPETITION LAW

MCA started enforcement of the law in 1971, just after that the policy decision leading to widespread nationalization of major private industries in 1972, somewhat limited

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[8] The Privatisation Commission in order to ensure participation of the small investors and benefit from the privatisation program also sold GOP shareholding in NBP, POL, ARL, DG Khan Cement, OGDCL, SSGC, PIA, PPL, UBL and KAPCO through Capital Market. For further detail see http://www.privatisation.gov.pk/about/Progress-in-PC(latest).htm. Last visited 17th October 2006.

[9] *Supra* Note No. 1.

[10] *Supra* Note No. 2.

the scope of MRTPO, and therefore, during the 1970s and 1980s, MCA's emphasis was on the diversification of capital resources of undertakings.

In 1990's however, the need to shift from asset-based investigation to market based investigation was felt in view of the changing economic scenario. The elaborate privatization plans of the Government required a comprehensive monitoring of possible tendencies of unreasonable monopoly power and unreasonably restrictive trade practices.

3.2.1. Pakistan's Competition Law

The Monopolies and Restrictive Trade Practices (Control and Prevention), Ordinance 1970 (MRTPO), has three substantive provisions through which it controls and prevents:

1. Undue concentration of economic power i.e., more than Rs.300 m. assets of a private limited company; more than 50% voting power with an individual; and dealings between associated companies that unfairly benefit owners/shareholders of one company at the cost of other - (Section 4);
2. Creation of monopolies i.e., associated companies having 1/3rd market share; merger/acquisition creating monopoly power; and granting of loan by a bank or insurance company on relatively favourable terms benefiting an associated company - (Section 5); and
3. Unreasonably restrictive trade practices such as cartels to fix price, restrict supplies, division of markets, trade restrictive agreements, etc. - (Section 6). [11]

The scheme of the law is to prohibit and regulate these well defined situations and to collect information through the process of registration about these and other circumstances that are likely to lead to such situations. The existing law was enacted in the environment of concentration of economic power in the hands of 22 families in the decade 1958-68. But it is not in line with the present policy of the Government for a free market economy with key

[11] Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970.

elements of liberalization, de-regulation, privatization attracting investment and protecting consumers at the same time. The present day international best practice is to provide for a competition regime in all spheres of economic activity. In view of that anti-competitive behavior in all its forms is to be discouraged. At present MCA is engaged in finalizing a Competition Law with technical assistance from the World Bank. This will entail capacity building and creation of a new Competition Authority. Competition advocacy is also being given the importance it deserves. MCA is striving for a competition regime in which level playing field is provided between public and private sectors as well as local and foreign investments. The important lesson of history is that interest of the consumers should not be sacrificed at the altar of free market economy.[12] Government is again pursuing the policy of economic development through private enterprise system for rapid growth. There is likelihood of concentration of economic power, creation of monopolies and formation of cartels in this system that is detrimental to the consumer's interest. Therefore, the Government has also to ensure social justice and consumer protection. It is therefore, essential to bring a synthesis between these divergent objectives and strong governmental regulation is hence required. Historical experience also reveals that an absolutely unregulated private sector results in monopolistic and restrictive business practices that are against the consumer's economic interests and generate general social unrest.[13]

3.2.2. Legal Provisions Dealing with Cartels and Horizontal Restraints to Competition: The Case of Pakistan

Various provisions of MRTPO, 1970 dealing with cartels are presented in the following sections.

3.2.2.1. Legal Provisions Relating to Cartels in Pakistan

Necessary definitions are provided in Section 2(1) of the Ordinance. Under Section 2(1)(a) of the MRTPO, 1970 'agreement' has been defined to include "any arrangement or

[12] Syed Bilal Ahmed, Chairman Monopoly Control Authority, 2005-2006. For further details see http://www.mca.gov.pk/message.htm. Last visited 17th May 2006.
[13] See http://r0.unctad.org/en/subsites/cpolicy/docs/IGE0702/pakistan2.pdf. Last visited 11th June 2006.

understanding whether or not in writing and whether or not it is or is intended to be legally enforceable". This would mean that unwritten collusive arrangements would also fall within the definition of the word 'agreement'. This is an important provision because restrictive agreements and cartelisation is quite often not in writing.

An 'unreasonably restrictive trade practice' is defined in Section 2(1)(m), but in order to properly appreciate this definition, it is necessary also to examine the concepts of 'trade' and 'trade practice', both these terms are also defined in the Ordinance. Section 2(1)(k) defines 'trade' in broad terms as "any business, industry, profession or occupation relating to the production, supply or distribution of goods, or the control of production, supply or distribution of goods, or to the provision or control of any service". Section 2(1)(l) defines 'trade practice' as "any act or practice relating to the carrying on of any trade or business". Though exhaustive, the definition brings within its ambit both an act (i.e., a single or isolated instance or event), and also a practice (i.e., a trade custom or usage or acts or events or series of acts or events undertaken with some degree of regularity, continuity or repetition) in relation to the carrying on of a trade or business. If the definition of 'unreasonably restrictive trade practice' contained in Section 2(1)(n) is now examined, it will be found to be comprised of two main components:

(a) there must be a trade practice, and

(b) such trade practice must or must have the effect of unreasonably preventing, restraining or otherwise lessening competition in any manner.

Obviously, both components must exist for a finding of an unreasonably restrictive trade practice to be recorded. Looking at the second component of the definition, it is clear that this itself has two requirements:

(a) the trade practice must prevent, restrain or lessen competition; and

(b) it must have this effect in any unreasonable manner or to an unreasonable degree.

A number of practices which are presumed to be restrictive trade practices have been listed in Section 6 i.e., agreements between actual or potential competitors to fix prices, divide markets, limit production, distribution, technical development/ investment or to boycott competitors. The list also includes fixing of minimum resale price requiring

wholesalers or retailers not to sell below a certain stipulated price and tying arrangements requiring customer to purchase one product in order to obtain a different one.

The term competition is not as such defined in the Ordinance but it is necessary to note for present purposes that competition means and requires free interplay between suppliers and consumers of goods in a market. The market forces and conditions as prevailing from time to time should be the sole controller of actions and decisions of the buyers and sellers without distortions created by cartels, etc.

Section 3 is one of the principal provisions of the Ordinance. It very clearly states, that "there shall be no undue concentration of economic power, unreasonable monopoly power or unreasonably restrictive trade practices". Each of these is a distinct category of undesirable situations and prohibited circumstances and each is separately defined and dealt within the Ordinance. Since the present research is confined to the unreasonably restrictive trade practice i.e., cartel, therefore, the other two categories prohibited by section 3 will not be discussed further.

Cartels are covered under Section 6 of the MRTPO, 1970, the term used is '**unreasonably restrictive trade practices**' and the same is defined as follows;

6(1) "Unreasonably restrictive trade practices shall be deemed to have been resorted to or continued if there is any agreement:

(a) Between actual or potential competitors for the purpose or having the effect of:

(i) fixing the purchase or selling prices or imposing any other restrictive trading conditions with regard to the sale or distribution of any goods or the provision of any services;

(ii) dividing or sharing of markets for any goods or services;

(iii) limiting the quantity or the means of production, distribution or sale with regard to any goods or the manner or means of providing any service;

(iv) limiting technical development or investment with regard to the production, distribution or sale of any goods or the provision of services;

(v) excluding by means of boycott any other person or undertaking from the production, distribution or sale of any goods or the provision of any services;

(b) Between a supplier and a dealer of goods fixing minimum resale prices including:

(i) An agreement with a condition for the sale of goods by a supplier to a dealer which purports to establish or provide for the minimum prices to be charged on the resale of the goods in Pakistan; or

(ii) An agreement which requires as a condition of supplying goods to a dealer the making of any such agreement;

(c) Which subjects the making of any agreement to the acceptance by suppliers or buyers of additional goods or services which are not, by their nature or by the custom of the trade related to the subject matter of such agreement."[14]

In addition to these enumerated practices, as per Section 7 of the MRTPO, the MCA may identify other situations that are found to be unreasonably restrictive. These additional circumstances may be included in the substantive provisions through a General Order, after following a procedure laid down in the Law.

3.2.2.2. Exemptions - The 'Gateways'

The Law "exempts" situations of unreasonably restrictive trade practices provided certain specified conditions are met. The conditions may be seen as catering to situations that on balance are advantageous in terms of promoting national economic well-being. The three-fold conditions are set out in Section 6(2) of the Law. Section 6(2) says that "no such agreement as is referred to in sub-section 6(1) shall be deemed to constitute an unreasonably restrictive trade practice if it is shown:

(a) that it contributes substantially to the efficiency of the production or distribution of goods or of the provision of services or to the promotion of technical progress or export of goods;

[14] *Supra* Note No. 11. Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970.

(b) that such efficiency or promotion could not reasonably have been achieved by means less restrictive of competition; and

(c) that the benefits from such efficiency or promotion clearly outweigh the adverse effect of the absence or lessening of competition."[15]

3.2.2.3. Investigation

Section 14 of the MRTPO, 1970 describes the power of the MCA to conduct special enquiries in the following instances:

- On its own into any matter relevant to the purposes of the Ordinance -Section 14(1).
- Upon a reference made to it by the Federal Government into any matter relevant to the purposes of the Ordinance -Section 14(1).
- Where the Authority receives from not less than twenty-five persons a complaint in writing of such facts that constitute a contravention of the provisions of Section 3, it shall, unless it is of opinion that the application is frivolous or vexatious or based on insufficient facts, conduct a special enquiry into the matter to which the complaint relates -Section 14(2).

Section 14(3) says that if upon the conclusion of a special inquiry under sub-section (1) or sub-section (2), the Authority is of opinion that the findings are such that it is necessary in the public interest so to do, it shall initiate proceedings under Section 11.[16]

3.2.2.4. Powers of the Authority in Relation to a Proceeding or Enquiry

Section 15(1) of MRTPO, 1970 says that the Authority shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (Act V of 1908) for the purposes of a proceeding or enquiry under this Ordinance while trying a suit, in respect of the following matters, namely:

- The summoning and enforcing the attendance of any witness and examining him on oath;
- The discovery and production of any document or other material object producible as evidence;
- The reception of evidence on affidavits;
- The requisitioning of any public record from any court or office:
- The issuing of commissions for the examination of witnesses and documents.

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[15] *Ibid.*
[16] *Ibid.*

According to section 15(2) "any proceeding before the Authority shall be deemed to be a judicial proceeding within the meaning of Section 193 and 228 of the Pakistan Penal Code (Act XLV of 1860), and the Authority shall be deemed to be a civil court for the purposes of section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898 (Act V of 1898)."

According to Section 15(3) "the Authority may, for the purposes of a proceeding or enquiry under this Ordinance, require any person,

- To produce before, and to allow to be examined and kept by, an officer of the Authority specified in this behalf, any books, accounts, or other documents in the custody or under the control of the person so required, being documents relating to any matter the examination of which may be necessary for the purposes of this Ordinance; and
- To furnish to an officer so specified such information in his possession relating to any matter as may be necessary for the purposes of this Ordinance."[17]

3.2.2.5. Proceedings in Case of Contravention of Section 3

Section 11 explains the proceedings in case a contravention of Section 3 is identified as a result of enquiry. Accordingly, if after investigation, the Authority is satisfied that there has been or is likely to be a contravention of the provisions of section 3 and that action is necessary in the public interest, it may make one or more of such orders specified in Section 12 as it may deem appropriate.

According to Section 11(2) before making an order under Section 11(1), the Authority has to fulfill the following requirements:

- Give notice of its intention to make such order stating reasons to such persons or undertakings as may appear to it to be concerned in the contravention to show cause on or before a date specified therein as to why such order shall not be made: and
- Give the persons or undertakings an opportunity of being heard and of placing before it facts and material in support of their contention.

Section 11(3) further goes on to say that an order made under Section 11(1) shall have effect notwithstanding anything contained in any other law for the time being in force

[17] *Ibid.*

or in any contract or memorandum or articles of association.[18]

3.2.2.6. Hearing to be in Public

Rule 5 of the Monopoly Control Authority Rules 1971[19] (As amended upto 30th June, 1983) provides that the hearing of the proceedings before the Authority shall be in public except where the Authority is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter, or for any other reason the Authority may-

- hear the proceeding or any part thereof in private;
- give directions as to the persons who may be present there at;
- prohibit or restrict the publication of any part of evidence given before the Authority, or of matters contained in documents filed before the Authority.

3.2.2.7. Remedial Orders of the Authority

The remedies provided in the Law for restrictive trade practices include 'Orders' requiring companies to discontinue and not to repeat such practices and to take affirmative actions to restore competition. Section 12(1)(c) says that in case of unreasonably restrictive trade practices the orders of the Authority under Section11 may -

- require the person or undertaking concerned to discontinue or not to repeat any restrictive trade practice and to terminate or modify any agreement relating thereto in such manner as may be specified in the order;
- require the person or undertaking concerned to take such actions specified in the order as may be necessary to restore competition in the production, distribution or sale of any goods or provision of any services.[20]

The law explains, in case of unreasonably restrictive trade practices, where any party to any such practice does not carry on business in Pakistan, the order of the Authority shall be with respect to that part of such practice as is carried on in Pakistan.[21]

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[18] *Ibid.*
[19] Published in the Gazette of Pakistan, Extra, dated 31st December, 1971 vide S.R.O. 641 (1)/71.
[20] *Supra* Note No. 11. Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970.
[21] Inserted by MARTP (Amendment) Ordinance XXVI of 1980.

3.2.2.8. Power to Issue Interim Order

Section 13(1) says that where, during the course of any proceeding under section 11, the Authority is of opinion that issuance of a final order in the proceeding is likely to take time and that, in the situation that exists or is likely to emerge, an interim order is necessary in the public interest, it may, after giving the persons or undertakings concerned an opportunity of being heard, by order, direct such persons or undertakings to do or refrain from doing or continuing to do any act or thing specified in the order.

Section 13(2) mentions that an order under Section 13(1) may, at any time, be modified or canceled by the Authority and, unless so canceled, shall remain in force for such period as may be specified therein but not beyond the date of the final order made under Section 11.

