HORIZONTAL RESTRAINTS AND COMPETITIVE ENVIRONMENT IN PAKISTAN

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HORIZONTAL RESTRAINTS AND COMPETITIVE ENVIRONMENT IN PAKISTAN

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Dedication

I dedicate this piece of work

To the Great Educator

HOLY PROPHET MOHAMMAD (S.A.W)

To my sweet Parents

Syed Shaukat Ali

And

Najm un Nisa

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All Praise is for Almighty ALLAH, Who blessed me with learning and mind to make them work, as they should. It is He, Who has given me boundless affection and depth of feeling for those who need them, whose guidance, help and blessing have always been a great source of encouragement for me.

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PREFACE

This thesis attempts to explain the historical background, overview of Competition Laws of various countries with emphasis on Competition Law of Pakistan. It is divided into four parts. Chapter I attempt to define the concept of competition and horizontal restraints and describe the main forms of such practices as described in model laws of OECD and UNCTAD. Chapter II gives an overview of treatment of horizontal restraints in competition laws of developed and developing countries like United States of America, United Kingdom, Australia and India. Chapter III discusses Competition Law in Pakistan and the effects of anti competitive practices in economic environment of Pakistan. Analysis of the main types of practices belonging to this category and the relevant case law is also discussed Chapter VI contains a short conclusion and recommendations.

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LIST OF ABBREVIATIONS

ACCC	Australian Competition and Consumer Commission
APCMA	All Pakistan Cement Manufacturing Association
CA	Competition Act, 2002
CCI	Competition Commission of India
EA	Enterprise Act 2002
ECC	Economic Coordination Committee of the Cabinet
FTC	Federal Trade Commission Act
IESCO	Electric Supply Company
MCA	Monopoly Control Authority
MRTP Act	Monopolies and Restrictive Trade Practices Act
MRTPO	Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance.1970
OFT	Office of Fair Trading
TPA	Trade Practices Act 1974
UNCTAD	United Nations Conference Of Trade And Development
WB	World Bank
WTO	World Trade Organization

ABSTRACT

The study was conducted to evaluate 'Horizontal Restraints and Competitive Environment in Pakistan'. In a competitive process, suppliers independently offer alternative ways to satisfy buyers' demands. This brings excellent results for consumers and the economy; whereas in horizontal restraints, there are agreements among suppliers to avoid competition with each other. Consequently, the prices elevate and output is decreased. Thus horizontal restraints are detrimental to public interest. Pakistan lags behind the rest of the world, even third world countries, in tackling anti-competitive practices especially horizontal restraints effectively, and needs to improve its regulatory framework to foster competition.

In case of Pakistan, this study recognized a research gap to systematically highlight the issues relating to competition Law, to explore deficiencies in legal provisions, and to chalk out recommendations for improvement in the existing regulatory framework. This has been the major task of this research endeavor.

Against this background, an attempt has been made to evaluate Pakistan's Law relating to restrictive trade practices especially horizontal restraints with reference to competition laws of various countries and with model laws of OECD and UNCTAD. In order to do so, this research did not seek to propose a grand unifying theory that would provide a single test, offering a way to distinguish between practices compatible and incompatible with above mentioned laws with emphasis on Pakistan's law. Instead, an analytical framework has been offered that distinguishes between different categories of practices depending on their effects on competition.

There are certain limitations in Competition Law of Pakistan; some relate to the lack of staffing and budget. Others relate to deficient legal provisions such as 'on the spot search' is not covered in the Law. This is considered to be the most effective way to tackle the horizontal restraints in other countries. The definition of 'services' is limited, major areas of services are outside the 'definition' clause and some of the services are covered under the sector regulators. Hence, Monopoly Control Authority's (MCA) role in

the sectors regulated by sector regulators has been marginalized. MCA can only make recommendations to the Federal Government for suitable governmental actions to prevent or eliminate undue concentration of economic power, unreasonable monopoly power or unreasonably restrictive trade practices. However, in practice this function of 'advice/recommendation' is hampered by the fact that the undertakings lying outside the purview of the Law are not bound to provide any information to the MCA, thus making it difficult to conduct any probing into the sector.

Successful implementation of competition law is, therefore, contingent on certain requisites being in place:

- Competition law is a highly complex area. It calls for a deep understanding and application of economics of competition on a case-by-case basis. It has to be demonstrated exactly how the overall market structure is going to be distorted by the anticompetitive horizontal restraints. The sophistication required is critical as wrong evaluations can drive decisions the wrong way.
- A high degree of economic and legal sophistication on the part of the enforcement agency and on the part of the courts and/or specialised tribunals that have judicial functions in the implementation of competition law.
- Training a core of enforcement experts to confidently handle such tasks is difficult. An even more Herculean task is the required retraining of a judiciary woefully ignorant of economics to competently adjudicate competition cases.
- A powerful enforcement agency insulated from political, bureaucratic and budgetary constraints can make a real difference in the implementation of competition law. High level of transparency, administrative and judicial independence is other necessary pre-requisites.

- Adequate financial resources are essential to marshal the necessary technical and professional expertise in assessing and prosecuting contravention to the Law.

CHAPTER 1

COMPETITION LAW AND HORIZONTAL RESTRAINTS

1.1. COMPETITION

Competition is a rivalry between individuals (or groups or nations), and it arises where two or more parties strive for something that all cannot obtain[1].The ability of rivals to seek out and compete away supernormal profits, unless prevented by legal obstacles, was previously believed to be the basic reason for the pervasiveness of competition[2]. The concept of perfect competition, or indeed any theoretical precise concept of competition, is not met by the actual conditions of competition in any industry. John Maurice Clark made the most influential effort to create a concept of workable competition that would serve as a working rule for public policies that seek to preserve or increase competition[3].Competition includes the concept of 'dynamic efficiency' by which firms engage in innovation and foster technological change and progress[4]. Fostering competition can be highly desirable in terms of policy making or theoretically, but economists argue that the goal of competition policy is not perfect competition, but a more realistic workable competition[5]. Competition laws around the world pursue this form of competition. Competitive markets are more likely to provide the poor with opportunities to be employed or start their own small businesses. This is because

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[1] *The New Pal grave A Dictionary of Economics*, Vol.1, Pal grave Macmillan, s.v. "Competition".p.531
[2] Ibid.,p.532
[3] Ibid. p. 535; and *Glossary of Industrial Organization Economics and Competition Law*, s.v. "Workable Competition", OECD.
[4] *Glossary of Industrial Organization Economics and competition Law*, s.v."Competition"
[5] Ibid., s.v. "Perfect Competition"

competition creates an enabling environment to unleash creative energies of entrepreneurs and productive forces of society, and thereby expand opportunities for gainful employment. Therefore, market-oriented economic reform is expected to help achieve the policy objective of generating more employment opportunities[6].

Further, competitive markets facilitate wider choice of goods and services for consumers at lowest possible prices and best quality. Competition creates environment for firms to minimize their costs and pass on the cost reductions to consumers. In this way, consumers, especially the poor, can get value for money[7].

1.2. COMPETITION LAW

Competition law[8] refers to a field of economic policy and law dealing with cartels, monopolies and other anti-competitive practices. The intellectual basis for competition economics or policy is found in the sub field of industrial organization economics that addresses issues arising from firms' behavior operating under different market structures and their economic performance[9]. Antitrust or competition laws promote economic and business competition by prohibiting anti-competitive behavior and unfair business practices. Government agencies known as competition regulators enforce antitrust laws, and may also be responsible in some case, for regulating related laws dealing with consumer protection[10]. Term antitrust law or antitrust policy is used in the United States. Some countries have utilized the phrases Fair Trading or Antimonopoly law.

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[6] Pradeep S Mehta and Manish Agarwal, *Time for a Functional Competition Policy and Law in India*, CUTS International, January, 2006.
[7] Ibid
[8] Names of competition laws around the world are given in Table A
[9] s.v."Antitrust", *supra* note 4.
[10] See "http://en.wikipedia.org/wiki/Antitrust" URL accessed on March 15, 2006.

1.2.1. *Rationale of Competition Laws*[11]

Well-functioning market is a key factor that can make a significant contribution towards economic development. The point is that a market-oriented economy has the potential to deliver goods, if it functions properly and is allowed to do so. This raises two important issues:

Firstly, what factors hamper the proper functioning of markets?

Secondly, what measures are required to make the markets function well?

Briefly, the factors that hamper proper functioning of markets include the practices by the firms or governments that deter market entry/exist. At the firms' level, these may be in the form of predatory pricing, abuse of dominance, cartelization to fix prices, etc. Subsidies, waivers and protection are some of the governmental actions that affect the markets. The measures required to correct the situation cover the Antitrust laws prohibiting a wide range of practices relating to agreements in restraint of trade, monopolization and attempted monopolization, anticompetitive mergers/ tie-in schemes, and, in some circumstances, price discrimination in the sale of commodities.

1.2.1.1. Consumer Benefits

Efficiency-oriented economists argue that antitrust legislation should benefit consumers through reduced prices, better product diversity, and thus more choices. Furthermore, as the market power of large cartels is reduced, they are forced to pay more attention to the needs and wishes of individual customers. These economists largely ignore the political issues that motivated the laws in the first place.

[11] See *supra* note 10

1.2.1.2. Protection to Small Business

Anticompetitive agreements among competitors, such as price fixing and customer and market allocation agreements are typical types of restraints of trade proscribed by the antitrust laws. These types of conspiracies are considered pernicious to competition and are generally proscribed outright by the antitrust laws. Resale price maintenance by manufacturers is another form of agreement in restraint of trade. Other agreements that may have an impact on competition are generally evaluated using a balancing test, under which legality depends on the overall impact of the agreement.

Monopolization and attempted monopolization are offenses that may be committed by an individual firm, even without an agreement with any other enterprise. Unreasonable exclusionary practices that serve to entrench or create monopoly power can therefore be unlawful. Allegations of predatory pricing by large companies can be the basis for a monopolization claim, but it is difficult to establish the required elements of proof. Large companies with huge cash reserves and large lines of credit can stifle competition by engaging in predatory pricing; that is, by selling their products and services at a loss for a time, in order to force their smaller competitors out of business. With no competition, they are then free to consolidate control of the industry and charge whatever prices they wish. At this point, there is also little motivation for investing in further technological research, since there are no competitors left to gain an advantage over.

High barriers to entry such as large upfront investment, notably named sunk costs, requirements in infrastructure and exclusive agreements with distributors, customers, and wholesalers ensure that it will be difficult for any new competitors to enter the market. The trust will have ample advance warning and time in which to either buy the competitor out, or engage in its own research and return to predatory pricing long enough to force the competitor out of business. Another entry barrier, generally in case of

developing countries, is the small size of market, which may restrain entry of many firms[12].

1.2.1.3. Efficient Allocation of Resources

In a competitive market economy, price (and profit) signals tend to be free of distortions and create incentives for firms to redeploy resources from lower to higher valued uses. Decentralized decision making by firms promotes efficient allocation of society's scarce resources, increases consumer welfare, and gives rise to dynamic efficiency in the form of innovation, technological change, and progress in the economy as a whole.[13]

1.3. SCOPE OF COMPETITION LAW

The scope of competition law specifies the entities (enterprises, natural persons etc.) to which the law applies. It can also specify any exclusion from the law. (Excerpts from the WB-OECD and UNCTAD model competition laws are presented in Appendix A).

Typically, competition law covers all commercial economic activity in its myriad forms. These include actions, transactions, agreements and arrangements involving goods, services and intellectual property. Both the WB-OECD and UNCTAD model laws have this basic statement.

1.3.1. *Scope of Competition Law as Defined by UNCTAD Model Law*[14]

The UNCTAD model law includes:

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[12] In case of Pakistan, an instance may be the PTA plant of the ICI that is large enough to meet the requirements of the industry.

[13] R. Shyam Khemani, *Objectives of Competition Policy*, Competition law and policy Committee of the Organization for Economic Co – operation and Development.

[14] *Pulling Up Our Socks*, Cuts,p. 83; See www.cuts-international.org URL accessed on 25th March 2006

- All enterprises, in regard to their commercial agreements, actions or transactions regarding goods, services or intellectual property.
- Applies to all natural persons who, acting in private capacity as owner, manager or employee of an enterprise, authorize, engage in or aid the commission of restrictive practices prohibited by the law.
- Does not apply to the sovereign acts of the State, to acts of local government, or to acts of persons compelled or supervised by the State or local government.

In its model competition law, UNCTAD includes 'natural persons' (as distinct from and in addition to enterprises) as a separate entity to which the law applies to. Such natural persons include owner, manager or employee of enterprises. UNCTAD also excludes all acts of the State and State-related agencies from the application of the competition law. However, the discussions in UNCTAD suggest that the inclusion or otherwise of state-owned enterprises may differ from country to country[15].

1.3.2. *Scope of Competition Law as Defined by WB - OECD Model Law*

The WB - OECD model law includes[16]:

- All areas of commercial activity.
- Does not derogate the privileges and protection conferred by other laws protecting intellectual property but it does apply to the use of such property in such a manner as to cause the anti competitive effects prohibited in the competition law.

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[15] *'Model Law On Competition - Substantive Possible Elements For A Competition Law, Commentaries And Alternative Approaches In Existing Legislations'*, UNCTAD Series on Issues in Competition Law And Policy, Geneva, 2004.

[16] http:www.competition-regulation.org.uk/conferencesouthafrica04/lee.pdf URL accessed on 25th March 2006

- The WBOECD model law includes acts done outside the country but have substantial effect in the country. It also excludes workers and employees union-related activities.

The extra-territorial element in the WB-OECD model law is an interesting one. While relevant, it remains to be seen how such provisions can be enforced particularly in small developing countries. Unlike UNCTAD, WB-OECD defines 'firms' as including natural persons. The exclusions related to the State that is provided for in the UNCTAD model law also requires careful considerations. Developing countries may pursue development strategies that require significant state intervention in the economy that may compromise competition (at least in the short and medium term). Even if such strategies are to be pursued and State-related acts are excluded in the competition law, some mechanisms of consultation (with the competition authority) should be implemented, at the very minimum[17].

1.4. RESTRICTIVE AGREEMENTS AS HORIZONTAL RESTRAINTS

Transactions between firms are often governed by implicit or explicit agreements amongst themselves.

1.4.1. *Classifiscation of Agreement*

Agreements among firms are basically of two types, horizontal and vertical[18]:

Horizontal Agreements - are concluded between firms engaged in the same activities or line of business i.e. between producers or between wholesalers or between retailers dealing in similar kinds of products.

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[17] Cassey Lee, *Model Competition Laws: The World Bank-OECD and UNCTAD Approaches Compared*, Faculty of Economics & Administration, University of Malaya, 10 August 2004

[18] see UNCTAD(2003), p.20

Vertical Agreements - are concluded between firms at different stages of the manufacturing or distribution process (i.e. between an upstream firm and a downstream firm- enterprises at different stages of the manufacturing and distribution process, for example, between manufacturers of components and manufacturers of products incorporating those goods, between producers and wholesalers, or between producers, wholesalers and retailers.

Such agreements tend to be 'restrictive' as they reduce the independence of firms involved to undertake alternative business decisions. When such agreements significantly lessen competition, they are said to be 'anticompetitive'.

1.4.1.1. The Meaning of Agreement

The importance of definitions in competition law becomes apparent in the process of enforcing a competition law. Characterizations and measures of market structure depend on the definitions employed in the law. Definitions can be set out either as either general type of definitions in the initial part of the statute or more specifically in the relevant sections of the statute.

Agreement usually has been defined to include any arrangement or 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 fall within the definition of the word 'agreement'[19].

1.4.1.2. Purpose of Agreement

To declare an agreement 'unlawful', the proof is sought that an agreement was undertaken for the purpose of substantially lessening competition in a relevant market. The reason being that there could be other purposes of agreements as well i.e., technology transfers, R&D agreements, etc.

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[19] See an Explanatory memorandum on the law on regulation and prevention of Monopolies and cartels, Government of Pakistan, Ministry of Finance. 1983, Islamabad.

1.4.1.3. Effect of Agreement

For the agreement to be investigated as being anti-competitive, it may have or is likely to have the effect of substantially lessening competition by:

- A secret cartel between competing firms governing prices or market shares;
- A pricing regime pursued by a dominant firm not with the requirements of the market in mind, but with a view to driving a smaller competitor out of the market ("predatory pricing");
- A dominant firm's refusal to supply;
- A distribution system which rigidly divides the nationwide market into separate territories and which prevents parallel imports of the contract product.

1.4.2. *The Five Major Types of Restrictive Agreements Identified in the WB-OECD and UNCTAD Model Competition Laws* (Excerpts from the WB-OECD and UNCTAD model competition laws are presented in Appendix B).

1.4.2.1. Price Fixing[20];

This refers to a situation, when companies[21] collude to set prices, effectively dismantling the free market.[22]Methods of price fixing include the following agreements to:[23]

- adhere to a price book.
- engage in cooperative price advertising.

