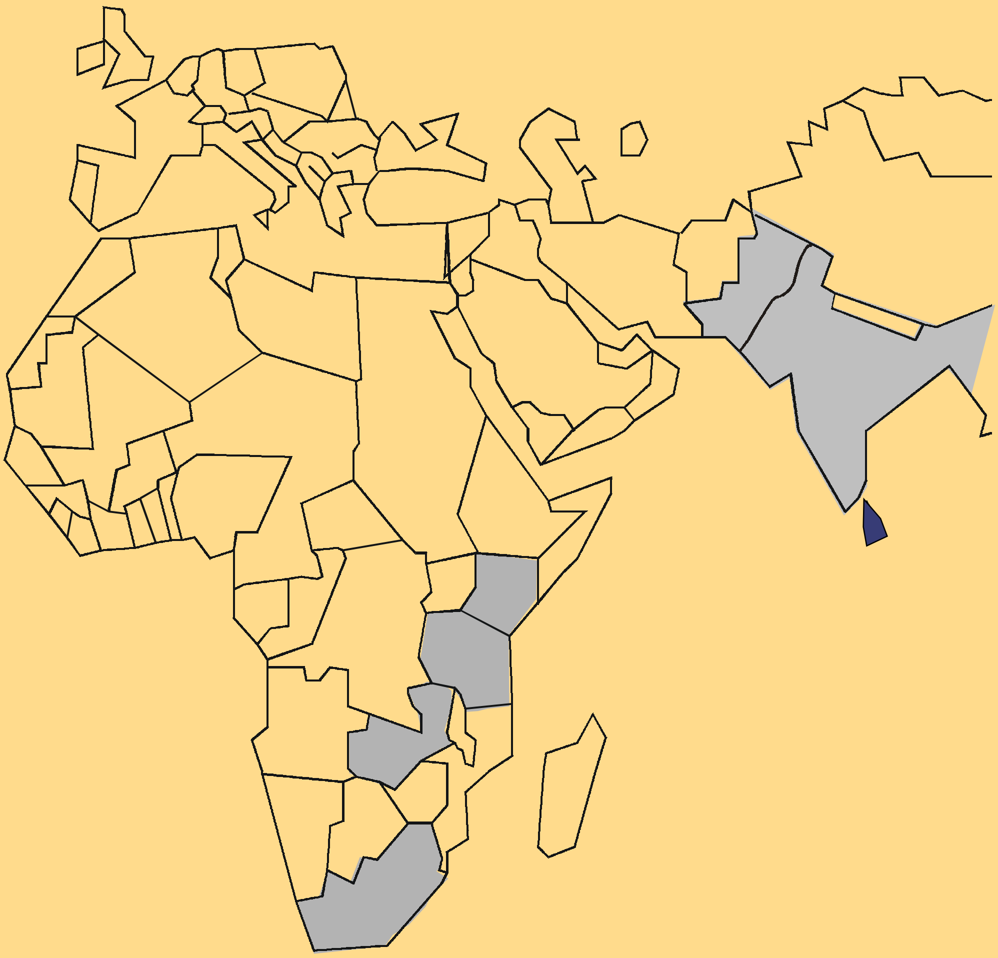
TOWARDS A NEW COMPETITION LAW IN SRI LANKA



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कट्स CUTS

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Published by:

Law & Society Trust (LST)
3, Kynsey Terrace, Colombo 8, Sri Lanka
Ph: +94-1-691 228/684 845/989 843
Fx: +94-1-686 843
Email: info@lawandsocietytrust.org, Website: www.lawandsocietytrust.org

Institute of Policy Studies (IPS)
99, St. Michael's Road, Colombo 3, Sri Lanka
Ph: +94-1-431 368/378/383/408
Fx: +94-1-431 395
Email: ips@sri.lanka.net, Website: www.ips.lk

कट्स CUTS
CUTS Centre for International Trade, Economics & Environment
D-217, Bhaskar Marg, Bani Park, Jaipur 302 016, India
Ph: +91-141-207 482, Fx: +91-141-207 486
Email: cuts@cuts.org, Website: www.cuts.org

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LIST OF ABBREVIATIONS

ADL	Anti Dumping Law
CPA	Competition Protection Authority
BOC	Bank of Ceylon
BOI	Board of Investment
BOP	Balance of Payments
CBSL	Central Bank of Sri Lanka
COL	Ceylon Oxygen Limited
CP	Controller of Prices
CSE	Colombo Stock Exchange
CCPI	Colombo Consumer Price Index
CIT	Commissioner of Internal Trade
CPA	Consumer Protection Act
CPA 1979	Consumer Protection Act (1979)
CPC	Competition Protection Council
CUTS	Consumer Unity & Trust Society
DIT	Department of Internal Trade
EPZ	Export Processing Zone
EU/ACP	European Union/ Africa Caribbean Pacific Group
FDI	Foreign Direct Investment
FTCA	Fair Trading Commission Act
FTC	Fair Trading Commission
FTAA	Free Trade Area of the Americas
GOSL	Government of Sri Lanka
IPA	Industrial Promotions Act
IPRs	Intellectual Property Rights
IGL	Industrial Gas Limited
LKR	Lankan Rupees
LPG	Liquefied Petroleum Gas
MIICF	Ministry of Internal and International Commerce and Food
PB	Peoples Bank
PERC	Public Enterprise Reform Commission
RDB	Regional Development Banks
SAARC	South Asian Association for Regional Co-operation
SME	Small and Medium Scale Enterprises
SOE	State Owned Enterprises
TEWA	Termination of Employment Workmen Act

FOREWORD

The significance of an effective competition policy as a part of any government development agenda was highlighted by the developed nations in the early 1990s. As government barriers to trade and investment have been reduced, there have been increasing concerns that the gains from such liberalisation may be thwarted by private anti-competitive practices.

There is also a growing realisation that mutually supportive trade and competition policies can contribute to sound economic development and that effective competition policies help to ensure that the benefits of liberalisation and market-based reforms flow through to all citizens.

The benefits of competition policy, including greater social welfare, as well as enhanced producer efficiency, were essential elements in selling this concept to the developing nations. However, the impact of the introduction of such policies, or, elements of such policies, among the developing nations has not been significant.

Thus there is a general degree of uncertainty among developing nations of the benefits of such a policy. This is also true for Sri Lanka. Sri Lanka, thus far has highlighted the complete inadequacy of the mere presence of a competition law and a competition authority, without the necessary commitment to the competition process in all economic transactions. The issue for Sri Lanka may very well be whether the Sri Lankan economy is sufficiently mature to sustain an effective competition policy regime to reap the many benefits that such a policy has to offer.

Sri Lanka is in the process of formulating and adopting a new competition law in the year 2002, twenty-five years after market liberalisation. The new competition law has the aspirations and the expectations of a number of stakeholders, including the private sector as well as competition law practitioners. Whether it will indeed deliver on its goals is another matter.

One thing is clear; the new law should not be another piece of legislation that lacks the support system to harness the objectives and goals outlined. The key to the effectiveness of the legislation lies in promoting an effective competition culture among business transactions/ethics of the private sector as well among government-sponsored transactions. The commitment to a market-based economy by government, devoid of artificial controls and institutions, may very well be the impetus that is needed to sustain and nurture such an environment.

Dr. Saman Kelegama
Institute of Policy Studies

PREFACE

This is the Sri Lanka country report, which will feed into the first phase of the Comparative Study of Competition Law Regimes of Select Developing Countries of the Commonwealth, also known as the 7-Up Project, undertaken by the Consumer Unity & Trust Society (CUTS) with the support of the Department for International Development, UK. The Sri Lanka component of study is being jointly conducted by the Institute of Policy Studies (IPS) and the Law & Society Trust (LST).

The motivation behind the project was increasing international concern with regard to ant- competitive practices, and the need to put in place an appropriate legal framework to deal with such practices. The research project is a comparative study of the competition regimes of seven developing countries in the Commonwealth. It aims to identify measures that would assist developing countries in strengthening their competition laws and introducing such laws where they are absent. Beside Sri Lanka the other countries in which the study has been undertaken are India, Kenya, Pakistan, South Africa, Tanzania and Zambia.

The proposal for a new Consumer Protection Authority in Sri Lanka, which is still awaiting parliamentary approval, would replace the Fair Trading Commission Act of 1987 and the Consumer Protection Act of 1979. This represents the first attempt to combine consumer protection with market regulation of international trade, and will replace the existing Fair Trading Commission and the Department for International Trade with a single body. However, given the absence of a co-ordinated approach to the promotion of competition in Sri Lanka, and the gaps in the proposed bill, the need for analysis of competition policy is still great.

It is most timely in the light of current developments in competition policy in Sri Lanka, and the need to encourage consumer organisations to engage in their activities with renewed strength. The Institute of Policy Studies and the Law & Society Trust are happy to be involved in this project and would like to thank Thushari de Zoysa and Pubudini Wickramaratne Rupesinghe for their hard work in preparing this country report.

Ms. Damaris Wickremesekera
Law & Society Trust

CHAPTER-I

Introduction

1.1 Overview

The broad objective of an effective competition policy is to ensure that market economies deliver and maintain high and rising standards of living by maximising economic efficiency, reflected in lower prices and better quality products.

Competition policy aims to preserve and protect the competition process, as opposed to competitors, in a given market. The broad objective of an effective competition policy is to ensure that market economies deliver and maintain high and rising standards of living by maximising economic efficiency, reflected in lower prices and better quality products. It may also include secondary objectives, such as contribution to market integration, preserving the freedom to compete etc.

To achieve these objectives, competition policy broadly makes use of two avenues. These are:

1. Competition advocacy - where competition agencies encourage different branches of government to adjust their policies to minimise interference with the desired levels of market competition; and
2. Competition agencies - that enforce competition law, investigate, prosecute and/or prohibit agreements that either exclude competitors or substitute collusion for competition.

Competition law aims to preserve and promote competition as a means of maximising efficiency and achieving an optimal allocation of resources within an economy.

Competition law aims to preserve and promote competition as a means of maximising efficiency and achieving an optimal allocation of resources within an economy. The object of the law is to prevent firms from protecting or expanding their market shares, except by means of greater efficiency in producing goods at the lowest possible prices.

The need for competition policy within the national development agenda gained popularity in the 1990s, and it was endorsed by developed nations as a method of enhancing economic efficiency and consumer welfare. However, the incorporation of this policy by developing nations has not been swift. More often that not, developing countries have tended to adopt price controls and restrictions on market entry as policies to promote economic welfare, which are counter to the basic premise of competition theory. Protectionist and anti-competitive policy measures pursued by such nations have led to legacies of weak and underdeveloped competition frameworks.

Effective competition policies focus on creating, enforcing and monitoring both policies and laws that promote competition, sustain economic efficiency, and ensure consumer welfare.

In instances of weak institutional enforcement capacity and regulatory authorities, there is a role for government to do whatever possible to make conditions favourable for pro-competitive behaviour. Such measures include trade liberalisation and avoiding the creation of monopolies via artificial barriers to entry and exclusivity clauses, as well as steering away from implementing ill-conceived protection policies.

Effective competition policies focus on creating, enforcing and monitoring both policies and laws that promote competition, sustain economic efficiency, and ensure consumer welfare. Among the international organisations to focus on this topic was the APEC meeting in 1995, which proposed the establishment of co-operation agreements among competition policy authorities,[1] as well as the WTO, which called for the establishment of a working group on competition policy at the 1996 meeting in Singapore.[2] In addition, competition policy issues have been gradually introduced as elements of multilateral and regional trade agreements over the last decade. For example, competition policy is a part of the negotiating agenda of two of the largest groupings of nations, the European Union/ Africa Caribbean Pacific group (EU/ACP) and the Western Hemisphere nations in the Free Trade Areas of the Americas (FTAA).

There is no consensus among competition policy theoreticians as to what constitute the principal elements of an 'ideal' competition policy for a given nation. Thus, the fundamentals of an effective competition policy are for individual nations to decide.

The lack of activism on the part of the South Asian regional body, SAARC, in promoting competition policy issues is noticeable, both at the domestic and at the regional level. For example, the current trade agenda of SAARC has not addressed the interrelated issues of trade liberalisation and its impact on the domestic competition regime.