3.2.2.9. Appeal to the High Court

Section 20 of MRTPO, 1970 provides right of Appeal to any person aggrieved by an order of the Authority under Section 11 or Section 19. Appeal against such order may be filed within sixty days of the receipt of order in the High Court, on any of the following grounds that the:

- order is contrary to law or to some usage having the force of law;
- order has failed to determine some material issue of law or usage having the force of law;
- order has a significant error or defect in following the procedure provided in the Law, which may possibly have produced error or defect in the order upon the merits. [22]

3.3. *PROCESSING OF A CARTEL CASE, INVESTIGATION AND PROOF OF THE EXISTENCE OF A CARTEL*

i. Examination of a case starts either *suo moto* by the MCA or upon receipt of a reference from the Government or on a

[22] *Supra* Note No. 11. Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970.

complaint filed by at least 25 persons under Section 14 of the Law.

ii. MCA can call for relevant information under Section 21 from various data sources as prescribed under the Law i.e., companies, manufacturer's groups/ associations, board of revenue, bureaus of statistics, etc.

iii. If a case prima facie falls in the purview of the Law, the MCA decides to involve other stakeholders in the investigations, e.g., consumer groups.

iv. Side by side, legal requirements are fulfilled i.e., show cause notice is issued to the concerned parties under Section 11. Opportunity of hearing is provided to submit record, evidence and any facts to support the contention of parties.

v. MCA decides, in the final stage, if a particular agreement and conduct falls in Section 6(1) i.e., contravening situation or in Section 6(2) i.e., when a particular agreement is not objected to - keeping in view its plus points.

In each case, MCA's staff in the Research and Investigation Branch initiates preliminary investigation, necessary information is called for as and when required. Once, MCA's research staff finds a *prima facie* contravention of the Law (Section 3), and the MCA considers that it is necessary in the public interest to do so, it can initiate proceedings under Section 11 i.e., show cause notice is issued. MCA has powers of a civil court (Section 15) all the proceedings are, therefore, quasi judicial in nature. The undertakings are provided with full opportunity to present evidence - showing advantages of their agreement (Rule 5 of the MCA's Rules, 1971) in the 'hearings'. Though these hearings are to be public but depending on specific nature of a case, confidentiality is maintained.

i. Finally, the decisions i.e., Orders of the MCA are expressed in terms of opinion of the majority of Members (Rule 7).

ii. The Orders of the MCA are appealable before the High Courts of the country.[23]

In case of Appeal, under Section 20 of the MRTPO, 1970, the existence of cartels can either be established by direct or circumstantial evidence. However, cartels or collusive agents, by nature and compulsion are secretive in their activities. As such to build a viable case against them requires efforts that are clandestine and covert to collect irrefutable evidence. Competition agencies, world-wide, generally use such methods to identify restrictive agreements between competitors; to identify parties involved; and to identify the purpose and working of such agreements. Otherwise, direct evidence of such agreements would always be exceptional and rare. Therefore, given the definition of agreement in Section 2(a) and the purpose and scope of the Ordinance, especially the prohibition of unreasonable restrictive trade practice such as cartel, an agreement in terms of Section 6(1) can be established indirectly, i.e., through circumstantial evidence. More particularly, it can be indirectly inferred from the facts and circumstances of the particular situation under examination by the court. It is important to mention here that a parallel increase in price that may be systematic and planned, over a given period is not sufficient indirect evidence from which a cartel agreement can legitimately be established. Competition agencies have to identify certain other factors, the so called "plus" factors- in addition to, and over and above the conscious parallelism for the existence of a cartel in violation of Section 3 read with Section 6 to be established. If such "plus" factors exist in addition to parallel pricing, then alleged conspirators have to present material to rebut the allegation. The logic behind this argument is that the cartel is being determined not on the basis of direct evidence but on the basis of indirect evidence. Conclusions drawn in such a situation may be misleading unless supported by additional evidence to prove violation of Section 6(1) of the MRTPO, 1970.

Even if such an agreement has been established, it will still be open to the violators to apply "gateways" contained in Section 6(2). However, the onus of proof would lie on them to establish 'gateway'. Although, an agreement can be inferred circumstantially as explained

[23] Khan Kishwar, 'Dealing with Cartels: the Case of Pakistan', Chief, Monopoly Control Authority, Pakistan, 2005.

above but it is necessary for the Authority to clearly identify the cartel members and to show when or how they functioned. If the Authority fails to do so, then no agreement can be found to exist.[24]

3.4. REVIEW OF CARTEL CASES IN PAKISTAN

The case law is not so rich in Pakistan considering nationalization of 1970's and other factors as described in the first section. However, cases under Section 6 have involved the MCA to deal with cartelization; a review of these cases is provided in the paragraphs to follow.

3.4.1. MCA'S Experience in Breaking Cartels

3.4.1.1. Cement Cartel

Cement has remained a cartel oriented sector and four cartel-like situations have been dealt with by the MCA. As a background, it is noted that in early nineties most of the cement plants owned by State Cement Corporation were privatized. After privatization, there was a trend to raise cement price and make money out of this process. The most devastating floods of 1992, provided an opportunity to cement manufacturers to cartelize. When re-construction and re-habilitation work started in October 1992, first cartel in the cement sector was formed.

At this stage, MCA undertook extensive investigation, examined distribution system, pricing pattern, capacity utilisation and cost structure. After establishing cartel formation, MCA made certain recommendations to the Economic Coordination Committee (ECC). Accordingly, State Cement Corporation's units were directed to open their retail shops at important points in major cities and sell cement at a rate approved by the ECC.

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[24] Judgment of Lahore High Court, Lahore in the matter of Dandot Cement Company Limited Vs. MCA alongwith similar Appeals filed by the undertakings under Section 20 of the MRTPO, 1970 against the orders of the MCA dated October 27, 2005, Monopoly Appeal No. 2 of 2005, the judgment was announced in the open court on 26th July 2006 and was approved for reporting.

Private cement companies were ordered to break the cartel. With these actions cartel was successfully broken and competitive environment in cement industry re-established.[25]

In October 1998, the second cartel like behavior came to the attention of MCA, when cement manufacturers concurrently and consistently increased prices (about Rs. 100/ bag). At the same time output was also decreased. MCA concluded that:

- The input cost did not show comparable increase;
- The price increase was to unreasonably increase profit margins and was not an economic compulsion; and
- The manufacturers, under tacit agreement, increased the market price prevailing in early October from Rs 135/bag to Rs.235/ bag.

Investigations established this cartel and in February 1999 the MCA directed to break it up, to restore the pre-cartel price and to remove the restriction on capacity utilization. This time the cement manufacturers failed to comply with the orders of MCA. When cement manufacturers continued to charge higher price, the MCA imposed penalties of Rs 100,000 on individual units and in case of continued non-compliance another Rs 10,000 per day. The manufacturers appealed against MCA's Orders in the provincial High Courts. Before the High Court could take up the appeals, the ECC directed the Ministry of Industries to ensure that cement manufacturers sell their cement at an indicative price of less than Rs 200 per bag. On the basis of ECC's decision, the High court disposed off the appeals.

In 2003, the MCA took *suo moto* notice of the national press against cement price increase in mid May. It decided in June, 2003 to conduct special enquiry under section 14(1) of the MRTPO. After due process of the law, it issued Orders in October/ November 2005 directing 18 cement factories to break the cartel and reduce cement price. The cement factories did not report compliance, consequently, penalties were imposed as per law. The cement factories filed appeals in the High Courts of Sindh, Punjab and NWFP. Lahore High Court accepted the appeals of cement factories and set aside the decision of the MCA.

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[25] Organization for Economic Co-operation and Development 09-Jan-2004, Centre for Co-operation with Non-Members Directorate for Financial, Fiscal and Enterprise Affairs, OECD Global Forum on Competition, '*How Enforcement against Private Anticompetitive Conduct has Contributed to Economic Development*', Contribution from Pakistan, Session IV, held on 12 and 13 February 2004, For further details see http://www.oecd.org/dataoecd/19/44/23734902.pdf, Last visited 17th June 2006.

The Court in its ruling stated that the MCA had no authority to control the prices of cement, issuing the Order of reducing the price was beyond its jurisdiction. It is noted that the MCA issued show cause notices in 2003 whereas the order was issued with considerable delay in 2005 stating that the Government reduced central excise duty in the 2003 budget but the relief was not passed on to consumers due to cartel.

The Court ruled that if a mere change in prices was sufficient to spell out a cartel then the whole matter would be at the free discretion and will of the MCA that could criticize a price movement or leave it uninterrupted as a market condition.[26] In that case, there would be no difference between the power exercised by the Authority under the Ordinance, and the power exercisable by the Government under Price Control and Prevention of Profiteering and Hoarding Act, 1977 to regulate prices. The Court categorically held that the Orders of MCA against the cement manufacturers were passed in a fundamental misapprehension of powers and jurisdiction of the Authority and resulted in a complete transformation of its role from a competition regulator to a price regulator without any warrant in law. The appeals were thus, allowed and the impugned orders were set aside.[27]

During last 12 years, cement manufacturers made four attempts to cartelize. Two reasons given on each occasion to defend and justify price increase were; (i) increase in cost of inputs; and (ii) lower utilization of production capacity due to decreased demand. Interestingly, these reasons remained uncorroborated by them.[28] The MCA is of the view that the recurring emergence of cement cartel is because the manufacturers find it easy to indulge in this restrictive business practice due to the absence of any strong deterrent provision in the law. The Government has recognized this shortcoming and suitable amendments are proposed to be made in the law.[29] The issues relating to investigation of cartels and required improvements are discussed in later part of this report.

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[26] The Daily Dawn, '*Cement Units Plea against MCA Order Accepted*', August 01, 2006.
[27] *Supra* Note No. 24.
[28] *Supra* Note No. 23.
[29] *Supra* Note No. 2.

3.4.1.2. Collusive Bidding by Cable and Conductor Manufacturers

In mid 2002, MCA received information that main suppliers of power cables and conductors were involved in collusive bidding for providing items to a public sector electricity distribution company. It was somewhat a simple case, as the information was supported with documentary evidence. When inquired, the manufacturers denied this arrangement. Nevertheless, one manufacturer categorically admitted the existence of a collusive bid rigging arrangement through prior mutual negotiations and understanding amongst themselves.

The existing Competition Law is rather very soft on the first time violators. It does not provide for imposition of any penalty on them. Rather the MCA can only direct the cartel members to discontinue or not to repeat any such restrictive trade practices and to terminate or modify any agreement relating thereto. An order was accordingly passed in December 2003. Before this order could be served on the manufacturers, new information along with evidence, was received in January 2004, about another instance of formation of cartel by 6 of the 9 cable and conductor manufacturers. They were indulging in similar collusive bid rigging arrangement.[30] Investigation was initiated in response to a complaint received, which alleged that the cable manufacturers had formed a cartel again. Therefore whenever a tender is floated for supply of cable, all the companies submit exactly the same bids. It appeared that these firms pooled their supplies of cable. This practice defeated the very purpose of inviting bids with the intention of purchasing the said material at the cheapest possible rate.[31] MCA ordered the undertakings involved to abstain from any sort of restrictive trade practice and cartel formation.

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[30] *Supra* Note No. 23.

[31] *'MCA Begins Probe Against Industry Cartels'*, October 26, 2005, Dawn (the internet edition available at http://DAWN.com), interview was taken in Islamabad on Oct 25, 2005, Also available at http://www.dawn.com/2005/10/26/ebr4.htm. Last visited 11th July 2006.

3.4.1.3. Collusive Bidding by Hardware Manufacturers

In October 2003, a case of bid rigging by 7 hardware manufacturers for supply of hardware items came to the notice of the MCA. MCA passed an order according to the law. The formation of the above cartels in mid-2002, October 2003 and January 2004 by more or less the same group of manufacturers and their associated companies was possible owing to the nonexistence of deterrent penal provisions in the existing Law. This defect needs to be removed urgently.[32]

3.4.1.4. Fertilizer

Another sector where some market players joined hands to create artificial shortages was the fertilizer industry. According to a news report, it is usual for fertilizer producers to spread rumors of a shortage while in reality the manufacturers' agents or stockists are asked to hoard the produce and create an artificial shortage to raise prices. This market manipulation by the fertilizer manufacturers and their distributors need to be investigated and prosecuted by the MCA.[33]

3.4.1.5. Sugar Cartel

Sugar industry is another major sector where companies joined hands to create artificial shortages and increase prices. Sugar being essential daily use item, the consumers suffered a lot. In this situation, the Government could only release some sugar stocks imported through the Trading Corporation of Pakistan (TCP) and to be sold at the utility stores at a subsidized price. MCA, on the other hand examined the issue at length.

While examining fortnightly statements of Pakistan Sugar Mills Association (PSMA) up to February 28, 2006, MCA observed that certain sugar mills were involved in limiting sale to create artificial shortage in the market thus pushing price of sugar to unreasonable level. As this act on the part of the undertakings was a violation of Section 6 of the

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[32] *Supra* Note No. 23.

[33] Article by Naween A. Mangi, See http://dailytimes.com.pk/default.asp? Page=story_23-12-2004_pg5_10, Daily times, December 23, 2004. Last visited 11th May 2006.

Ordinance, the MCA, therefore, served show cause notices under Section 11 of the Law to 42 sugar mills.

After completion of due process, MCA passed Orders directing the concerned undertakings to discontinue restrictive trade practices by releasing sugar and to abstain from indulging in restrictive trade practices in future. The undertakings were required to submit compliance of the order of the Authority by end of May 2006. Subsequently, the undertakings that did not comply with the order were served with hearing notices under Section 19 to show cause as to why penalty under Section 19 of the Ordinance may not be imposed.

The Authority, after considering facts i.e., sale and lifting of sugar up to June, submissions of counsel of the undertakings and the fact that the undertakings had not complied with the Order, imposed following maximum penalty on 23 sugar mills of Punjab under Section 19 of the Ordinance.

ii) Penalty of Rs 100,000 (rupees one hundred thousand) to be deposited within 7 days of the receipt of the Order, and

iii) In view of the fact that failure to comply with the Order of MCA is continuous in nature, pay a further penalty of Rs 10,000 (rupees ten thousand) for every day, starting from the date of issue of this Order and up to the date the undertaking releases sugar commensurate with the monthly percentages. This penalty shall be paid on fortnightly basis.

Reasons given by the sugar mill owners to defend and justify price increase were; (i) higher production cost, which mostly depends on the sugarcane price, is also partly responsible for the high sugar price; and (ii) a severe shortage of the sugarcane crop in Punjab because of frost.[34] Maximum penalty was also imposed on four sugar mills of Sindh.[35]

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[34]Article by Khalid Mustafa, See http://www.jang.com.pk/thenews/feb2006-weekly/nos-05-02-2006/enc.htm. Last visited 11th June 2006.

[35] See http://mca.gov.pk. Last visited 11th August 2006.

3.5. GENERAL PROBLEMS IN PROCESSING A CASE

Thorough interviews of the MCA's officers were conducted to identify difficulties on policy and operational aspects in the enforcement of the Law. On the basis of interviews as per detailed questionnaire, the experience in the investigation of cartels showed the following major problems.

(1). Insufficient Information Received from Stakeholders

The officers made efforts to collect all essential information to process a case. The difficulty, often faced is that the necessary information, at times, is not available from the stakeholders themselves. They are not readily able to provide the evidence that they are paying higher prices with effective dates or to point out shortages of products. The major issue is the lack of general awareness about the law. Consumer's societies have a low profile. For that reason, MCA does not have the sources within the general public who may come forward with evidence about the infringement of the Law. As a result, in nearly all the cases, MCA had to move *sou moto* and gather evidence from the information supplied by the accused party which in itself is a time consuming process.