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[20] Includes tariffs, discounts, surcharges and any other charges. See *supra* note 17
[21] The terms businesses, companies and firms are used interchangeably in the text.
[22]See http://en.wikipedia.org/wiki/Anti-competitive_behaviour URL accessed on July15, 2005.
[23] Ibid.

- standardize credit terms offered to purchasers.
- use uniform trade-in allowances.
- limit discounts.
- discontinue free service or to fix any other element of prices.
- adhere to previously announced prices and terms of sale.
- establish uniform costs and markups.
- impose mandatory surcharges.
- reduce output or sales.
- Share markets, territories, or customers.

1.4.2.2. Quantity Fixing[24];

A firm with market power has the ability to individually affect either the total quantity or the prevailing price in the market. If the demand curve is downward sloping (that is, the most common situation where price increase lead to a lower quantity demanded), then the decrease in supply as a result of the exercise of market power creates an economic deadweight loss in comparison with a situation of perfect competition. This is often viewed as socially undesirable, and as a result, many countries have anti-trust or other legislation with the aim of limiting the ability of firms to acquire market power or to abuse this power.

1.4.2.3. Market Allocation;

Where companies collude to allocate market with reference to geographic region or customer allocation. They distort the free functioning of market.

1.4.2.4. Refusal to Deal;

Partial or complete refusal to deal on an enterprise's customary commercial terms; where a retailer or wholesaler is 'tied' to purchase from a supplier.

[24] See http://en.wikipedia.org/wiki/Market_power URL accessed on July15, 2005.

1.4.2.5. Collusive Bidding / Tendering;

Bid rigging is sometimes regarded as price fixing. If no individual participant in the market has significant market power, then anti-competitive behavior can take place only through collusion, or the exercise of a group of participants' collective market power[25].

With the exception of collusive bidding, all the above agreements can take place either horizontally or vertically. The term 'vertical restraints' is also used to denote the various types of restrictive vertical agreements such as retail price maintenance (a form of price fixing), quantity forcing (quantity fixing), exclusive dealing (manufacturing firm prohibits distributor firm dealing with competing products or distributors, subject to threat of refusal to supply), and tying (also subject to threat of refusal to supply).

While both the WB-OECD and UNCTAD model competition laws are in agreement on the types of restrictive agreements, there are some differences in terms of the provisions for:

1. Horizontal vs. vertical restrictive agreements; and
2. per se vs. rule of reason prohibitions.

The WB-OECD model law makes an explicit distinction between prohibitions subjected to per se illegality and rule of reason.

1.4.3. *Horizontal Restrictive Agreement in the Model Laws That are Subject to Per Se Illegality*[26]

In the model law, horizontal restrictive agreements (i.e. agreements between competitors) that are subjected to per se illegality include:

1. Price Fixing;
2. Quantity Fixing;

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[25] See http://en.wikipedia.org/wiki/Market_power URL accessed on July15, 2005.
[26] See *supra* note 17

3. Market Allocation;

4. Refusal to Deal;

5. Collusive Bidding / Tendering; and

6. Elimination of actual or potential sellers or purchasers from the market.

Restrictive agreements other than those listed above are subjected to rule of reason.

1.4.4. *Application of Rule of Reason*

The application of rule of reason comprises the following two elements:

1.4.4.1. A Threshold Criteria

There are two forms of threshold criteria, though these relate to the structure of the industry rather than the behaviour.

1.4.4.1.1. *For Competing Firms* (i.e. horizontal agreement)

The restrictive agreement may significantly limit competition if shares of the firms participating in the agreement collectively exceed 20 percent of a market affected by the agreement.

1.4.4.1.2. *For Non-Competing Firms* (i.e. vertical agreement)

The restrictive agreement cannot be found to significantly limit competition unless:

i. At least one of the parties holds a dominant position in a market affected by the agreement; or

ii. The limitation of competition results from the fact that similar agreements are widespread in a market affected by the agreement.

1.4.4.2. A Cost-Benefit Comparison

A cost-benefit comparison between 'the effects of any limitation on competition that result or are likely to result from the agreement' and 'gains in real as opposed to

merely pecuniary efficiencies', applying either a total welfare standard (giving equal weight to consumers and producers) or a consumer welfare standard.

The rule of reason also relates to the exemption of such restrictive agreements with the provision that "the burden of proof lies with the parties seeking the exemption". The treatment of restrictive agreements is somewhat simpler in UNCTAD's model competition law. There is a list of restrictive agreements that are prohibited but any of these may be exempted or authorized if it can be shown that it will produce 'net public benefit'. As a result of UNCTAD's emphasis on exemptions, there is an extensive discussion on exemptions and authorizations in its model competition law document.

Even though the UNCTAD's model law does not make the distinction between horizontal and vertical agreements and between per se and rule of reason, such differences are discussed in the context of selected country experiences.

In general, restrictive horizontal agreements tend to be considered more serious than restrictive vertical agreements. Therefore, restrictive horizontal agreements particularly cartel agreements tend to be considered per se illegal in some countries (e.g. in the United States) while restrictive vertical agreements are mostly subjected rule of reason.

1.5. COMPETITION AUTHORITIES AND COMPETITION ADVOCACY [27]

To deal with anti-competitive practices including horizontal restraints, there are almost 100 competition agencies in the world enforcing competition law[28]. More than half of them introduced or improved the laws during the last decade of the 20th century (Competition legislation in the United Nations Member States and other entities are given in Table B[29]). These competition agencies differ with reference to their

[27] See *supra* note 17
[28] The term competition agency and authority are used interchangeably in the text.
[29] UNCTAD Data Bank on National Legislation,See www.unctad.org/competition

institutional set-up, the competition regime they enforce, their organizational structure, the degree of autonomy of decision making, etc.[30] This makes their comparison a difficult task and there are hardly any one-fits-all solutions for the problems they face. It is difficult to define the degree of independence of a competition authority.

Moreover, independence can be interpreted in legal, political and economic as well as in factual terms. How independent is an agency that has to struggle each year to obtain the funds necessary to carry out its mission? Or when its head can be dismissed any time? At the other extreme, even in the absence of formal autonomy it is considered that competition authorities should have sufficient powers to advice other public entities on their legislative and regulatory programs both ex-officio and upon request and to make comments on restrictions imposed on competition by any law, regulation or administrative ruling.

The Steering Group of the International Competition Network (ICN) decided to undertake a study on competition advocacy with the purpose of analyzing its relevance in fostering competitive markets and promoting social welfare.[31]

In this report the following definition of competition advocacy was adopted:

> "Competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition."

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[30] These competition agencies vary with reference to their size also. For instance, there are about 500 employees in Australia, Korea and Canada. Ukraine, UK and United States of America have a staff of about 800. Russian Federation has a big strength of 1810. Even Colombia has 228 persons. However, the staff strength may depend upon the economic requirements of a country yet it shows the level of priority 'competition' gets in the governments' economic agenda. Most of the agencies extensively utilize skills of economists and lawyers for evaluation of cases.

[31] *'Advocacy and Competition Policy'*, Report prepared by the Advocacy Working Group ICN's Conference Naples, Italy, 2002.

CHAPTER 2

TREATMENT OF HORIZONTAL RESTRAINTS IN COMPETITION LAWS OF DEVELOPED AND DEVELOPING COUNTRIES: AN OVERVIEW

Competition and liberalisation are considered essential to unleash the entrepreneurial forces in the economy. Arguably, free and fair competition is one of the pillars of an efficient economy. Competition stimulates innovation and productivity and leads to optimum allocation of resources. These have been reflected in higher GDP growth, the growing diversity of the goods and services in the market, and setting of prices in a competitive manner.

However, in an open market economy, some enterprises may undermine the market forces by resorting to anti-competitive practices for short-term gain e.g. they may form cartels, or big companies with market power which may resort to extortionist or predatory pricing. These practices can completely nullify the gains from competition. Thus there is a need for a competition law to discipline such behaviour when it takes place. It is for this reason that, while countries across the globe are increasingly embracing market economy, they are also involved in regulatory reform through enactment of competition law and setting up competition regulatory authorities. Several countries have done this much earlier than Pakistan. Today over 90 countries have a new competition law and a new competition authority.

The earliest competition legislation was in the United States in the shape of the Sherman Act enacted in 1890. The Clayton Act, in 1914 and the Federal Trade Commission Act in 1914. The Federal Trade Commission was set up as a market watchdog with the power to take action against violations of these Acts.

In the European Union, the historic Treaty of Rome, which led to the formation of the European Union, contained the famous two Articles 85 and 86 which constitute the competition law of the European Union and whose objective was that

while the European markets were to be integrated into a single economic market, this common market was to be clearly governed by 'effective competition'.

In the United Kingdom, the Monopolies and Restrictive Trade Practices (Inquiry and Control) Act was enacted in 1948. It was latter on repealed. Presently, there are three main statutes in the UK's competition regime: firstly, the Competition Act, 1998. It came into force in the year 2000 and repealed the Restrictive Trade Practices Act and Competition Act of 1980. This legislation deals with the anti-competitive agreements and practices. Secondly, the Fair Trading Act, 1973 which deals with monopolies, mergers and fair-trading. Thirdly, the Enterprise Act, 2002 that brings about reforms and amendments in the above statutes and describes enforcement mechanism relating to competition.

Now we will discuss how competition has been promoted through competition regimes in selected foreign countries namely, the UK, the USA, Australia and India.

2.1. AUSTRALIA

2.1.1. *The Primary Statutory Source of Antitrust Law in Australia*

The Trade Practices Act 1974(TPA)[1] is the primary statutory source of antitrust law in Australia. Although Australia, like the United States and Canada, has a long history of antitrust law, a successful constitutional framework for competition law was not devised until 1972. This legislation was enacted by the Labor government in the Federal Parliament in 1974 and is, according to some commentators, predicated largely on U.S. precedent[2]. The Act performs a variety of functions; most importantly, it encourages competition within the market (i.e. through the antitrust provisions) and prohibits misleading or deceptive conduct.

2.1.2. *Application of the Act:*

The Trade Practices Act (TPA) is an act of the Parliament of Australia, section 51 of the Australian Constitution (which sets out the division of powers between the federal and state parliaments) restricts the application of the doctrine in a number of ways. Most of the TPA is drafted to apply only to corporations, thus relying on

[1] The full text is available at http://www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/.
[2] Baxt and Brunt, *The Murphy Trade Practices Bill: Admirable Objectives, Inadequate Means*, 2 Austl. Bus. L. Rew. 3 (1974).

Section 51(xx). Some parts of the TPA have a broader operation, relying for instance on the telecommunications power (Section 51(v)) or the territories power.[3]

2.1.3. *Legal Provisions Relating to Restrictive Trade Practices* :[4]

2.1.3.1. Aim of Restrictive Trade Practices Provisions in the Trade Practices Act:

The restrictive trade practices provisions in the Trade Practices Act are aimed at deterring practices by firms that are anti-competitive in that they restrict free competition. The competition provisions of the TPA regulate anticompetitive arrangements and understandings (referred to collectively as agreements) which have the purpose, effect, or likely effect of substantially lessening competition[5].

2.1.3.2. Enforcement of the Act:

The Australian Competition and Consumer Commission (ACCC) can litigate in the Federal Court of Australia, and seek pecuniary penalties of up to $10 million from corporations and $500,000 from individuals. Private actions for compensation may also be available.

2.1.3.3. What is Prohibited?

The provisions of the Act prohibit:

- Most Price Agreements
- Primary boycotts (an agreement between parties to exclude another)
- Secondary boycotts whose purpose is to cause substantial lose or damage or lower competition (Actions between two persons engaging in conduct hindering 3rd person from supplying or acquiring goods or services from 4th)
- Misuse of market power – taking advantage to eliminate or damage actual or potential competitor, preventing entry, or lowering competition.
- Exclusive dealing – attempt to interfere with freedom of buyers to buy from other suppliers

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[3] See http://en.wikipedia.org/wiki/Trade_Practices_Act_1974 URL accessed on March 3rd, 2006

[4] Ibid.

[5] *Competition Laws Outside the United States*, Section of Anti-Trust Law, American Bar Association, 2001.p. 8-9

- Third-line forcing: Supply goods or services on condition that acquire goods/services from another supplier even a related company
- Resale price maintenance – fixing a price below which resellers cannot sell or advertise.

2.1.3.4. Exceptions Granted under the Act:

There are some exceptions to these provisions that allow the ACCC to authorize these agreements/activities if there is sufficient disclosure to the ACCC and it is in the public interest. There are procedures that must be followed and some legislative requirements in the Act.

This part of the Act also gives the ACCC supervisory powers over mergers, requiring that some mergers be in the public benefit.

2.1.3.5. Grounds for Prohibition:

Section 45 of The TPA prohibits contracts, arrangements, or understandings (referred to hereafter as agreements) that have the purpose of substantially lessening competition. Section 45 is said to deal with horizontal agreements, though it also covers vertical arrangements dealing with exclusionary provisions. Vertical agreements or practices are generally regarded as being regulated by Section 47 of the TPA, which deals with exclusive dealing[6].

Under the scheme of the TPA, Section 45 "gives way" to more specific provisions dealing with resale price maintenance (Section 48), and acquisitions of shares or assets (or the "merger" section, as it is sometimes referred to ----Section 50)[7].

2.1.3.5.1. *Necessary Elements to Prove Breach:*

For other intents and purposes, for a breach of section 45 to occur, the following elements must be present:

- There must be some kind of agreement; and

[6] *Competition Laws Outside the United States*, Section of Anti-Trust Law, American Bar Association, 2001.p. 32-33

[7] Ibid

- The agreement must be formed with the purpose, the effect, or the likely effect of substantially lessening competition in a relevant market.

2.1.4. *Definitions of Some Commonly used Terms in Relation to Horizontal Restraints*[8]

The definitions of selected terms that are used in relation to horizontal restraints are described below.

2.1.4.1. Competition:

In determining the level of competition, the following factors should be considered:

- The number and size of the sellers
- The ease with which new competitors may enter the market.
- If prices can be raised and nothing else is changed, would the enterprise lose sales? If the answer is yes, there is likely competition.

2.1.4.2. Agreement, Arrangement or Understanding

Agreements, arrangements or understandings need not be in writing, nor be legally enforceable. All there need be is communication with another person from which each person has an expectation of how the other will act.

A "nod and a wink" is sufficient.

2.1.4.3. Purpose of Agreement

The purpose need not be a sole purpose but must be a substantial purpose which will be inferred from the nature of the arrangement, the circumstances in which it was made and its likely effect.

2.1.4.4. Market

In determining the market, one question the courts ask is if a supplier "were to give less and charge more: would there be much of a reaction? If so, from whom? If

[8] see http://www.adm.monash.edu.au/tpa/restrictive-tp.html URL accessed on March 3rd, 2006

the response was a shift from one product to another, these products may be in the same market.

There are three dimensions to be taken into account when defining the market:

- The product market:
- The geographic market; and
- The Functional level.

2.1.4.5. Market Power

One way to determine market power is to look at the ability of a corporation to raise prices above product cost without rivals taking away customers.

Although a large market share may be evidence of market power, the ease with which competitors are able to enter the market should also be considered. When it is not rational or possible for new entrants to enter the market then a corporation may be said to have market power.

2.1.4.6. Product

Reference in this part means goods, services, or both.

2.1.4.7. Substantial

The word "substantial" is used in a relative sense. It may mean "large or weighty", "considerable or big", and must be "real or of substance" and not "insubstantial or nominal".

2.1.5. *Horizontal agreements in TPA*

2.1.5.1. Price Fixing

In Australia, price fixing is treated as a *per se* violation of the competition laws. Specifically, price fixing constitutes a per se violation of section 45 of the TPA, pursuant to section 45A. Section 45A deems price fixing as conduct that substantially lessens competition for the purposes of section 45. Any provision of any (actual or proposed) agreement that has the purpose, effect or likely effect, of fixing, controlling or maintaining the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired by any of the parties where they are competitors is deemed under Section 45A to substantially lessen competition, thus violating section 45.

All parties to a violative agreement do not need to be in competition with each other, but at least two of the parties must be competitors[9]. Parties are deemed to be in competition where they would be, or would be likely to be in competition but for the (actual or proposed) provision of any (actual or proposed) agreement under section 45a (8). The section extends to the resupply of goods when the original supply is from the parties to the agreement[10]. The offence of price fixing must be pleaded specifically[11].

It is substance rather than the form of the understanding that is important, as is made clear by Section 45A (5). How it is fixed or for how long need not be important[12]. The fixing of price need not be permanent; however, it must be seen to have an element of continuity rather than for a period, that is "instantaneous or merely ephemeral."[13]

Radio 2Ue Sydney Pty. Ltd. V. Stereo FM Pty. Ltd. [14]is sometimes cited as a case that recognized a 'rule of reason' approach to an allegation of price fixing. However, that evaluation has not received much support. In the case, two radio stations, stereo FM and another FM station, competed to provide airplay for advertisers. They agreed to provide a joint advertising card for people who wished to advertise on both stations. The price charged was the sum of both parties' rates. There was no consultation between the parties as to those rates and revenue was divided according to each party's share of the combined rate. Radio 2UE sought injunction to stop this. It claimed price fixing in breach of section 45. The application was dismissed at first instance. Judge Lockhart found that none of the elements of price fixing was present: each party fixed its own rate and customers were free to deal with each party independently. The arrangement was regarded as a lawful supplementary option to the normal advertising deals. This conclusion was upheld on appeal[15].