There is no consensus among competition policy theoreticians as to what constitute the principal elements of an 'ideal' competition policy for a given nation. Thus, the fundamentals of an effective competition policy are for individual nations to decide. For example, Malaysia does not have a competition law, but is in the process of drafting such an act. However, competition is emphasised in the ongoing Malaysian privatisation and de-regulation process.

The Philippines on the other hand, has a long history of anti-monopoly laws. However, there is no central agency to oversee the implementations of competition laws. While the lack of a set agenda allows for a certain degree of freedom and flexibility, it also imposes a certain amount of ambiguity. There is a tendency among many emerging economies to emulate the US or the UK competition regimes, without paying attention to the endemic features of the domestic policy regime.

The main objective of the government privatisation initiative has been revenue generation, rather than economic efficiency and consumer welfare.

1.2 The Context of Competition Policy in Sri Lanka

Competition in the Sri Lankan context has been ambiguous. While on the one hand it is promoted as one of the key polices of the 21st century for Sri Lanka, there is no process suitable to facilitate competition within different sectors of the market.

Further, competition in Sri Lanka has been essentially intertwined with the privatisation process. The main objective of the government privatisation initiative has been revenue generation, rather than economic efficiency and consumer welfare. The lack of a common set of elements in the privatisation-competition interface has introduced conflicts from the onset. The goal of maximising revenue from the sale of state-owned enterprises conflicts with the objective of greater competition, since the sale value of state enterprises is likely to be much higher when associated with future monopoly power.

A culture that promotes competition as a process is essential for an effective competition regime.

1.3 Perceived Role of Competition Policy in Sri Lanka

At present the Sri Lankan competition regime consists only of a legal and an institutional framework. However, the presence of a regime on market behaviour and consumer interests alone is insufficient. A culture that promotes competition as a process is essential for an effective competition regime. It should set the agenda for superior individual performance, leading to greater levels of industrial efficiency.

Thus Sri Lanka needs to make inroads towards transforming the existing competition regime into an *effective* competition regime, via effective enforcement and monitoring mechanisms capable of delivering the goals and objectives of competition law.

The liberal market policies of 1977 saw several policy changes, including significant trade liberalisation, aimed at creating an environment conducive to private foreign and local investment. However, the boundaries of acceptable market behaviour were not detailed until 1987, with the passing of the Fair Trading Commission Act (FTCA) (1987). In this regard the process is still evolving. The delay in the creation of a regulatory regime to monitor market behaviour via competition laws in the aftermath of economic liberalisation may be attributed to the lack of a central, long term objective among policymakers of the achievable goals of a market based economy.

While the government identifies that competition is a central part of the privatisation process there is no mechanism, by way of either regulation or contract, to ensure greater competition in recently privatised industries.

The overall dearth of progress in competition and the regulation of competition has also been attributed to the numerous issues faced by Sri Lanka as a developing nation in the midst of an ethnic conflict. Issues of market regulation, economic efficiency and consumer welfare within a competitive market framework have not been a priority. It is necessary to change this agenda and prioritise the need for reforming this regime.

Policymakers need to recognise and accept the need for adjusting the local competition regime to meet the basic requirements of a market-based economy, increase economic efficiency, and improve consumer welfare. Some other factors that explain the urgency of this policy direction within the Sri Lankan context are now explained.

The privatisation of large state owned enterprises by the Government of Sri Lanka and the creation of private monopolies in Liquefied Petroleum Gas, (LPG), flour, lubricants etc were carried out with a view to creating competition in the long-run. However the mechanics and the process by which competition is to be stimulated within markets with high barriers to entry have been effectively ignored by policymakers.

In addition, neither regulators nor policymakers have detailed the role of regulation or the manner in which it is capable of facilitating competition within privatised industries. Thus, while the government identifies that competition is a central part of the privatisation process there is no mechanism, by way of either regulation or contract, to ensure greater competition in recently privatised industries. It is essential to provide one, for though private ownership promotes administrative and financial discipline, it is competition and rivalry among firms that promote lower prices to reflect marginal costs.[3]

The weaknesses of the existing competition regime, both legal and institutional, have not been redressed by the proposed competition regime, operative under the Consumer Protection Act (CPA) (2001).

The weaknesses of the existing competition regime, both legal and institutional, have not been redressed by the proposed competition regime, operative under the Consumer Protection Act (CPA) (2001). Further, the CPA ignores the limitations of the existing substantive law, and has created additional controversial new issues and irregularities, which affect the credibility of the future competition regime. (A brief outline of the issues arising as a result of the CPA is detailed in chapter seven of the report).

Trade liberalisation initiatives pursued by the government have reduced barriers to entry in the tradable sector of the economy. The presence of imports contributes to greater consumer choice and impacts positively on local competition in this sector. However, trade liberalisation and the ensuing trade-competition interface do not apply to the non-tradable sector of the economy.

The endorsement of competition policy as a part of its national agenda by Sri Lanka's developed trading partners will make it necessary for Sri Lanka to ensure that domestic market conditions are in harmony with international market regulations and requirements.

1.4 Objective of the Report

The inefficiencies of the existing competition law and the competition authority, and the shortcomings of the proposed CPA, cumulatively affect the credibility of the law and of the institution that enforces the law.

The objectives of the current trade and investment policy agenda of the government and its inherent conflicts with the existing competition regime alone are sufficient reasons for Sri Lankan policy-makers to highlight the need for changes to the current competition regime. The inefficiencies of the existing competition law and the competition authority, and the shortcomings of the proposed CPA, cumulatively affect the credibility of the law and of the institution that enforces the law. Failure to detail the future direction and objectives of the new competition regime would result in an impotent competition regime, devoid of the support of industry stakeholders.

Thus, the objective of this paper is to highlight some of the main issues facing the Sri Lankan competition regime in the light of the proposed CPA, which is pending parliamentary approval.

1.5 Format of the Report

The objective of this paper is to highlight some of the main issues facing the Sri Lankan competition regime in the light of the proposed CPA, which is pending parliamentary approval.

In achieving its objective the report adopts the following format. Chapter two of the report focuses on Sri Lanka's macro-economic status, including sectoral performance and socio-economic issues that have arisen over the past few years. Chapter three of the report focuses on the public policy arena of the government and its relationship with the competition regime of Sri Lanka. The scope of competition law and consumer protection law in Sri Lanka are analysed in chapter four, while chapter five assesses the administrative aspect of the competition regime. Chapter six looks at the proficiency of the competition authority. For the purposes of this chapter, information collated from the survey conducted on the competition authority was used. Chapter seven highlights the issues arising from the proposed CPA and the manner in which they will affect the future competition regime of Sri Lanka. Chapter eight concludes, briefly focusing on the main issues that have been dealt with in the main body of the report.

CHAPTER-II

The Economic and Socio-Economic Status of Sri Lanka

2.1 Overview

In Sri Lanka, 19.4 million people inhabit a land area of 65,610 square km. About 20 percent of Sri Lanka's output is derived from agriculture, forestry and fishing, 20 percent is from manufacturing and over 50 percent is from the service sector.[4] Agriculture, which was the mainstay of the economy at independence in 1948, and accounted for about 40 percent of the GDP, has decreased in importance, while the factory manufacturing sector has grown significantly over the last few years. Economic liberalisation and the restructuring programmes adopted by subsequent governments have resulted in fairly high rates of growth, except during the late 1970s and the late 1980s, Growth during these periods was hampered as a result of the youth insurrection. Sri Lanka has maintained growth averaging 5.4 percent during the 1990-2000 period.[5]

2.2 Socio-Economic Perspective

Modern Sri Lankan history has witnessed an ascent of violence against its people. The Janata Vimokti Peramuna (People's Freedom Movement) uprising in the early 1970s and the late 1980s and the ongoing ethnic crisis over the last two decades have had a severe impact on Sri Lanka's socio-political and economic agendas. However, conflict within the nation has not impeded progress in the area of human development.

2.2.1 Education and Unemployment

Over the past 50 years, Sri Lanka has made important gains in its education sector, reaching near universal literacy and primary school enrolment rates. Despite these achievements, the education sector faces many problems, including the poor quality of instruction and its lack of relevance to modern labour markets and social needs. Reform efforts, including greater private sector involvement in education, are underway to address these issues, but the process is likely to be lengthy and costly.

The gap in relevance between education and the modern labour market is one of the main contributors to high levels of youth unemployment.

The gap in relevance between education and the modern labour market is one of the main contributors to high levels of youth unemployment. The 1999 unemployment rate for the 15-29 year old segment of the labour market was 52.9 percent. The overall rate of unemployment however, has been declining since 1990; in 1990 it was estimated at 15.9 percent, by 1998 the rate had dropped to 9.5 percent, declining further in 1999 to 8.8 percent.[6]

The positive economic growth in 2000 generated employment, largely in the private sector, with a subsequent decline in the unemployment rate to 7.7 percent. However, a survey conducted by the Department of Census and Statistics in the third quarter of 2000, suggested that unemployment was higher compared to 1999 third quarter figures. The labour force participation rate was 49 .5 percent in 2000 (3rd quarter) compared to 50.75 percent in 1999 in the corresponding period.

2.2.2 Poverty and Mortality Rates

Over the last four decades the incidence of poverty has reduced significantly. However, one in five households are still below the poverty line. Infant mortality rates have fallen from 48 per 1,000 live births in 1970 to 16 per 1,000 in 1996.[7] Life expectancy at birth has climbed from 67 to 75 years for women and 65 to 71 years for men over the past three decades. The maternal mortality rate has dropped from 90 per 100,000 live births in 1980 to 30 in 1996, and birth rates have declined from 4 births per woman to a near replacement level of 2.4 births per woman.

2.3 Economic Performance 1999-2001

Sri Lanka's position in the international classification moved up within the lower middle-income category, which consists of countries with a per capita income of US$795-3125.

The first half of 1999 experienced a slow growth in exports; export growth fell by 10 percent. Over the second half of 1999, however, exports improved significantly, which contributed to the 4.25 percent growth rate in 1999. This figure, however, was still below Sri Lanka's annual growth rate of 5 percent, experienced during 1995-99. Strong growth continued in the first three quarters of 2000, with GDP growth rising to 6 percent, fuelled by the strong growth in exports. High growth in GDP for the first three quarters of 2000, and the relatively low population growth in Sri Lanka was instrumental in raising Sri Lanka's per capita income from US$825 in 1999 to US$865 in 2000. Thus, Sri Lanka's position in the international classification moved up within the lower middle-income category, which consists of countries with a per capita income of US$795-3125.

High growth rates were not sustained over early 2001, and the Sri Lankan economy experienced a growth rate of 1.3 percent for the first half of 2001. The achievements of 2000 were further eroded in August 2001, as a result of the Liberation Tigers of Tamil Elam (LTTE) terrorist attack on Katunayake International Airport. The destruction of three new Airbus jets and the damage to a further three involved an estimated cost of US$350 million, half of the annual defence budget, which itself takes up a third of total government revenue. The losses to the aircraft and the tourist industry were valued at nearly LKR95 billion, or approximately 7.6 percent of GDP in 2000.

Gross domestic investment increased from 25 percent of GDP in 1998 to 27.25 percent in 1999, reflecting the expansion of telecommunication services and the re-fleeting of the privatised Sri Lanka Airlines. In 2000 gross domestic investment increased to 29 percent of GDP, as a result of increased investment in the garments sector, textiles, ports and power plants.

Despite a surge in exports and increased inflows through private transfers in 2000, the current account deficit as well as the overall deficit in the balance of payments (BOP) widened sharply, mainly due to increases in energy and defence related imports. To reduce import consumption with a view to improving the current account, an import duty surcharge was imposed on all imports except for essential consumer items,[8] certain capital goods[9] and essential intermediary goods.[10] Although this rise in tariff barriers is expected to be temporary, it could adversely affect levels of competition, because of decreased competition from imports.