(2). Under-Developed/ Inadequate Data Sources

As in other developing countries, the data sources in Pakistan are few far between, consequently, MCA, at times has to rely on the data provided by the relevant parties. An attempt, certainly, is made to cross-check the same from other sources, as is a practice in other competition regimes - this may be in the form of discussions with 'whistle blowers', competitors, major customers, etc. However, this sort of oral evidence could only serve as a guideline/basis to move in a particular direction, rather than solid evidence for prosecution.[36]

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[36] *Supra* Note No. 23.

(3). Legal Limitations

Some of the legal limitations faced by the MCA are as under:

- The definition of undertaking does not cover the 'association of manufacturers' that are the prime suspect in cartel cases.
- Though the MCA can conduct enquiries for the purposes of the Law, 'raids' or 'leniency programs' to get quick evidence are not provided in the legal instruments.
- The penalties which MCA can impose in case of non-compliance with its orders are very low i.e., a one time penalty upto Rs.100,000 and Rs. 10,000 per day in case of continuous default. These penalties are quite low as compared to other countries. In addition to this the penalty is same for first time, second time violation of law. Current practice clearly shows that there are companies, which repeatedly breach the rules of fair competition, as in case of cement sector in Pakistan, despite penalties, because they consider them worth the trouble.[37]
- There is no provision in the MRTPO, 1970 that gives right of appeal to MCA against High Court's decision.

(4). Resource and Structural Constraints

MCA's budget only covers pay/allowances of employees and other essential expenses. No provision for research and investigation of cartels is provided in the budget. There are a few professionals, they are not well equipped with support teams. Most of the officers at working level have never got any training abroad. At present, there are only twenty officers in the MCA including three members.[38]

(5). Lack of Cooperation among Competition Agencies

Normally, parties to a cartel with certain anti-competitive behaviour operate in several markets, and it is difficult for MCA to identify such cases without active

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[37] *'Cartel Enforcement'*, by Josef Bednář, Chairman of the Office for the Protection of Competition of the Czech Republic, See:http://www.compet.cz/English/Aktuality/CartelEnforcem.htm. Last visited 11th June 2006.
[38] *Supra* Note No. 2.

cooperation among agencies.[39] The upshot of the foregoing discussion is that the MCA needs to be restructured and redesigned.[40] Professionals such as chartered accountants, financial analysts, economists and lawyers need to be inducted rather than the civil servants. Also, the MCA needs to be given the budget to act as per its mandate. It should be given the power to impose heavy penalties and fines when its decisions are not put into practice. It is suggested that the penalty for non-compliance be enhanced through an amendment because the penalties provided at present in the MRTPO are three decades old and clearly lacks deterrence due to devaluation of rupee. Consequently, the businesses find it easier to pay the low penalties and to continue with their abusive practices.[41] It has been gathered that the MCA is considering recommending to the Government that non-compliance with its orders within stipulated period be declared a criminal offence punishable with imprisonment.[42]

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[39] Exchange of information between competition agencies worldwide is not much. For instance, the US Anti Trust Office received an application for leniency from an important company with worldwide operations and therefore asked the European Commission, which was investigating the same case, for certain information. The US standpoint is that all information and evidence that may be acquired under its Leniency Program, including evidence of certain criminal offences can be exchanged. The EC approach to the assessment of leniency applications presumes that investigations are undertaken at two parallel lines i.e., related to anti-competitive behaviour and the other is related to the protection of human rights guaranteed by the Protection of Human Rights Convention. This means that information acquired in leniency programmes in one country that might result in the commencement of criminal proceedings in another country cannot be exchanged for the protection of human rights. The existing problem can be eliminated only with harmonization and full convergence of criminal jurisdictions.

[40] Kishwar Khan, 'Peer Reviews: an opportunity to learn, Modify and Improve', World Trade Review, August 15-30, 2004, Islamabad.

[41] United Nations Conference on Trade and Development, 20 June, 2002, Trade and Development Board, Commission on Investment, Technology and Related Financial Issues, Intergovernmental Group of Experts on Competition Law and Policy, Fourth Session, Geneva, 3-5 July 2002, Communication submitted by Pakistan, '*Pakistan's Experience in the Enforcement of Monopolies Law and Capacity Building Requirements*', Saleem Asghar Mian, Chairman, Monopoly Control Authority, Pakistan. See http://r0.unctad.org/en/subsites/cpolicy/docs/ige0702/pakistan1.pdf. Last visited 5th June 2006.

[42] Business & Economy, 'MCA issues show cause notices to 16 Cement Co's', Muhammad Ilyas, 27 February 1999, Issue 05/09, Dawn Group of Newspapers, Haroon House, Karachi 74200, Pakistan. See http://www.lib.virginia.edu/area-studies/SouthAsia/SAserials/Dawn/1999/27Feb99.html. Last visited 11th June 2006.

3.6. COMPARISON OF PAKISTAN'S ANTI-CARTEL LAW WITH ANTI-TRUST LAWS OF OTHER COUNTRIES

From a discussion in the previous sections, the three major issues concerning MCA emerge to be: outdated legislation, low penalties, non-availability of leniency and raid's provisions. These aspects, with reference to several other jurisdictions both developing and developed are explored in this section.

3.6.1. Australia

The Trade Practices Amendment Act, 2006 significantly increased the maximum penalty that can be imposed in relation to serious breaches of Australia's trade practices laws. The maximum pecuniary penalty payable under the Law is A$10,000,000. In case the Court can determine the value of the benefit that the body corporate obtained directly or indirectly, fine equivalent to 3 times the value of that benefit can be imposed. Criminal sanctions have also been introduced for the cartel conduct.[43]

The Australian Competition and Consumer Commission (ACCC) released its Immunity Policy for Cartel Conduct, and an accompanying Immunity Guidelines replacing the ACCC's 2003 Leniency Policy for Cartel Conduct in 2005.[44] The new policy contains a number of changes that are intended to provide increased transparency and certainty. The changes are considered to be consistent with leniency policies in the USA, UK and EU. The new immunity policy talks of full amnesty from prosecution and penalty on the first cartel participant who meets the cooperation requirements. It is not available to those who have intimidated or forced others to take part in the cartel.[45] The new policy sanctions oral applications for immunity, an ingredient that is designed to address concerns that written applications may not be protected by legal privilege and could be discoverable in relation

[43] See http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/A72027015FA26777CA2572960001D3D7/$file/1312006.pdf. Last visited 25th December 2006.

[44] The ACCC's new Immunity Policy is available at http://www.accc.gov.au/content/index.phtml/itemId/706275. Last visited 11th May 2006.

[45] ACCC Position Paper, paragraphs 12-20.

to actions in foreign jurisdictions.[46] The strengthened policy allows for placement of a marker allowing potential applicants to secure their place in the "queue" while they complete internal investigations, and full immunity even after an investigation has begun, so long as the ACCC has not yet received legal advice that it has enough evidence to commence proceedings in relation to that cartel. Prior to this, full immunity was available only if the ACCC was unaware of the cartel when the participant self-reported. [47]

3.6.2. New Zealand

In 2001, the Ministry of Economic Development significantly toughened New Zealand's penalties for cartel conduct following a 1998 review.[48] The maximum penalty for businesses increased from NZ$5 million, to the greater of NZ$10 million or three times the value of any commercial gain resulting from the breach or, if the commercial gain cannot be determined, 10 per cent of the turnover of the business body corporate and all its interconnected bodies corporate. The maximum penalty for individuals is NZ$500,000 and the court must order individuals to pay a pecuniary penalty unless the court considers there is "good reason for not making that order".[49] Individuals who have engaged in price fixing or exclusionary arrangements can be excluded from management of a body corporate for up to five years. Companies are also prohibited from indemnifying individuals who engage in price fixing against any pecuniary penalties imposed and/or their costs incurred in defending or settling proceedings.

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[46] *Ibid* paragraph 9.

[47] The Twentieth Annual National Institute on White Collar Crime, '*Charting New Waters In International Cartel Prosecutions*', By Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement Antitrust Division U.S. Department of Justice, Presented at The Westin St. Francis Hotel San Francisco, California, March 2, 2006. Also available at http://www.usdoj.gov/atr/public/ speeches/214861.htm. Last visited 11th May 2006.

[48] Ministry of Commerce (now Ministry of Economic Development): '*Penalties, Remedies and Court Processes under the Commerce Act 1986*', A Discussion Document (January 1998).

[49] *Ibid*, Section 80(2) Commerce Act.

3.6.3. Korea

In 2004, the amendments to the Competition Act increased maximum fines, introduced a new leniency program to increase predictability and incentives for applicants, and introduced a reward system for cartel informants. At present, the Fair Trade Commission may impose, upon those conducting any behavior of cartelization, a surcharge not exceeding an amount equivalent to 10 per cent of the turnover determined by Presidential Decree. In the case of an absence of turnover, etc. a surcharge may be imposed up to but not exceeding two billion won.

3.6.4. Japan

Japan presents a case of strong antitrust enforcement. In 2002, Japan adopted new legislation that provided harsher penalties for repeat offenders and increased the maximum amount of fines from ¥100 million to ¥500 million. In May 2005, the Japanese Fair Trade Commission (JFTC) cracked the highest profile cartel case in the last 30 years in Japan, involving bid rigging on billions of dollars of steel bridge construction projects ordered by the government. 49 companies participated in the bid-rigging conspiracy, and the JFTC initiated a record number of criminal prosecutions against 26 companies and 13 corporate officials for involvement in the said cartel. This cartel prosecution paved the way for a number of revisions to Japan's Antimonopoly Act, which became effective in January 2006. These amendments include substantial increase in administrative fine that JFTC can impose, authority for the JFTC to obtain compulsory search warrants in investigations of cartel conduct that is likely to be prosecuted criminally, and introduction of Corporate Leniency Program.[50] Besides abolishing the administrative fine for the first company that reports its involvement in a cartel prior to the commencement of a JFTC investigation, the JFTC announced that it will not file criminal accusations against that company or its

[50] See Press Release, JFTC, The Bill to Amend the Antimonopoly Act Approved (Apr. 20, 2005), available at http://www.jftc.go.jp/e-page/pressreleases/2005/ April/050420.pdf. The full amended Antimonopoly Act can be found at http://www.jftc.go.jp/e-page/legislation/ama/amended_ama.pdf. Last visited 20th July 2006.

cooperating employees.[51] These amendments, combined with the creation of a new Criminal Investigation Department within the JFTC's Investigation Bureau, indicate a new era of increased accountability for companies and executives that decide to engage in hard-core cartel violations in Japan.

3.6.5. United States

In 2004, the Antitrust Criminal Penalty Enforcement and Reform Act increased maximum corporate fines from US$10 million to US$100 million; the maximum individual fine from US$350,000 to US$1 million, and the maximum jail time from three to 10 years. In USA, increases in fines and prison terms are said to be attributable to the quality and quantity of information gathered through amnesty programs. These programs provide automatic amnesty where there is no pre-existing investigation, and alternative amnesty where there is a pre-existing investigation. Corporate amnesty also covers company directors, officers and employees who cooperate. Where an executive of a corporation applies for amnesty after an investigation has started, serious consideration will be given to providing individual amnesty. However, the person or entity applying for amnesty must show that it is not the leader or originator of the cartel in order to be eligible.

3.6.6. United Kingdom

The Enterprise Act has introduced several new ways for the competition authorities to enforce the UK competition rules, including the adoption of criminal sanctions for infringements of competition law. It incorporated the reform proposals outlined in the Government's White Paper *Productivity and Enterprise: A World Class Competition Regime* including:

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[51] See JFTC, The Fair Trade Commission's Policy on Criminal Accusation and Compulsory Investigation of Criminal Cases Regarding Antimonopoly Violations (Oct. 7, 2005), available at http://www.jftc.go.jp/e-page/legislation/ama/ policy_on_criminalaccusation.pdf. Last visited 9th June 2006.

- **Criminal sanctions:** The reforms create a new criminal offence for individuals who participate in cartels, including penalties of up to five years' imprisonment and/or a fine;
- **Disqualification of Directors:** The OFT was given new powers to seek disqualification of directors whose companies are found to have violated competition rules;
- **Encouraging competition litigation:** New rules intended to facilitate private claims for damages and allow consumer groups to bring representative actions will be introduced.[52]

Penalty for contravention of the law could be as high as ten per cent of the last business year's turnover. The law also provides for leniency provisions for disclosing a cartel activity.[53]

3.6.7. India

The Competition Commission can impose penalty upto ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises that are parties to cartel agreements. In case any agreement has been entered into by any cartel, the Commission can impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty equivalent to three times of the amount of profits made out of such agreement by the cartel or ten per cent of the average of the turnover of the cartel for the last preceding three financial years, whichever is higher.[54]

Section 46 of the Competition Act 2002 provides for "leniency policy" that would facilitate the detection of infringements. It states that the Commission may, if it is satisfied

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[52] Cartel Watch Newsletter, second edition of Baker and McKenzie's Cartel Watch Newsletter, Issue 2, October 2002, See http://www.bakernet.com/newsletters/Newsletter_Full.asp? NLID=10 andEditionID=71. Last visited 11th June 2006.

[53] OFT's Guidance As To The Appropriate Amount Of A Penalty (understanding competition law), Competition Law 2004, December 2004, Published by the Office of Fair Trading, printed in the UK, Product code OFT423, Edition 12/04, PUB 12/04/2,000, Crown Copyright 2004. Also available at http://www.oft.gov.uk/NR/rdonlyres/4546166B-0413-45E4-8C8F-208CC3CDC325/0/OFT423.pdf# search =%22uk%20penalties%2C%20enterprise%20act%22. Last visited 11th May 2006.

[54] See Section 3 of The Competition Act, 2002 (No.12 of 2003) the Gazette of India, Part 2, Section 1. Also available at http://www.competition-commission-india.nic.in/Act/competition_act2002.pdf #search=%22India%2Cindian%20competition%20act%202002%2C%22. Last visited 11th May 2006.

that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated the law, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty than leviable under the Act or the rules or the regulations.