Another case which declined to find price fixing was *Trade practices Commission v. Services Station Association ltd*[16]. The association began an educational campaign to teach petrol operators how to run their businesses profitably.

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[9] Trade Prac. Comm'n v. David Jones (Austl.) Pty. Ltd., 13 F.C.R. 446. 473 (1986)(Fed. Ct.)
[10] See TPA sec 45A(7)
[11] ACCC v. Mobil Oil Austl. Ltd., A.T.P.R. 41 – 568 (1997) (Fed. Ct.)
[12] Trade Prac. Comm'n v. Parkfield operations Pty. Ltd., 5 F.C.R. 140 (1985) (Fed. Ct.)
[13] Radio 2Ue Sydney Pty. Ltd. V. Stereo FM Pty. Ltd; 44 A.L.R. 557 (1982) (fed. Ct.)
[14] 48 A.L.R. 361 (1983) (Full Fed). Ct.)
[15] see *supra* note 14
[16] 44 F.C.R.206 (1993)

The program was begun in response to cut – throat competition by virtue of which profit margins had been driven below sustainable levels. The campaign pushed a minimum profit margin of 10 percent. The TPC argued that this amounted to price fixing notwithstanding that the prices were not uniform. Judge Heerey held that this did not amount to price fixing because the operators had the final say in setting their own prices, depending on the profit required. He also stated that, in the circumstances, where consumers had mobility and there was no brand loyalty, the fact that there were differences in price from operator to operator also supported the conclusion that there was no price fixing. The court acknowledged, however, that it is possible to violate section 45A without setting a specific price[17]. The decision was upheld on appeal[18].

McPhee & Son (Australia) Pty Ltd

On 27 March 1998, Justice Heerey of the Federal Court imposed penalties totaling $4 million on J McPhee & Son (Australia) Pty Ltd and four of the company's executives in relation to price-fixing in the freight industry. The Court found that McPhee and three of its executives had attempted to reach a collusive tendering arrangement with a competitor, Discount Freight Express (DFE), in 1995. A penalty of $3 million was imposed on McPhee for this incident. A director of the company, was penalised $100000; the General Manager, $60 000; and the Business Development Manager, $80 000.

H O Wills (Australia) Ltd & Brenton Porter

On 23 February 1998, the Federal Court imposed penalties of $250 000 on cigarette manufacturer WD & HO Wills (Australia) Ltd for its role in an attempted price fix of cigarettes. The Court accepted joint submissions on injunctions and penalty for breaches of the TPAct by Wills and a small delicatessen owner. The Court ordered that Wills pay a penalty of $250 000, pay $30 000 toward the ACCC's costs, refrain from repeating the conduct, revise its existing trade practices compliance program, and write to of its customers in South Australia informing them of their respective obligations under the Act. The delicatessen owner also consented to an injunction and agreed to contribute toward the ACCC's costs.

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[17] The finding of price fixing in Trade Practices Commission v. park field Operations Pty. Ltd., 7 F.C.R.534 (1985) (Fed. Ct.), where petrol retailers agreed to raise prices by four or six cents per liter, the arrangement may have been based in part on a scheme that did not set a specific price, though there was evidence of a specific price presented.

[18] Trade practices Commission v. Services Station association ltd 44 F.C.R.206 (1993) (full Fed. Ct.)

This was the first ACCC action under a State Competition Code, which applies the restrictive trade practices sections of the TPAct to individuals. The individual in this case was not subject to a penalty because the offence occurred during the phasing in of the Code when no penalties applied.

2.1.5.2. Market Sharing / Allocation

Section 45 prohibits anticompetitive market sharing or allocation agreements, as well other types of anticompetitive agreements. Such prohibited agreements include geographic market sharing arrangements or market sharing arrangements by reference to customers or types of customers. The relevant elements of section 45 would have to be established to prove a violation of this provision by virtue of such market and customer allocation agreements. However, it is unlikely that many market sharing arrangements will be treated as per se violations of the TPA unless they are closely linked to price fixing arrangements.

The ACCC was successful in two recent large cases involving price – fixing arrangements that included certain elements of market sharing conduct. The first, the *TNT* case[19], concerned the airfreight business in which the relevant defendants in effect pleaded guilty to the ACCC's claims of violations of section 45 of the TPA. Significant fines of over Aus$14 million were imposed by the Federal Court.The ACCC also has had major success against concrete companies in Queen land for price fixing and market sharing arrangements in which fines totaling over Aus$20 million were imposed by the Federal Court, again with the consent of the relevant parties.[20]

2.1.5.3. Customer Allocation

Agreements between competitors that allocate customers between the competitors (thus excluding others) are covered by the general prohibition against anticompetitive conduct prohibited by Section 45 of the TPA. If these arrangements are related to price fixing arrangements, they may be attached under Section 45A. The *TNT* case, for example, contained elements of customer allocation. If the

[19] Trade practices Commission v. TNT Austl. Pty.Ltd., A.T.P.R. 41 – 375 (1995) (Fed. Ct.)
[20] Austl. Competition and Consumer Common v. Hymix Indus. Pty. Ltd., A.T.P.R. 41 – 465 (1996) (Fed. Ct.) Austl. Competition and Consumer Common v. Pioneer Concrete (Qld.) Pty. Ltd., A.T.P.R. 41 – 457 (1996) (Fed. Ct.)

arrangements preclude service to certain customers, the collective boycott provisions of the TPA may also catch the conduct.

2.1.5.4. Output Restrictions

Like market allocation (and other similar anticompetitive arrangements), agreements to restrict outputs are generally covered by section 45 of the TPA, which prohibits anticompetitive conduct. It is necessary to prove an agreement (broadly defined) between the relevant competitors or competitors and other parties, it is also necessary to show that the purpose, the effect or likely effect of the agreement is such as to lead to a substantial lessening of competition.

2.1.5.5. Exclusionary Provisions (Collective Boycotts)

Section 45 prohibits exclusionary provisions (which are also referred to as primary or collective boycotts) per se. exclusionary provisions are defined in Section 4D of the TPA. For the provisions to satisfy the definition, it must

1. Be a provision in an agreement or a proposed agreement;
2. Be between parties any two or more of whom are competitive with each other; and
3. Have the purpose of preventing, restricting or limiting the (actual or possible) supply or acquisition of goods or services from:
    - Particular persons or classes of persons, or
    - Particular persons or classes of persons in particular circumstances, or on particular conditions.

To violate Section 45, the provision must be exclusionary at the time it was made; it cannot become exclusionary due to subsequent circumstances.

In *Hughes v. Western Australia Cricket Association Inc.*, [21] the parties in competition were cricket clubs, which were not corporations for the purpose of section; the Western Australian Cricket Association Inc., with which the clubs were not competing, was the requisite trading corporation.

[21] 19 F.C.R. 10 (1986) (Fed. Ct.)

An Exclusionary provision must have the purpose of preventing, restricting or limiting the (actual or possible) supply or acquisition of goods or services by any or all of the parties to the (actual or proposed) agreement. The anticompetitive effect alone of a primary boycott is not sufficient. Moreover, section 4F states that any such purpose must be substantial one.

The question of purpose has been a contentious one. Apart from the general difficulty of proving purpose, the working of section 4D, 4F and 45 does not make it clear whether the purpose must be objective purpose of the provision or the subjective purpose of the parties to the provision.[22] In *Trade practices Commission v. TNT Austl. Pty.Ltd.*, Judge Frankie held that "where one is concerned with the purpose of a provision (as apposed to parties') ---- it is the objective purpose which is relevant. However following the decisions in *Hughes v. Western Australia Cricket Association Inc* and *ASX Operations Pty. Ltd. V. Pont Data Australia Pty.Ltd.*, it is generally thought that it is the subjective purpose can "generally be inferred from the nature of the contract, the circumstances in which it was made and its likely effect,"[23]especially if the provision is "so obviously (intended) to constrain particular conduct.[24]

To satisfy the Section 4D criteria for an exclusionary provision, the persons or classes of persons must be specified.

2.1.5.6. Restrictive Covenants

Covenants are defined in Section 4(1) of the TPA as a covenant running with an estate or interest in land and so cannot be personal for the purposes of the TPA. Covenants are unenforceable by Section 45B (1) if they have, or are likely to have, the effect of substantially lessening competition.

The market in which the substantial lessening of competition can occur is defined in subsections 45B(1) and (2) as any in which a party to the covenant, or any person connected to it, would supply or acquire goods or services, or would be likely to but for the covenant. However the section does not apply to parties that are related to each other [subsection 45B (6)].

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[22] Although Sec: 4F requires that the purpose must be a substantial purpose, the provision recognizes that it need not be the only purpose.

[23] Dowling v. Dalgety Austl. Ltd., 34 F.C.R. 109, 134 (1992) (Fed. Ct.); Hughes v. Western Australia Cricket Association Inc.; 19 F.C.R. 10 (1986) (Fed. Ct.)

Any invitation of offer to enter into such a covenant will be deemed to be requiring the covenant [Section 45B (3)]. Engaging in particular conduct or the threat to do so by reason that a party fails or refuses to comply with such a covenant is also prohibited [Section 45B(2) and (3)].subsection 45B(4) allows this aggression of covenants in the assessment of any anticompetitive effects.

The section provides several exemptions. It does not apply to conduct which would be caught by the exclusive dealing provisions of the TPA (subsection 45B (5)). It does not apply where the principal purpose of the covenant is to ensure that the land is used for residential purposes, or where the covenant was required by a religious, charitable or public benevolent institution or the trustee of such are in pursuit of a legally enforceable requirement made by such an institution or its trustee (subsection 45B(9)). A covenant is exempt if it is subject to an authorization and the application for this has been lodged within fourteen days of the giving of the covenant [Section 45B(8)].

2.2. INDIA

2.2.1. *Competition Law in India*

India enacted its first anti-competitive legislation in 1969, known as the Monopolies and Restrictive Trade Practices Act (MRTP Act), and made it an integral part of the economic life of the country. After India became a party to the WTO agreement, a perceptible change was noticed in India's foreign trade policy that had been earlier highly restrictive. Recognizing the important linkages between trade and economic growth, the Government of India, in the early 90s took step to integrate the Indian economy with the global economy. Thus, finally enhancing its thrust on globalization and opened up its economy removing controls and resorting to liberalization. Finding the ambit of MRTP Act inadequate for fostering competition in the market and eliminating anti-competitive practices in the national and international trade, the Government of India in October 1999 appointed a high-level committee on Competition Policy and Law (the Raghavan Committee) to advise on the competition law consonant with international developments. Acting on the report of the committee, the Government enacted the new Competition Act, 2002 that replaced the earlier MRTP Act, 1969.

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[24] Adamson v. N.S.W. Rugby League Ltd., 31 F.C.R. 242, 261 (1991) (Fed. Ct.)

2.2.1.1. The Origin of the Competition Act, 2002: The MRTP Act[25].

The MRTP Act was designed to ensure that the operation of economic system does not result in the concentration of economic power to the common detriment and to prohibit such monopolistic and restrictive trade practices prejudicial to public interest. A perusal of the MRTP Act also shows that there was neither a definition nor a mention of certain offending trade practices that are restrictive in character. For example, abuse of dominance, cartels, collusion and price fixing, bid rigging, boycotts and refusal to deal and predatory pricing were not covered under the Act.

Thus, the MRTP Act become obsolete in the light of the economic developments relating more particularly to competition laws and the need was felt to shift the focus from curbing monopolies to promoting competition. To address these lacunas the government enacted the Competition Act, 2002.

2.2.2. *Significant Features of the New Competition Administration*

The Competition Act was designed as an omnibus code to deal with matters relating to the existence and regulation of competition and monopolies. Its objectives are lofty, and include the promotion and sustenance of competition in markets, protection of consumer interests and ensuring freedom of trade of other participants in the market, all against the backdrop of the economic development of the country. However, the Competition Act is surprisingly. Compact, composed of only 66 sections. The legislation is procedure-intensive, and is structured in an uncomplicated manner. The raison detre of the Competition Act is to create an environment conducive to competition.

2.2.2.1. Focal Point of New Law

The new law provides for a modern framework of competition. It focuses on four core areas:

i. Anti-competitive agreements

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[25] Debashree Dutta, *New Competition Regime in India*, http://www. legalserviceindia. com/articles/neew.htm URL accessed on 25 March,2006

ii. Abuse of dominance

iii. Combinations regulation

iv. Competition advocacy

Explicit definitions and criteria have been specified to assess whether a practice has an appreciable adverse effect on competition. One distinguishing feature of the Act is that it emphasises on behavioural approach to examine competition in the market as against the structural approach followed by the MRTP Act. The regulation of M&As has returned to the scope of Indian Competition Law, although the new law sets rather high turnover thresholds for combinations to fall under its purview.

The new law has extraterritorial reach. This provision is based on what is known as the *'effects doctrine'*. Thus, actions or practices taking place outside India but having an appreciable adverse effect on competition in the relevant market in India would come within the ambit of the Act.

By including provisions on competition advocacy, the Act extends the mandate of the CCI beyond merely enforcing the law. Introduction of competition advocacy function is to create a culture of competition in the country and increase awareness amongst various stakeholders about competition policy and law.

However the Act is, facing a challenge even before becoming operational. Writ petition was filed in the Supreme Court, challenging, the constitutional validity of the Act, and the appointment of a bureaucrat to head the Commission. Pursuant to the litigation, the Government proposed to amend the Competition Act, 2002 inter alia bifurcating the body into two: Competition Commission and a Competition Appellate Tribunal. There are several concerns, which are likely to impair the effectiveness of the Competition Act[26]. the Competition Commission of India that was established by Government notification on 14th October 2003, is not fully operational. Presently, the Commission has one member/ acting chairman, one secretary, one director general and certain middle level functionaries, appointed by the Government to carry out the activities relating to competition advocacy, foundational and preparatory work.

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[26] Pradeep S Mehta 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

2.2.3. *The Competition Commission of India*

The Competition Act seeks to ensure fair competition in India through a body known as the Competition Commission of India (CCI). The CCI will have a principal bench and additional benches and will have one or more merger benches. It will consist of a chairperson and two to 10 members. The members will be full-time members and need to be either judges of a high court or possess special knowledge and professional experience of not less than 15 years in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs, administration or in any other matter which, in the opinion of the central government, may be useful to the CCI. The CCI will have the authority to inquire suo moto on information or complaints received, or on a reference made by the central government, the state government or statutory authorities[27].

The central government also has the power to appoint a director general and other advisers and consultants to assist the CCI for inquiries. The CCI will also have the power to investigate agreements, combinations or abuse of dominant positions outside India that affect competition in India. The CCI will have the powers of a civil court and appeals from the CCI will be directed to the Supreme Court of India[28].

However, pursuant to orders passed by the Supreme Court of India the government proposes to amend certain provisions of the Act and provide for establishment of an appellate tribunal to hear appeals from the CCI[29].

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2.2.4. *Anti-Competitive Agreements*

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 likely to cause an appreciable adverse effect on competition within India .

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[27] Seehttp://www.globalcompetitionreview.com/sr/hcea_winpage.cfm?master_id=1&chapter_id=37&page_id=277 URL Accessed on 3 April 2006

[28] Ibid

[29] Ibid

2.2.5. *Horizontal Agreements*[30]

Horizontal agreements are between independent enterprises or enterprises potentially competing in the same market. Many horizontal agreements relating to prices, discounts, output or the sharing of the markets often restrain the competitors and directly or indirectly limit access to market.

2.2.5.1. Price Fixing[31]

A collective agreement to fix prices is regarded as a per se offence. However, this is subject to two exemptions:-

(a) A list of recommended prices issued by the trade associations to its small business members may not be regarded as an infringement of competition law, if the prices are only recommendatory in nature and individual enterprises are free to charge what they like.

(b) Cartels that seek to fix export prices commodities are exempted from competition law because competition law is generally concerned with the effects of anti- competitive practices on the domestic market alone.

2.2.5.2. Output Quotas[32]

Cartels normally fix an output quota for each participating firm as an alternative to fixing the prices at which the goods can be sold.

The effect of this is to prevent the other firms less efficient or less vigorous form. The result is lessening of competition and higher prices to consumers.

The collective agreement to set output quotas for the individual participants in a cartel is usually regarded as a per se infringement of the competition law.