Table 1: Value of Exports as a percentage of GDP			
Year	GDP[11] (LKR mn)	Exports (LKR mn)	Exports as % of GDP
1996	695,934	226,801	32.59
1997	803,698	271,193	33.74
1998	912,839	310,398	34.00
1999	994,730	324,453	32.62
2000	1,125,259	420,114	37.33
Source: Compiled from Table from Central Bank Annual Report 2000.			

Table 2: Total Exports for 1999 and 2000		
Exports	Value (LKR mn)	
	1999	2000
Industrial Exports		
Garments	155,187	206,360
Yarn and other textiles	15,853	20,569
Petroleum Products	5,210	7,416
Diamonds	10,774	13,577
Gems	4,326	7,091
Agricultural Exports		
Tea	43,728	50,370
Rubber	2,035	2,179
Coconut Products	9,119	9,174
Other agricultural products	11,598	11,784
Source: Derived from the Central Bank Annual Report, 1999, and 2000 Report Table 79.		

2.3.1 Export Performance

The Sri Lankan export performance since 1996 is traced in table 1. Exports as a share of GDP have not varied significantly over the last five years. The performance of the export sector is shown below. The total value of exports for the years 1999 and 2000 is categorised into industrial exports and agricultural exports and is presented in Table 1.

The largest income earner for Sri Lanka for 1999 and 2000 was the garments sector, as shown by table 2 above, with the traditional export tea, ranked in a very distant second place.

Table 3: Performance of Imports				
Category	Value (LKR mn)		% of Total Imports	
	1999	2000	1999	2000
Consumer goods[12]	79,713	95,778	18.9	17.3
Other consumer goods[13]	40,943	52,819	9.8	9.5
Intermediate goods	223,450	296,821	52.8	53.5
Investment goods	110,599	130,889	26.5	23.6
Source: Derived from the Central Bank Annual Report, 2000, Table 89.				

2.3.2 Import Penetration

Imports into Sri Lanka are categorised under the headings consumer goods, intermediate goods and investment goods. The performances of these individual sectors are presented in table 6. At present, a two-tiered tariff regime operates in Sri Lanka, with tariff lines of zero, 10 percent duty and a maximum 25 percent.

The value of imported goods for the year 2000 increased by 14.5 percent compared to the 1999 figure of LKR39,420 million.[14] This figure excludes the importation of aircraft during this period. One notable feature has been the 4.5 percent net decrease in the inflow of imports of investment goods for the year 2000 from US$114.4 million in 1999. Table 4 traces Sri Lanka's import performance for the 1996-2000 period.

Table 4:Value of Imports as a percentage of GDP

Year	GDP (LKR mn)[15]	Imports (LKR mn)	Imports % of GDP
1996	695,934	301,075	43.26
1997	803,698	346,026	43.05
1998	912,839	380,138	41.64
1999	994,730	415,902	41.81
2000	1,125,259	554,290	49.25

Source: Compiled from Tables of the Central Bank Annual Report 1999 and 2000.

Import penetration is high and has increased, especially in 2000.

2.4 Sectoral Performance

Over the 1990s, the industrial sector, more specifically the manufacturing sector, has emerged as one of the main sources of growth in Sri Lanka. In 2000, the services sector contributed 61 percent of total growth in GDP, compared to 51 percent in 1999; one of the reasons for this was the significant improvement in the world economy. Table 5 below traces Sri Lanka's sectoral composition and its contribution to GNP at constant prices for 1999 and 2000 respectively.

Table 5: Sectoral Performance and Contribution to GNP at constant (1996) prices

Sector	Contribution to GNP 1999 (%)	Contribution to GNP 2000 (%)
Agriculture Forestry, and Fishing[16]	20.7	19.4
Mining and Quarrying	1.8	1.9
Manufacturing[17]	16.4	16.8
Construction	7.6	7.3
Electricity, Water and Gas	1.5	1.2
Transport Storage and Communication	11.4	11.7
Wholesale and Retail Trade[18]	21.0	22.6
Banking Insurance and Real Estate	8.1	8.1
Ownership of Dwellings	1.8	1.8
Public Administration and Defence	5.3	5.2
Other Services	4.1	4.0

Source: Central Bank of Sri Lanka Annual Report 2000.

2.5 Levels of Concentration and Monopolisation across Industries

There are no studies that detail the market concentration of particular sectors of the Sri Lankan economy. It is therefore difficult to determine the overall levels of concentration. However, by using data from the 1998 survey into the number establishments in Sri Lanka conducted by the Department of Census and Statistics of Sri Lanka, we can identify certain sectors with high concentration levels.

Table 6: The Number of Establishments in selected Sri Lankan Industries - 1998

Type of Industry	Number of Establishments
Slaughter and Preserving Meat	5
Distilling , rectifying spirits	7
Malt liquors or Malt beverages	3
Soft drinks and carbonated water	9
Petroleum Refineries	2
Steel and iron, basic industries	9
Ship building and repairing	19
Motor cycles and bicycles	4
Transport equipment	13
Electricity	1
Water	1
Source: Annual Survey of Industries, 1998.	

In the other sectors, a larger number of establishments share the market. However, this does not necessarily indicate lower levels of concentration, since a few firms may dominate. The petroleum, electricity and water sectors are dominated by state monopolies. One sector that was not included in the survey is the telecommunications sector. A brief overview of this sector is presented in section 2.5.1 below.

2.5.1 The Telecom Sector

The telecommunications sector is one of the fastest expanding sectors of the Sri Lankan economy. This sector was re-structured and subsequently privatised in 1997, and it is amongst the most de-regulated in the South Asian region. The government intention to divest 40 percent of its 61.5 percent holdings in the year 2000 has not materialised. Low prices in the global telecom market was given as the primary reason for this. Participation of the private sector in the telecommunications industry has been improving gradually. However, Lanka Telecom is still a dominant incumbent in the market for telecommunication services, accounting for 60 percent of the industry.

The cellular services market is made up of four players, each holding an approximately equal percentage of the market. In the public payphones market there are six operators, while in radio paging services four operators are active. There are 17 participants in the data communication services segment and two players provide wireless local loop telephones in the local market. In the fixed-access market, Lanka Telecom has an 86.3 percent market share, while Suntel and Lanka Bell, two private operators, have 9.59 percent and 4.11 percent respectively.[19]

2.6 The Importance of the Public Sector in Different Industries

The dominant role played by the state in economic activity was a reflection of the sharp increase in state intervention from the mid 1950s to the late 1970s.

At the time of economic liberalisation in 1977, the Sri Lankan state sector played a dominant role in production, distribution and financing the economy. Major economic and social activities such as banking, plantations, large-scale industries, transport, insurance, telecommunications, postal services, ports, electricity, import and distribution of petroleum, roads, health and education were either under public-sector monopoly or largely undertaken by public enterprises. The dominant role played by the state in economic activity was a reflection of the sharp increase in state intervention from the mid 1950s to the late 1970s.[20] During this period, new public enterprises were set up, monopolies were created, and selected private enterprises were nationalised.

In contrast, the medium-term economic policy objective of the current government has been to promote sustainable non-inflationary economic growth in a market-friendly environment, with the aim of promoting the private sector as the engine of growth in Sri Lanka. One of the key policies being promoted in this regard has been the ongoing privatisation of the state owned enterprises.

Although the Sri Lankan economy was liberalised in 1977 the full-scale privatisation initiative did not start until 1987.[21] Table 7 highlights the fact that the private sector now plays a dominant role in different sectors of the economy. This change is only partly due to the privatisation process. The liberalisation of various sectors has also created a lot of opportunities for the private sector to take the initiative and expand.

Table 7: Percentage Share of Private and Public Sector Industries - 2000

Categories	Private	Public
Food, beverage and tobacco products	99	1
Textiles apparels and leather products	100	-
Wood and wood products	93	7
Paper and paper products	96	4
Chemicals, petroleum, rubber and plastic products	66	34
Non-metallic mineral products	99	1
Basic metal products	100	-
Fabricated metal products, machinery and transport equipment	100	-
Manufactured products	100	

Source: Central Bank Annual Report 2000 Table 19.

CHAPTER-III

Competition and Public Policy Context

The options for reform under the "effective" competition policy agenda are many, and in many instances implementing such policies can be daunting.

The issue of competition policy in Sri Lanka is a concept that is in its infancy. Though the issue of competition has been dealt with extensively among developed nations, developing nations such as Sri Lanka are compelled to consider this issue amidst the forces of economic liberalisation. The options for reform under the "effective" competition policy agenda are many, and in many instances implementing such policies can be daunting. Competition policy essentially entails the harmonisation of trade, investment, labour and financial polices in an attempt to minimise interference with the desired levels of competition in the market place.

As a developing country, the challenges for Sri Lanka within the competition policy arena are very different from those experienced by developed countries such as Canada and the US. The main agenda for many developing nations is economic development and sustainable growth. Therefore these are the overriding objectives of all policies, including competition policy.

Economic development for many developing nations also translates directly into restrictive or protectionist policies which aim to promote economic welfare.

Economic development for many developing nations also translates directly into restrictive or protectionist policies which aim to promote economic welfare. Economic liberalisation tends to be gradual or partial, and economies are driven by the need to ensure the survival of domestic firms and institutions. Investments are promoted under protectionist policies. Thus a conflict of interests may emerge. For example, the privatisation initiative of the government envisions competition as a key policy in the long-term, however the privatisation process itself is skewed towards sustaining monopolies and exempting the privatised sectors from the realm of competition law.

3.1 Industrial Policy

By assigning an important role to the private sector, the industrial policy of the government aims to achieve rapid and sustainable development within the framework of an export-orientated industrialisation strategy. Among the main objectives of this policy as envisioned by the government are:

- The expansion, diversification, and upgrading of both the industrial base and the export base;
- The efficient management of physical and manpower resources; and
- Employment and income generation in both rural and urban areas.

The approach adopted by the government to achieve these objectives is incentive-based, and ranges from tax holidays to duty-free imports of machinery and raw materials.

The approach adopted by the government to achieve these objectives is incentive-based, and ranges from tax holidays to duty-free imports of machinery and raw materials. Government incentive schemes target new investors, and industries such as agriculture, apparel, leather, footwear, rubber and plastic processing sectors, as well as the electronic information industry.

The government's strategy of focussing on the export sector has contributed to the creation of an uneven playing field between export-orientated industries and producers who cater for the domestic market. There is a tendency among many small firms to enter or attempt to enter the export market to qualify for government assistance and government sponsored incentives, since many such incentives are not provided to local manufacturers. Sometimes incentives include exemption from competition law, for example the privatisation initiative of the Colombo Gas Company in 1995.

The small- and medium-scale enterprise (SME) sector has also been sustained by incentives, for example a specific incentive scheme was launched in 1996, which introduced advanced technology to SMEs. This scheme offered incentives to local and foreign investors of duty-free machinery and equipment for any investment over LKR4 million, and for existing enterprises, for investments over LKR1 million, including a five-year tax holiday on incremental profits. The minimum investment requirement on the importation of approved machinery and equipment for SMEs was removed in 1999. The lack of a specialised institution to cater for their special needs is considered to be a serious limitation by the stakeholders of SMEs.

3.2 Trade Policy

Trade and tariff policies are streamlined to support the export-led growth environment and create an incentive-driven export sector. In addition, a simple broad-based transparent tariff system with lower tariff rates is being promoted. At present a two-tiered duty regime operates in Sri Lanka, with tariff lines of zero, 10 percent and a maximum 25 percent duty. Sri Lankan trade policy is geared towards fostering regional trade, with the emergence of the South Asian Preferential Trade Agreement, a pre-cursor to the creation of a South Asian Free Trade Agreement. It is anticipated that the SAARC region will liberalise their individual economies by dismantling intra-trade barriers, while maintaining preferential tariffs with non-member nations.

The lack of a specialised institution to cater for their special needs is considered to be a serious limitation by the stakeholders of SMEs.

The ongoing liberalisation initiative of the government has been an effective substitute for competition in the tradable sector. The non-tradable sector has not benefited from this initiative; hence there is a role for regulation in the non-tradable sector to ensure that the goals of greater economic efficiency and efficient allocation of resources are realised.