A proviso says that lesser penalty shall not be imposed by the Commission in cases where proceedings for the violation have already been initiated under Section 26 before making such disclosure. Provided further that lesser penalty shall be imposed by the Commission only in respect of a producer, seller, distributor, trader or service provider included in the cartel, who first made the full, true and vital disclosures under this Section otherwise he may be prosecuted for providing false or misleading information.[55] The Act provides for imposing lesser penalties in case of voluntary disclosure on any cartel formation, to the first informer and if it is before the beginning of the inquiry.[56]

3.6.8. Canada

Section 45 of the Canadian Competition Act makes it a criminal offence for anyone to conspire, combine, agree or arrange to unduly lessen competition or unreasonably enhance the price of a product. The purpose of this section is to counter egregious anticompetitive behaviour such as price fixing and market sharing by the competitors. considering the serious impact of this anticompetitive behaviour on the economy and, in particular on consumers, it is dealt with by the criminal courts and carries sanctions i.e., fines up to C$10 million and/or imprisonment for up to five years. To increase deterrence, the current C$10 million fine would be replaced with a fine set at the court's discretion.[57]

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[55] See The Competition Act, 2002 (No.12 of 2003) the Gazette of India, Part 2, Section 1. Also available at http://www.competition-commission-india.nic.in/Act/competition_act2002.pdf#search=%22India%2Cindian%20competition%20act%202002%2C%22. Last visited 11th June 2006.

[56] Available at http://www.cuts-international.org/pdf/PAR-FORE-2-2006.pdf. Last visited 5th November 2006.

[57] '*Cartel Enforcement: International and Canadian Developments – Paper*', Sheridan Scott, Commissioner of Competition, Competition Bureau, Fordham Corporate Law Institute Conference on International Antitrust Law & Policy, October 7, 2004. Also available at http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1871&lg=e. Last visited 11th May 2006.

To explain, it is noted that the provisions of the Canadian Competition Act are divided into two broad categories: criminal offences and non-criminal (civil) matters that the Competition Tribunal may examine. This division is significant because the tools available and the approaches taken in applying the law may differ according to the type and seriousness of the practices. Criminal offences specifically include cartels, bid rigging, price discrimination and certain unfair trade practices. Civil practices mainly concern the abuse of a dominant position, restrictive trade practices such as tied sales, and other misleading trade practices associated with advertising and marketing. The Competition Commissioner have important constraining powers, with which he can obtain orders requiring the production of documents or testimonies, conduct searches or do wiretapping.[58]

Canada's initial anti-cartel legislation was not very successful, nevertheless it was revised and now it closely mirrors the US legislation and is being increasingly successful. One key difference is that it currently includes a requirement that cartel conduct be anti-competitive before it is prohibited. Amnesty through leniency program is available to the first party to disclose conduct if the Bureau is unaware of the cartel or has insufficient evidence. In order to attain amnesty, the applicant must have terminated its participation in illegal activity, must not be the leader or sole beneficiary of the conduct, must provide full, timely and continuing cooperation, must reveal any and all offences at the outset and must make restitution for its involvement. The immunity program is further being reviewed for improvements.[59]

To sum up the comparison of salient features of various laws, it is concluded that the countries have taken several steps to improve their ability to detect, investigate and prosecute cartels, including modernizing their cartel provisions. Introduction of immunity program, high level of fines, raising awareness of cartels, expansion and refinement of the investigative tools, deepening cooperation and relationships with other enforcement agencies

[58] For more details see http://strategis.ic.gc.ca/SSG/ct01768e.html. Last visited 9th May 2006.
[59] Available at http://www.globalcompetitionreview.com/sr/sr_fullpage.cfm? Page_id=100. Last visited 11th May 2006.

are among such areas where MCA can learn from their experiences to improve its anti-cartel efforts.

CHAPTER 4

CONCLUSIONS AND RECOMMENDATIONS

4.1. INTRODUCTION

Corrective policy intervention is necessary as market players may distort, eradicate or destroy competition to maximize profits or acquire and abuse their market power. Such interventions are generally enforced through competition policy and law. Competition policy and law aims at maintaining and encouraging healthy competition by dealing with anti-competitive practices of firms, preventing market concentration, addressing legislation and administrative practices that distort competition.[1]

The most important objectives of competition policy and law are as under:

i. To defend and safeguard consumers' interest by ensuring that they have greater choice in terms of price, quality and service.[2]
ii. To maintain a competitive environment so that an efficient allocation of resources in the domestic economy can take place, thus promoting economic growth.
iii. To maintain competitive process, freedom of trade, freedom of choice and access to markets.[3]

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[1] UNCTAD, Communication from Consumers International Asia Pacific Office, '*Competition Policy and Law in the Consumer and Development Interest*', by Rachagan. S.Sothi, Executive Summary, Part1, Page No. 2-3, 2-4 July 2003.

[2] "*Our competitors are our friends, our customers are the enemy.*" Whether or not this sum up the cavalier attitude of cartels to business, they certainly appear to lack the service-oriented, open mentality today's society expects. Cleaner business, Published January 2003, '*Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programs*', © OECD Observer No. 234, October 2002.

[3] Objectives of Competition Policy, Chapter Prepared by Principal Team Member, Shyam Khemani, with input from Members of the Competition Law and Policy Committee of the Organization for Economic Co-operation and Development.

The term "hard-core cartels" refers to the most detrimental and harmful type of anti-competitive practices covering price or quantity fixing, bid rigging, market allocation etc. Such practices increase price and restrict supply, as a result making goods expensive or even unavailable.

Cartels are unique among various types of anticompetitive conduct and that is why unique investigative methods are required to combat them. Competition agencies have developed tools that are proving to be useful in this effort. The past few years have seen considerable developments but in the struggle against cartels, more remains to be done. In the fight against cartels, it is necessary to identify factors that assist cartel behaviour, these are:

- Small number of firms in a particular market
- High entry barriers
- Excess capacity and stocks
- Persistent demand instability
- Supply- demand gap
- Frequency of interaction of competitors and exchange of information
- Market transparency to predict competitors moves and actions

The following issues are also important to be considered while identifying cartels:

Firstly, nature of the product. Prospects for cartelization increase if the product is fairly identical or homogeneous.

Secondly, cartels are far more possible if output and market conditions are stable and predictable.

Thirdly, the main market players are relatively large and have almost constant market shares for a considerable period of time. It implies that market entry and exit is not so frequent to change faces of cartel members or to persuade new comers to join existing cartel agreement.[4]

In the words of Neelie Kroes (Commissioner responsible for Competition Policy in European Union), *"Cartels attack free markets at their very heart. They don't just mess up*

[4] '*Techniques for Gathering Evidence on Cartels*', See http://www.unctadxi.org/templates/Page____5736.aspx. Last updated 11 November 2005. Last visited 25th June 2006.

the grass on a level playing field – they blow great holes out of the surface. And it is consumers who are asked over and over again to pay the price of replacing the turf."

Hard core cartels are detrimental to both consumers and businesses. None of the studies so far could establish their lawful economic or social gains but there are several to establish the case vice versa. According to an estimate by the US Department of Justice, a cartel will result in prices on average being ten per cent higher than would otherwise be the case.[5] This is the result of limiting competition that reduces incentives to improve and innovate by the producers. In the long run, this diminishing national competition ends up lessening international competitiveness of a nation as a whole.

During past couple of decades, countries are being increasingly conscious of the need to fight cartels with rigorous legal instruments and effective enforcement. Side by side, cartel members are also being increasingly aware of their unlawful conduct, therefore they carry out such agreements secretly to conceal from competition agencies and consumers.

Curbing cartels is considered to be the first and the foremost enforcement priority of competition agencies. Technically speaking, the following factors make it a challenging fight:

- Firstly, cartel members are secretive about their illegal behaviour, and for that reason agencies have to undertake great investigation to discover them.
- Secondly, agencies need enough legal powers and practical skills for 'searches and raids' to collect evidence to establish a case.
- Thirdly, sophisticated 'leniency programs' are needed to destabilise conspiracies and create a situation of 'prisoner's dilemma'.
- Fourthly, criminal prosecution of cartel members require high standard of procedure and evidence.
- With increasing globalisation, cartels are also crossing national boundaries; this has raised concerns about jurisdictional boundaries.[6]

To meet the above challenges, one could not ignore the words of Commissioner Monti who observed, '*since by nature cartels are secret and therefore difficult to uncover,*

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[5] Department of Justice, '*Sentencing Guidelines Manual*', Page No. 231, 1998.

[6] Seehttp://www.internationalcompetitionnetwork.org/capetown2006/ICNMission&AchievementsStatement.pdf Last visited 2oth July 2006.

it is likely that what we are seeing is only the tip of the iceberg.[7] To explore the whole iceberg, the competition agencies need to keep an eye on the press and the trade journals of manufacturers groups to monitor 'what's new' in the market. For instance, officers of the Romanian Competition Authority monitored the press for five years to obtain information about every price increase and actions of the cement cartel members. Finally, they were able to find out that three parties used newspapers to exchange information about every price increase.

Once the investigation is started, the competition agency should be able to quickly get hold of documentary and electronic evidence of a cartel agreement, this is possible only with the help of dawn raids to obtain documents, account books, financial, accounting and commercial documents or other evidence related to the violation.

Another successful and most recent investigative tool against cartels is the "leniency program". Cartel members are persuaded by using 'carrot' to give insiders' information about a hard-core cartel. Though, it is not a simple task to persuade them when in normal circumstances they would not come up to help competition agencies. A clear threat could be the 'stick' in the shape of heavy fines and criminal sanctions. Advocacy campaigns could be used for brainwashing cartel members to behave otherwise.

The issue of cartel investigation is being taken up at the international level as well, though binding rules have not been designed so far. Nevertheless, jurisdictions share the view of mutual cooperation to investigate cartels.[8] For this purpose discussions at OECD and ICN forums are going on. As a result of deliberations that identify international best practice and also based on the experience, several countries have improved their national competition laws.

In case of Pakistan, the law i.e., the MRTPO, 1970 was enacted in the backdrop of famous 22 families controlling major proportion of the business activity in the decade of 1958-68. During the course of this study, it was observed that the Law is not only outdated

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[7] M.Monti, (2000), '*Fighting Cartels Why and How? Why Should we be Concerned with Cartels and Collusive Behaviour*', 3rd Nordic Competition Policy Conference 11-12 September, 2000.
[8] *Supra* Note No. 4.

but also not in line with the policy of the Government for a free market economy with key elements of liberalization, de-regulation and privatization to attract investment. The present law was enforced in 1971 since then economic variables have underwent drastic change e.g., new services and regulatory mechanisms have emerged. Globalization of economy aimed at elimination of barriers on investment, trade, industry, services sectors and WTO regimes requiring rule based market mechanism; all this necessitates review of this law.[9] General and specific recommendations, in this regard, are chalked out in the following sections of this Chapter.

4.2. GENERAL RECOMMENDATIONS AND STRATEGIES FOR WINNING THE FIGHT AGAINST HARD-CORE CARTELS

Hard core price fixing and market sharing cartels are continued and are growing in number and size. The only deterrent is high penalties along with a considerable threat and danger of detection. Several factors and actions that can be taken by competition agencies to increase the detection of cartels and to prosecute them successfully are given in the sections to follow:

4.2.1. Awareness about Cartels' Harm

The task of competition agencies becomes harder with the lack of public awareness about cartels' harm. Even in countries that have adequate competition laws, failure of the consumers, government departments and officials to understand cartels' harm can create many problems. Considering the importance of public awareness, the OECD in its Anti-cartel Recommendation, 1998 stressed especially on "competition advocacy".[10] Competition agencies use a variety of methods to raise awareness such as bulletins, enforcement guidelines, seminars, videos, advisory opinions and warning letters.

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[9] See http://r0.unctad.org/en/subsites/cpolicy/docs/IGE0702/pakistan2.pdf. Last visited 15th June 2006.

[10] See, e.g., Richard Whish, '*Competition Law*', Fourth Ed. (2001), at Page No. 83 describes the European Commission's *Dyestuffs case* that found a price fixing agreement on the basis of "*various pieces of evidence, including the similarity of the rate and timing of price increases and of instructions sent out by parent companies to their subsidiaries and the fact that there had been informal contact between the firms concerned.*"

competition agencies (40 out of 57), the appointments are carried out through the executive. [12]

Moreover, the duration of term of appointment also raises independence concerns. Conceptually, the independence increases by increasing the term. It is at maximum if they are appointed for life (or up to a mandatory retirement age) and cannot be removed from office, except by a legal procedure. In most of the countries, the term is found to be five years.[13] There are seven countries in which tenure is at least 12 years, but also six with less than four (Brazil, Greece, Peru, Taiwan, Thailand and Zambia). Competition officers are assumed to be less independent if terms are renewable because they have a motivation to please those who can reappoint them. Nevertheless, in 47 out of 57 competition laws, reappointment is possible. In essence, the agency is more independent, the more difficult it is for government to remove 7 competition laws provide for a judicial procedure for removal but in 37 cases competition officers can be removed by the parliament or the executive.

At the working level, if the distribution of cases to various members of the competition agency is the discretion of the competition officer, then it may also affect the final outcome of cases thus making agency less independent internally. On the other hand, if there is a general rule to assign cases, then the independence increases. However, only 17 competition laws had a general allocation rule and 35 did not.

4.2.2.2. The *De Facto* Independence of Competition Agencies

A decisive feature of the *de facto* independence is the effective average term length of the chairman of the agency. Removing before the end of term reduces independence. The countries with the lowest average tenure of competition officers are Kazakhstan, Slovakia, Uzbekistan and Venezuela where average tenure is below two years. Income

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[12] Prof. Dr. Stefan Voigt, '*Competition Policies Matter – At least at the Margin: Cross-Country Evidence Using Four New Indicators*', Economic Policy, Economics Department, University of Kassel, Nora-Platiel-Str. 4-6, D-34109 Kassel, Germany. See http://www.canlecon.org/submissions/docs/Stefan%20Voigt%20-%20Uni-Kassel%20-%20CompetitionAuthorities5.doc. Last visited 9th June 2006.

[13] The 2006 Handbook of Competition Enforcement Agencies, Published by 'Global Competition Review'. www.GlobalCompetitionReview.com

level, number of staff employed, the size of library, the availability of modern computer equipment etc are other factors that affect independence by varied degrees.[14]

4.2.2.3. Economic Independence of Competition Agencies

Although, there are no concrete examples of budgetary mechanisms affecting independence, nevertheless, funding and budget is a factor that directly affects agencies' independence. Generally, competition agencies receive their budget from the state budget in different manners. In most of the countries, say in Argentina, the Commission gets the budget from Ministry of Economy and Production, this reduces budgetary autonomy. If the annual budget is granted by the legislator and the agency is at liberty to use it; this increases budgetary autonomy. If the agency depends on responsible ministry for current expenditures, then autonomy is compromised. Alternative sources of funding include fines imposed, processing fees for notifications or filing complaints, priced publications, etc.[15]

Independence, should indeed be subject to certain checks and balances as being a public sector body. This may be gauged through the handling and investigation of complaints, assessing merger applicants etc. in a timely and professional manner.[16] Several competition laws require the agency to present its performance report in the parliament or to the relevant ministry.

4.2.3. Effective Investigative Tools

4.2.3.1. Sufficient Resources for Anti-Cartel Investigation

The experience of various jurisdictions shows the need to strengthen legal powers of the competition agency. This can be done by creating dedicated cartel units with trained

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[14] *Supra* Note No. 12.