2.2.5.3. Exclusive Joint Selling Rights[33]

Joint selling on an exclusive basis restricts competition - be it in the sports or in any other sector - because it has the effect of reducing output and limiting price competition. The sale of the entire rights on an exclusive basis and for a long period

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[30] T.K.Viswanathan, *Competition Law,* Secretary , Ministry of Law & Justice Legislative Department, India
[31] Ibid
[32] Ibid
[33] Ibid

has the effect of reinforcing the position of the incumbent television companies as the only ones with the financial strength to win the bids.

This, in turn, leads to unsatisfied demand from broadcasters and a lesser ability to make an attractive offer to customers. Sports and films are two key ingredients for television and for pay-TV channels in particular. They are also proving increasingly critical for the development of new technologies. Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies.

2.3. UNITED KINGDOM

2.3.1. *General Competition Law*

UK competition law has undergone a great deal of change in the recent years. The process of overhauling the law in this area, which become increasingly outdated, started in March 2000, with the entry into force of the Competition Act 1998 (CA98). This introduced general prohibitions of anti-competitive agreements and the abuse of market dominance into domestic law, mirroring the EC law provisions set out in Articles 81 and 82 of the EC Treaty. The move from a system where restrictions of competition were generally allowed unless specifically prohibited to one where they were generally prohibited, with infringement potentially leading to substantial fines, marked a highly significant development for UK competition policy[34].

2.3.2. *The Enterprise Act 2002*

This development was rapidly followed by the Enterprise Act 2002, which introduced a large number of significant changes, including[35]:

- updating the old Fair Trading Act monopoly reference procedure to allow the OFT to refer markets to the CC for an in-depth investigation, and potential remedial action, where features of the market could be expected to lead to the prevention, restriction or distortion of competition;

[34] Seehttp://www.globalcompetitionreview.com/sr/hcea_winpage.cfm?master_id=1&chapter_id=76&page_id=340 URL Accessed on 3 April 2006

[35] Seehttp://www.globalcompetitionreview.com/sr/hcea_winpage.cfm?master_id=1&chapter_id=76&page_id=340 URL Accessed on 3 April 2006

- rewriting merger control law to remove government ministers from decision making and to replace the old 'public interest' clearance test with one based on establishing whether a merger may be expected to result in a substantial lessening of competition;
- introducing powers to allow a court to disqualify individuals from acting as a director of a UK company for up to 15 years if the company of which the individual in question is a director infringes competition law;
- replacing the director general of fair trading with a chairman, chief executive and board; and
- making participation in a hard-core cartel a criminal offence.

2.3.3. *The Laws on Anti-Competitive Behaviour:*

In the UK anti-competitive behaviour is prohibited under Chapters I and II of the Competition Act 1998 and may be prohibited under Articles 81 and 82 of the EC Treaty. These laws prohibit anti-competitive agreements between businesses and the abuse of a dominant position in a market. The Act prohibits anti-competitive behaviour that affects trade in the UK. Articles 81 and 82 prohibit anti-competitive behaviour that affects trade in the EU.

The Office of Fair Trading (OFT) has a wide range of powers to investigate businesses suspected of breaching these laws and we can order that offending agreements or conduct be stopped.

Businesses that breach the law can be fined up to ten per cent of their worldwide turnover and third parties (including injured competitors, customers and consumer groups) can bring damages claims against them. In addition, individuals found to be involved in cartels can be fined and imprisoned for up to five years and directors of companies that breach the prohibitions can be disqualified for up to 15 years.

2.3.3.1. Implementation of Competition Law:

Competition law is enforced in the UK principally by the OFT. However, in certain industries such as communications, gas, electricity, water and sewerage,

railway and air traffic services the sector regulators have been given 'concurrent powers' to apply and enforce competition law.

2.3.4. *Anti-competitive Agreements*[36]

Chapter I of the Act and Article 81 of the EC Treaty prohibit agreements between businesses that prevent, restrict or distort competition or are intended to do so and which affect trade in the UK and/or EU.

2.3.4.1. Agreements Likely to be Prohibited

Agreements likely to be prohibited include those which:

- fix the prices to be charged for goods or services
- limit production
- carve up markets
- discriminate, eg, between customers (eg, charge different prices or impose different terms where there is no difference in what is being supplied).

2.3.4.1.1. *Formal or Informal, Written or Verbal Agreements*

Agreements can be formal or informal, written or verbal. An informal understanding or telephone conversation where two competitors agree to match each other's prices will be caught in the same way as a formal agreement between them.

The prohibitions also cover decisions of associations of businesses as well as concerted practices (ie, cooperation that falls short of an agreement or decision).

2.3.4.1.2. *Object and Effect of Competition*

Article 81 and/or the Chapter I prohibition apply where the object or effect of the agreement is to prevent, restrict or distort competition within the common market (in the case of Article 81) or within the United Kingdom (in the case of the Chapter I prohibition). Any agreement between undertakings might be said to restrict the freedom of action of the parties. That does not, however, necessarily

[36] *Competing Fairly, An introduction to the laws on anti-competitive behaviour*, See www.oft.gov.uk .URL Accessed on 3rd April 2006

mean that the agreement is prohibited. The OFT does not adopt such a narrow approach. The OFT will assess an agreement in its economic context[37].

2.3.4.1.3. *The Appreciable Effect on Competition Test*[38]

An agreement will fall within Article 81 and/or the Chapter I prohibition only if it has as its object or effect an appreciable prevention, restriction or distortion of competition within:

- The common market in the case of Article 81, or
- The United Kingdom in the case of the Chapter I prohibition

2.3.4.2. Directly or Indirectly Fixing Prices[39]

An agreement whose object is directly or indirectly to fix prices, or the resale prices of any product or service, almost invariably infringes Article 81 and/or the Chapter I prohibition. The OFT considers that such price-fixing agreements, by their very nature, restrict competition to an appreciable extent.

Prices can be fixed in many ways. Price fixing may involve fixing either the price itself or the components of a price, setting a minimum price below which prices are not to be reduced, establishing the amount or percentage by which prices are to be increased, or establishing a range outside which prices are not to move. Price fixing may also take the form of an agreement to restrict price competition.

An agreement may also have the object of fixing prices while only indirectly affecting the price to be charged. It may cover the discounts or allowances to be granted, transport charges, payments for additional services, credit terms or the terms of guarantees, for example. The agreement may relate to the charges or allowances quoted themselves, to the ranges within which they fall, or to the formulae by which ancillary terms are to be calculated.

2.3.4.3. Agreements to Fix Trading Conditions

Undertakings may agree to regulate the terms and conditions on which goods or services are to be supplied, in addition to prices.

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[37] *Competition Law Guideline*, December 2004, Understanding competition law, Agreements and concerted practices, See www.oft.gov.uk, URL Accessed on 3rd April 2006

[38] Ibid

[39] Ibid

2.3.4.4. Agreements to Share Markets

Undertakings may agree to share markets, whether by territory, type or size of customer, or in some other way. This may be as well as or instead of agreeing on the prices to be charged, especially where the product is reasonably standardized. Where the object of the agreement is to share markets in this way, it will almost invariably infringe Article 81 and/or the Chapter I prohibition. The OFT considers that such market-sharing agreements, by their very nature, restrict competition to an appreciable extent.

There can be agreements, however, which have the effect (rather than the object) of sharing the market to some degree as a consequence of the main object of the agreement. Parties may agree, for example, each to specialize in the manufacture of certain products in a range, or of certain components of a product, in order to be able to produce in longer runs and therefore more efficiently. Such an agreement may fall within Article 81 and/or the Chapter I prohibition where there is, or is likely to be, an appreciable effect on competition.

In assessing research and development (R&D) agreements[40]and joint production or specialization agreements[41], the OFT has regard to the European Commission's Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (Guidelines on Horizontal Cooperation Agreements). R&D agreements may have the benefit of the European Commission block exemption for categories of research and development agreements18. Similarly, joint production or specialization agreements may have the benefit of the European Commission block exemption for categories of specialization agreements

2.3.4.5. Agreements to Limit or Control Production or Investment

An agreement whose object is to limit or control production will almost invariably infringe Article 81 and/or the Chapter I prohibition.

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[40] An R&D agreement may range in scope from outsourcing certain research and development activities, to the joint improvement of existing products or to a co-operation concerning the research, development and marketing of completely new products.

[41] A joint production agreement is an agreement between parties to produce certain products jointly, whereas a specialization agreement is an agreement whereby the parties agree (unilaterally or reciprocally) to cease production of a product and to purchase it from the other party.

Such an agreement may be the way in which prices are fixed, it may relate to production levels or quotas, or it may be intended to deal with structural overcapacity. In some cases, it will be linked to other agreements that may affect competition.

Competitive pressures may be reduced if undertakings in an industry agree to limit investment or at least to coordinate future investment plans. The OFT considers that any agreement whose object is to limit or control investment will, by its very nature, restrict competition to an appreciable extent.

2.3.4.6. Collusive Tendering ('Bid-Rigging')

Tendering procedures are designed to provide competition in areas where it might otherwise be absent. An essential feature of the system is that prospective suppliers prepare and submit tenders or bids independently. Any tender submitted because of collusion between prospective suppliers will almost invariably infringe Article 81 and/or the Chapter I prohibition. The OFT considers that bid-rigging agreements, by their very nature, restrict competition to an appreciable extent.

2.3.4.7. Joint Purchasing/Selling

An agreement between purchasers to fix (directly or indirectly) the price that they are prepared to pay, or to purchase only through agreed arrangements, limits competition between them. An example of one type of agreement that might be made between purchasers is an agreement as to those with whom they will deal. Such an arrangement may fall within Article 81 and/or the Chapter I prohibition if it has an appreciable effect on competition. In assessing joint purchasing/selling agreements, the OFT has regard to the European Commission's Guidelines on Horizontal Cooperation Agreements.

The same issues potentially arise in agreements between sellers, in particular where sellers agree to boycott certain customers. This type of agreement may have an appreciable effect on competition. In assessing agreements involving co-operation between competitors in the selling, distribution or promotion of their products, the OFT has regard to the European Commission's Guidelines on Horizontal Cooperation Agreements.

2.3.4.8. Other Anti-Competitive Agreements

Competition in a market can be restricted in less direct ways than for example, fixing prices or sharing markets or the other examples set out above could regard a scheme under which a customer obtains better terms the more business it places with the parties to the scheme regarded as anti-competitive. Each case will need to be considered in its own circumstances.

Other agreements where the parties agree to cooperate may fall within Article 81 and/or the Chapter I prohibition if they have an appreciable effect on competition. However, not all these, or other, agreements having appreciable effect on competition will necessarily be prohibited. Certain agreements which have an appreciable effect on competition within the meaning of Article 81 and/or the Chapter I prohibition will not be prohibited (and will still be valid and enforceable) where they satisfy the conditions in Article 81(3) and/or in section 9(1) of the Act respectively.

2.3.5. *Consequences of Infringement*

2.3.5.1. Void and Unenforceable Agreements

Any agreement that falls within Article 81(1) or the Chapter I prohibition and does not satisfy the conditions set out in Article 81(3) or section 9(1) of the Act, respectively, is void and unenforceable[42].

2.3.5.2. Financial Penalties

Section 36 of the Act provides that the OFT may impose a financial penalty on an undertaking which has intentionally or negligently committed an infringement of Article 81 and/or the Chapter I prohibition. The amount of the penalty imposed may be up to 10 percent of the worldwide turnover of the undertaking.

2.4. UNITED STATES OF AMERICA

2.4.1. *Principal US Antitrust Statutes*:

The principal US antitrust statutes are the Sherman act enacted on 1890, and the Clayton and Federal Trade Commission Acts (both enacted in 1914). The

[42] Article 81(2) and section 2(4) of the Act.

Sherman Act prohibits unreasonable restraints of trade, attempts at monopolization and abuses of monopoly power[43].

The Clayton Act prohibits mergers or acquisitions where "the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly."[44] The FTC Act declares that unfair methods of competition and deceptive trade practice are unlawful[45].

2.4.2. *Horizontal Restraints in Competition Law of USA*

Horizontal agreements between independent undertakings may be entered into for limiting output, to increase price and be devoid of any beneficial consequence that can affect this loss to consumer welfare agreements of this type are perhaps the most obvious target for any system of competition law.

2.4.2.1. Horizontal Price Fixing

Most people as the most blatant and undesirable of restrictive trade practices would regard horizontal price fixing. In the United States horizontal price fixing is subject to a per se rule of prohibition[46].

Despite some early cases which flirted with the idea that price fixing agreements should be permitted if the price set was reasonable and which showed some sympathy for restricting price competition during the Depression, many decisions of the Supreme Court have since established the existence of the per se rule and have expanded the range of agreements within its scope[47].

The definitive case is *United States v Socony Vacuum Oil Co.*[48] Since it clearly indicated that the conflict between *Appalachian Coals* and the earlier decision in *United States V Trenton Potteries Co.*[49] should be resolved in the latter's favour. The Court rejected the Oil companies defenses based on the reasonableness of their prices and the benefit price stabilization, holding that any combination which tempers

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[43] See http// www.globalcompetitionreview.com
[44] See http// www.globalcompetitionreview.com
[45] Ibid
[46] Richard Whish, *Competition Law*, London Butterworth 1985 p. 283.
[47] Ibid
[48] 310 US 150 (1940)
[49] 273 US 392 (1927)

with price structures is un lawful and that it was not the court's function to consider whether a particular price fixing scheme was wise or unwise healthy or destructive.

In *Business Electronics Corp. V. Sharp Electronics Corp.* holds that where a manufacturer and one of its dealers agree to terminate a dealer known for its price cutting activities, this does not amount to per se vertical price fixing absent evidence of the further agreement on the remaining dealer or dealers. In so holding, the court reiterated earlier rulings distinguishing vertical agreements on resale prices ("illegal per se since Dr. Miles Medical Co") from "vertical non price restraints" (not per se illegal)[50].

Horizontal restraints directed at pricing were expressly placed in a different category, with the Court specifically rejecting arguments that since price motivated horizontal restraints have been subjected to per se analysis; the same should be true of vertical terminations having a pricing impact[51].

2.4.2.2. Horizontal Market Division

The agreements in particularly restrictive from the consumer's point of view since it diminishes choice: at least where the parties fix prices, a choice of product remains, and it is possible that the restriction of price competition will force the parties to complete in other ways[52]. It is sometimes argued in favour of market sharing agreements that they should be permitted since they reduce the distribution costs of producers who are relieved of the need to supply outside their exclusive geographical territories or to categories of customers other than those allotted to them[53]. This is unconvincing however, it does not explain why the benefit claimed is dependent upon the horizontal agreements. If a producer found it profitable to do so, it would want to sell outside its allotted territory or class of customer and determining the profitability of doing so, it would consider distribution costs[54]. All the agreement does is to foreclose this possibility. Potential competition is removed with the same adverse effect upon consumer welfare that other horizontal restrictions may produce a reduction in out put and an increase in price[55].

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[50] William C. Holmes, *1989 Antitrust Law Handbook*, Clark Boardman Company Ltd, p.1.
[51] Ibid
[52] Ibid. p.290
[53] Ibid p.290
[54] Ibid p.290.
[55] Ibid

In the United States, the position has finally been reached after some ambiguity[56] whereby market division is prohibited per se.

In *United States V Topco Associates Inc*[57]. The Supreme Court went out its way to explain the advantages of the promotion of the Topco private label that introduced an important new competitive pressure upon larger supermarket chains and yet it rejected per se the allotment of designated exclusive territories to the participating undertakings.

Even if one considers that in this case the market sharing agreement should not have been permitted, one might regret that technique chosen to prohibit the agreement: It could still have been condemned under a rule of reason approach, but only after a consideration of the effects of the agreement upon economic efficiency assessed in its legal and economic context.

In a series of cases extending back to the early years of Sherman Act, the Supreme Court repeatedly applied a standard of per se illegality to horizontal conspiracies allocating territories dividing customers or otherwise imposing non-price restraints upon actual or potential competitors. The Court refused to consider firms operating at the same level of the market structure they should be treated as inherently anti competitive imposed possible economic justifications for the arrangements, reasoning instead that since the restraints[58]

In *Timken roller Bearing Co v. United State*[59] the defendant tinker was a US company that had granted trademark licenses covering a line of antifriction bearings to two European companies with which it was affiliated. The licensing agreements expressly divided world markets among the companies and fix the price of product which each sold in the territories of the others. The district court had concluded that the arrangement violated section1of the Sherman Act.

On appeal to Supreme Court, the defendant argued that the price and territorial restraint were justifiably ancillary to licensing of various Timken trademark. The Supreme Court held otherwise where the evidence established that licensing of the

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[56] See *Timken Rollers Bearing Co V United States* 341 US 593 (1951) which held that the aggregation of price fixing and market sharing was per se illegal but did not give any indication of the position of market standing alone and *United States V Sealy Inc* 388 US 350 (1967) which again condemned edaphically, the aggregation of trade restraints'.

[57] William C. Holmes, *1989 Antitrust Law Handbook*, Clark Boardman Company Ltd, p.137.

[58] Ibid

[59] 341 U.S 593 (1951)

trademark was "subsidiary and secondary to the central prose of allocating trade territories"[60].