3.3 Foreign Direct Investment Policies

Economic liberalisation in 1977 brought forth a liberal policy towards Foreign Direct Investment (FDI), with the removal of government control over a number of industries. Investor responses to these new policies were swift. In 1978, capital inflow as a share of GDP increased by 6 percent, compared to 1 percent in 1977. 1989 saw a second round of reforms, undertaken with the assistance of the IMF structural adjustment facility, promoting reform in the public sector through privatisation, while continuing with a liberal policy towards FDI.

An incentive package consisting of simplified and unified procedures for investment approval, granting tax holidays, concessionary duty rates, and exemption from existing exchange control regulations were extended to foreign investors in the early 1990s. Shifts in capital inflows from official capital to private foreign capital inflows in the form of portfolio investment and direct investment were observed during this period.

Sri Lankan FDI policy has played a key role in the development agenda since the time of economic liberalisation. Sri Lanka has actively sought FDI by implementing a range of measures to enhance its attractiveness as an investment destination. The government encourages private foreign investment in areas of strategic importance by offering a range of fiscal incentives. These include the removal of restrictions on the repatriation of profits, establishing current account convertibility, and fast-tracking FDI approvals.

Sri Lankan FDI policy has played a key role in the development agenda since the time of economic liberalisation.

An enterprise may be eligible for incentives offered under either of two regimes:

1. BOI incentives under Section 17 of the BOI Act - special incentives outside identified laws of the country, available to enterprises approved by the BOI.
2. General incentives under the normal laws of the country - the incentives offered under this regime are available to both local and foreign investors. Firms that do not qualify for concessions under Section 17 of the BOI Act may seek incentives available under the normal laws of the country.

The government has also created eight Export Processing Zones (EPZs) to promote foreign investments.

In 1999 the BOI was successful in attracting large amounts of investment from Australia, the UK, Japan, Indonesia and the USA.

Foreign investment in sectors including shipping, travel agencies, professional services, transportation, telecommunications, utilities, mining, fishing, forestry, and many agriculture sectors, require 'screening' if foreign equity amounts to more than 40 percent. Other regulated industries such as the energy sector, stock-broking and finance, air transportation, coastal shipping, energy and power, lotteries, large-scale mechanised gem mining, 'sensitive' industries such as military hardware, dangerous drugs and currency; and the establishment of local branches of foreign companies also require government approval.

Foreign investment is not permitted in the following areas:

- Non-bank money lending (1998 budget recommendations to open this sector to foreign investment have not yet been implemented);
- Pawn broking;
- Retail trade with a capital investment of less than US$1 million (with one notable exception: the BOI permits retail and wholesale trading by reputed international brand names and franchises with an initial investment of not less than US$150,000);
- Personal services other than for the export or tourism sectors;
- Coastal fishing.

The BOI approved 342 investment projects for 1999, of these, 82 projects were entirely foreign-owned, 100 were joint-venture collaboration and 160 were domestic-owned ventures.

Net foreign equity inflows towards new projects and advances by foreign shareholders increased by 68 percent in 1999, from LKR9,689 million to LKR16,261 million. This is the highest amount recorded for any given year. In 1999 the BOI was successful in attracting large amounts of investment from Australia, the UK, Japan, Indonesia and the USA. Investment contracted with the BOI increased by 42 percent in 1999 and the sectors that attracted the most amount of investment were garments and the service sector. The service sector attracted LKR70,363 million worth of investment for 1999 compared to LKR58,438 million in 1998. The BOI approved 342 investment projects for 1999, of these, 82 projects were entirely foreign-owned, 100 were joint-venture collaboration and 160 were domestic-owned ventures.[22]

3.4 The Financial Sector

The liberalisation of the financial sector opened up the current account and maintained restrictions on the capital account. Monetary policy was traditionally directed at sustaining financial stability by containing monetary expansion and maintaining moderate levels of inflation. However, the year 2000 saw a general increase in interest rates. Increases in government borrowing, a reduction in liquidity as a result of a deficit in the balance of payments, and increases in inflation towards the end of the year contributed to upward pressure on interest rates. The government reacted to rising inflation with a restrictive monetary policy for the year 2000, which continued into 2001, as indicated in the 2001 budget.

3.4.1 The Banking Sector

The expansion of the banking sector has been a response to competitive pressures and increased commercial activity. The total number of commercial banks in operation as of 1999 comprised 25 financial institutions, of which nine were domestic and the rest were foreign. However, there has been a decrease in the number of banks in operation in the year 2000, with the closure of two foreign banks (ABN Amro and Bank Nova Scotia[23]).

The ratio of non-performing loans (NPL) to total advances continues to be high for the banking sector. Table 8 highlights the NPL ratios for different bank institutions for the 1999-2000 period. The marginal improvement in NPL ratios in the state-banking sector in the second and third quarters of 2000 was due to the extension of government guarantees. Overall, the

Table 8: Ratios of NPL/Total Advances in the Banking System 1999-2000

Bank	1999				2000		
	Q1	Q2	Q3	Q4	Q1	Q2	Q3
State Commercial Banks	19.3	19.9	20.1	18.3	24.2	18.8	18.6
Private Domestic Banks	14.7	16.6	16.6	15.9	15.9	15.6	15.8
Foreign Banks	11.3	11.7	11.4	10.7	11.3	12.5	12.7
All Banks	16.8	17.8	17.9	16.6	19.8	16.9	16.9

Source: IMF Publication, Sri Lanka Economic Outlook May 2001 p 31

high NPL ratios indicate the weak profit performance of the corporate sector and the impact of the depreciation of the Sri Lankan Rupee.
In an attempt to remedy the situation, the government decided to participate in the Financial Sector Assistance Program (FSAP) of the IMF, which involved restructuring the Bank of Ceylon (BOC) and the Peoples Bank (PB), achieving performance targets, and reducing of the share of NPLs.

The two state-owned banks, the BOC and the PB, account for more than 50 percent of the market share in the banking system. Despite their gradual loss of market share due to emerging new entrants, these two banks continue to dominate the banking sector.

3.4.2 Rural Banking

A total of six Regional Development Banks (RDBs) operate with a network of 178 branches in Sri Lanka. RDBs are specialised institutions that cater to the needs of the rural sector. These banks have been undergoing further de-centralisation and are an integral part of the SME finance structure. Though commercial banks themselves do have diverse programmes that cater to the special needs of industry, SMEs and micro industries, the absence of a specialised institution to address the needs of SMEs is an issue that affects the overall competitiveness of the SME sector. In some instances the regionally based RDB assumes this role. Recently, RDBs have begun to expand their activities into the lower end of the SME market, via the mediation of a number of regional NGOs.

The key feature of the forward contract policy was to encourage the establishment of a widespread rural banking network at the grass-roots level making credit more accessible to the rural population.

A forward contract system was introduced to rural markets in 1999 to combat constant seasonal fluctuations in agriculture prices. The key feature of the forward contract policy was to encourage the establishment of a widespread rural banking network at the grass-roots level making credit more accessible to the rural population. It intended to provide credit plus services to rural populations so that they could effectively use the credit funds for income generating self-employment activities.

3.5 Policies that Affect Contestability in Different Markets

The weak capital market persisted over the latter part of the 1990s, and 1999 and 2000 saw declines in the overall share prices in the Colombo Stock Exchange (CSE). The decline in 1999 was attributed to the uncertainty associated with the elections and the poor performance of some of the major listed companies during the first half of the year. The privatisation initiative in 1987 was launched with a view to reducing the financial burden of some SOEs and improving the efficiency, profitability and productivity of these enterprises.

From the early 1980s, the government began taking certain steps in preparation for privatisation. Among these were:

- Improving the commercial orientation of the SOEs;
- Allowing the private sector to compete in commercial activities by abolishing public sector monopolies;
- Transferring the management of some loss-making public enterprises to the private sector under a contract system;
- Franchising certain parts of public enterprises to the private sector;
- Closing down several non-economical enterprises.

The rapid implementation of privatisation schemes in 1989 and 1994 saw the setting up of the Public Enterprise Reform Commission (PERC) to carry out the privatisation process in a more efficient and transparent manner.

The rapid implementation of privatisation schemes in 1989 and 1994 saw the setting up of the Public Enterprise Reform Commission (PERC) to carry out the privatisation process in a more efficient and transparent manner. By mid-1994, 43 enterprises in the industrial sector had been privatised. By 1997, the number had risen to 75, with several plantation companies and large utility-oriented industries such as telecommunications and the LPG sector being privatised.

NT&T of Japan purchased 35 percent of Sri Lanka Telecom in 1997, but full privatisation is still not complete. The other large-scale privatisation occurred when Emirates bought 40 percent of Air Lanka and subsequently changed its name to Sri Lanka Airlines in 2000. The World Bank and the Asian Development Bank have pressed the government to privatise the People's Bank and the Bank of Ceylon, but there has been little progress over the last two years. The Post Office is to be corporatised, which may lead to privatisation in the future.

Competition is essentially intertwined with the privatisation process in Sri Lanka. Government policymakers promote competition as a long-term prospect for privatised industries. However, there is an inherent conflict

The Sri Lankan privatisation initiative is promoted by granting monopoly status to foreign investors either via an exclusive period of operation, or via licensing agreements operative for a specific period of time.

in this rationale. The Sri Lankan privatisation initiative is promoted by granting monopoly status to foreign investors either via an exclusive period of operation, as in the case of Shell Gas Lanka Ltd and Prima Flour; or via licensing agreements operative for a specific period of time, as in the case of Lanka Lubricants. These artificial barriers to entry effectively provide a first-mover advantage to the incumbent company, which tends to inhibit potential competitors from entering privatised markets. The absence of an effective regulator in these markets is another factor that will inhibit competition in the long term.

3.5.1 Labour Policy

There are 42 laws that are related to labour relations in Sri Lanka, and at present these laws have not been codified. Most permanent full-time workers are covered by laws pertaining to minimum hours of work, a minimum wage, leave, the right of association, and health & safety standards.

The most stringent of the labour laws is the Termination of Employment Workmen Act of 1971 (TEWA). This act removes the right of the employer to lay off and fire workers who have been employed for more than six months for any reason other than serious, well-documented disciplinary problems. This law not only affects the level of investment in Sri Lanka, but also impacts significantly on the entry/exit conditions for any market. Further, the TEWA is associated with cumbersome procedures for retrenchment, which constrain rapid industrial restructuring, and the lack of a transparent formula for the payment of compensation, which inhibits firms from responding to fluctuations in the business cycle.

The labour regime and the archaic nature of the laws is one factor that has hindered the drive by the Sri Lankan government to attract FDI in order to generate economic growth.

The government has not grasped the need for labour market policy reform. Neither has it addressed the need for amending the labour laws to make the labour market more flexible. The labour regime and the archaic nature of the laws is one factor that has hindered the drive by the Sri Lankan government to attract FDI in order to generate economic growth. The origin and the rationale for the TEWA was the widespread retrenchment in 1971 due to the shortage of raw material for industries, and the problems faced by private industries. These problems essentially derived from the encouragement of state enterprises at the expense of private enterprises. Labour laws must now be updated to reflect the government's commitment to liberal market policies.

Overall, labour market polices in Sri Lanka do not facilitate movement between different sectors of the economy. Thus labour market reform has become one of the foremost issues that needs to be tackled by policymakers to ensure that a more competitive economic environment prevails.

CHAPTER-IV

The Scope of Competition Law

4.1 Overview

Within a liberalised economy, a need arises to set the boundaries of firms operating in markets. The first step in this direction involved the passing of the FTCA in 1987, though the process is still evolving. The need for reform was partly addressed by amendments to the FTCA by Act No 1 of 1993.

Trade practice or anti-trust laws regulating firms in the Sri Lankan economy are limited to Part III of the FTCA. Sections 12, 13 and 14 of Part III relate to monopolies, mergers, and anti-competitive conduct respectively. These correspond to sections 33, 34 and 35 of Part III of the proposed CPA respectively. Financial institutions are governed by the Banking Act No 30 (1988), and by virtue of section 82A of this act, the Banking Act prevails over other laws.

The FTCA is unclear as to the exact scope of its operation, but by virtue of section 11, the FTC has the power to investigate complaints with respect to sections 12 to 14.