[15] See http://www.iadb.org/res/publications/pubfiles/pubs-209.pdf#search=%22OECD%2C%20independence%20of%20competition%20agencies%22.Last visited 25th May 2006.

[16] Organisation for Economic Co-operation and Development, 15-Jan-2003, '*Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency within Overall Government*', Ireland, This note was submitted by Ireland under Session I of the Global Forum on Competition held on 10-11February 2003. Also available at http://www.oecd.org/dataoecd/58/55/2485613.pdf#search=%22OECD%2C%20independence%20of%20competition%20agencies%22. Last visited 12th June 2006.

investigators. Once consumers realise the benefit of successful cases, they may come up to support the investigations and gather evidence.[17]

Furthermore, the workforce of competition agency should be authorized to investigate on business premises to procure evidence. They need to enter property, all structures, rooms and vehicles which are used by the undertakings in their business activities, to examine their books and other business records, take copies from there and ask for oral explanations on the spot.[18]

Apart from effective legislation, other factors that contribute to the effectiveness of the action are: monitoring of markets where possibility of cartel agreements is high; and use of specialized workforce in cartel proceedings. In cartel cases, experience has shown that some employees of the agency deal with certain specific situation more frequently than others, for that reason, formation of special cartel department can facilitate the agency.[19]

4.2.3.2. Evidence Gathering: Searches and Raids

For investigation of cartels, the use of formal powers to collect evidence, such as in particular unannounced searches or raids, is required. Unannounced searches are generally considered as a science, involving warrants, mandates, judicial authorizations, etc. Practical expertise and specialist skills regarding the constitution of teams, coordination with other agencies, prevention of and dealing with obstruction, destruction of evidence, etc are also required.[20]

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[17] Consumers are the stakeholders who first notice and experience effects of market changes and can communicate their observations to the competition agency individually or collectively through their civil society organisations. The 3rd Nordic Competition Policy Conference, '*Fighting Cartels - Why and How; Lessons Common to Detecting and Deterring Cartel Activity*', by Scott D. Hammond, Director of Criminal Enforcement, Antitrust Division, U.S. Department of Justice, Presented at Modern Museum Stockholm, Sweden, September 12, 2000, See http://www.usdoj.gov/atr/public/speeches/6487.htm. Last visited 15th June 2006.

[18] For a detailed discussion on similar issues, see '*Anti- Cartel Enforcement Manual*', International Competition Network, Subgroup on Enforcement Techniques, For further details see http://www.internationalcompetitionnet work.org-cartels. Last visited 17th July 2006.

[19] *'Cartel Enforcement'*, by Josef Bednář, Chairman of the Office for the Protection of Competition of the Czech Republic, See http://www.compet.cz/English/Aktuality/CartelEnforcem.htm. Last visited 11th June 2006.

[20] ICN, '*Defining Hared Core Cartel Conduct, Effective Institutions, Effective Penalties, Building Blocks for Effective Anti- Cartel Regimes*', Vol. 1, Report prepared by the ICN Working Group on Cartels, ICN 4th

To fight cartels successfully, it is essential to gather evidence and information from whistleblowers. These may be the dissatisfied former employees dismissed from work for various reasons. As a tip, the dawn- raiders should ask for a list of employees dismissed in recent past. An example of a cartel agreement is quoted; among bakeries investigated in Czech Republic. The competition agency was informed by one of the employees about the time and place of a meeting between two biggest competitors. As the meeting was going on, they took photographs of their cars, parked in front of the building. The relevant authorities confirmed that the cars with those licence plate numbers actually belonged to the competing companies. Although, it was not a direct evidence of cartel agreement but it did indicate the meeting.

4.2.3.2.1. Requirement for IT-Forensics Expertise to Detect Evidence

The lessons learnt from dawn raids are that the group performing the dawn raid must include a specialist in information technologies who would supervise the computer room.[21] As evidence is increasingly stored electronically, the competition agencies' success or failure of the on-the-spot investigations may in certain cases depend crucially on the availability of investigators with expert IT skills. Computer-illiteracy can seriously hamper the success of searches because computers, USB-sticks or memory cards are password protected.

Simultaneously, it is comforting to the companies under investigation that no other than IT specialists access their server, applying searching techniques. It is also the best defense against claims by companies that the evidence would have been *"tampered with during the search"*. For competition agencies like that of Pakistan, this is a relatively new phenomenon but some agencies are making long-term investments by building up dedicated in-house IT investigation units, whereas others outsource this task and rely on external consultants. For smaller agencies, outsourcing may be the only viable option since

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Annual Conference, Bonn, Germany, 6-8 June 2005, Also Available at http://www.internationalcompetitionnetwork.org/bonn/Cartels_WG/SG1_General_Framework/Effective_Anti-Cartel_Regimes_Building_Blocks.pdf. Last visited 25th May 2006.

[21] *Supra* Note No. 19.

the small number of cases may not warrant the considerable investment into a qualified team of IT-trained inspectors. IT forensic training could be imparted to "regular" officials involved in searches. The forensic IT unit's mandate may include:

- Taking part in searches and seizures of electronic records.
- Supporting in obtaining, evaluating and examining electronic records.
- Maintaining a laboratory to capture, process and analyze electronic records.
- Training agency officers to assist analysis of electronic records.
- In the competition agency, a basic forensic IT training must be given to all staff who are called to participate in on-the site searches.[22]

Generally, e-mails may contain proposals for exchange of customers between the producers, production or pricing information. An e-mail, that is an example of how very well the undertakings knew that they were violating law – it ended with the following: "*P.S. I am going to erase this e-mail after I send it, because the Devil and the Competition Office never sleep*".

The use of dawn raids is an effective instrument for acquiring evidence but it must also observe legalities such as the Charter of Fundamental Rights and Freedoms. The competition agency may not seize personal correspondence or correspondence with the legal representative.[23]

4.2.3.3. Whistle Blowing, Leniency and Amnesty Program

Undeniably, the 'Whistle Blowing' Program is the key investigative tool available for detecting and cracking cartel activity. Leniency programs uncover conspiracies that would otherwise go undetected and also make investigations more efficient and effective. The necessary aspects of such a program will be discussed in the following sections.

4.2.3.3.1. Using Leniency to Crack Hard-Core Cartels

Breaking hard-core cartels require breaking their cover of secrecy. In order to do so it is very essential to persuade a cartel member to plead guilty and expose its co-conspirators with first-hand, direct "insider" evidence about their meetings and communications. In

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4.2.3.4.3 Shrinking Safe Harbors

The world is fast changing, antitrust agencies' enforcement mechanisms are increasingly being coordinated across countries therefore, the safe harbors for cartel activity are fast eroding Worldwide vitamin cartel can be cited as an example of changing environment. Each of the foreign executives of the companies involved voluntarily traveled to the United States to plead guilty and to serve time in a U.S. prison. They were all citizens of either Switzerland or Germany, residing abroad, with no family or other ties to the United States. Therefore, the United States courts had no personal jurisdiction over any of these individuals. Furthermore, the United States does not have an extradition treaty with either Switzerland or Germany covering antitrust offenses. Here one may wonder why did these six international executives agreed to submit to the jurisdiction of a U.S. court, cooperate with US investigation, and serve time in a U.S. jail? They had to accept prosecution instead of being international fugitives.

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4.2.3.7. Ways to Compensate for Deficient Investigative Tools

Competition agencies like the one in Pakistan without powerful anti-cartel investigation tools can focus on agreements among competitors to observe parallel behaviour, refrain from advertising, or otherwise eliminate a potentially significant form of competition. Such agreements are easier often to detect. The agency may get alert on "exclusionary boycotts" – horizontal agreements not to deal with customers or suppliers unless they agree that they will not compete with the parties to the agreement or do business with the parties' competitors or potential competitors. Such agreements that result into exclusion of third parties may be easier to detect. However, it is suggested that a reward scheme could be an effective tool to uncover cartels and could also make the formation of cartels more costly and less likely.[32] To sum up, considerable improvements in competition law enforcement as stated under are required:

- First of all, competition agencies would need to have enough procedural instruments and human resources to effectively investigate and uncover cartels.

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[32] See Aubert Cécile, Rey Patrick, and Kovacic William E., '*The Impact of Leniency and Whistle blowing Programs on Cartels*' (2004). http://www.iadb.org/europe/LACF2005/pdf/IssuesPaper-session1.pdf. Last visited 25th June 2006.

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record of successful prosecutions and heavy sentences has hardened the stick for companies. The question is often raised as to whether an Amnesty Program will work in a jurisdiction where there is no individual liability? The opportunity to avoid imprisonment for corporate officials is a major carrot for firms to seek amnesty. However, an Amnesty Program can still succeed if the threat of heavy fines is there.

For instance, the international vitamin cartel was broken by the assistance provided by French based Rhône-Poulenc SA.[30] The Company made the decision to cooperate although the responsible French executives resided outside the United States and USA's extradition treaty with France does not cover antitrust offenses. So, the opportunity to avoid imprisonment of its culpable executives was probably not the major incentive to Rhône-Poulenc's decision to cooperate but rather the desire to avoid a criminal conviction and heavy fine for the corporation. While, Rhône-Poulenc paid no fines, its major co-conspirators, HLR and BASF, paid fines of $500 million and $225 million, respectively.

4.2.3.4. Fear of Detection

4.2.3.4.1. Building a Strong Enforcement Record and Credibility

Stiff maximum penalties will not be enough to deter cartels, if the risk of being caught by antitrust agency is very small. Similarly, if cartel members do not fear detection, they will not use leniency program no matter how sophisticated it may be. Therefore, antitrust agencies have to promote a law enforcement environment wherein businesses have a considerable risk of detection.

4.2.3.4.2. Prisoners' Dilemma

The more worried a company is about cartel detection, the more likely it is to report its wrongdoing in exchange for amnesty. The promise of zero fines and no jail for culpable executives is a big incentive. Amnesty may be available to the first one in the door, the

[30] Division has a policy of treating the identity of amnesty applicants as a confidential matter, much like the treatment afforded to confidential informants. However, confidentiality is not required in this case with respect to Rhône-Poulenc's amnesty status, because the company has already issued a press release announcing its acceptance into the Amnesty Program.

second firm and all of its culpable executives be subjected to full prosecution. The "winner-take-all" race leads to tension and mistrust among the cartel members creating a situation of 'prisoner's dilemma'. Each member of the cartel knows that any of its co-conspirators can be the first to come forward.

4.2.3.4.3 Shrinking Safe Harbors

The world is fast changing, antitrust agencies' enforcement mechanisms are increasingly being coordinated across countries therefore, the safe harbors for cartel activity are fast eroding Worldwide vitamin cartel can be cited as an example of changing environment. Each of the foreign executives of the companies involved voluntarily traveled to the United States to plead guilty and to serve time in a U.S. prison. They were all citizens of either Switzerland or Germany, residing abroad, with no family or other ties to the United States. Therefore, the United States courts had no personal jurisdiction over any of these individuals. Furthermore, the United States does not have an extradition treaty with either Switzerland or Germany covering antitrust offenses. Here one may wonder why did these six international executives agreed to submit to the jurisdiction of a U.S. court, cooperate with US investigation, and serve time in a U.S. jail? They had to accept prosecution instead of being international fugitives.

4.2.3.5. Witness Statement Taking and Interviewing Techniques

Another apparatus used in the detection of cartel infringements is to interview or interrogate suspected cartelists or other individuals concerned. A successful interview should lead to a maximum amount of information being obtained. Countries that typically rely on interviews as part of their evidence gathering process agree that the success of an interview will largely depend on the experience and training of the personnel conducting the interview. The ultimate objective is to use the information obtained through interviews in the course of a cartel prosecution.[31]

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In shaping the idea of an effective sanction, the OECD members opined: *"The principal Purpose of sanctions in cartel cases is deterrence. Sanctions have another, related purpose in the cartel context – that of providing an incentive for cartel participants to defect from the secret agreement and provide information to the investigators."* Thus, the principal purpose of sanctions in cartel cases is deterrence, supplemented by the phenomenon of encouraging 'whistle-blowing' in jurisdictions where there is a leniency program.

4.2.3.8.3. Calculating an Effective Deterrence

Another relevant statement in the OECD-report is quoted which categorically states that *"An effective deterrent is one that promises, on average, to take away the financial gains that otherwise accrue to the cartel members. In the case of fines against enterprises this would mean that both the expected gains from the cartel and the probability that the cartel will be detected have to be taken into account."* It is true that the fines should, on average, make cartel activity financially unattractive. In order to make cartel activity less attractive and to make leniency program more attractive fines need to be substantially higher than the gain from the cartel. Harm to the consumers should be taken into account in setting the fine. In addition, criminal sanctions including imprisonment may create effective deterrence. The press coverage of the sanction can damage to reputation and may also make cartel activity unattractive.

Effective Sanctions' (http://www.oecd.org/dataoecd/30/10/2754996.pdf), The '*Report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Laws'* published in 2002 (http://www.oecd.org/dataoecd/41/44/1841891.pdf). The 2003 publication '*Hard Core Cartels: Recent Progress and Challenges Ahead'*, The 2005 Report on '*Cartels: Sanctions against Individuals'* (DAF/COMP(2004)39; The Global Forum has dealt with the Issue of Effective Penalties on its Second Meeting, see the 'Overview' given in the '*2004 Report'*. Available at http://www.oecd.org/dataoecd/13/42/27892500.pdf, pp. 71 et sqq. Last visited 15th May 2006.

4.2.3.8.4. Penalties under Existing Competition Laws

The most common sanctions provided for hard-core cartel in different jurisdictions include fines of either an administrative or a criminal nature. Some jurisdictions punish individuals with jail sentences. The most common penalties given under competition laws of various countries to punish cartels are discussed in the paragraphs to follow.

4.2.3.8.4.1. Fines

The most widespread penalty for cartels is fines imposed on the cartel members. In penal law, the principle of *"nullum crimen, nulla poene sine lege"* requires not only the deed, but also the punishment to be specified in clear and understandable terms in advance. Even though competition law is not a part of criminal law in all countries, this principle affects the legislator to put a "price tag" on cartels as such.[37]

4.2.3.8.4.2. Setting the Fine

The most commonly used method to calculate the fine is the adjustment of a "basic penalty" with reference to the relevant circumstances i.e., the:

- damage caused to the interests of consumers and other businesses, gravity and the duration of cartel;
- degree of guilt;
- financial position of the cartel members;
- profits earned as a result of cartel agreement;
- willingness of cartel member(s) to cooperate and to stop participating in cartel activity;
- threat to economic competition and dimension of the market affected;
- market share of the cartel member; and
- repetition of the prohibited cartel conduct.