The 'purpose' oriented test of Timken was relatively narrow in its potential reach simply striking down those trademark licensing systems used as sham devices by actual or potential competitors to violate the antitrust laws.

2.4.3. *Per Se versus Rule of Reason Analysis*

2.4.3.1. General:

Section 1 of the Sherman Act broadly states that "every" contract, combination or conspiracy that restrains interstate or foreign trade is illegal.

Taken literally this extremely broad language would prohibit virtually any business combination or agreement, including competitively desirable as well as undesirable arrangements,

Three separate lines of analysis have been developed to gauge the competitive reasonableness of particular practices challenged under section 1[61].

The first such line of analysis treats certain practices as being so plainly anticompetitive and without redeeming virtue as to be per se, or conclusively, unreasonable[62]. The plaintiff need only prove that the practice occurred and is not required to affirmatively demonstrate its competitive unreasonableness, while the defendants are precluded from attempting to justify the restraint as being reasonable[63].

2.4.3.2. Practices Considered Per se Illegal:

Practices considered per se illegal include:

1. Horizontal agreements to fix price
2. Vertical agreements to fix price
3. Horizontal territorial, customer and other market allocations.
4. Certain competitively motivated group boycotts.

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[60] see *supra* note 57 at p.598

[61] Ibid.p. 109

[62] See e.g. *United States V Socony Vacuum Oil Co.* 310 U.S.150 (1940) (horizontal price fixing), *United States V. Topco Associates, Inc,* 405 U.S. 596(1972) (horizontal territorial and customer allocations); Fashion Originators' Guild of American, Inv.v.FTc, 312 U.S.457 (1941) (certain competitively motivated horizontal group boycotts).

[63] Northern Pacific Ry.Co. V. United States, 356U.S.1, 5 (1958), United States V. Socony vacuum oil co 310 Us .150, 220-21(1990)

Unlike the per se approach, this intermediate line of reasoning is more of a burden shifting analysis, premised upon presumptions of illegality. The principal such practice challenged using the burden shifting approach consists of tying restraints imposed by firms with economic power.

The distinction between practices deemed per se illegal and those that are instead to be judged by the rule of reason or by some intermediate standard, is immutable. These have not been easy categories for the Court to define, let alone to apply. As a result, practices that have at one time been analyzed under one test have later been brought under an altogether different standard for example in the 1967 decision of *United State V.Arnold, Schwinn Co*[64] the Supreme Court held that vertical restriction imposed by a manufacturer on the territories or customers of its distributors were per se illegal , once the manufacturer had sold its product to the distributors, just ten years later, the court reversed itself , holding in *Continental T.V., Inc. V GTE Sylvania, Inc.*[65] that vertical non-price restraints imposed by a manufacturer upon its distributors are to be assessed under the more flexible rule of reason.

2.4.3.3. Rule of Reason:

Practices not considered per se illegal are of instead governed by the far more flexible rule of reason. Relevant circumstance can include such diverse factors as the defendants, the intent and purpose in adopting the restriction, the structure of and competitive condition within the affected industry, the relative competitive positions of the defendants, and the presence of economic barriers inhibiting the ability of competitors to respond and offset the challenged practices, no single such factor is decisive, rather the fact finder 'weighs all the circumstances' in deciding whether the challenged practice is , on balance, competitively unreasonable and, as such, illegal under Sherman Act section 1[66].

An initial starting point in any rule of reason inquiry is identification of the 'relevant market', meaning the particular group of products with which, and the

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[64] 388U.S 365 (1967)

[65] 433U.S 36 (1977) see also business electronic cop .v. sharp electronic crop, 108 S ct. 1515(1988) (holding that an agreement between a manufacturer and one of its dealers to terminate a price cutting dealer was neither (per see) illegal in direct vertical price fixing nor a (per se) illegal boycott) Broadcast music, Inc V Columbia Broad casting system, Inc 441 U.S !(1979) (holding that a practice that only indirectly affected price, Without the purpose to do so, was not (per se illegal price fixing)

[66] William C. Holmen's, 1989 *Antitrust Law Handbook*, Clarke Boardman. Company, Ltd p113

geographic area within which the defendant's products effectively compete and the challenged restraint will be felt[67].

2.4.4. *Horizontal Non-Price Restraints:*

Territorial customer and other horizontal non price restraints on head to head competitors between competitors are a category of offence generally said to be *per se* illegal[68] in contrast, vertical non price restraints are governed by the rule of reason, rather than per se standards of illegality[69].

The Supreme Court in Business Electronic Corp.V Sharp Electronics Corp. reemphasized this horizontal-vertical dichotomy.[70]The Court held that it was not *per se* illegal price fixing for a manufacturer and one of its dealers to agree to terminate a price cutting dealers, absent evidence of a further agreement on the prices to be charged by remaining dealers. In so ruling the court placed horizontal restraints in an altogether different category from vertical restraints.

In *United State V. Cooperative Theaters of Ohio, Inc.* The appellate court affirmed a jury verdict that the defendants two motion picture booking agencies, had engaged in a per se illegal conspiracy to allocate customers. On appeal. The sixth circuit rejected defense arguments that the conspiracy should have been assessed under the rule of reason same not involving. An absolute ban an all-competitive bidding.

The second circuit in Auwood V. Harry Brandt Booking office Inc. similarly upheld a jury verdict against the defendants in a motion picture related case.

The Court there ruled that the jury the had sufficient evidence before it to find that the defendants, a group of motion picture exhibitors and distributors, had conspired to allocate 'first run' motion picture among the conspiring exhibitors, thereby injuring the plaintiff a competition exhibitor supporting the verdict was testimony by a witness personally familiar with the arrangements together with evidence that the plaintiff had offered higher bid prices than the favoured exhibitors and still failed on his bids[71].

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[67] see *supra* note 66
[68] Ibid. p11
[69] Ibid
[70] 108 s.ct 1515 1988-1 Trade Cas. (CCH)67,982(1988)
[71] William C Holmes, 1989 *Antitrust Law Handbook*, Clarke Boardman Company, Ltd. P.13

Nevertheless, the case now stands for the basic proposition that a horizontal non price restraints may be spared per se condemnation not simply because of circumstances unique to the particular restraint, but because of the overall 'industry' conditions in which the restraint arises an argument that practitioners can now expect to see with increasing frequency[72].

2.4.5. *US Antitrust Enforcement* [73]

US antitrust responsibilities of the Antitrust Division and the FTC are divided in two broad areas of, firstly merger enforcement; and secondly, civil and criminal investigation of anti competitive practices. Being relevant here, the later is explained below.

2.4.5.1. Civil Investigation Of Anti Competitive Practices

The Antitrust division and FTC generally begin civil investigation by issuing civil investigative demands or subpoenas (or both) which compel individuals or organization to produce information (typically business records or testimony) relating to questionable conduct or practices. If the antitrust division believes that the Sherman or Clayton Act has been violated, it can file a complaint in the federal court and may use traditional pre trial discovery devices including deposition, request for production of document and written interrogatories - to obtain further information and testimony. A federal court have preliminarily or permanently enjoin the anti competitive conduct at issue or award such other relief as it deems necessary or appropriate.

2.4.5.2. Criminal Investigation Of Anti Competitive Practices

The antitrust division has exclusive authority to bring criminal action for violation of the Sherman Act.

In *Re Schering-Plough Corp* on 18th December 2003 the commission reversed the decision of an Administrative law judge and concluded that the payment by a manufacturer of a brand pharmaceutical to the manufacturer of a generic alternative to delay its entry on to the market violated section 5 of the FTC Act. The brand

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[72] see *supra* note 7, p .143

[73] See. www.glogalcompetittionreview.com

manufacturer had made payments to settle patent legislation pending under the Hatch Waxman Act that the commission concluded were a quid proquo for the generic to defer entry.

In *United States V Visa USA Inc.* The court of Appeals for the second circuit on 17th September 2003 upheld the district court's finding that visa's and MasterCard's rules prohibiting their members banks from issuing credit or charge cards under the brands of competing network, eg, American Express or discover cards, violate section 1 of the Sherman Act. The court concluded that the Antitrust division's evidence that no competitor had been able to issue their cards along with the defendant has combined market share of 73 percent, demonstrated market power and an ability to exclude competitors.

CHAPTER 3

COMPETITION LAW IN PAKISTAN

3.1. OVERVIEW

The competition policy in Pakistan is enshrined in the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance. The law became statutory in 1970 mainly based on the recommendations made by the Anti-Cartel Laws Study Group[1]. The Study Group was entrusted with the task of examining as to what policies and measures would be advisable and effective to prevent unreasonable growth of monopolies and restrictive trade practices in the country. The Report of the Group established presence of monopolistic situations, cartel like arrangements and signs of vertical integration in the country; and hence the need for anti-monopoly law.

The Anti-Cartel Law Study Group was conceived at the time when there was a large and thriving private sector in the country. The Government policies in the past, that aimed at encouraging capital formation in the private sector, especially industrial licensing, industrial credit, fiscal concessions, resulted in high degree of concentration of economic power in the hands of a few family groups that dominated industrial, commercial, banking and insurance activities in the country. The tendency of acquisition and control of overall resources by them created a contemptuous feeling of discontent in the country that was not conducive to the public interest.

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[1] The Anti-cartel Laws Study group was set up by the Government of Pakistan in 1963 in pursuance of announcement made by the Finance Minister in his budget speech for fiscal year 1963 – 64, the Group submitted its report in April 1964.

Some studies pointed out that the growth of the private sector lead to concentration of wealth in the hands of 22 big business houses[2]. These twenty-two families owned and controlled 66% of the industrial assets and 87% of the banking and insurance assets of the country. This culminated in the nationalisation of industry during the Zulfiqar Ali Bhutto regime in 1972. Papanek also showed that 60 industrial groups controlled 61% of all private industrial assets and 44% of all private industrial sales in Pakistan during the 1960s[3]. According to him, out of 3000 firms in Pakistan in 1959, only 24 controlled almost 50% of private industrial assets. He further found that seven industrial families controlled 25% of assets while 15 families owned about 75% of shares in banks and insurance companies. White found that in 1968, 43 families owned 49% of all the enlisted companies on the Karachi Stock Exchange (KSE), controlling 53% of the total assets. Amjad pointed out a clear positive relationship between profitability in the manufacturing sector and concentration in the production of manufactured goods[4]. White estimated average four-firm concentration ratio at 70% for 82 Pakistani industries. The studies conducted by White[5] and Amjad provide evidence that this high rate of concentration resulted in windfall profits for the industrialists in Pakistan.

As mentioned above, the Anti Cartel Laws Study Group studied harmful growth of monopolies and restrictive trade practices in the country. As a result, the Government circulated a draft Anti-Monopoly and Restrictive Trade Practices Law for public opinion with the budget for 1969-70. The draft law was widely commented upon by the press, the Chambers of Commerce, Industry and the public. Taking these comments into account,

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[2] Mahbub ul Haq, *The Poverty Curtain: Choices for the Third World*, Columbia University Press, New York, 1974.
[3] G. F. Papanek, *Pakistan's Development: Social Goals and Private Incentives*, Harvard University Press, Cambridge, Massachusetts, 1967.
[4] R. Amjad, "Impact of Concentration on Profitability in Pakistan", *Journal of Development Studies*, Vol. 13, No. 4, April 1977.
[5] L. White, *Industrial Concentration and Economic Power in Pakistan*, Princeton University Press, New Jersey, 1974.

the President and CMLA promulgated the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance in February, 1970[6].

For carrying out its purposes, the Ordinance provides for setting up of an independent body namely, the Monopoly Control Authority comprising of three members including a chairman. The qualifications for the members of the authority have not been laid down in the Ordinance. However, the Federal Government appoints such persons of ability, integrity and standing as members who, by their adequate experience, can take unbiased and informed judgments about complicated industrial and trade situations.

The enactment of the antimonopoly law added a new subject to the modern laws of Pakistan. The principal attraction of the subject lies in the fact that it imbibes the socio-economic philosophy contained in the constitution of Islamic Republic of Pakistan. The genesis of this legislative measure may be found in the Fundamental Rights and principles of Policy enunciated in the Constitution 1973 that read as follows:

Article 18: Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business:

Provided that nothing in this Article shall prevent

b) The regulations of trade, commerce or industry in the interest of free competition therein.

Article 38: The state shall

a) secure the well being of the people, irrespective of sex, caste, creed or race, 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

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[6] Preamble to the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970.

interest and ensuring equitable adjustment of rights between employers and employees, and landlords and tenants.

3.2. THE LAW: MONOPOLIES AND RESTRICTIVE TRADE PRACTICES (CONTROL AND PREVENTION) ORDINANCE,1970.

Among the legislative measures adopted earlier in regard to fundamental rights and principles of policy as enunciated in the Constitution of the Islamic Republic of Pakistan, the one was the Capital Issues (Continuance of Control) Act, 1947. This law was somewhat broad based in its approach. It meant to achieve various avowed socio-economic objectives and in so doing, it rather implicitly, assisted in regulating concentration of economic power. The Monopolies and Restrictive Trade practices (Control and Prevention) Ordinance, 1970, on the other hand, is the first specific piece of anti-monopoly legislation introduced in Pakistan[7].

3.2.1. *The Basic Approach of the Law:*

Monopoly Control Authority (MCA) was established on 17th of August, 1971 under Section 8 of the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance 1970 (MRTPO). MCA's objective was to control and prevent:

- 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.
- creation of monopolies i.e., associated companies having 1/3rd market share; merger/ acquisition creating monopoly power; and granting of loan

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[7] M.S.Khan, *Regulation and Control of Monopolies and Restrictive Trade Practices in Pakistan*, Royal Book Company, p. 4 – 8, 1992.

by a bank or insurance company on relatively favorable terms benefiting an associated company; and

- Unreasonably restrictive trade practices such as cartels to fix prices restrict supplies, divide markets etc.

When the MRTPO was promulgated, the policy of the Government was to keep a balance between rapid economic development, on the one hand, and social justice and consumers' protection, on the other. Infact, there is a traditional conflict between these two aims. It was, therefore, necessary to regulate trade, commerce or industry in the interest of free competition therein. The need for effective competition law has increased many-folds over a period of three decades. Reason being rapid globalization and its linkages with the national economy.

The Law does not *per se* condemn the above mentioned prohibitory situations, as imbibed in the American antitrust laws. Instead, it stipulates a case by case approach and accordingly, each situation has to be judged on its own merits through the test of reasonableness[8]. The anti-monopoly law of Pakistan is largely based on the British legal system. In the British system no practice has been regarded as illegal or even initially presumed contrary to the public interest unless it is proved to be so[9].

3.2.2. *Role of the MCA and Limitations in Enforcement:*

MCA is a statutory, quasi-judicial body consisting of not less than three members appointed by Federal Government, one of whom is appointed the chairman (Organization Chart of MCA is given in Table C)[10].

This Organization is divided into three Branches:

- Research and Investigation Branch initiates cases and conducts research on situations falling under the purview of MRTPO;

[8]See *supra* note 7 p. 9
[9] Ibid. p. 9

- Legal and Administration Branch - registers individuals, undertakings and agreements, and provides administrative support to the officers.
- Information Technology Section is responsible to provide integrated database for analysis and investigation.

There are certain limitations in the enforcement of the Anti-monopoly Law of Pakistan; some relate to the lack of staffing and budget. Others relate to deficient legal provisions such as 'on the spot search' is not covered in the Law. This is considered to be the most effective way to tackle horizontal restraints in other countries with reference to evidence gathering. The definition of 'services' is limited, major areas of services are outside the 'definition' clause and some of the services are covered under the sector regulators (excerpts from the MRTPO are presented in Appendix C). Hence, MCA's role in the sectors regulated by sector regulators has been marginalized. MCA can only make recommendations to the Federal Government for suitable governmental actions to prevent or eliminate undue concentration of economic power, unreasonable monopoly power or unreasonably restrictive trade practices, which, in its opinion exist in case of any undertaking or group of undertakings engaged in business activities in a sector regulated by a sector regulator. However, in practice, this function of 'advice/ recommendation' is hampered by the fact that the undertakings lying outside the purview of the Law are not bound to provide any information to the MCA, thus making it difficult to conduct any probing into the sector.

3.3. WORKING AND ADMINISTRATION

Unlike much other contemporary antitrust legislation, the antimonopoly law of Pakistan does not contemplate creation of separate and independent offices of the director and registrar for making enquiries and maintaining register of agreements subject to registration, respectively. Under the present scheme of law, the Authority itself conducts enquiries, keeps, and maintains registers of undertakings, individuals and agreements. Interestingly, the Authority combines in itself the roles of a prosecutor and adjudicator. Besides, the law empowers the Authority to appoint such officers and servants on such

[10] As on July 6, 2006.

terms and conditions as it may determine. About unreasonably restrictive trade practices, there is no provision in the law of an office of the Registrar, Restrictive Trade Agreement, with whom agreements pertaining to restrictive trade practices of the kind laid down in the law are to be registered. It is incumbent upon the Authority, under the law, to register restrictive trade agreements. However, for maintaining the register of agreements as well as for performing other relevant duties, the Authority, by rules, has created an office of the registrar. Willful failure to register a restrictive trade agreement within fifteen days of the date of its becoming liable to registration is actionable under the law.