The objective of the FTCA was to establish the 'Fair Trading Commission for the control of monopolies, mergers and anti-competitive practices'. The FTCA is unclear as to the exact scope of its operation, but by virtue of section 11, the FTC has the power to investigate complaints with respect to sections 12 to 14. The composition of the law is such that once each of the elements of sections 12 to 14 are satisfied, the FTC proceeds to consider whether the monopoly, merger or anti-competitive conduct is contrary to the "pubic interest" as per section 15(1)(a) of the FTCA. This common public interest test is very broad, and the FTC has the power to take into account "all matters that appear to be relevant". Special consideration is given to consumer and producer issues, maintaining and promoting a balanced distribution of industrial activity, and promoting 'effective' competition in the domestic market as well as export markets.

The lack of guidelines to interpret the elements of the public interest test is a limitation of the law, which is heightened by the lack of case law.

Upon the conclusion of its investigations, if the FTC holds that the alleged action under sections 12 to 14 is contrary to the "public interest", then the FTC proceeds to the remedial stage, which is governed by section 15(1)(c) of the FTCA (see section 4.1.6 for an outline of the available remedies). If the alleged action is not contrary to the "public interest", then the FTC has the power to authorise the transaction. The lack of guidelines to interpret the elements of the public interest test is a limitation of the law, which is heightened by the lack of case law.

4.1.1 Monopolisation

A monopoly is deemed to exist in relation to the supply of goods; or supply of services; or export of goods in specific cases; or export of goods generally; or export of goods to any particular market, if it is of a prescribed percentage of all goods supplied in Sri Lanka, by one and the same person, or to one and the same person. The Minister in charge of the Ministry of Internal and International Commerce and Food (MIICF) determines the prescribed percentage on the recommendation of the

FTC. The prescribed percentage should not be less than one third of the total market share of the product, and is determined in relation to the supply and export of goods and services of "any description". At present there are 47 identified and gazetted products and services with prescribed percentages applicable to section 12 of the FTCA.

The FTC does not intervene if the item in question is not detailed in the gazette as a prescribed article.

The FTC does not intervene if the item in question is not detailed in the gazette as a prescribed article. The case of ACL cables highlights the workings of section 12 in this regard. The decision of ACL Cables to buy out Kelani Cables gave ACL control of over an estimated 70 percent of the market. The FTC did not interfere in this transaction as cables were not a gazetted item, thus the prescribed percentage test was not applicable in this case, and hence it did not fall within the ambit of section12.

The 'prescribed percentage' is an arbitrary cut off point set by the Minister of MIICF, (henceforth Minister) which varies between 40 and 50 percent. The prescribed percentage element in section 12 of the FTCA makes the law with respect to monopolies dependent on the activism of the Minister and the FTC, and introduces distortions in the market which are counter to the basic theory of competition. The shortcomings of the prescribed percentage feature have not been addressed in the forthcoming CPA.

Market share alone is not sufficient to declare that a monopoly is illegal in Sri Lanka; a second test, determining whether the monopoly is contrary to the public interest must also be satisfied.

Market share alone is not sufficient to declare that a monopoly is illegal in Sri Lanka; a second test, determining whether the monopoly is contrary to the public interest must also be satisfied. The number of investigations pursued by the FTC under section 12 is low. Between 1996 and 2000, the FTC initiated only seven section 12 investigations.

4.1.2 Restrictive and Unfair Trade Practices

The FTCA does not identify different types of restrictive and unfair trade practices. Instead, it defines anti-competitive practices in section 14 to include instances where in the course of business, a person pursues a course of conduct that is or is likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition of goods, or the supply or securing of services in Sri Lanka. The charge of anti-competitive practice alone is not enough, and it is essential to prove that such practices are against the public interest.

The FTCA does not identify different types of restrictive and unfair trade practices. Instead, it defines anti-competitive practices in section 14.

In the event that an anti-competitive practice is found to exist, the FTC has the power to remedy the situation by issuing an order to terminate the practice. Investigations into anti-competitive practices have been the most frequent investigations at the FTC. During the past five years 23 investigations have been made with regard to anti-competitive practices. The broad ambit of section 14 is such that the FTC decides on the alleged anti-competitive practice on a case-by-case basis.

During the past five years 23 investigations have been made with regard to anti-competitive practices.

An example is the case of Ceylon Oxygen Ltd. vs Industrial Gases (Pvt.) Ltd. Ceylon Oxygen Ltd. (COL) was a monopoly in the production and distribution of oxygen gas and related products in the domestic market from its inception in 1936 until 1993. Industrial Gases (Pvt.) Ltd. (IGL) commenced operations in this market in December 1993. COL's market share was approximately 80 percent, with the rest of the market supplied by IGL. In 1994, IGL objected to the behaviour of COL on the grounds of unfair trade practices detrimental to IGL. IGL alleged that COL had resorted to predatory pricing tactics in the aftermath of IGL's entry into the market. In this regard, evidence of price movements of COL's products was tendered. This included a reduction in the deposit fee on oxygen cylinders from LKR8500 to LKR3000. In addition, there was a decrease in value maintenance charges from LKR75, to a range of LKR55 to LKR35 after IGL's entry. Further allegations were made of discriminatory discounts and exclusive dealing, evidenced by written agreements entered into by COL in October 1993 with its bulk purchasers, where buyers agreed to purchase their total requirements of industrial oxygen/related products from COL for an agreed period. It was also established that several substantial discounts were given on different types of gases and cylinder handling charges.

Section 14 introduces flexibility to the enforcers of the law, but is too general to capture the nuances of strategic market behaviour, which can be potentially anti-competitive.

On this matter the FTC identified three courses of conduct that would constitute an anti-competitive practice, namely predatory pricing, discriminatory rebates or discounts, and exclusive dealing, and concluded that there was insufficient evidence to establish any of the charges except one. The provision in the purchase agreements stipulating that buyers must purchase their total requirement of oxygen gas from COL was held to amount to an anti-competitive practice. The FTC thus declared those agreements null and void. In subsequent court proceedings instituted by COL, the Court of Appeal set aside this decision.[24] The Court of Appeal held that the FTC did not have the power to declare the agreements null and void without rendering an opportunity for all relevant parties to be heard, and in doing so had breached the rules of natural justice.

Section 14 introduces flexibility to the enforcers of the law, but is too general to capture the nuances of strategic market behaviour, which can be potentially anti-competitive. For the purposes of section 14 of the FTCA, collusive pricing, exclusive dealing, unconscionable conduct, price fixing and predatory pricing are all 'anti-competitive conduct'. Thus, the lack of demarcation of different types of anti-competitive conduct is a serious limitation of the competition law in Sri Lanka. In addition, the lack of interim orders limits the scope of the FTC in addressing matters with respect to anti-competitive conduct.

4.1.3 Price Control

Under the FTCA, the FTC was given wide price-control powers. If the Controller of Prices (henceforth Controller) was of the opinion that a potential shortage of any article might occur, or there had been an unreasonable increase in the price, or the price was excessive, then the Controller could request the FTC to fix prices, or set out a price structure. In addition, the FTC was also empowered to examine the price structure if requested by any agency, to examine questions relating to the price of an article referred to it by the Minister, and to review questions relating to the price of an article or the charge for any service, and report to the Minister.

Under the FTCA, the FTC was given wide price-control powers but these price surveillance functions were greatly curtailed by the Industrial Promotions Act No 46 of 1990 (IPA).

These price surveillance functions were greatly curtailed by the Industrial Promotions Act No 46 of 1990 (IPA). Under section 23 of the IPA, the FTC could only review the price of an article and hold an inquiry. If the FTC did find that the price was unreasonable and that it was necessary to facilitate competition by encouraging imports, it could only recommend to the Minister that the customs tariff be lowered. Under section 32 of the IPA, the FTC may be requested by the Controller to fix prices of 'specified articles' (i.e. food or pharmaceutical products), if there is an unreasonable increase in prices, or if the price at which they are sold is excessive. It also confers power on the FTC to vary the maximum price fixed for a specific pharmaceutical item. Before these pharmaceutical items are put on the market, the FTC considers all relevant documents and sets the maximum retail price. In 1992, the power to fix the prices of food items was removed from the ambit of the FTC.

4.1.4 Mergers and Acquisitions

Section 13 of the FTCA states that a merger arises when a person, whether a body corporate or not, acquires any share in the capital or assets of a body corporate or any other person, if this results, or would be likely to result in this person having a position of control or dominance in a market for goods or services; or if the person is already in a position to control or dominate a market for goods or services and the acquisition would substantially strengthen this power. These features alone do not make the transaction contrary to section 13 of the FTCA. The resulting merger must be contrary to the public interest.

As a matter of procedure all mergers and acquisitions must be notified in writing to the FTC, according to section 9A of the 1993 amendment to the FTCA.

As a matter of procedure all mergers and acquisitions must be notified in writing to the FTC, according to section 9A of the 1993 amendment to the FTCA. Section 9A further strengthens the powers of the FTC with regard to mergers, by empowering it to commence investigations either on a complaint made to it or by its own motion. If it is found that the proposed merger is not likely to operate against the public interest, the FTC may authorise it.

For example, in 1999, the FTC received notification from Kelani Tyres Ltd., Associated Ceat (Pvt.) Ltd. and Ceat India Ltd. The proposed merger envisaged the unification of the tyre manufacturing businesses of Kelani Tyres Ltd. and Associated Ceat (Pvt.) Ltd. with a view to upgrading and maximising the performances of these two businesses, as well as enhancing the quality of the tyres produced by both firms in accordance with international standards. The merger was also intended to realise economies of scale and lower the costs of manufacturing. The FTC approved the merger based on the fact that there was sufficient competition from imported tyres to prevent a single company from achieving a dominant position in the market for tyres.

The main element of section 13 is whether the proposed merger would be likely to result in the acquirer being in a position "to control or dominate" a market for goods and services.

The main element of section 13 is whether the proposed merger would be likely to result in the acquirer being in a position "to control or dominate" a market for goods and services. Despite the emphasis placed on control and dominance in section 13, it is section 15(1)(a), the public interest test, which determines the legality of the merger.

Section 13 allows for a position of control or dominance, but does not automatically trigger the application of section 12, the monopoly provision, as a result of the prescribed percentage test in the latter. Thus, the law on mergers and acquisitions is not flexible or sensitive enough to capture monopolistic behaviour arising from mergers and acquisitions.

4.1.5 Extra Territorial Jurisdiction

Sri Lankan law does not expressly confer any extra-territorial jurisdiction upon the FTC on matters of law relating to competition and anti-competitive issues, nor does it expressly exclude the same. The general rule however, is that the operation of all laws is confined within the territory of the Republic. However, the FTC can follow the US approach to the problem, by using the 'effects doctrine' to look into matters with an 'international' aspect.

To date, the FTC has considered only one such case, namely, the Glaxo Welcome - SmithKline Beecham merger. Glaxo Welcome referred the case to the FTC in April 2000 and the then legal officer advised the Board that the merger did not fall within the purview of the FTC's jurisdiction. The reasons behind this advice, however, cannot be found in any documentation.

Legislation in the areas of anti-dumping and computer crimes is currently being drafted. In addition, a new TRIPS compliant Intellectual Property Act has been drafted.

4.1.6 Available Remedies

Remedies that the FTC can use are specified in sections 15(1)(b) and (c). These include the following:

b) Refusal to authorise a proposed merger where it is likely to operate against the public interest;

c) Where the monopoly, merger or anti-competitive practice is against the public interest,

i) The division of any business by sale of any part of the undertaking or asset including:

- Transferring or vesting property, rights, liabilities or obligations;
- Adjusting contracts whether by discharge or reduction of any liability;
- Creating, allotting, surrendering or cancelling any shares, stock or securities;
- Subject to the Companies Act, forming or winding up a company or other association or amending the memorandum and or articles regulating any company or institution;
- Determining the extent to which and the circumstances in which provisions of the order affecting a company or association in its share capital or constitution may be altered by the company or association;
- The continuation, with any necessary change of parties, of any legal proceedings;

ii) The appointment of a person to conduct or supervise such activities on terms specified by the FTC;

iii) The termination of any anti-competitive practice in such a manner as may be specified in the order; and

iv) Any other action that the FTC may consider necessary for the purpose of remedying or preventing the adverse effects of any monopoly or merger situation or anti-competitive practice.