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[37] Some examples include: *'The United States Sentencing Commission, Guidelines Manual'*, (USSG) (2004). Available at http://www.ussc.gov/2004guid/TABCON04.htm. The Guidelines Manual is updated at least once a year and the most current version can always be located at http://www.ussc.gov/GUIDELIN.HTM, for further details on the method of calculation of fines imposed in the EU jurisdiction, see http://europa.eu.int/eurlex/pri/en/oj/dat/1998/c_009/c_00919980114en00030005.pdf, the Office of Fair Trading has published the guidance as to the appropriate amount of a penalty at: http://www.oft.gov.uk/nr/rdonlyres/4546166b-0413-45e4-8c8f-208cc3cdc325/0/oft423.pdf, the French Conseil de la concurrence published its criteria in its *1997* Annual Report.

This adjustment of penalty may be in the form of a multiplier or as the deduction or addition of certain percentages from the base fine. In setting the fine, the criteria applied vary from jurisdiction to jurisdiction but generally the following aggravating factors are taken into consideration:

- destruction of evidence;
- Position in the cartel i.e., a leader or a member;
- participation of directors or senior management of companies in the cartel meeting;
- retaliatory or other coercive measures against cartel violation so as to prolong cartel activity;
- continuing cartel activity even after the start of investigation;
- repeated involvement in cartel activity by the same company or other companies in the same group;
- intentional involvement in cartel activity;
- retaliatory measures taken against a leniency applicant.

Certain other factors the have a mitigating affect include:

- where the company under severe duress or pressure to join the cartel;
- genuine uncertainty as to whether certain conduct is unlawful;
- efforts to ensure compliance with the applicable competition laws;
- willingness to use leniency program and cooperation after start of investigation.

4.2.3.8.4.3. Fining Individuals

Personal liability can provide a strong deterrent for the cartels' decision makers to abstain from cartel activity. In this regards, individuals might be held responsible for cartel conduct for their involvement in the cartel conduct as well as the company involved. Although the companies benefit most from cartel activities but the individuals perform such cartel acts on behalf of their companies. One of the risks linked to this deterrent effect of fining individuals is the possibility of the company reimbursing its employees afterwards.

4.2.3.8.4.4. Jail Sentences

Another possible way of creating a strong incentive refrain from involvement in cartelization is the imminent threat of being sent to jail for such an offence.[38]

4.2.3.9. Cartel Enforcement

Effective cartel enforcement requires effective anti-cartel laws and investigators and prosecutors who understand their job.[39] The cartel members are fully aware of the fact that they are doing a forbidden act as per law. Nevertheless, they are not afraid of the consequences, as any possible fine imposed by the anti-trust agency will be a small part of the profits gained by applying the cartel agreement, hence, the company can easily pay it. The devastating effect of cartel agreements on competition itself, as well as on the consumer holds true even in cases where it is active for a very short period. Besides, the undeniable advantages of globalisation there is a real attraction among businesses to form cartels affecting national and international markets. Participants in a cartel have resources abroad (branches); therefore, the main evidence on national cartels often cannot be gathered on a national level. Witnesses, too, are located in various countries with various jurisdictions.[40]

4.2.3.9.1. Effective Deterrence: Tough Penalties Combined with a Risk of being Caught

Tough penalties alone are not sufficient unless combined with real threats of being caught. There is sufficient evidence that businesses disregard laws that are not effectively enforced.[41] Cartels are generally well planned and the cartel members are at times clever sophisticated business executives who composedly calculate their profits from such behaviour. Given the enormous profits arising out of cartelization, the only effective

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[38] *Supra* Note No. 20.
[39] '*U.S. and EU Competition Policy*: *Cartels, Mergers, and Beyond*', address by William J. Kolasky, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, before the Council for the United States and Italy, Annual Conference, New York, January 25, 2002.
[40] *Supra* Note No. 19.
[41] D. Baker, '*Building a New Competition Law that Works*', Page No. 23-26.

deterrent seems to be a system of enforcement that contains serious penalties. Civil proceedings are not so effective and criminal sanctions are necessary in a system which does not provide for imposition of fines on individuals concerned.[42] Therefore, careful drafting of a competition law as well as its effective enforcement is necessary so as to have credibility in the system.[43]

4.2.3.9.2. Criminalisation and Imprisonment

Cartel participants can be fined through civil and administrative procedures as discussed above, adding insult to injury- the bad publicity accompanying a criminal penality can be a deterrent factor.[44] According to Hopkins (1978), corporate crime is *"committed by the corporation itself or on behalf of the corporation by its employees, in furtherance of the corporate interest."* [45] By using this definition, it is possible to classify anti-competitive acts as corporate crimes. The role of individuals in corporate crime is crucial, as the corporations *per se* cannot actually *commit* crime without individuals.[46] If a violation is due to the conduct of particular employee or employees, it is then possible to fix individual responsibility.[47] Furthermore, by holding an individual responsible for corporate crime, it is possible to effectively use deterrent and advocacy components.[48] For

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[42] Competition and Mergers Review Group, OECD Committee on '*Competition Law and Policy*', 2001.

[43] '*Using Immunity to fight Criminal Cartels; New Strategies that Can Help Win the War against Cartels*', Patrick Massey, Director, Cartels Division, Competition Authority, Friday, 17th November 2000, Radisson Hotel Dublin, for further details See http://www.tca.ie/speeches/conferences/immunityconference/pm.doc. Last visited 25th June 2006.

[44] That the threat of criminal sanctions weighs much heavier than financial sanctions is further evidenced by the experience of the United States where individuals repeatedly offered to pay high financial fines if they could avoid jail time, but nobody has ever offered to go to jail in order to avoid paying a fine, also see http://www.iadb.org/europe/LACF2005/pdf/IssuesPaper-session1.pdf. Last visited 12th May 2006.

[45] Hopkins A, '*The Anatomy of Corporate Crime*', 1978, In P. R. Wilson & J.Braithwaite (Eds.), '*Two Faces of Deviance: Crimes of the Powerless and the Powerful*', pp. 214-229, St.Lucia, University of Queensland Press.

[46] Edwards, P. R, '*Choices that Increase Compliance*', Policy Studies Review, *10*(4), 6-27, 1991/92.

[47] Braithwaite. J, '*Crime, Shame and Reintegration*', Cambridge, Cambridge University Press, 1989.

[48] Fisse B & Braithwaite J, '*Corporations, Crime and Accountability*', Cambridge, Cambridge University Press, 1993.

this, the penalties must take into consideration the aggravating and mitigating factors discussed earlier.[49]

In theory pecuniary penalty serve as a source of self- accountability. In practice, the imposition of high fines can send a strong signal to others engaged in illegal behaviour that they too might face the same consequences.[50] Despite this, it has been argued that to deter individuals, criminal sanctions and imprisonment is necessary, as noted by Delrahim[51] and Griffin. [52] Failure to implement individual criminal sanctions that may be reimbursed by the company may even encourage the continuation of illegal activity. For example, cartel participants may pass on the penalty to the consumers or write it off as a non-recurring loss[53] or by simply viewing it as a cost of doing business.[54] In that case, they will be least bothered about the consequences. However, by criminalising cartel members, the sanction becomes personal and it is unlikely to pass it on to someone else. Therefore, the optimal deterrence to cartel conduct is considered to be the imposition of individual penalties such as jail sentences, temporary or permanent bans on serving as an officer or director of an enterprise and travel restrictions.[55]

Moreover, criminalising cartel activity requires stronger investigative powers and search techniques to attain higher standards of proof ie., "beyond a reasonable doubt". This would involve greater rights of the accused, the requirement to show "intent" and the possible need of some "direct evidence" in addition to "circumstantial evidence". This

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[49] Tamblyn, J, '*Progress Towards a More Responsive Trade Practices Strategy*', 1993. In P. Grabosky & J. Braithwaite (Eds.), '*Business Regulation and Australia's Future*', Page No. 151-168. Canberra: Australian Institute of Criminology, Trade Practices Act (1974). *Trade Practices Commission v CSR Limited*, 762 ATPR 41-076 (Federal Court of Australia 1991).

[50] *Supra* Note No. 46.

[51] Delrahim, M, '*The Basics of a Successful Anti-cartel Enforcement Program*', Paper presented at the Seoul Competition Forum, Republic of Korea, 2004.

[52] Griffin, J. M, '*Key elements of an effective antitrust leniency policy and criminal penalties and deterrence - the American experience*'. Paper presented at the Competition and Consumer Protection Law Enforcement Conference, Sydney, 2002.

[53] Grabosky, P, Australian Regulatory Enforcement in Comparative Perspective, 1993.In P. Grabosky & J. Braithwaite (Eds.), '*Business Regulation and Australia's Future*', Page No. 9-24, Canberra: Australian Institute of Criminology.

[54] Hammond, S, '*Beating Cartels at their Own Game - Sharing Information in the Fight against Cartels*', Paper presented at the Inaugural Symposium on Competition Policy, Japan, 2003.

[55] *Supra* Note No. 51.

would to some extent make prosecution more difficult, and for this reason, proponents of criminalisation generally propose it as a supplement, rather than a substitute, for civil or administrative fines.[56]

4.2.3.9.3. International Cooperation

"Globalisation goes hand in hand with the internationalisation of cartels. And the more we continue to expose our economies to the world, the greater will be the need for us to work together to fight those who would abuse the opening up of our economies to extort our citizens."[57] The OECD's 1998 Recommendation concerning Effective Action against Hard Core Cartels and the International Competition Network (ICN) have both provided a forum for international cooperation and discussion about issues to do with detection and enforcement of cartels. The United Nations Conference on Trade and Development has also considered the impact of cartels. The OECD has produced a number of reports and recommendations relating to cartels,[58] and covering topics such as effective sanctions and implementation of leniency programs. The WTO Working Group on the Interface between Trade and Competition Policy helped identify several aspects that require international cooperation on competition issues.[59] A working group on cartels was setup by the ICN in 2004 to further explore and study the practical aspects of competition law enforcement at the individual country level.[60]

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[56] See http://www.iadb.org/europe/LACF2005/pdf/IssuesPaper-session1.pdf. Last visited 25th June 2006.

[57] Samuel Graham, Future Work of the ICN, Introduction to the 6th International Cartels Workshop, Third International Competition Network Annual Conference, Seoul, 22 April 2004.

[58] The main reports are Recommendation of the Council concerning '*Effective Action against Hard Core Cartels*', c (98) 35/Final, 13 May 1998, '*Implementation of the Council Recommendation concerning Effective Action against Hard Core cartels: First Report by the Competition Committee*', 1 January 2000, Report on the *'Nature and Impact of Hard Core Cartels and Sanctions Against Cartels under National Competition Laws'* DAFFE/COMP (2002) 7 (9 April 2002): '*Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation*' 15 December 2005.

[59] For a more elaborate discussion on the subject, see Kishwar Khan, 'Competition Policy Issues at the WTO', World Trade Review, August 2001, Islamabad. Also available at http://www.worldtradereview.com/webpage.asp?wID=60. Debriefing on the 5th WTO Ministerial Conference in Cancun, ISLAMABAD (October 11 2003). Last visited 5th November 2006. Also available at http://www.thenetwork.org.pk/pressrelease10-11.htm

[60] *Supra* Note No. 20.

The ICN's Working Group on Cartels basically focuses on the nature and extent of cooperation between ICN members in international cartel cases, on evidence gathering, and on evidence exchange.[61] The ICN has also started a program, which teams up more experienced competition agencies with younger competition agencies. Accordingly, the more experienced agencies can share knowledge and give advice to less experienced competition agencies.[62] The OECD's Third Report of December, 2005 concluded that there had been a trend to legislative changes that had given regulators greater opportunities to cooperate with each other.[63] International cooperation is also strongly encouraged by this Report.[64]

It is becoming increasingly common for international agencies to cooperate in order to investigate against cartels. A recent example of coordinated investigation is the one when Canadian Competition Bureau discovered several producers of rubber chemicals conspiring to fix prices and share customers. Crompton Corporation admitted its participation in international price fixing cartel and a fine of US$9 million was imposed for cartel activity involving meetings, communications about price increases, sales data and customer information. As a result of USA and Canada's cooperation, in the United States, the Antitrust Division imposed penalty over US$100 million in fines. Crompton pled guilty and was sentenced to pay a US$50 million criminal fine. Bayer AG was sentenced to pay a US$66 million fine. Executives from these companies were also charged personally.

While more experienced competition agencies are leading international investigations, other less experienced countries are also coming up. For instance, in case of extra-territorial application of Korean competition law to an international cartel, the Korean Fair Trade Commission in 2002 imposed surcharges of about 11.2 billion won (approximately US$8.5 million), along with a corrective order, on six graphite electrodes

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[61] Preliminary results presented at the ICN Cartel Workshop on 9-10 November 2005.

[62] '*Pilot Project to Share Experience of more Experienced Competition Agencies with Newer Competition Agencies*' ICN News Release, 14 December 2005, see http://www.internationalcompetitionnetwork.org/cpi/Pilot.htm. Last visited 15th June 2006.

[63] '*Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation*' 15 December 2005.

[64] *Ibid*, see also http://www.globalcompetitionreview.com/sr/sr_fullpage.cfm? Page_id=100. Last visited 25th June 2006.

manufacturers involving four Japanese, one German and one from USA. The involvement of several countries in the prosecution can increase the chances of greater fines that act as a greater deterrent. International cooperation and exchange of information is a critical factor in investigating international cartels and those domestic cartels where companies involved have foreign offices. In many cases investigation of international cartels is constrained by the inability of competition agencies to formally exchange information. Nonetheless, informal cooperation can be a very effective contribution to effective competition enforcement.[65]

4.3. HOW EXISTING LAW OF PAKISTAN DEALING WITH CARTELISATION CAN BE IMPROVED?

"Developing countries have been jumping out of the frying pan into the fire by privatising before putting in place independent regulatory regimes, which is bad for both consumers and investors..."[66]

Comprehensive review of the competition law of Pakistan (MRTPO, 1970) in the previous Chapter shows the desirability of modifications. There is a grave need to review the Ordinance to bring it more in line with the domestic economic realities and international norms by strengthening human and other resources of the MCA for effective enforcement. The present Ordinance is substantively the same that was enacted in 1970 but the economic conditions have changed to a great extent. Although the Government set-up various committees/commissions from time to time to review corporate laws. The amendments proposed by these were basically some deletion/improvement in the existing text. What is required is a complete review/repeal of the MRTPO to give it the shape of a competition law, since globalization and liberalization is adding newer and complex aspects to the definition of market structure, services, concentration, etc.[67]

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[65] See website http://www.globalcompetition review.com/sr/sr_fullpage.cfm? Page_id=100. Last visited 13th June 2006.

[66] Pradeep S. Mehta, Secretary General of CUTS, See www.cuts-international.org. Last visited 19th June 2006.