After registration, the Authority examines each restrictive trade agreement and wherever it finds that terms and conditions so laid down in the agreement are detrimental to the public interest, it initiates proceedings.

3.4. RESTRICTIVE TRADE PRACTICES UNDER THE LAW [11]

Apart from undue concentration of economic power and monopolistic practices, the anti-monopoly law also prohibits unreasonably restrictive trade practices. In the context of horizontal restraints, the following practices are deemed to be unreasonably restrictive trade practices[12] under Section 6 of the MRTPO:

a) agreements between actual or potential competitors for the purpose or having the effect of

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

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

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

[11] Excerpts from the MRTPO are presented in Appendix D

[12] The law enumerates unreasonably restrictive trade practices under section 6.

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

v) excluding by means of boycott any person or undertaking from production, distribution or sale of any goods or 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 sale of goods by a supplier to a dealer which purports to establish or provide for the minimum prices to be charged on resale of goods;

ii) An agreement that requires as a condition of supplying goods to a dealer to the making of any such agreement.

When any restrictions contrary to the public interest are found by the Authority, it holds the agreement void in respect of those restrictions and makes suitable Orders for restraining all or any one of the parties to the agreement who carry on business in Pakistan. The Orders of the Authority are appealable in the High Courts.

3.4.1. *The 'Gateway' Clauses and Remedies*

In order to satisfy the Authority that a particular restrictive trade practice is not against public interest, the parties concerned have to bring themselves within one of the following gateways:

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

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

c) those benefits from such efficiency or promotion clearly outweigh the adverse effects of the absence on lessening of competition.

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. In case of unreasonably restrictive trade practices--MCA can issue the following Orders as per Section 12 (c):

(i) 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;

(ii) 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;

[Explanation.--In the 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.]

3.5. SOME INSTANCES OF UNREASONABLY RESTRICTIVE TRADE PRACTICES

Cases under Section 6 have involved the MCA to, firstly, deal with the cartel formation and secondly to modify/ amend suitably the restrictive clauses in the agreements amongst companies (list of cases pertaining to Unreasonably Restrictive Trade Practices (1971 - 2003) is given in Table D). A review is provided in the paragraphs to follow.

3.5.1. *Horizontal Restraints: Case Studies*

There have been some instances of dealing with cartels in the cement sector; a brief account of such cases is presented in the paragraphs to follow.

3.5.1.1. Cartels in the Cement Sector

First Cartel Case

During early nineties, most of the cement plants owned by The State Cement Corporation were privatized. Being in the hands of private entrepreneurs, there was a tendency to raise prices. The floods of 1992 provided an opportunity when re-construction started. In October 1992, first cartel in the cement sector was formed. Demand of cement was greater as compared to supply. Cement manufacturers raised the price over night and restricted supply.

The MCA examined the pricing pattern, capacity utilization and cost structure. After concluding that the cartel has been formed, recommendations were sent to the Economic Coordination Committee of the Cabinet (ECC). Consequently, the State Cement Corporation, still having influence in the market, was asked to open retail shops in the major cities and to print suggested sale price on the bags. This measure broke the cartel.

Second Cartel Case:

During later part of the 1990s, the cement manufacturers anticipated growth at around 8% in the domestic demand of cement, expected opening of Central Asian Countries' market including probable start of re-habilitation work in rubble-turned Afghanistan[13].Therefore, by the start of 1998, the production capacity was almost doubled. Public sector units, their production and strength to affect market were reduced subsequent to privatisation. The projected demand remained stagnant contrary to the assumptions of manufacturers.

The manufacturers again tried to form cartel in February 1998 as reported by the press. The MCA held discussions with them immediately and indicated to start the proceedings. Thus, the attempt to form cartel in February 1998 was foiled even without initiating formal proceedings.

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[13] Report by the All Pakistan Cement Manufacturers Association on 'Cement Industry in Pakistan', 1998.

Third Cartel Case:

In October 1998, the cement manufacturers simultaneously and uniformly increased prices (about Rs. 100/ bag). Under Section 14 of the MRTPO, The MCA initiated an enquiry in November 1998 to look into the possibility of cartelization[14]. All Pakistan Cement Manufacturing Association (APCMA), individual units and the users' associations were also involved in the enquiry. The manufacturers attributed the increase in price to the increase in cost of inputs, high taxation regime, and an effort by the industry to recover huge losses that it incurred due to low prices/ low demand in the preceding years. In their view, it was the only way to sustain units from closing down. However the MCA observed that:

- the input cost did not show comparable increase;
- there was no increase in furnace oil and excise duty since June 1997;
- The level of taxation was reduced from 47.5% to 40% (budget 1997).
- The price of furnace oil was reduced by Rs.800/tonne in June 1998. There was only a marginal increase in electricity charges in late 1997;
- Except for units that were paying very high financial charges, cost of cement production in all other cases was lower than the prices charged prior to the price hike of February.

Considering this, the MCA concluded that:

- the price increase was meant to unreasonably increase profit margins and was not an economic compulsion;
- the manufacturers, under tacit agreement increased the price prevailing in the market in early October i.e., Rs.135/bag to Rs.235/ bag in mid October, 1998; and
- This increase was through cartel formation as per section 6(1) (a) of the MRTPO.

[14] Muhammad Ilyas, Business and Economy, 'MCA Issues Show Cause Notices to 16 Cement Co 27 February 1999, *The 'Dawn', Issue 05/09* Dawn group of Newspaper, Haroon House Karachi 74200, Pak. See www.lib.virginia.edu/area-studies/southasia/Saserials/Dawn/1999/27feb99.html

The MCA passed an order on February 20, 1999 under Section 12(1) (c) of the Law. Cement manufacturers were directed, in the Order to break the cartel, reverse the cement price to pre-cartel level, to remove the restriction on their capacity utilization and to operate at the optimum level. MCA further directed to utilize full production capacity that was worked out to reduce the overhead expenses thus lowering the overall cost.

The cement manufacturers continued to charge a high price, ignoring the judgment of the MCA. Therefore, MCA imposed penalties. The undertakings appealed against decision of the MCA in the High Court[15].

In the meantime, the Economic Coordination Committee directed the Ministry of Industries to ensure that cement manufacturers sell their cement at an indicative price of less than Rs.200 per bag[16]. In addition, M/O Industries recommended lowering down cement prices by decreasing excise duty. Based on ECC's decision, the High Court disposed off the appeals[17].

Fourth Cartel Case:

In another instance, the MCA took suo moto notice of the public outcry appearing in the national press against cement price increase from the second week of May, 2003 onwards. It was decided in June, 2003 to conduct special enquiry about this situation under section 14(1) of the MRTPO.

The MCA after due process of the law issued Orders in October/ November 2005 directing 18 cement factories to break the cartel and reduce cement prices[18]. The cement factories did not report compliance of the Order, where after, 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 18 cement factories and set aside the decision of the MCA.

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[15] Attock Cement Paksitan Ltd and Pakland Cement Ltd *vs.* the Monopoly Control Authority, Order No. C.M.151-C-99.
[16] Case No. ECC – 56/07/99 dated 15.04.1999.
[17] The Lahore High Court, FAO.51/1999.
[18] *MCA Begins Probe Against Industry Cartels* Oct 26, 2005 see www.Dawn.com

The Court held that the MCA had no authority to control the prices of cement while it was mandated to act merely as a price regulator and issuing the Order of reducing the price was beyond its jurisdiction.

The voluminous court order, states that the MCA had been assigned the statutory role of protecting market competition and preventing unreasonable restrictive trade practice to ensure that there was no prevention or harm to competition. The order notes that the MCA had in May 2003 took the suo motu action against the cement factories and issued show-cause notices to appellant companies.

Later, the MCA passed an order in 2005 stating that the Federal Government had given substantial relief in central exercise duty in the 2003 budget, but the same had not been passed on to consumers because there was a cartel of cement companies to fix the prices and under-utilise the manufacturing capacity. The Authority also ordered the cement factories to reduce the prices in October/ November last year and that the companies filed appeals against the order.

The Court held that the simple fact that the price in May 2003 had risen beyond a justification, did not establish that cement manufacturers were involved in a cartel. Besides, the LHC said that the MCA had not identified the element of conspiracy in the working of the factories and it had failed in leveling a specific allegation against a particular cement manufacturer regarding its participation in a cartel.

The Court further said, the MCA had admitted that there was no cartel before May 2003 and before that, the prices increased due to market conditions. Under the circumstances, it would merely be an assumption by the Authority that cement factories might have been involved them in a cartel and monopolized the market in fixing prices. The MCA in fact overlooked the fact that the prices were also increased in October 2002 with almost the same ratio and did not take any action against them at that time.

The Court ruled that if a mere change in prices was sufficient to spell out a cartel then the whole matter would be at an unfettered sweet will of the MCA and it could condemn a price movement or leave it undisturbed as a market condition.[19] The decision of the Court, thus, reflects the need of evidence gathering on scientific basis as is being done in other countries.

3.5.1.2. Cable and Hardware Manufacturers' Cartels

Islamabad Electric Supply Company (IESCO) forwarded three cartel cases to the MCA, formed by the Pakistan Cable Manufacturers Association and hardware manufacturers. These were proved based on evidence provided by the IESCO showing collusive bidding by suppliers of cables, PVC pipes, etc. by quoting same price for all the items offered for supply. In December 2003 and 2004, the MCA ordered the companies to desist from collusive bidding[20]. Repetition of the cartel attempts in the same manner shows that the earlier order of the MCA had no or little deterrence effect for the companies involved.

3.6. COMPARISON OF MRTPO, COMPETITION LAWS OF VARIOUS COUNTRIES AND MODEL LAWS OF WB-OECD AND UNCTAD: AN APPRAISAL OF DEFICIENCIES IN THE LAW OF PAKISTAN

International agencies such as the OECD, UNCTAD and the World Bank assist countries in implementing competition law; these agencies have come up with model competition laws that serve as templates for drafting competition law statutes. The World Bank and OECD (1999) published one such model in 1999 while the UNCTAD's last version was published in 2003. World Bank-OECD approach is generally more

[19] August 01, 2006, 'Cement units' plea against MCA order accepted'.
[20] MCA's Order dated December 27, 2003 and December 27, 2004 in the matter of 'Cable and Hardware Manufacturers'.

substantive (in the basic foundational sense) while UNCTAD is more inclusive (recording a wide range of experiences).

Discussion on the similarities and differences between two major model competition laws published by the OECD-World Bank and UNCTAD and the Pakistani competition law is necessary to draw implications for policy makers involved in the drafting of Competition Law for Pakistan.

3.6.1. *Objective of Competition Law*

The objective of Competition Law is stated in the World Bank-OECD[21] (1999) in the following words:

> "This Law is intended to maintain and enhance competition in order ultimately to enhance consumer welfare."

Similarly, UNCTAD (2003)[22] in this regard say:

> "To control or eliminate restrictive agreements or arrangements among enterprises, or acquisition and/or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic and international trade or economic development."

While the broad objectives of the Law of Pakistan[23] are to provide for measures against:

1. Undue concentration of economic power
2. Unreasonable monopoly power
3. Unreasonably restrictive trade practices

For World Bank-OECD, the ultimate objective is the enhancement of consumer welfare. UNCTAD's approach emphasizes on domestic and international trade and economic development. This has the advantage of implicitly incorporating a wide range of objectives such as consumer welfare, social welfare, economic efficiency, protection

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

[22] UNCTAD (2003). Model Law on Competition. United Nations, Geneva.

[23] An Explanatory Memorandum on the Law on Regulation and Prevention of Monopolies and Cartels, Government of Pakistan, Ministry of Finance. 1970

of small business etc. The disadvantage of being able to do so is that some of these implicit objectives may conflict with each other[24].

Enhancement of competition, economic efficiency, consumer welfare and economic freedom are the points not highlighted in the Law of Pakistan, however, these are implicitly covered in the 'public interest'. Though the Law does not provide the definition of the public interest but it is taken to be in its dictionary meaning while evaluating a particular situation.

3.6.2. *Scope of Competition Law*

The scope of Competition Law[25] specifies the entities (enterprises, natural persons etc.) to which the law applies. It can also specify any exclusion from the law.
The WB-OECD Model Law includes acts done outside the country but have substantial effect in the country. It excludes workers and employees union-related activities.

In its Model Competition Law, UNCTAD includes 'natural persons' (as distinct from and in addition to enterprises) as a separate entity to which the law applies. Such natural persons include owner, manager or employee of enterprises. UNCTAD also excludes all acts of the state and state-related agencies from the application of the competition law. The discussions in UNCTAD (2003) seem to suggest that whether this includes state-owned enterprises may differ from country to country.

Unlike UNCTAD, WB-OECD defines 'firms' as including natural persons. The exclusions related to the State that is provided for in the UNCTAD model law also requires careful considerations.

On the other hand,The Pakistani law[26] is applicable to all private economic entities. It does not cover state owned enterprises. The law is silent on extra territorial jurisdiction and cross border abuses. In addition, the 'definition clause' under the Law requires modification. The definition of 'services' is limited, major areas of services are outside the 'definition' clause and some of the services are covered under the sector

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[24] Cassey Lee, *Model Competition Laws: The World Bank-OECD and UNCTAD Approaches Compared*, Faculty of Economics & Administration, University of Malaya, 10 August 2004
[25] See *supra* note 23
[26] Ibid

regulators. Hence, the MCA's role in such sectors has been marginalized. In the same way, 'association' of manufacturers is not covered under the MRTPO while in India enterprise or association of enterprises or person or association of persons are forbidden to enter in any restrictive 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[27].

3.6.3. *Restrictive Agreement*

Transactions between firms are often governed by implicit or explicit agreements amongst themselves. These agreements can be classified as either horizontal or vertical agreements. Such agreements tend to be 'restrictive' in the sense of reducing the independence of firms involved to undertake alternative business decisions. When such agreements significantly lessen competition, they are said to be 'anti-competitive'.

The five major types of restrictive agreements identified in both the WB-OECD and UNCTAD model competition laws are as follows[28]:

1. Price Fixing;
2. Quantity Fixing;
3. Market Allocation;
4. Refusal to Deal;
5. Collusive Bidding / Tendering;

With the exception of collusive bidding, all the above agreements can take place either horizontally or vertically. Some are per se illegal while other is subject to rule of reason in WB- OECD model law.

The treatment of restrictive agreements is somewhat simpler in UNCTAD's model competition law. There is a list of restrictive agreements that are prohibited but any of these may be exempted or authorized if it can be shown that it will produce 'net public benefit'.

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[27] see *supra* note 21
[28] See *supra* note 13

In the MRTPO, unreasonably restrictive trade practices are practices that unreasonably prevent, restrain or lessen competition. These practices include agreements between actual or potential competitors to fix prices, divide markets, and limit production, distribution, technical development or investment, boycott competitors. In this effect, the MCA has power to remedy the situation by issuing an order to terminate such practices. MCA can only make recommendations to the Federal Government for suitable governmental actions to prevent or eliminate undue concentration of economic power, unreasonable monopoly power or unreasonably restrictive trade practices, which, in its opinion exists in case of any undertaking or group of undertakings engaged in business activities in a sector regulated by a sector regulator. However, in practice this function of 'advice/recommendation' is hampered by the fact that the undertakings lying outside the purview of the law are not bound to provide any information to the MCA, thus making it difficult to conduct any probing into the sector.

In South Africa a practice is prohibited if it 'has the effect of substantially preventing or lessening competition in a market'; Law per se prohibited horizontal practices include price fixing, dividing markets or collusive tendering.

In the similar fashion in the law of Germany agreements between competing undertakings, decisions by associations of undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition shall be prohibited.

3.6.4. *Nature of Enforcement Agency*

No specific suggestions under Model Law of UNCTAD, while WB–OECD Model Law suggests Independent Competition Office[29].

It states:

- The competition office is under the authority of the [President], and receives its budget directly from and reports directly to the [legislature of]

[29] see *supra* note 21 and 22

- The [head] of the competition office is appointed by the [President of], for a renewable term of [a minimum of three] years, and can only be removed by a [vote of the legislature] for patent inability to discharge his functions.

In India[30] the Commission shall consist of a Chairperson and minimum two and maximum ten other Members to be appointed by the Central Government provided that the Central Government shall appoint the Chairperson and a member during the first year of the establishment of the Commission.

The Chairperson and every other Member shall be a person of ability, integrity and standing and who, has been, or is qualified to be, a judge of a High Court, or has special knowledge of, and professional experience of not less than fifteen years in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs, administration or in any other matter which, in the opinion of the Central Government, may be useful to the Commission. The Chairperson and other members shall be whole-time Members.