The penalties enforceable under section 15(1)(c)(i) are extensive, but these broad powers are curtailed by the inability of the FTC to make interim, or provisional orders that bind a party to the decisions of the FTC for alleged violations of sections 12 to 14.

The penalties enforceable under section 15(1)(c)(i) are extensive, but these broad powers are curtailed by the inability of the FTC to make interim, or provisional orders that bind a party to the decisions of the FTC for alleged violations of sections 12 to 14.

Further, the price-control orders made by the FTC are subject to adjustment by the Minister upon application by the parties concerned, thereby giving the executive the power to override the FTC's decisions. The Minister almost never accepts the recommendations made by the FTC under section 23 of the IPA regarding high prices of articles. The FTC has not utilised this power since 1991. Thus, the powers of the FTC are rendered ineffective, affecting the credibility of the institution.

4.1.7 Sanctions

Section 37 lays down the penalties for contravention of the FTCA. It provides that a person who contravenes or fails to comply with any provision of the FTCA or regulation made thereunder shall be guilty of an offence and shall, on conviction after trial before the Magistrates Court, be liable to a fine of up to LKR5,000, or imprisonment for up to one year, or both. Where a person fails to comply with an order made under section 15 (with regard to mergers, monopolies and anti-competitive practices), he/she is guilty of an offence, and on conviction after trial before the Magistrate, is liable for a of fine of up to LKR50,000, or imprisonment for up to two years, or both. In addition, the court can order such person to refrain from carrying on the business in respect of which the order was made.

Under section 7 of the FTCA, a right of appeal to the Court of Appeal exists for those parties aggrieved by an order made by the FTC for thirty days after the making of the order. The party affected by the order of the Court of Appeal can make an appeal to the Supreme Court under the normal Supreme Court rules.

4.2 Consumer Protection Law

4.2.1 Overview

The preamble of the Act sets out the ambit of the CPA as "…an Act to make provision for the regulation of internal trade, for the protection of the consumer; for the establishment of fair trade practices… …and for matters connected therewith or incidental thereto…"

The bulk of consumer protection law in Sri Lanka is found in the Consumer Protection Act No 1 of 1979 (CPA 1979). This Act is the successor of several enactments, including the Sale of Goods Ordinance, the Control of Prices Act, the Weights and Measures Ordinance, and the National Prices Commission Law. The preamble of the Act sets out the ambit of the CPA as "…an Act to make provision for the regulation of internal trade, for the protection of the consumer; for the establishment of fair trade practices… …and for matters connected therewith or incidental thereto…"

The task of consumer protection is currently under the authority of the DIT. Section 2 of the CPA 1979 creates the offices of Commissioner and Deputy Commissioners of Internal Trade. The enforcement of the CPA 1979 is decentralised and it is the responsibility of the Deputy Commissioners of Internal Trade, who are also heads of the Divisional Secretariat. At present the DIT has approximately 270 inspectors, who are responsible for maintaining the standards and qualities of the goods and services that are offered in the market.

4.2.2 Investigative Powers

Any person can lodge a complaint in writing with the Commissioner of Internal Trade (CIT) regarding the manufacture or sale of any article that is not compatible with the standards set by the Commissioner under section 8(2) of the Act. However, only a seven-day period is given to make the complaint. An inquiry may be launched on the basis of such a complaint. For the purposes of the investigation, the CIT is given the power to call any document, powers of entry, and power to inspect or search any business premises and seize certain articles. The number of complaints received and resolved from 1995 to the 3rd quarter (q3) of 2000 is set out below:

Table 9: Performance of the Department of International Trade (DIT)

	1995	1996	1997	1998	1999	2000q3
No of complaints received	867	1157	896	657	401	245
No of complaints settled	434	544	746	767	286	153

Source: A document prepared by the DIT

If, after the inquiry, the CIT finds that the trader or manufacturer has manufactured or sold an article not conforming to the standards set by him, the CIT may order a refund of the amount paid, or compensation to be paid to the consumer.

The DIT mainly relies on administrative measures of negotiating amicable settlements, and the legal provisions relating to dispute settlement are insufficient. The lack of personnel trained for dispute settlement at the DIT is also a notable limitation to its efficiency.

4.2.3 Other Powers

The CIT can undertake studies with respect to satisfactory quality, reasonableness of the price, and the availability of any article. For the protection of consumers, the CIT may issue directions to manufacturers or traders with respect to labelling, price marking and packaging of any article.

The price-control arm of the DIT is strengthened by section 14 of the CPA 1979, which makes it an offence to sell a good above the stipulated maximum price.

The CIT has the authority under section 10 of the CPA 1979, to enter into written agreements with manufacturers or traders, setting out the maximum price, the quantity sold, the conditions of sale and the time of the sale of a specified good. The price-control arm of the DIT is strengthened by section 14 of the CPA 1979, which makes it an offence to sell a good above the stipulated maximum price. The CPA 1979 makes it an offence to refuse to sell an item, to deny possession of an item, to hoard articles, and to sell articles above the marked price.

The CPA 1979 requires traders to display a price-list, to issue receipts, and to provide a notice board displaying any notice, direction or warning issued by the CIT. In addition, it supplements the FTCA in regulating the behaviour of producers for the benefit of consumers. Thus it addresses areas of misleading conduct, false representations, exclusive dealing, price discrimination and warranties.[25]

A case before the CIT under section 20 of the CPA 1979, dealt with exclusive dealing. It addressed the issue of the conversion of petrol motor-vehicles to Liquefied Petroleum Gas (LPG), vehicles. Motorchrome Auto Gas Conversions (Pvt.) Ltd. (MAGC) and Gas Auto Lanka (Pvt.) Ltd. (GAL) are the two key players in this market. GAL refused to sell LPG to cars that had been converted by MAGC. It only sold LPG to cars converted by GAL itself. The CIT held that the refusal to sell LPG could eliminate MAGC from competing in the market, and that GAL was engaging in exclusive dealing contrary to section 20 of the CPA 1979.

The CPA 1979 requires traders to display a price-list, to issue receipts, and to provide a notice board displaying any notice, direction or warning issued by the CIT.

4.2.4 Sanctions

Section 28 of the CPA 1979 makes any contravention of the Act or a regulation made thereunder, an offence. However, the penalties that can be imposed by a Magistrate on conviction of such offences are insignificant. For example, a first time contravention of sections 11, 12 and 13[26] is limited to a fine of a sum between LKR1000 and LKR3000, imprisonment of up to 3 months, or both. For a subsequent offence, the offender is liable to pay a sum between LKR3000 and LKR7500 *and* be subject imprisonment for a period of up to six months.

Ministerial powers are also very broad under this Act. Under section 25, after an inquiry establishes that a contravention of the Act has taken place, the Minister has the authority to order the forfeiture of all or part of the assets of the offender, whether or not they are connected with that particular business or trade.

4.2.5 Links with Competition Law

While providing for the protection of the consumer, the CPA 1979 also covered the regulation of trade, including certain restrictive business practices such as exclusive dealing, price discrimination and monopoly. The FTCA that was enacted in 1987 amended the CPA 1979 in certain respects.

Powers relating to monopolies were removed from the DIT by the FTCA and were brought under the FTC.

Powers relating to monopolies were removed from the DIT by the FTCA and were brought under the FTC. Although exclusive dealing and price discrimination are still under the DIT, the FTC is given the power, in the interests of the national economy, to grant permission for a trader to engage in the practice of exclusive dealing. The FTC is also given the power, in the interests of national economy, to exempt a trader from the application of the provisions relating to price discrimination. The failure of the Court of Appeal[27] to recognise price discrimination as an anti-competitive practice may be due to the fact that price discrimination expressly came under the DIT.

Administrative procedures adopted by the FTC and the DIT ensure that there is no overlap of their functions. Complaints that do not fall within their scope are directed to the relevant authorities to avoid overlap. It is notable however, that the two institutions act together in consumer education and advocacy programmes.

Administrative procedures adopted by the FTC and the DIT ensure that there is no overlap of their functions.

4.2.6 Improvements in the New Legislation - the CPA

Under the proposed CPA, the investigative powers of the Competition Protection Authority (henceforth Authority) will encompass almost all of the laws in relation to consumer protection.

There are a number of procedural improvements that have been adopted by the CPA. They are:

1. The expansion of the time limit for a complaint to be lodged from 7 days to three months; and
2. Any increase of the retail or wholesale price of an article prescribed by the Minister to be 'essential to the life of the community', can be made only with the prior approval of the Competition Protection Council (henceforth Council).

In addition, the Authority is given the power to protect the consumer by ensuring the quality of the goods sold or services provided. To this end, the Authority may determine standards and specifications relating to production, manufacture, storage, transportation, and the sale of any good or supply of any service. Further, the powers of inquiry have been extended (from manufacture or sale) to cover complaints about production, manufacture, supply, storage, transportation and sale of any goods, and also cover non-conformity with warranties or specific or implied guarantees.

One of the shortcomings of the CPA is that although its primary objective is the protection of consumers, it fails to spell out their rights.

One of the shortcomings of the CPA is that although its primary objective is the protection of consumers, it fails to spell out their rights. As it stands, consumer rights must be deduced from the restraints imposed on traders and manufacturers.

4.2.7 The Consumer Movement

Sri Lanka does not have an active consumer movement. Consumer organisations can be registered under the DIT and currently there are 250 such organisations registered. Approximately 4000 consumer organisations are in existence at present under the umbrella organisation the Federation of Consumer Associations in Sri Lanka (FOCAS). A lack of awareness among consumers as to their rights and the remedies available in the event of a breach of their rights is very common. Consumer organisations have not been active in creating awareness among consumers. A proposal has been made[28] to constitute consumer courts with the objective of providing consumers with easy access to justice, swift remedies etc.

The Sri Lanka Telecommunications Act[29] (SLTA), which established the TRC, does not clearly set out the powers of the TRC and the FTC, and neither does the FTCA.

4.3 Sector Specific Regulatory Bodies and their Links with Competition Law

The other active sector specific regulatory body in Sri Lanka is the Telecom Regulatory Commission (TRC), established in 1998. The National Transport Commission (NTC), established during the liberalisation of the public transport system in the mid-1980s has been dormant since the time of its inception. Other utilities, such as electricity, ports, and water, do not have regulators.

The Sri Lanka Telecommunications Act[29] (SLTA), which established the TRC, does not clearly set out the powers of the TRC and the FTC, and neither does the FTCA. The FTCA does not exclude telecommunications from its scope, while the SLTA provides for the regulation of telecommunications without excluding such power from the FTC. The objectives of the TRC are to:

1. Protect and promote the interests of consumers with respect to charges and the quality and variety of telecommunication services; and
2. To maintain and promote effective competition between those engaged in commercial activities connected with telecommunication.

To this end, the TRC is equipped with the power to hold investigations and make determinations.

In practice however, the exercise of powers of the FTC and the TRC do not overlap. This is so because the FTC refers all matters that come before it regarding telecommunications to the TRC. The FTC has not established steady links with the TRC, but they interact if any related matter arises during the functions of the TRC.

In practice however, the exercise of powers of the FTC and the TRC do not overlap.

The NTC was established by the National Transport Commission Act[30] (NTCA). The Preamble to the Act sets out the government policy, *inter alia*, as follows:

a) To promote the development of services relating to passenger transport by omnibus of sufficient quantity and quality to meet the needs of the public, and to promote the equitable distribution of such services through Sri Lanka;
b) To ensure healthy competition between the providers of such services;

The functions of the NTC include, among others, the powers to:

a) Monitor the availability of omnibus services of acceptable quality;
b) Specify the conditions subject to which it may issue passenger service permits;
c) Prescribe the form in which the permits are to be issued and determine the rates for issue or renewal of such permits;
d) Monitor and enforce compliance by permit holders with the conditions of the permits issued to them.