[67] Kishwar Khan, 'Globalization and Competition Policy', in the Proceedings Report of the International Conference on 'Globalization: Pakistan-Japan Economic Relations', 24-25 Oct, 2000, edited by Muhammad Aslam, Ferozesons Publishers, 2003, Islamabad.

Effective competition and consumer protection policies are essential to achieve fair markets and consumer welfare. Developing countries like Pakistan need assistance from developed countries to build capacity in this area and achieve their national social and economic objectives. Consumers all over the world including Pakistan are robbed of billions of dollars each year by cartels and over-charging by dominant firms. Competition agencies of developing countries like Pakistan are making efforts to protect their consumers from these abuses. But they will need cooperation from competition agencies in other countries, where the cartels are usually located. Experts have also agreed that there is no 'one-size-fits-all' in competition policy and law. "An ideal law will fail when you try to put it into practice" said Prof. Hassan Gemei, Vice President of the National Legal Alliance for Consumer Protection of Egypt. It has been widely agreed that each country should shape its competition law to meet its national economic and social conditions.[68] These aspects are further explored in the sections to follow.

4.3.1. Fighting Hard Core Cartels: The Legal Framework

Competition policy is very important for Pakistan where economic development and poverty eradication have to be linked to competition policy and law. A link should be found at the macro and micro levels. It has been pointed out above that the Law regarding cartelization in Pakistan is inadequate and needs to be radically and drastically changed. In Pakistan for an alleged cartel activity to be illegal, it must fall under Section 6 of MRTPO, 1970. The level of fines under Section 19 of the MRTPO, 1970 is not at all a deterrent to cartel activity. Accordingly, any person or undertaking that fails to carry out the directions of MCA or has willfully failed will be liable to pay a one time monetary penalty amounting to Rs100,000/- and additional Rs10,000/- per day till compliance. Therefore, it goes without saying that these penalties need to be reconsidered. Under the present circumstance, the benefit of having a cartel may very well exceed the maximum fine; the cartel members would therefore continue the anti competitive practice. In the absence of

[68] *'Strengthen Consumers to Fight Anti-Competitive Abuses, Cartels'*, Geneva, 13 October 2001, see http://www.cuts-international.org/news-cuts.htm. Last visited 25th June 2006.

any leniency program, businesses do not have any incentive to come forward and cooperate with the competition agency. One very effective approach to penalizing persons who engage in cartel activity is to base fines on total turnover or gross revenue of the cartel members or on the volume of commerce in the duration of cartel. In addition to fining companies, to deter cartel activity it would also be useful to focus on fining or imprisoning persons for their participation. The MCA does not have a leniency program in place but given the fact that the existing level of fines does not encourage whistle blowing, such a program would seem to be almost useless.

MRTPO, do not give the MCA powers of entry, search and to seal off premises. It does not define "premises" and it fails to address the question of search of persons. Given this background, it is viewed that the Ordinance, is deficient in investigating anti-cartel activity. Nevertheless, it could be strengthened by:

- Establishing penalties at a level where they will act as a deterrent. They may be linked to the value of offenders' annual turnover and may exceed the amount gained by the cartel activity.
- Authorizing the sealing off of premises, documents, computers, equipment, etc., during search and raid.
- Extending the power of search to individuals and to personal property, perhaps a stipulation should be made regarding residences.
- Extending the powers of interviewing/ examining persons/ witnesses to the staff who conducts the relevant investigations.

Proving the existence of a cartel agreement is very difficult. Any information, which would constitute circumstantial evidence of the existence of an agreement, is useful. For example, evidence from telephone calls, e.mails and other correspondence showing contact especially when the communication is followed by simultaneous identical action, would be useful. Other indicators such as timing of price movements or similar percentage changes in prices, when considered in isolation, may not be enough to prove cartel. All indicators and various pieces of circumstantial evidence taken together may be sufficient to make a 'concrete' case. Wire-tapping has proven to be a very useful investigative tool in certain jurisdictions. e.g. USA. No criminal sanctions against cartel activity are provided in our law. Criminalisation could be used as a supplement to administrative fines to increase

deterrence even more and provide significantly greater incentives for leniency applications and cooperation.

Although statutory powers exist under the MRTPO, to tackle anti-competitive practices, they need to be strengthened further to a greater extent. Individual sanctions such as temporary or permanent bans on someone proven to be engaged in cartel activity, from serving as a director of an enterprise, or restrictions on travel, are also workable. Government departments and officials do not understand the damage caused by cartels; consequently, they do not support the proposals for strengthening law and investigation by sealing premises, wire tapping and significantly increasing penalties - all are necessary tools in the fight against cartels. This means that the MCA may seek to engage in more serious advocacy.

Weakness in the current law in dealing with various manifestations of cross-border competition concerns both at the national and regional level must be removed. There is a serious need for amending the present competition law. The entire loophole existing in the law that can prolong proceedings against cartels has to be removed. Although a legal system exists in Pakistan but there is a need for implementation of the law in an efficient manner. There is a need to identify areas where further research needs to be done and then carry it forward, such as the interface between intellectual property right's and competition policy is also a missing link.

4.3.1.1. Special Legal Provisions to Check Cartels

As Pakistan liberalises and relaxes its control over market forces, the chances of market abuses also increase. The most harmful of all these abuses are those perpetrated by cartels. What is required, therefore, is a targeted strategy backed by complementary legal provisions. Due to lack of such a strategy and legal provisions, it is not surprising that the MCA, in its history of over thirty years, has detected very few cartels in the domestic market. Manufacturers' association are said to be involved in manipulated prices and cartel activities but the law does not cover the 'association' as an undertaking that can be

searched. The current regime is, therefore, helpless in cracking such destructive and harmful cartels.

To prevent cartel behaviour, the competition agency relies on access to information that is difficult to come by. It needs to have 'carrot' like protection for whistleblowers and leniency for cartel members cooperating with the investigation to balance the 'stick' of fines and prison terms. This has been an effective combination in many countries. Unfortunately, there is no mention of leniency in the MRTPO. More so, the structure of fines given under the Ordinance, has painted all types of conduct with the same brush. On one hand fines could be harsh for abuse of dominance and vertical agreements, while on the other, they may be less for serious abuses like cartels. To be an effective deterrent, fines on cartels should be much higher than the gains from them. The law can be given more muscle by providing for criminal liability in the form of fines or imprisonment. This is followed in many countries including Canada, US, France, Germany and UK.

4.3.1.2 Investigative Tools

The MCA has never conducted a dawn raid and does not have the practical experience in conducting one since the law does not support it. However, it is recognized that where strong sanctions do not exist, the agency has to consider other mechanisms to provide incentives for individuals to leave the cartel. Korea for example, has instituted a monetary reward system. It is unlikely that such a system could be implemented in Pakistan, as there is no budget for such an item of expenditure. Despite the limitations, some of the tools that could be applied in Pakistan are explored in the next sections.

Any firm that goes to the competition agency and provides proofs i.e., an approver in the US is given some leniency. There should be a deal that an approver would be given similar if not the same leniency, in Pakistan also, in return for providing information. But it is argued that this provision would be helpful only if the companies fear the MCA's penalties in case of detection otherwise not.

Publicizing the case in the media, raising questions in the parliament or trying to get information from intermediate producers are other ways in which the case could be taken forward.

4.3.1.3. Searching Premises

Despite not having powers of sealing off, if used correctly, searches can be an effective tool in terms of gaining immediate access to critical information. Warrant to conduct searches can be issued after satisfying the issuing authority that there is sufficient evidence or reasonable grounds to prove cartel agreement. This requires a change in the existing law.

4.3.1.4. High Pecuniary Sanctions

A policy of imposing strong sanctions for cartel conduct is an indispensable part of a successful anti-cartel program. High financial sanctions have become more common in many countries. But in Pakistan, sanctions are not optimal. Pakistan should therefore increase fines for participating in cartels and also to introduce leniency program. In order to enhance both deterrence and the effectiveness of leniency programs, it should also consider introducing and imposing sanctions against individuals, including criminal sanctions. The following measures can pave the way for criminal sanctions:

- Securing broad public support for criminal sanctions.
- Persuading prosecutors and judges that cartels should be criminally prosecuted and criminal sanctions be imposed. For this, close cooperation between competition and public prosecutors is also required.[69]

4.3.2. Independence of the MCA

Operational independence from the Government and internal independence will enhance the credibility and effectiveness of the MCA. To this end it is important that:

- the enforcement, advocacy and decision-making functions are safeguarded preferably by the statute;

[69] Available at http://www.oecd.org/dataoecd/58/1/35863307.pdf. Last visited 25th May 2006.

- there is budgetary and financial autonomy leaving no opportunity for 'financial punishment' by political masters or executive;
- there is a transparent recruitment process for senior office holders and clear terms and conditions for working and removal from office.
- the authority has a mandate for 'free and frank' public comment.
- The authority should be able to hire dedicated specialist expertise, from within and outside of the public sector. Ideally, statute should require that senior office holders are competition experts as opposed to senior beaurocrates.

The World Bank-OECD model law suggests that the enforcement agency should be independent from any government and should receive its budget from (and report to) the legislature or the president of the country. In Pakistan, even though the MCA is *de jure* independent, it is *de facto* prone to government interference because it is dependent on it for its budget. In South Africa and Zambia funds are allocated to the agencies by the legislature and apart from these grants they can receive income from filing fees. These agencies are thus legally and financially independent bodies and not part of any government department. A combination of funds allocated by the legislature and those received from filing fees seems to be the best solution.

The issue of budget of competition agency is equally important. The Government of Pakistan must address this issue and allocate sufficient resources for the effective working of the Authority. MCA can request international donors to finance training and advocacy programs. This would alleviate the strained budget of the MCA without threatening its independence.

Independence of MCA theoretically and practically is very crucial to make it more effective to fight anti competitive practices including cartels. In Pakistan, the case of cement sector is an excellent example to emphasis the importance of independence of a competition authority to fight hard-core cartels. Any interference from the Government must be strongly discouraged if MCA is to play an effective role in keeping competitive environment in market for the benefit of consumers.

As has been experienced in the late 1998's, when cement manufacturers increased the price of cement bags by about 75 per cent overnight, the MCA investigated and discovered a cartel but the Government intervened and despite the MCA's theoretical independence,

its Order was not implemented. The lesson learnt is that not only theoretical independence matters but also that independence in practice is crucial. The MCA, though autonomous in theory, is not insulated from influence in practice. It may be because the Federal Government appoints the members and there is no provision with respect to their qualification. Independence is the key to effectiveness. This is why the developed countries attach much importance to this aspect.

4.3.2.1. Recruitment of experts

The level of expertise, which is required to identify and investigate cartel activity, is not available to MCA. There is a lack of data, expertise, practical experience and resources to conduct a full-scale cartel investigation. Access to expertise in areas such as information technology, engineering, forensic investigation, interviewing skills, search techniques, research methods and expert surveillance, is negligible. The inadequate funding of the MCA does not allow it to access the expertise or to train the staff sufficiently. The number of staff members and the limited nature of their expertise make it difficult to carry out investigations effectively. There is a need to pay higher salaries comparable to the level of private sector, in order to attract skilled personnel and professionals. To attract and retain competent and qualified staff, it is necessary to increase budget in salary and allowance heads.

4.3.2.2. Training

Another area where MCA needs to do something is to improve the skills of MCA's officers. Presently, MCA has a limited staff strength that makes it even more important to upgrade their qualification/understanding. This may take the form of providing refresher courses to the officers especially in the field of investigative techniques and methods to analyze cases relating to unreasonably restrictive trade practices. Visit of resource persons from counterpart organizations may prove beneficial in giving customized training to officers. Case study seminars with focus on competition law enforcement must be

conducted for the staff of MCA. Officials can do internships or study visits to the developed competition agencies.

4.3.2.3. Information Management

Information management and IT should have a central position in the efficient working of an organization like MCA. Upgrading management information section of MCA is very much required. Databases containing market information should be developed and maintained to enable the competition agencies' staff to perform necessary economic analysis in competition cases. It is understandable that the competition agency has to categorise as to what information is confidential and what is not.

In the years to come, the MCA needs to be strengthened in real terms. With the falling of international barriers to trade, the competition policy will perhaps be the most effective means to deal with restrictive practices of transnational corporations and at the same time providing a level playing field to small domestic firms. However, in order to make MCA, discharge its functions effectively and to face international challenges, institutional capacity building is a necessary.[70]

4.3.2.4. Global Networking and Cooperation

No doubt cooperation arrangements can be very beneficial for developing countries like Pakistan particularly when they lack resources and experience to deal with complex restrictive trade practices of multi-national companies. It would provide them with an opportunity to learn and exchange information. This might also reduce jurisdictional disputes. It is a debatable issue as to what would work for the developing countries. Bilateral agreements may give 'superior bargaining position' to the developed country competition agency. In order to boost the concept of cooperation, cooperation provisions may be included in the national competition law. [71] However, developing countries may find it to be another burden over their limited human and other resources.

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[70] *Supra* Note No. 67.

[71] See http://www.cuts-international.org/gva_meeting_report.doc. Last visited 13th June 2006.

Research needs to be conducted by the MCA through external agencies, to solve the problem of insufficient background material and lack of proper analysis regarding international cartels. This would not be prescriptive but would allow agencies to learn from each other. Exchange of experience between developing country agencies would be particularly useful.

It is well acknowledged that a system of international competition law is required to ensure the creation of more open and competitive markets. The question is as to how this could be achieved? The only multilateral instrument on restrictive business practices is UNCTAD Rules, 1980. These rules prohibit price fixing, collusive tendering, market or customer allocation, allocation of production quotas, etc. But these rules are non-binding and have no machinery for enforcement, therefore are not effective.

4.3.3. Competition advocacy

A 'competition culture' needs to be created at all levels. This will help a long way towards effectiveness of the regime. To create such a culture, a broad advocacy program should be undertaken. Strong consumer movement is crucial for competition culture; therefore, coordination between competition watchdog and civil society organizations need to be developed. Media interaction and publicity is a good method for generating awareness.

Open and regular universities and colleges can offer both long term and short term training courses for professionals, economists and lawyers. Business chambers, NGOs, research and training institutions can also be involved in offering such courses. Competition issues need to be part and parcel of law and economics curriculum at institutes of higher education.

It would also be useful for MCA to collect experiences of competition agencies as to prepare 'do and don't list' for advocacy issues. The competition agency and the consumer organisations should make joint advocacy efforts to make the consumers conscious about their rights and harms caused by the cartels. Seminars can create awareness among consumers. Focused workshops for judges and lawyers on competition issues could be

useful. In order to assist in developing relevant jurisprudence, the publication of small handbooks outlining how other jurisdictions have dealt with for instance, 'rule of reason' cases, would be useful.