The Competition Act of Germany provides for a Monopolies Commission having rules of procedure and a secretariat. The function of the latter is to scientifically, administratively and technically support the Monopolies Commission.

The Federal Cartel Office institutes proceedings or conducts investigations; at the same time it shall inform the supreme authority in whose district the undertakings concerned have their registered seat. If a supreme authority institutes proceedings or conducts investigations, it shall at the same time inform the Federal Cartel Office.

Under the MRTPO 1970 the Monopoly Control Authority (MCA) is a statutory quasi-judicial body consisting of not less than three members appointed by Federal Government one of whom is appointed as chairman.

This Organization is divided into three Branches[31]:

- Research and Investigation branch initiates cases and conducts research on situations falling under the purview of MRTPO;

[30] Competition Act 2002 of India.
[31] See Table C: The Organizational chart of MCA (till July 2006)

Legal and Administration Branch - registers individuals, undertakings and agreements, and provides administrative support to the officers.

Information Technology Section is responsible to provide integrated database for analysis and investigation.

3.6.5. *Sanctions and Penalties*

Model Law of UNCTAD[32] suggests imposition of sanction for:

- Violation of the law
- Failure to comply with the decision or orders of competition agency or of the appropriate judicial authority
- Failure to supply information or documents required within time limit specified
- Furnishing false or misleading information

Sanctions could include:

- Fines (in proportion to gravity of the offence or illicit gain)
- Imprisonment (major violations)
- Interim orders or injunction
- Cease and desist, public disclosure or apology
- Divestiture or rescission (mergers or restrictive contract)
- Restitution to injured consumers
- Finding of prima facie evidence of liability in private actions.

Model Law of WB - OECD[33] suggests:

- The competition office (or appropriate court or tribunal) may issue orders prohibiting firms from carrying on the anti-competitive or unfair practices, and if necessary, requiring such firms to take other specified actions to eliminate the harmful effects of such practices and to ensure against recurrence of such practices.

[32] see *supra* note 22
[33] see *supra* note 21

- Fines for cartel or restrictive agreements, serious or repeated abuse of dominance, unfair competition and to ensure merger and acquisition notification compliance.
- Interim injunctions whenever necessary.
- Parties may apply for advance ruling, which would be binding on the competition office. Advance ruling is for a limited period but can be renewed or modified or revoked under certain conditions.

The Competition Commission of India[34] has the power to:

- direct the parties to discontinue and not to re-enter into any such agreement that has been declared void under the law
- direct the parties to discontinue abuse of dominant position.
- impose such penalty on each of the parties, which shall not be more than ten per cent of the average of the turnover for the last three preceding financial years
- award specified compensation to the parties
- direct that specified modifications be made to the agreements; and recommend to the central government for the division of an undertaking enjoying dominant position.

In the MRTPO[35], 1970 of Pakistan the penalty for non-compliance with the orders are up to Rs.100, 000/- (US$ 1700); and per day Rs.10, 000/- for continued default. Thus, the businessmen find it easier to pay the low penalties and to continue their abusive practices. Low penalty and its inadequate enforcement is the major flaw in the Law because penalties are collected as arrears of land revenue. Which is an elaborate system of revenue collection but exercise of this power is at the discretion of agencies other than MCA; thus, this system does not give any enforcement power to MCA itself for collecting penalties.

[34] Competition Act 2002 of India
[35] see *supra* note 23

CHAPTER 4
CONCLUSIONS AND RECOMMENDATIONS

4.1. NATURE AND CHARACTERISTIC OF COMPETITION POLICY AND LAW

Where markets operate freely and effectively, competition can be expected to bring benefits in the shape of encouraging firms to improve productivity, reduce prices and to innovate, whilst rewarding consumers with lower prices, higher quality and wider choice. When markets fail, competition policy and law is the tool that can be used to bring about the efficient workings of markets and to alleviate market failures.

Competition policy encompasses all government policies intended to influence competition in markets. Competition law is the legal framework to give effect to this policy. Competition law is therefore a sub-set of competition policy. Traditionally, economic efficiency has been the key aim of competition policy and competition law. Effective enforcement of this law, it is assumed, contributes inestimably to the efficient and equitable functioning of the progressive market economy that in the long-term will result in producer benefit and consumer welfare.

The Competition law has a number of characteristics that are important for discussion that ensues:

- The Competition Law should intend to maintain and enhance competition in order ultimately to enhance consumer welfare;
- The criteria for determining anti-competitive behaviour is formulated keeping in view welfare considerations of consumers;
- There is need for powerful regulatory framework for implementation of competition policy.

4.2. COMPLEXITIES IN IMPLEMENTING COMPETITION LAW

Anti-competitive practices refer to a wide range of business practices that firms or group of firms may engage in. The type of practices that are considered anti-competitive and in violation of competition law, vary by jurisdiction and are determined on a case by

case basis. Certain practices may be prohibited outright (or declared per se illegal), while others may be subject to rule of reason.

Generally, competition-restricting practices can be said to fall into two categories, namely horizontal and vertical restraints on competition. Horizontal restraints entail collusive conduct with other competitors in the market and include specific practices such as cartels, conspiracy, as well as pricing behaviour such as predatory pricing, price discrimination and price fixing. Vertical restraints entail supplier-distributor relationships and include practices such as exclusive dealing, geographic market restrictions, refusal to deal/sell, resale price maintenance, and tied selling.

Competition authorities also pay considerable attention to mergers and acquisitions primarily because they could result in monopolies or at least a dominance that will permit anticompetitive behaviour. The foregoing is testimony to the fact that competition law is arguably one of the more difficult regimes to implement effectively particularly because it cannot be applied 'uniformly'. All provisions of the law have to be applied on a case by case basis, but competition law calls for a myriad of considerations, many of which are subjective and imprecise in nature. Moreover, competition law confers immense power and it has to be ensured that this power is exercised competently and effectively.

4.3. CONCLUDING ANNOTATIONS ON COMPETITION LAW OF PAKISTAN

Competition legislation is necessary to regulate business, ensure consumer and producer welfare, and promote the healthy growth of the economy and social justice. Pakistan enacted competition legislation (MRTPO) as early as 1971, but the law needs more frequent amendments.

- Only private monopolies come under the purview of the law, and state monopolies do not. It is necessary to extend the coverage of the MRTPO to public sector enterprises. This would provide a level playing field to

both private and public sector organisations[1].

- The definition of 'services' is limited, major areas of services are outside the 'definition' clause and some of the services are covered under the sector regulators. For example, The Law of 1970's covers transport, provision of board, lodging, entertainment or amusement, supply of electrical or other energy - Now with Sector regulator NEPRA, purveying of news - Now with Sectorial regulator PEMRA, banking, insurance or investment.
- The levels of the penalties are very low as compared to other countries and this encourages businesses to pay the penalties and then continue their abusive practices.

There are certain capacity issues regarding organizational setup of MCA that need to be addressed.

- The law does not provide any qualification criteria for the selection of the Authority as a result senior officers having no relevant background have been posted in the MCA.
- The staff strength may depend upon the economic requirements of a country yet it shows the level of priority 'competition' gets in the governments' economic agenda. Most of the agencies in the world extensively utilize skills of economists, accountants and lawyers for evaluation of cases. MCA on the other hand is suffering lack of professional skills.
- Lack of human, financial and necessary infrastructure is another problem that led to picking the issues for analysis/ cases on random basis. Lack of a systematic approach hinders the analysis of various sectors of the economy. As a result, there had been not so much sectoral research work/ studies and hence a systematic approach could not flourish.
- The MCA's budget meets only pay and allowances of the employees therefore, the research efforts remain limited in coverage. Due to funding constraint, the

[1]Though, due to privatization, the State enterprises are not so prominent in the markets with reference to their size and number.

services of high profile legal experts could not be obtained to represent the organization at the appeal's level .

4.4. RECOMMENDATIONS FOR SUCCESSFUL IMPLEMENTATION OF COMPETITION LAW

Successful implementation of competition law is contingent on certain requisites being in place:

- Competition law is a highly complex area. It calls for a deep understanding and application of economics of competition on a case-by-case basis. It has to be demonstrated exactly how the overall market structure is going to be distorted by the anticompetitive horizontal restraints. The sophistication required is critical as wrong evaluations can drive decisions the wrong way.
- A high degree of economic and legal sophistication on the part of the enforcement agency and on the part of the courts and/or specialized tribunals that have judicial functions in the implementation of competition law.
- Training a core of enforcement experts to confidently handle such tasks is difficult. An even more Herculean task is the required retraining of a judiciary woefully ignorant of economics to competently adjudicate competition cases.
- A powerful enforcement agency insulated from political, bureaucratic and budgetary constraints can make a real difference in the implementation of competition law. High level of transparency, administrative and judicial independence is other necessary pre-requisites.

The MCA was established to implement an important legislation, so there is a need to revitalise this important institution and to strengthen it.

- The MCA should also make use of the opportunities for technical assistance provided by UNCTAD[2].
- It is recommended that the Authority should revise its recruitment and human

[2] United Nations, *The United Nations Set of Principles and Rules on Competition*, Document No. TD/RBP/CONF/10/Rev.2, P. 22-23, Geneva, 2000.

resource policy, and offer attractive terms and conditions. Without aggressive investment in HRD, it will be difficult for the Authority to meet the challenges of the requirements of changed circumstances.

- There is a strong need to build partnerships with civil society groups, citizen representatives and members of academia to create awareness and promote the competition culture. Lessons could be learnt from the experiences of other countries' competition bodies.
- A well thought advocacy campaign is also recommended to the Authority, to cater to both the public and businesses. MCA therefore, needs to develop an advocacy program in liaison with consumer associations and develop a better interface with the Government ministries.
- It is imperative that officers with legal and economic background, with sufficient exposure to the business and industry practices are assigned to head the MCA.

It is expected that the above mentioned steps would lead to deal with horizontal restraints in an effective manner. This would in turn, promote competitive environment for the businesses in the country.

APPENDICES

APPENDIX A

SCOPE OF COMPETITION LAW IN MODEL COMPETITION LAWS

A.1 WB-OECD

1. "This Law shall be enforceable on the whole territory of the Republic of X and applies to all areas of commercial economic activity. The Law shall be applicable to all matters specified in [section(s) of the law containing the prohibitions of restrictive agreement, abuse of dominance, and merger review], having substantial effects in the Republic of X, including those that result from acts done outside the Republic of X.

2. This Law does not derogate from the direct enjoyment of the privileges and protections conferred by other laws protecting intellectual property, including inventions, industrial models, trademarks, and copyrights. It does apply to the use of such property in such a manner as to cause the anticompetitive effects prohibited therein.

3. This Law shall apply neither to the combinations nor to activities of workers or employees nor to agreements or arrangements between two or more employers when such combinations, activities, agreements, or arrangements are designed solely to facilitate collective bargaining in respect of conditions of employment".

A.2 UNCTAD

1. "Applies to all enterprises as defined above, about all their commercial agreements, actions or transactions regarding goods, services or intellectual property.

2. Applies to all natural persons who, acting in private capacity as owner, manager or employee of an enterprise, authorize, engage in or aid the commission of restrictive practices prohibited by law.

3. Does not apply to the sovereign acts of the State itself, or to those of local governments, or to acts of enterprises or natural persons which are compelled or supervised by the State or by local governments or branches of government acting within their delegated power".

APPENDIX B

RESTRICTIVE AGREEMENTS IN MODEL COMPETITION LAWS RESTRICTIVE AGREEMENTS

B.1 WB-OECD

Prohibited agreements between firms

1. "An agreement, concluded in any form including by concerted practice, between competing firms (including firms that could easily become competitors) is prohibited if such an agreement has or would likely have as its principle effect:

(a) Fixing or setting prices, tariffs, discounts, surcharges, or any other charges,

(b) fixing or setting the quantity of output,

(c) fixing or setting prices at auctions or in any other form of bidding, except for joint bids so identified on their face to the party soliciting bids,

(d) dividing the market, whether by territory, by volume of sales or purchases, by type of goods sod, by customers or sellers, or by other means,

(e) eliminating from the market actual or potential sellers or purchasers; or

(f) refusing to conclude contracts with actual or potential sellers or purchasers.

2. An agreement, other than those enumerated in Section 1 of this article, concluded in any form including by concerted practice, is prohibited if it has or would likely have as its result a significant limitation of competition.

(a) An agreement among competing firms, including firms that could easily become competitors, other than those agreements enumerated in Section 1 of this article, cannot be found to significantly limit competition unless the shares of the firms participating in the agreement collectively exceed 20 percent of a market affected by the agreement.

(b) An agreement solely among no competing firms cannot be found to significantly limit competition unless:

i. At least one of the parties holds a dominant position in a market affected by the agreement; or

ii. the limitation of competition results from the fact that similar agreements are widespread in a market affected by the agreement.

3. (a) An agreement prohibited under Section 2 of this article is nonetheless legal if it has brought about or is likely to bring about gains in real as opposed to merely pecuniary efficiencies that are greater than or more than offset the effects of any limitation on competition that result or are likely to result from the agreement. or An agreement prohibited under Section 2 of this article is nonetheless legal if it has brought about or likely to bring about such large gains in real as opposed to merely pecuniary efficiencies that consumer wellbeing is expected to be enhanced because of the agreement.

(b) The burden of proof under this section lies with the parties seeking the exemption, and includes demonstrating that if the agreement were not implemented it is not likely that the relevant efficiency gains would be realized by means that would limit competition to a lesser degree than the agreement".

B.2 UNCTAD

1. "Prohibition of the following agreements between rival or potential rival firms, regardless of whether such agreements are written or oral, formal or informal:

(a) Agreements fixing prices or other terms of sale, including in international trade

(b) Collusive tendering;

(c) Market or customer allocation;

(d) Restraints on production or sale, including by quota;

(e) Concerted refusals to purchase,

(f) Concerted refusals to supply,

(g) Collective denial of access to an agreement, or association, which is crucial to competition.

2. Authorization or exemption

Practices falling within paragraph 1, when properly notified in advance, and when engaged in by firms subject to effective competition, may be authorized or exempted when competition officials conclude that the agreement as a whole will produce net public benefit".

APPENDIX C

MONOPOLIES AND RESTRICTIVE TRADE PRACTICES (CONTROL AND PREVENTION) ORDINANCE, 1970

C.1 PREAMBLE

"To provide for measures against undue concentration of economic power, growth of unreasonable monopoly power and unreasonably restrictive trade practices.

WHEREAS the undue concentration of economic power, growth of unreasonable monopoly power and unreasonably restrictive trade practices are injurious to the economic well-being, growth and development of Pakistan;

AND WHEREAS it is expedient to provide for measures against such concentration, growth and practices and for matters connected therewith or incidental thereto;

AND WHEREAS the national interest of Pakistan in relation to the economic and financial stability of Pakistan requires Central legislation in the matter;

NOW THEREFORE, in pursuance of the Proclamation of the 25th day of March 1969, read with Provisional Constitution Order, and in exercise of all powers enabling him in that behalf, the President is pleased to make and promulgate the following Ordinance".

C.2 DEFINITIONS

(l) "In this Ordinance, unless there is anything repugnant in the subject or context.

(a) "agreement" includes any arrangement or understanding whether or not in writing and whether or not it is or is intended to be legally enforceable;

(b) "associated undertakings" means any two or more undertakings interconnected with each other in the following manner, namely:—

(i) if a person who is the owner or a partner of an undertaking or who directly or indirectly holds or controls shares carrying not less than thirty per cent of the voting power in such undertaking, is also the owner or a partner of another undertaking or, directly or indirectly, holds or controls shares carrying not less then thirty percent of the voting power in that undertaking; or

(ii) if the undertakings are under common management or common control or one is the subsidiary of another,

(c) "Authority" means the Monopoly Control Authority constituted under section 8,

(d) "Control", in relation to an undertaking, means the power to exercise a controlling influence over the management or the policies of the undertaking, and, in relation to shares, means the power to exercise a controlling influence over the voting power attached to such shares;

(e) 'individual' includes a Hindu undivided family,

(f) "market" in relation to any goods or services, means the geographic region in which competition in the production or sale of such goods or the provision of such services takes place,

(g) "monopoly power" means the ability of one or more sellers in a market to set non-competitive prices or restrict output without losing a substantial share of the market or to exclude others from any part of that market;

(h) "price", in relation to the sale of any goods or to the provision of any services, includes every valuable consideration, whether direct or indirect, which in effect relates to the sale of any goods or the provision of any services,

(i) "retailer ", in relation to the sale of any goods, means a person who sells the goods to any other person otherwise than for re-sale;

(j) "service" means provision of board, lodging, transport, entertainment or amusement' or of facilities in connection with the supply of electrical or other energy, purveying of news, banking. insurance or investment:

k) "trade" means 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;

(l) "trade practice" means any act or practice relating to the carrying on of any trade or business,

(m) "undertaking" means any concern, institutions, establishment or enterprise engaged in the production, supply or distribution of goods or in the provision or control of any service;

(n) "unreasonably restrictive trade practice" means a trade practice which has or may have the effect of unreasonably preventing, restraining or otherwise lessening competition in any manner:

(o) "value of assets", in relation to an undertaking, means the value of assets of the undertaking at cost less depreciation at the normal rates at which depreciation is calculated for purpose of assessment of income-tax:

(p) "wholesaler", in relation to the sale of any goods, means a person who purchases goods and sells them to any other person for re-sale; and

(q) Words and expressions used but not defined in this Ordinance and defined in the Companies Act, 1913 (VII of 1913)2, have the meanings respectively assigned to them in that Act.