CHAPTER-V

Administrative Aspects of Competition Law

5.1 The Competition Regulatory Authority – the FTC

The FTC, the body in charge of regulating competition in Sri Lanka was established by the FTCA No 1 of 1987, and came into operation on August 1st 1987. The objective of the FTCA as espoused in its preamble was to "…[Establish] a Fair Trading Commission for the *control* of monopolies, mergers and anti-competitive practices, and the formulation and implementation of a *national price policy*…"

The FTC was to ensure a competitive business environment, and high levels of competition, promoting greater consumer choice with respect to goods and services of a desired quantity and quality and at favourable prices.

Hence the FTC was to ensure a competitive business environment, and high levels of competition, promoting greater consumer choice with respect to goods and services of a desired quantity and quality and at favourable prices. The FTC functions as a quasi-administrative body and comes under the MIICF. Companies and ventures registered under the BOI and professional conduct do not come within the purview of the FTC.

5.2 The Structure of the FTC and its Independence

The FTC, a body corporate with perpetual succession, consists of seven members appointed by the Minister. The members or the commissioners of the FTC hold office for a term of three years with provision for reappointment. They are required to have extensive experience in the fields of industry, law, trade, commerce or administration. The three commissioners of the board are non-practising lawyers; while the rest are professionals in accountancy and economics. The Minister appoints one member as Chairman of the FTC, who is a full-time member, and the other commissioners are part-time appointments.

The selection process of the commissioners and the structure of the present system do not guarantee the independence of the FTC; they leave room for external influences.

The selection process of the commissioners and the structure of the present system do not guarantee the independence of the FTC; they leave room for external influences. Political influence within the workings of the FTC is pervasive. Under provision 3 of the Schedule to the FTCA the Minister has the power to remove any member of the FTC by order published in the Gazette, without providing any reason thereof. This decision of the Minister cannot be challenged in a court of law.

Further, provision 12 of the Schedule empowers the Minister to terminate the appointment of the Chairman without giving any reasons. The FTC may, with the approval in writing of the Minister, appoint a Secretary General as the chief executive officer to act under the direction of the FTC.

All meetings of the FTC are presided over by the Chairman. The quorum for any meeting is three members, and the Chairman has a casting vote in addition to his/her own vote. As per provision 11 of the Schedule to the FTCA, any member who has direct or indirect interests on a matter before the FTC is obliged to disclose the matter, and henceforth must refrain from taking part in any proceeding or decision regarding that particular matter.

The Minister is given power under section 28 to make regulations in respect of any matter required by the FTCA; in particular matters prescribing the manner in which meetings of the FTC are convened and conducted. Subject to these regulations, the FTC can regulate the procedure with regard to its meetings and transactions of business at such meetings.

5.3 Funds of the FTC

The FTC publishes an annual report and its contents are regarded as public information. However, it is not made freely available to the public.

The FTC's main source of income is the funds allocated to it by Parliament, but it also receives revenue via the exercise of its duties and functions. Remuneration payable to the Commissioners, and other sums required for the expenses incurred by the FTC are paid out of the funds from Parliament. The FTC calculates what funds will be required for the financial year ahead and forwards this to the Department of National Budget to be approved by Parliament.

The Board of Directors handles the finances of the FTC. Section 31 requires the FTC to maintain proper books of accounts of income and expenditure, assets and liabilities, and other transactions.

5.4 Annual Report of the FTC and Advocacy Programmes

The FTC publishes an annual report and its contents are regarded as public information. However, it is not made freely available to the public. The latest available report is for the year 1996. Information regarding the investigations carried out, price orders made, additions to the staff, accounts, and the scope and powers of the FTC are set out in the annual reports. The FTC has published several materials educating the public on the functions and the scope of the FTC and the types of actions that fall under the descriptions of monopolies, mergers and anti competitive practices etc. The FTC actively collates market surveys and market statistics.

5.5 Powers of the FTC

The broad powers of the FTC are aimed at promoting effective competition, and consumer protection. Whether these powers are fully used in practice is another matter. The following section of the report will attempt to provide a brief overview of the workings of the FTC.

Under section 11 of the FTCA, the FTC has the power, either on its own motion or on a complaint made by another, to investigate monopolies, mergers, or the prevalence of any anti-competitive practices.

5.5.1 Investigative Powers

Under section 11 of the FTCA, the FTC has the power, either on its own motion or on a complaint made by another, to investigate monopolies, mergers, or the prevalence of any anti-competitive practices. In addition, it may hold other enquiries that are necessary to carry out its functions as specified under section 10(1)(a) of the FTCA. In practice, the FTC rarely initiates investigations on its own accord. This dormancy on the part of the FTC has been attributed to the lack of staff and financial resources, despite the allocation of funds by Parliament. Hence the bulk of the applications brought before the FTC are complaints by aggrieved parties.

Private individuals can make complaints, as can the public, the private sector, government departments, consumer organisations, non-governmental organisations and any other interested person. A distinction is made between a complaint and providing information, the former being a document made available to any person for perusal, while the latter is considered confidential and not divulged except with the written permission of the party who provided the information. The FTC does not investigate all the complaints it receives, but takes up only those which are within its purview, as determined under the FTCA.

The FTC does not investigate all the complaints it receives, but takes up only those which are within its purview, as determined under the FTCA.

Complaints that are not under the purview of the FTC are directed to the relevant authority, such as the DIT or the TRC. An investigation must be carried out with regard to a complaint before a determination is made. There is no process by which a complaint could be directly adjudicated without prior investigation into the matter. Presently, the FTC does not keep a record of the number of complaints made or information received. The only information that is available to the public regarding the complaints is that which is included in the Annual Report.

In carrying out an investigation, whether on its own motion or as a result of a complaint, the FTC provides aggrieved parties with an opportunity to be heard under section 10(2) of the FTCA. The overriding objectives of any investigation by the FTC are the promotion of 'effective competition', the promotion of the interests of consumers, and the reduction of prices. However, the FTCA fails to clarify the meaning of 'effective competition'. This hinders the functions of the competition authority. In addition, the FTCA fails to outline the criteria of the National Price Policy as envisaged by the preamble of the Act.

Upon concluding an investigation, the FTC has the power under section 15 to make an order authorising the merger, monopoly or anti-competitive practice if it is not likely to operate against the public interest.

Under section 8(1) of the FTCA, the FTC has the power to authorise persons to furnish any information that the FTC may consider necessary for carrying out its functions. The powers of search and seizure are very broad. Section 9 of the Act authorises any officer[31] to enter any business place and to take copies of any records that are required to be kept under any law. Upon concluding an investigation, the FTC has the power under section 15 to make an order authorising the merger, monopoly or anti-competitive practice if it is not likely to operate against the public interest. Persons interfering with the lawful process of the FTC, or those failing to carry out an order given by it, are guilty of an offence and are held in contempt of the FTC.

5.5.2 Quasi-Judicial Powers

The remedies within the ambit of the FTC are very broad, and this raises the question of the suitability of a quasi-adjudicative body for making decisions of a predominantly business nature.

In the event that the FTC decides that the monopoly, merger or alleged anti-competitive practice is against the public interest, it can order a number of remedies under section 15(1)(i). These include the division of any business by sale of any part of the undertaking; the appointment of a person to conduct such activities on terms specified by the FTC; the termination of any anti-competitive practices; and any other action that the FTC may consider necessary. The remedies within the ambit of the FTC are very broad, and this raises the question of the suitability of a quasi-adjudicative body for making decisions of a predominantly business nature. An aggrieved party can appeal to the Court of Appeal against an order made under section 15 within 30 days of the order. However, there is no procedure by which an order can be reviewed or reconsidered within the FTC.

5.5.3 Advisory Powers

Currently, the FTC does not have any advisory powers.

Currently, the FTC does not have any advisory powers. Under section 24 of the original FTCA, there was a provision for the Minister to seek advisory reference from the FTC relating to the price of any article or the charge for any service. A total of 31 advisory references were made during the period of 1985 to 1990. However, this power has been removed by amendments to the FTCA by the IPA in 1990.

5.6 Separation of Adjudicative and Investigative Powers

As is evident from the preceding sections, the FTC performs both adjudicative and investigative functions. The adjudicative and prosecutorial powers are inextricably linked, to the extent that the body that looks into complaints is not separate from the body that makes orders. Instead, both functions are carried out by, and within the FTC.

The adjudicative and prosecutorial powers are inextricably linked, to the extent that the body that looks into complaints is not separate from the body that makes orders.

However, once a complaint is received, different aspects of the complaints are looked into by different staff at the FTC, such as economists and legal officers. At this stage the officers base their investigations on the complaint or petition, the objections or clarifications tendered by the other parties, and relevant information collected by the FTC.

Once the investigation is complete, the officers forward the file to the Commissioners with their recommendations. The Commissioners may call for clarifications from the officers who investigated, or call for documents from the parties, or even require the parties present themselves and give information. The Commissioners then make the order. To this extent, there is a separation within the FTC.

In the proposed CPA it appears prima facie that the investigative process is to be carried out by the Authority while the adjudicative powers come under the Council.

In the proposed CPA it appears prima facie that the investigative process is to be carried out by the Authority while the adjudicative powers come under the Council. However, a closer examination of the provision indicates a certain amount ambiguity on this issue (refer to chapter seven for details).

CHAPTER-VI

Capabilities of Competition Authority

Information relating to the capabilities of the FTC is presented below. This was collated from the survey on the Authority.

6.1 The Structure of the FTC

Though the FTC has the power to appoint other officers and advisers 'necessary' for its functions, this option has been under-utilised.

Although the FTCA provides for the appointment of seven members, until November 2000 only six members held office, with one as Acting Chairman. In November 2000 the FTC was reconstituted and a new Chairman and four more members were appointed. In 2000, a Secretary General was appointed by the FTC with the approval of the Minister.

Though the FTC has the power to appoint other officers and advisers 'necessary' for its functions, this option has been under-utilised. For example, the approved cadre of the FTC is 27 persons,[32] but only about 13 positions within the FTC have been occupied over the past four years.

According to the Annual Reports, the post of legal officer was vacant from 1996 until 2000, while the post of senior economist was vacant from 1996-1999. The post of administrative and finance assistant has been vacant from 1996 to date. The high number of vacancies in the FTC may be attributed to the low priority given to staff recruitment, and the bureaucratic nature of the MIICF. In 1998, though approval was sought to fill all the existing vacancies, the Department of National Budget within the MIICF only approved the filling of *three* vacancies. The MIICF has not shown any interest in funding and providing human resources since the proposal to merge the FTC and the DIT was put forward in 1995.

Difficulties in recruiting staff have also been attributed to the poor salaries and other benefits for FTC staff compared to the wage structure of the private sector. Full-time and part-time members of the commission are placed on a similar salary scale to that of corresponding government officials. The salaries of the professionals and supporting staff are lower than the government scale, and much lower than the private sector.

Difficulties in recruiting staff have also been attributed to the poor salaries and other benefits for FTC staff compared to the wage structure of the private sector.

As to the allocation of staff to different areas, 0.25 of the staff are allocated to deal with mergers and acquisitions while 0.75 of staff handle anti-competitive practices. 3.75 are allocated to finance and administration while 3.5 are allocated for other activities. However, no staff are allocated to research and investigation activities.[33]

6.2 Investigations

The time taken for investigation and adjudication of a case is not normally recorded. One reason for this is that the FTC does not keep records of all the cases investigated and orders made. Secondly, the time taken depends on the complexity of the case and not its nature, (e.g. whether it is a merger or a monopoly). Some cases have been concluded within one year of the lodging of the complaint, while others have taken as long as 5 years. The FTC explains the delay as being purely administrative. The officers of the FTC do not take more than 2/3 months to look into economic and legal aspects of a case. The delay occurs once the case is referred to the Commissioners. Recent changes in the composition of the Commissioners and the lack of interest on the part of the Commissioners have also contributed to the delays in findings by the FTC. The FTC has revealed that even convening Board meetings has become difficult due to the lack of interest among the Commissioners.

To date, the FTC has not utilised its powers to deal with any cases with cross-border implications.