4.3.3.1. Implications of the Lack of Awareness about Cartels

The lack of awareness about cartels and the harm caused by them is directly and indirectly responsible for many of the difficulties faced by the MCA. Lawmakers, Government officials, business people and the public in general, are not aware of the harm and the activities that may constitute cartel activity. Seminars, workshops and meetings with government officials, members of the judiciary, academia, business groups and professional associations should be included in MCA's annual agenda of activities. Other forms of 'public education' include speeches, radio and television interviews, newspaper articles and periodic newsletters. These activities should contain:

- Information about cartel cases, their background, nature, mode of operation.
- Public statements highlighting the harms of cartels.
- Estimates of the actual or potential damage, and other effects on the economy or even at the political scene such as presence of cartel members in the cabinet.
- An indication of the benefits say fall in prices resulting from breaking cartel.
- MCA may learn lessons from the publication experiences of other countries to publish brochures and create website such as by the United States Department of Justice.

4.3.3.2. Improving Effectiveness of Judiciary to Support Enforcement

Competence of the judiciary and the quality of legal environment is a decisive factor to reap the benefits from competition enforcement. For example, merely the introduction of competition law could not lead to a reduction in restrictive trade practices in some developing countries like Pakistan, due to the absence of proper functioning competition courts. In such a situation, training of the judiciary could contribute towards creating credible competition law enforcement.

To sum up, it is mentioned that Article 38 of Pakistan's constitution makes it incumbent upon the State, i.e. the Federation, to inter alia, secure the well -being of the

people by raising their standard of living, by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest; Clause 2 of Article 151 (clause 1 of which provides for freedom of trade) stipulates that Parliament may impose such restrictions on the freedom of trade, commerce or intercourse between one province and another or within any part of Pakistan as may be required in the public interest.[72] This shows that the Parliament under the constitution has been tasked to protect consumer's interest through freedom of trade. [73]

Briefly, the present law enforcement is based upon "do this, and don't do that". It does not provide for MCA's speedy action against violators. There is a need to have a new competition law, with the following proposed key features:

- It should be preventive in nature while ensuring competition.
- It should ensure a quick response to any market distortion arising from cartelization.
- Penalty should be very high so as to make cartel activity unattractive.
- The penalty now imposed by the MCA is recoverable as "arrears of land revenue" only. It should be changed to a system where the recovery of new bigger penalty may be in the form of a deposit notice; failure to comply may be followed by the attachment of immovable or sale of moveable property. Appointment of a receiver for the management of the movable or immovable property may strengthen recovery provisions along with "arrears of land revenue" process;
- The new law should provide more investigative powers, speedy procedures and greater independence for the MCA, more in line with modern competition laws in the world.[74]

To conclude, it can be argued that there is no universal role model to be followed in the area of competition law and policy. Nevertheless, it is imperative to benefit from the experiences of developed countries having established competition norms as well as the model laws prepared by the UNCTAD and the OECD-World Bank. This will have several advantages in the shape of readymade case law and learning externalities. In any case, it is

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[72] See http://r0.unctad.org/en/subsites/cpolicy/docs/IGE0702/pakistan1.pdf. Last visited 12th June 2006.

[73] Kishwar Khan, 'A Strategy for Consumer Protection in Pakistan', Pakistan Development Review, Vol.35, No. 4. December, 1996.

[74] Article from Dawn newspaper, *'will cement and sugar imports cut prices?'*, By M. Aftab, September 12, 2005, Monday, Sha'aban 7, 1426, See http://www.dawn.com/2005/09/12/ebr3.htm. Last visited 29th June 2006.

necessary to keep into consideration the socio-economic differences among countries. The underlying economic concepts of other jurisdictions may not necessarily match with that of Pakistan. Other countries might be having a different array of economic development goals and resources in hand may also differ. For instance, they have multi-national companies whereas Pakistan, on the other hand is facing financial constraints and low capital base of the businesses and investors.

Law is important no doubt, its proper implementation is equally important too. There may be constraints in the proper functioning of competition agencies such as lack of funds, inadequate information and expertise, etc. To provide for explicit transparency in the rulings of the Authority, the investigative and adjudicatory functions of the MCA should be separated within the organization.

It has been observed during this research work that in almost all the developing countries including Pakistan, competition agencies face difficulties in implementing the competition law. These problems are caused by the lack of institutional capacity. This is aggravated by other factors such as: lack of political will, lack of awareness and indifference of stakeholders. The issues that have been identified in this research work need to be addressed in the new law. The crucial ingredients that will enable to turn the new competition law into an effective one include: adequate finances, expert personnel, effective advocacy, compliance programs, and involvement of academia, institutional capacity building, international cooperation networking and political backing.

BIBLIOGRAPHY

1. *'Advocacy and Competition Policy'*, Report prepared by the Advocacy Working Group International Competition Networks Conference, Naples, Italy, 2002.
2. Australian Competition and Consumer Commission, Cartels web page. Available at: http://www.accc.gov.au/content/index.phtml/itemId/549116.
3. Bundeskartellamt, the Bundeskartellamt and its tasks, at page 5, '*What is a cartel*? Available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/ Broschure111.
4. Canadian Competition Bureau, Pamphlet Series; '*Reaching an agreement with competitors: and Bid Rigging'*, see http://cb-bc.gc.ca/epic/internet/incb-bc.nsf /en/ct01077e.html.
5. Cartel working group: see www.internationalcompetitionnetwork.org.
6. Cassey Lee, '*Model Competition Laws*: *The World Bank-OECD and UNCTAD Approaches Compared'*, Faculty of Economics & Administration, University of Malaya, 10 August 2004.
7. *'Competing Fairly: An Introduction to the Laws on Anti-Competitive Behaviour'*. Available at www.oft.gov.uk .
8. Competition Law Guideline, December 2004, '*Understanding Competition Law, Agreements and Concerted Practices'*. See www.oft.gov.uk.
9. Consumers Unity and Trust Society, *'Pulling up our Socks- A Study of Competition Regimes of Seven Developing Countries of Africa and Asia*: *the 7-up Project*', Consumers India, 2003. Available at www.cuts-international.org.
10. D.K Osborn, '*Cartel Problems'*, American Economic review, vol.66, September 1976, pages 835-44.

11. Canton D.W and D.A Perl Off, *Modern Industrial Organization*, Scott, Foresman / Little Brown Glen view, II, Ch 9, 1990.
12. European Commission, '*Making Sure Companies Play Fair*'. See http://europa.eu.int/comm/competition/publications/consumer_en.pdf.
13. European Commission, '*Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty (98/C9/03) Brussels'*. Available from: http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/c_009/c_00919980114en00030005.pdf.
14. F.M. Scherer and D. Ross, '*Industrial Market Structure and Economic Performance'*, Houghton Mifflin Co, Boston, 1990, Chs. 7 and 8.
15. G.J Stigler, '*A Theory of Oligopoly*', Journal of political economy, vol. 72(1), February 1964, pages 44-61.
16. Glossary of Industrial Organization Economics and Competition Law.
17. Irish Competition Authority, Cartel Watch, '*Guidelines on Cartels: Detection and Remedies'*. See http://www.tca.ie/reports/booklets/cartelwatch.pdf.
18. Khan Kishwar, *'Dealing With Cartels and Horizontal Restraints to Competition: The Case of Pakistan'*, Monopoly Control Authority, Pakistan, 2005.
19. Khan Kishwar, '*Competition issues within and outside WTO*' paper presented in the Experts Advisory Cells' WTO Experts Moot, August 24th, 2004, Islamabad.
20. Khan Kishwar, '*Peer Reviews: an Opportunity to Learn, Modify and Improve'*, World Trade Review, august 15-30, 2004, Islamabad.
21. Khan Kishwar, '*Globalization and Competition Policy'*, in the Proceedings Report of the International Conference on Globalization: Pakistan-Japan Ecionomic Relations, 24-25 Oct, 2000, edited by Muhammad Aslam, Ferozesons Publishers, 2003, Islamabad.
22. Khan Kishwar, *'The Need and State of Consumer Protection in Pakistan'*, Report on Competition Policy and Law: Recent Initiatives, German Foundation for International Development, 2001, Germany.
23. Khan Kishwar, *'Competition Policy issues at the WTO'*, World Trade Review, August 2001, Islamabad.

24. Khan Kishwar, *'A Strategy for Consumer Protection in Pakistan'*, Pakistan Development Review, Vol.35, No. 4, December, 1996.

25. Khan M.S, *'Regulation and Control of Monopolies and Restrictive Trade Practices in Pakistan'*, Royal Book Company, 1992.

26. Khemani R. Shyam, *'Objectives of Competition Policy'*, Competition law and policy Committee of the Organization for Economic Co-operation and Development.

27. **Legislations**:

    i. Australia: Trade Practices Act1974 (No 51 1974) section 45.

    ii. Canada: Competition Act 1985 C-34, sections 45-49.

    iii. Treaty Establishing the European Communities, Article 81.

    iv. Germany: Restraints of Competition Act 1958 (ARC).

    v. Hungary: Competition Act (1996/LVII) Articles 11 and 13.

    vi. India: Competition Act 2002 of India.

    vii. Mexico: Federal Criminal Code and the Federal Law of Economic Competition 1993, Article 9.

    viii. New Zealand: Commerce Act, 1986.

    ix. Pakistan: Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970.

    x. UNCTAD Model Law.

    xi. United Kingdom: the Competition Act 1998 (Chapter 41) section 2 and the Enterprise Act 2002 (Chapter 40) section 188.

    xii. United States of America: the Sherman Act 1890 (15 U.S.C. 1), Clayton Act 1914 of USA.

    xiii. World Bank - OECD Model Law.

28. Mehta Pradeep S and Manish Agarwal, *'Time for a Functional Competition Policy and Law in India'*, CUTS Centre for Competition, Investment and Economic Regulation, January, 2006, See www.cuts-international.org.

29. Mirza Ghafoor, *'Final Report on Review and Identification of Monopolies, Cartels and Restrictive Trade Practices in Pakistan'*, July 2004.

30. Office of Fair Trading, '*Cartels - What is a cartel?*' Available at http://www.oft.gov.uk/Business/Cartels/what+is+a+cartel.htm.
31. OECD's Glossary of Industrial Organization Economics and Competition Law.
32. Organisation for Economic Co-operation and Development (1998), '*Recommendation of the Council Concerning Effective Action against Hard Core Cartels*', 25 March 1998, paragraph I.A.2. Paris, OECD Publications at: http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(98)35.
33. UNCTAD (2003), '*Model Law on Competition*', United Nations, Geneva. World Bank and OECD (1999), A Framework for the Design and Implementation of Competition Law and Policy. World Bank and OECD, Washington, DC.
34. Wilson Joseph, '*Competition Policy at the Crossroads: Making Competition Law Effective in Pakistan*', Spring 2006, Volume 26, Number 3, Northwestern Journal Of International Law and Business, 2006.
35. World Trade Organization (2003), '*Report of the Working Party on the Interaction between Trade and Competition Policy to the General Council*', Geneva, WTO.
36. *Competition related* Websites Consulted:

http://r0.unctad.org/en/subsites/cpolicy/
http://www2.jftc.go.jp/eacpf/01_00.html
http://www.accc.gov.au/content/index.phtml/itemId/142
http://www.oecd.org/document/62/0,2340,en_2649_37463_28753214_1_1_1_37463,00.html
http://repositories.cdlib.org/iber/cpc/
http://www.euractiv.com/cgi-bin/cgint.exe/3766118-570?targ=5&714&1015=9&1014=ld_vertical_restraints&-tt=COVRLD
http://www.europa.eu.int/pol/comp/index_en.htm
http://www.internationalcompetitionnetwork.org/
http://www.worldbank.org/
http://rru.worldbank.org/
http://www.ksg.harvard.edu/hepg/Competitive_Models.htm

http://groups.haas.berkeley.edu/iber/cpc/pubs/Publications.html

http://www.ccr.uea.ac.uk/default.shtml

http://idpm.man.ac.uk/crc/index.html

http://repositories.cdlib.org/iber/cpc/

http://www.gtap.agecon.purdue.edu/resources/res_display.asp?RecordID=317

http://r0.unctad.org/en/subsites/cpolicy/

http://rru.worldbank.org/

http://www.worldbank.org/

http://www.fias.net/

http://www.southcentre.org/publications/competition/competition-04.htm

http://www.cid.harvard.edu/cidtrade/issues/competitionpaper.html

http://www.eldis.org/static/DOC13127.htm

http://idpm.man.ac.uk/crc/compresflowtext.html

http://www.oecd.org/document/62/0,2340,en_2649_37463_28753214_1_1_1_37463,00.html

http://ideas.repec.org/JEL/L10.html

http://www.ciudadanosaldia.org/ci/demo.htm

http://www.globalcompetitionforum.org/africa.htm

http://groups.haas.berkeley.edu/iber/cpc/pubs/Publications.html

http://idpm.man.ac.uk/crc/index.html

http://repositories.cdlib.org/iber/cpc/

http://www.euractiv.com/cgi-bin/cgint.exe/3766118-570?targ=5&714&1015=9&1014=ld_vertical_restraints&-tt=COVRLD

http://www.gtap.agecon.purdue.edu/resources/res_display.asp?RecordID=317

http://www.europa.eu.int/pol/comp/index_en.htm

http://www.cuts-india.org/ (consumer protection/ Competition/ Development)

http://www.cuts-international.org/pdf/PAR-FORE-2-2006.pdf

http://www.consumersinternational.org/HomePage.asp?regionid=152&langid=1

Argentina:

http://www.mecon.gov.ar/cndc/home.htm

Australia:

http://www.accc.gov.au/content/index.phtml/itemId/142

Brazil:

http://www.mj.gov.br/

Canada:

http://strategis.ic.gc.ca/SSG/ct01250e.html

Colombia:

http://www.sic.gov.co/

European Commission:

http://europa.eu.int/comm/competition/index_en.html

Costa Rica:

http://www.meic.go.cr/index2.html

France:

http://www.finances.gouv.fr/conseilconcurrence/

Germany:

http://www.bundeskartellamt.de/

Japan:

http://www.jftc.admix.go.jp/e-page/f_home.htm

Korea:

http://www.ftc.go.kr/

Mexico:

http://www.cfc.gob.mx/

The Netherlands:

http://www.nmanet.nl/nl/

Norway:

http://www.kt.no/

Pakistan

http://www.mca.gov.pk

Panama:

http://www.clicac.gob.pa/

Portugal:

http://www.dgcc.pt/

Spain:

http://www.mineco.es/dgdc/sdc/default.htm

Switzerland:

http://www.weko.admin.ch/index.html?lang=en&PHPSESSID=def0e174cfd4054ca0f0cf1be3c75c01

Taiwan:

http://www.ftc.gov.tw/

United Kingdom:

http://www.competition-commission.org.uk/index.htm

http://www.oft.gov.uk/default.htm

U.S.A.:

http://www.usdoj.gov/atr/

http://www.ftc.gov/

Venezuela:

http://www.procompetencia.gov.ve/