(2) For the purposes of this Ordinance an individual shall be deemed to own, hold or control a thing if it is owned, held or controlled by the individual or his spouse, or by a brother or sister of the individual, or by any of the lineal ascendants or descendants of the individual".

APPENDIX D

UNREASONABLY RESTRICTIVE TRADE PRACTICES UNDER MRTPO 1970

(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.

(2) No such agreement as is referred to in sub-section (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,

(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".

TABLES

TABLE A

NAMES OF COMPETITION LAWS AROUND THE WORLD

Several countries adopted competition laws in the 1980s and 1990s. Below are examples of names given to these laws by countries, in alphabetical order.

Country	Name of the competition law	Horizontal Restraints
Algeria	Law on the Safeguarding of Economic Competition	
Argentina	Law No. 22 262 of 1980 on Competition	
Armenian	Law of the 6 of November 2000 on the Protection of Economic Competition	
Australia	Trade Practices Act 1974	
Austria	Cartel Act of 1998	
Belgium	Law of 5 August 1991 on the Protection of Economic Competition	
Brazil	Federal Law No. 8 884 of 1994 on the Competition Defense System	
Canada	Competition Act	

Colombia	Law on Promotion of Competition and Restrictive Commercial Practices	
Costa Rica	Law on the Promotion of Competition and Effective Consumer Protection	
Côte d'Ivoire	Law on Competition	
Czech Republic	Commercial Competition Protection Act	
Denmark	Competition Act 1997	
European Union	Rules of Competition of the Treaty instituting the European Community	
Finland	Act on Restrictions on Competition	
France	Ordinance No. 86 - 1243 of 1 December 1986 on Liberalization of Prices and Competition	

Germany	Act Against Restraints of Competition of 1957	Agreements between competing undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition.
Greece	Law 703/77 on the Control of Monopolies and Oligopolies and Protection of Free Competition	
Hungary	Act No LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices	
India	Monopolies and Restrictive Trade Practices (MRTP) Act, Competition Act 2002	Chapter I (2). (c) "cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services;

Ireland	Competition Act 1991 and Mergers and Takeovers (Control) Acts 1978 to 1996; Competition Act 2002	
Italy	Act No. 287/1990, "Rules for the Protection of Competition and the Market"	
Jamaica	Fair Competition Act	
Japan	Act Concerning the Prohibition of Private Monopolization and Maintenance of Fair Trade also called "Antimonopoly Law"	Chapter I Sec. 2 (6) The term "unreasonable restraint of trade" as used in this Act shall mean such business activities, by which any entrepreneur, by contract, agreement or any other concerted actions, irrespective of its names, with other entrepreneurs, mutually restrict or conduct their business activities in such a manner as to fix, maintain, or increase prices, or to limit production, technology, products, facilities, or transaction counterparties, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.

Kenya	The Restrictive Trade Practices, Monopolies and Trade Control Act	
Luxembourg	Law of 17 June 1970 governing Restrictive Commercial Practices	
Malta	Act to Regulate Competition and Provide for Fair Trading	
Mexico	Federal Law on Economic Competition	
Mongolia	Law on Prohibiting Unfair Competition	
Netherlands	Competition Act of 22 May 1997	
New Zealand	Commerce Act 1986	
Norway	Competition Act of 1993	
Pakistan	The Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance 1970	
Panama	Law on the Protection of Competition	

Peru	Legislative Decree Against Monopolistic, Controlist and Restrictive Practices Affecting Free Competition	
Poland	Law of Counteracting Monopolistic Practices Act of 24 February 1990	
Portugal	Decree-Law No. 371/93 of 29 October 1993 on the Protection and Promotion of Competition	
Russian Federation	Act Law on Competition and the Limitation Restriction of Monopolistic Monopoly Activity in Commodity Markets	
Slovakia	Act No. 188/1994 Coll. on the Protection of Economic Competition Act No. 136/2001 Coll. on Protection of Competition Act No. 465/2002 Coll. on Block Exemptions from the Ban of Agreements Restricting Competition	

South Africa	Maintenance and Promotion of Competition Act 1979	1(1)(xxx) 'restrictive horizontal practice' means any practice listed in section 4;
Spain	Law 16/1989 on the Defense of Competition Protection of Competition Law	
Sri Lanka	The Fair Trading Commission Act	
Sweden	Competition Act of 1993	
Switzerland	Federal Law on Cartels and other Restrictions in Competition	
Ukraine	Law of the 11th of January 2001 on the Protection of Economic Competition,	
United Kingdom	Fair Trading Act 1973, Competition Act 1980, Competition Act 1989, Enterprise Act 2002"	
United States of America	Antitrust Laws (Sherman Act, Clayton Act, Federal Trade Commission Act, Hart-Scott-Rodino Antitrust Improvements Act)	

Venezuela	Law to Promote and Protect the Exercise of Free Competition	

TABLE B

COMPETITION LEGISLATION IN THE UNITED NATIONS MEMBER STATES AND OTHER ENTITIES[i]

(With year of adoption)

Africa	Asia and Pacific	Countries in transition	Latin America and Caribbean	OECD countries
Algeria (1995)	China (1993) (Draft Revisión 2002/2003)	Armania (2000) Azerbaijan**	Argentina (1980)	Australia (1974)
Benin Botswana	Fiji (1993)	Belarus **	Bolivia*	Austria (1988)
Burkina Faso*	India (1969)	Bulgaria (1991)	Brazil (rev. 1994, rev. 2002)	Belgium (1991)
Cameroon* Central African Republic	Indonesia (1999)	Croatia (1995)	Chile (1973, rev. 1980, REV. 2002)	Canada (1889)

[i] SOURCE: UNCTAD Data Bank on National Legislation,See www.unctad.org/competition

Africa	Asia and Pacific	Countries in transition	Latin America and Caribbean	OECD countries
Côte d'Ivoire (1978)	Jordan*	Georgia**	Colombia (1992)	Czech Republic (1991, rev. 2001)
Egypt*	Malaysia*	Kazakhstan**	Costa Rica (1992)	Denmark (1997, rev. 2002)
Gabon (1998)	Pakistan (1970) (Draft Revision 2002)	Kyrgyzstan**	Dominican Republic*	European Union (1957)
Ghana*	Philippines*	Lithuania (1992)	El Salvador*	Finland (1992, rev. 2001)
Kenya (1988) (Draft Revision 2002/2003)	Sri Lanka (1987)	Mongolia (1993)	Guatemala*	France (1977, rev. 1986 et 2001)
Malawi (1998)	Taiwan Province of China (1992)	Republic of Moldova**	Honduras*	Germany (1957, rev. 1998)
Mali (1998)	Thailand (1979) and (1999)	Romania (1996)	Jamaica (1993)	Greece (1977, rev. 1995)

Africa	Asia and Pacific	Countries in transition	Latin America and Caribbean	OECD countries
Mauritius*	Viet Nam*	Russian Federation (1991)	Nicaragua*	Hungary (1996, rev 2000)
Morocco (1999)		Slovakia (1994) **Slovakia is already a member of OECD. The competition legislation is valid from 1991 in the territory of Slovakia**	Panama (1996)	Ireland (1991, rev. 1996, rev. 2002)
Senegal (1994)		Slovenia (1991)	Paraguay*	Italy (1990)
South Africa (1955, amended 1979)		Tajikistan**	Peru (1990)	Japan (1947, rev. 1998)
Togo*		Turkmenistan**	Trinidad and Tobago*	Luxembourg (1970, rev. 1993)
Tunisia (1991)		Ukraine**	Venezuela (1991)	Mexico (1992)

Africa	Asia and Pacific	Countries in transition	Latin America and Caribbean	OECD countries
United Republic of Tanzania (1994),*** (Rev. 2002)		Uzbekistan		Netherlands (1997)
Zambia (1994)				New Zealand (1986)
Zimbabwe (1996, rev 2001)				Norway (1993)
				Poland (1990)
				Portugal (1993)
				Republic of Korea (1980, rev. 1999))
				Spain (1989, rev. 1996)
				Sweden (1993)
				Switzerland (1985, rev. 1995)
				Turkey (1994)

Africa	Asia and Pacific	Countries in transition	Latin America and Caribbean	OECD countries
				United Kingdom (1890, rev.1973, 1980, 1998 & 2002))
				United States (1890, rev. 1976)

TABLE C

ORGANIZATIONAL CHART OF MCA
(till July 2006)

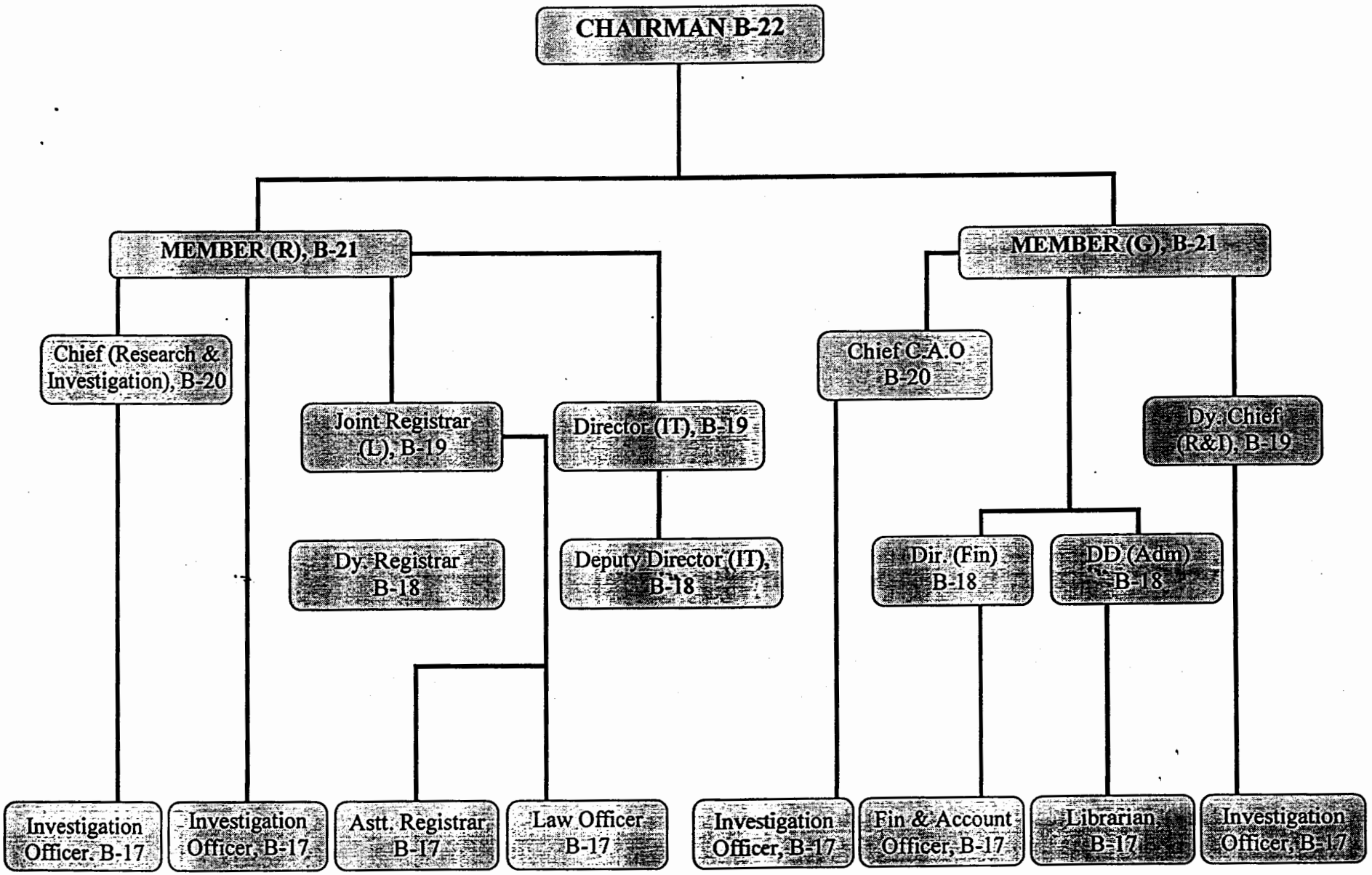

TABLE D

LIST OF CASES PERTAINING TO UNREASONABLY RESTRICTIVE TRADE PRACTICES (1971 - 2003)

SR. NO.	NAME OF UNDERTAKINGS	DATE OF ORDER
1	Sikandar Limited	07-02-1981
2	Pakistan Burmah Shell Limited	19-02-1981
3	Pakistan Burmah Shell Limited	19-02-1981
4	Zelin Limited (Chloride Pakistan Limited)	19-02-1981
5	Muller & Phipps (Pakistan) Limited	12-05-1981
6	Ali Gohar & Company	08-07-1981
7	Lever Brother Pakistan Limited	03-09-1981
8	Spencer & Company Pakistan Limited	03-09-1981
9	Spencer & Company Pakistan Limited	05-09-1981
10	Adam Tea Company Limited	07-09-1981
11	Brook Bond Pakistan Limited	18-10-1981
12	Lahore Chemical & Pharamaceutical Works Limited	02-11-1981
13	Muller & Phipps (Pakistan) Limited	02-11-1981
14	Hoehcest Pakistan Limited	03-11-1981
15	M.M. Isphahani Limited	03-11-1981
16	Sterling Prodects Limited	03-12-1981
17	Rafhan Maiz Prodects Limited	02-01-1982
18	Spencer & Company Pakistan Limited	14-01-1982

19	Smithe Kline & Frcnch Limited	14-01-1982
20	Burshane Pakistan Limited	22-02-1982
21	Annoor Textile Mills Limited	22-02-1982
22	Crescent Engineering Company Limited	22-02-1982
23	Lipton Pakistan Limited	22-02-1982
24	Muller & Phipps (Pakistan) Limited	22-02-1982
25	Rafhan Maze Products Limited	22-02-1982
26	Caltex Oil Pakistan Limited	22-02-1982
27	Bayer Pharna Limited	22-02-1982
28	Spencer & Company Pakistan Limited	27-02-1982
29	Parke-Davis And Company Limited	28-03-1982
30	Parke-Davis And Company Limited	28-03-1982
31	Ali Gohar Company	14-04-1982
32	Smithe Kline & French Limited	04-05-1982
33	Lekson Tobacco Company Limited	12-05-1982
34	Tobacco International Limited	12-05-1982
35	Souvenia Tobacco Company Limited	12-05-1982
36	Moghual Tobacco Company Limited	12-05-1982
37	Tanmac International Limited	08-06-1982
38	Bayer Pharma Limited	10-06-1982
39	Avery Scales Limited	30-06-1982
40	Avery Scales Limited	30-06-1982
41	Boots Company Pakistan Limited	25-08-1982
42	Avery Scales Limited	06-01-1983
43	Slimax Engineering Company Limited	25-05-1983
44	Dentogene Laboratories Limited	21-09-1983

45	Glaxo Laboratories Pakistan Limited	19-01-1984
46	English Biscuits Manufacturers Limited	19-01-1984
47	Forbes Forbes Camphell & Company Limited	06-05-1984
48	Ciba Geigy Pakistan Limited	16-02-1982
49	Trans Continental Agencies	08-09-1990
50	Pakistan Tobacco Company Limited & Khyber Tobacco Company Limited	22-09-1973
51	Lakson Tobacco Company Limited	24-09-1973
52	Souvenir Tobacco Company Limited	24-09-1973
53	Tobacco International Limited	24-09-1973
54	Premier Tobacco Industries Limited	24-09-1973
55	General Order (Manufacturers Os Tobacco, Soaps Etc)	19-09-1974
56	Bata Shoe Company Limited	01-11-1977
57	Pakistan Oxygon Limited	19-12-1977
58	Bata Shoe Company Pakistan Limited	25-06-1978
59	Bata Shoe Company Pakistan Limited	06-07-1978
60	Searle Pakistan Limited	15-04-1979
61	Searle Pakistan Limited	15-04-1979
62	Muller & Phipps Pakistan Limited	15-04-1979
63	Exxon Chemical Pakistan Limited	16-05-1979
64	Siemens Pakistan Engineering Company Limited	17-06-1979
65	Bata Shoe Company Pakistan Limited	28-06-1979
66	Shezan International Limited	12-07-1979
67	Caltex Oil Pakistan Limited	24-10-1979
68	M.M. Isphahani Limited	13-10-1980
69	Shell Paksitan Limitad	28-02-1997

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