To date, the FTC has not utilised its powers to deal with any cases with cross-border implications. The only case that was referred to the FTC, namely the Glaxo Welcome - SmithKline Beecham merger, was not taken up for investigation, as the FTC decided that it did not come within its purview. Complaints relating to cases of such a nature are generally not made to the FTC due to its dormant nature, which is also highlighted by the low number of complaints investigated by the FTC during the 1995 to 2000 period (see table 10). The table does not differentiate which cases proceeded to adjudication and which were settled.

Table 10: Performance Statistics of the FTC (1995-2000)

Year	1995	1996	1997	1998	1999	2000
Number of complaints investigated	7	5	6	11	8	6
Number of complaints rejected						
after investigation	1	0	1	0	3	2

Source: Complied from the questionnaire on the functions of the FTC.

Table 11: Price Control Orders and Price Surveillance (1992-2000)

Year	Under Section 32 of the IPA	Under Section 23 of the IPA
1992	2	7
1993	9	3
1994	24	3
1995	47	6
1996	53	-
1997	50	-
1998	30	-
1999	47	-
2000	51	-

Source: A document prepared by the FTC

Since 1992 the FTC has utilised its price control powers under section 32 of the IPA, and price surveillance powers under section 23 of the IPA in the following manner:

6.3 Facilities

The FTC has:

- Total office space of 4359 square feet;
- Fifteen telephone lines;
- One fax line;

- One internet and e-mail connection;
- One photocopying machine; and
- Nine computers.

No library facilities are available to the FTC. However, ten local newspapers are subscribed to, although no arrangement is made for news clipping. Five periodicals, including Asia Week, Time, and The Economist are also received. There is also a database on the local pharmaceutical industry.

6.4 Funds

In 1998, the total amount of money allocated to the FTC by Parliament was LKR6.4 million, out of which LKR6.29 million was used. In 1999, LKR8 million was allocated and the expenditure incurred was LKR2.5 million.[34] This suggests that there was considerable under-utilisation of funds in that year. Any excess funds or savings have to be returned to the Treasury at the end of the financial year. The expenditure of the FTC is audited every year by a government agency. Table 12 illustrates the manner in which the FTC used the funds for the 1996 to 2000 period:[35]

Table 12: Utilisation of the Funds of the FTC (in LKR millions)

	1996	1997	1998	1999	2000
Salary & Honorarium etc.	1.838	2.371	2.237	2.690	3.131
Establishment Cost	1.803	2.709	3.612	3.387	3.867
Books / Periodicals etc.	0.054	0.037	0.037	0.045	0.058
Research & Investigation			0.014	0.031	0.028
Printing / Publications	0.136	0.139	0.097	0.141	0.169
Meeting / Conferences	0.019	0.025	0.019	0.017	0.013
Total	3.850	5.281	6.016	6.311	7.261

Source: Question No 34 of the Questionnaire

Salaries and establishment costs have been the highest costs for the FTC during the 1996-2000 period.

Table 13: Budget of the FTC as a Percentage of the Government Budget and GDP

Year	Budget of FTC (1) LKR mn	Budget of GOSL (2) LKR mn	(1) as a % of (2)	GDP (3) LKR mn	(1) as a % of (3)
1996	4.790	175,104	0.00274	768,000	0.000624
1997	5.815	185,120	0.00314	890,000	0.000653
1998	6.290	199,528	0.00315	1,018,000	0.000618
1999	7.500	206,822	0.00363	1,106,000	0.000678
2000	7.350	254,968	0.00288	1,256,000	0.000585

Source: Central Bank Annual Report 2000 and the questionnaire.

The annual budget of the FTC as a percentage of Gross Domestic Expenditure (GDE) and GDP of Sri Lanka is presented in Table 13:[36]
The budgetary allocation of the FTC is less than 0.001 percent of GDP, as shown in table 13 above.

The FTC suffers a shortage of accountants and internal auditors. At present, the internal auditor also functions as the accountant in the price-fixing division, devoting most of his time to fixing the prices of drugs. For this reason, the FTC has faced difficulties in preparing its Annual Internal Audit Report.[37]

6.5 Training and Advocacy Programmes and the Annual Report

In 1997, the FTC, along with MIICF and the DIT, facilitated the formation of the Federation of Consumer Associations in Sri Lanka, in order to strengthen consumer awareness activities.

In 1997, the FTC, along with MIICF and the DIT, facilitated the formation of the Federation of Consumer Associations in Sri Lanka, in order to strengthen consumer awareness activities. Representatives of the FTC participated in several television and radio programmes that dealt with consumer issues, and also seminars and international conferences on the same theme. The FTC organised an international conference for the first time in 1997, on the enforcement of national laws on competition and restrictive business practices.

The latest available Annual Report of the FTC is that of 1996, of which around 550 copies have been printed. However, for purposes of internal management, the FTC has prepared an annual report for 1997. This report is not as comprehensive as the Annual Report of 1996. It has been made available to the researchers for the purposes of the 7-Up Project.

Upon commencing work at the FTC, staff are given local training for a limited period of time. There are no regular training programmes thereafter.

Upon commencing work at the FTC, staff are given local training for a limited period of time. There are no regular training programmes thereafter. However, ad hoc local training is given to a limited number of staff and some are sent abroad for workshops and conferences. In 1997, staff benefited from the international workshop organised by the FTC on national competition laws and restrictive business practices. There is no system to evaluate staff performance.

6.6 Recommendations

- The Powers of the FTC should be expanded to expressly cover cases with cross-border implications.
- Skilled and competent staff, including professionals, should be engaged to carry out its functions. It is important that attractive remuneration and other benefits be provided to them, when compared with the private sector.
- Extensive training and education relating to competition issues should be provided to all staff members, especially those dealing with complaints. It is important that the staff has international exposure by attending seminars and workshops in other countries.
- Resources in terms of staff, funding and other facilities should be provided to maintain records of the complaints lodged and cases investigated or transferred etc.
- Library facilities should be made available to the FTC.
- Relationships between the FTC and other international competition authorities should be encouraged. This would provide the FTC with the opportunity to learn from the experiences of others.

CHAPTER-VII

The Proposed Consumer Protection Authority (CPA)

The proposed CPA[38] is the first attempt to combine the complementary areas of consumer protection and market regulation of internal trade, thereby streamlining market activity.

The proposed CPA[38] is the first attempt to combine the complementary areas of consumer protection and market regulation of internal trade, thereby streamlining market activity. The CPA proposes to repeal the FTCA, the CPA 1979, and the Control of Prices Act. Under this Bill the FTC and the DIT will cease to exist, and will be replaced by the Authority and the Council.

The objective of the CPA is to achieve the following:

a) To control and eliminate restrictive agreements; arrangements amongst enterprises with regard to prices; the acquisition or abuse of a dominant position with regard to domestic or economic development within the market or in a substantial part of the market; or any restraint of competition which adversely affects domestic or international trade or economic development.;
b) Investigate monopolies, mergers and anti-competitive practices, and cases of abuse of a dominant position; and
c) Maintain and promote 'effective competition' between suppliers of goods and services.

The functions of the Authority are set out in section 7 of the CPA and are as follows:

a) To promote the interests of consumers, purchasers and other users of goods and services with respect to prices, the availability of goods and services, and the variety supplied;
b) To carry out investigations in relation to any matter specified in this Act;
c) To promote competitive prices and regulate prices in markets where competition is less than effective;
d) To undertake studies, publish reports, and provide information to the public relating to market conditions and consumer affairs;
e) To undertake public and private sector efficiency studies; and
f) To promote the exchange of information relating to market conditions and consumer affairs with other institutions.

Parts II and III of the CPA relate to the regulation of trade, monopolies, mergers and anti competitive practices. Part VI deals with the Council, which is empowered to make determinations on the existence of monopolies, mergers and anti competitive practices, investigate matters relating to excessive pricing, and to approve items as being essential to the life of the community.

The staffs of the FTC and the DIT are to be absorbed by the new Authority and Council. Both consumer protection and fair trading issues will come under the power of the Authority and the Council. The eight members of the Authority are to be selected from the fields of industry, law, economics, commerce, administration, science and health.[39] These specialities will be well suited to the investigative role of the Authority. The Council will comprise of an Attorney-at-Law with expertise in the field of commercial law to serve as its Chairman, and two economists with experience in the management of business enterprises, trade practices and consumer affairs. However, given that the "public interest" test must be established in accordance with the legal rules with regard to economic principles, the role of the Council would have been better served if it comprised of a panel of commercial lawyers/judges as opposed to another multi-disciplinary panel.[40]

Given that the "public interest" test must be established in accordance with the legal rules with regard to economic principles, the role of the Council would have been better served if it comprised of a panel of commercial lawyers/judges as opposed to another multi-disciplinary panel.

Any appointments to the Council are made by the Minister. An improvement on the present law is the stipulation that the Minister is empowered to remove members and the Chairman of the Authority only in certain specified instances. The present law does not require the Minister to give any reason for the removal of members.

The substance of the laws proposed in sections 33 to 35 of the CPA is identical to that of sections 12 to 14 of the FTCA. The lack of specific sections of the law to deal with collusive behaviour, exclusive dealing, and unconscionable conduct in business is a serious limitation of the law that has not been remedied by the proposed CPA. The absence of cross-border applications of the law is such that domestic laws have no-extra territorial applications. This has not been redressed in the CPA.

Under the proposed new Bill the public interest test lies within the realm of the three-member Council, the apex body of the new competition regime. The public interest criteria under section 41(2) of the CPA are similar to those under section 15(1)(a) of the FTCA. However, the former test is the preferred approach, as it does not require the Council to have special regard to maintaining a balanced distribution of industrial activity and the promotion of competitive activity in the export markets,[41] which are not the core objectives of competition. The nine-member Authority is predominantly an investigative body dealing with sections 33 to 35. It refers matters under section 41(2), the determination of the 'public interest' criterion to the Council.

The separation of duties between the Authority and the Council is an attempt to streamline and expedite the activities of the competition authority. However, the potential for delays in the decision-making process, and the possibility of the duplication of tasks between the Authority and the Council are significant.

The separation of duties between the Authority and the Council is an attempt to streamline and expedite the activities of the competition authority. However, the potential for delays in the decision-making process, and the possibility of the duplication of tasks between the Authority and the Council are significant. The Council has to take into account "all matters that are relevant" upon receipt of an application by the Authority, to determine whether the monopoly, merger or anti-competitive conduct is contrary to the public interest as per section 41(2). It is also not clear from section 37 of the CPA whether the Authority has the capacity to make any recommendations to the Council with regard to matters or transactions under sections 33 to 35.

Section 36 of the proposed regime empowers the Authority to carry out investigations on issues of monopolies, mergers and anti-competitive practices, at the conclusion of which it can make an application to the Council to determine on the matter. Though ostensibly, there is a separation of the investigative and judicial roles, it is not very clear since under section 18 of the Bill, the Authority is required to refer matters regarding excessive pricing to the Council for investigation.

Furthermore, both the Council and the Authority are given powers of investigation such as issuing notices, examining witnesses and receiving evidence etc. As there is no clear-cut division of investigative and adjudicative powers between the Authority and the Council, it is not clear whether the Council will handle all judicial and quasi-judicial functions or not. Although recommendations have been made that a single body should not exercise both investigative and adjudicative functions, this seems to have been overlooked.

It is not clear whether the Council will handle all judicial and quasi-judicial functions or not.

Overall the shortcomings of the CPA are broadly twofold. Firstly, it has not addressed the existing problems of the FTCA. Thus the substantive and the procedural limitations of the FTCA are reflected in the CPA. Secondly, the CPA has introduced sections 50 and 81, which effectively create an uneven playing field and are contrary to the basic premise of competition policy.

Despite several rounds of amendments to the proposed Bill, the problems of sections 50 and 81 of the CPA have not been addressed. The main reason for the presence of these two clauses in the CPA is the lack of co-ordination of between policies envisioned by the competition regime and the privatisation initiative of the government. Details of sections 50 and 81, and the manner in which they will impact on the future competition regime of Sri Lanka are presented below:

7.1 Protection of Public Sector Monopolies

Section 50(a) of the CPA exempts all public sector monopolies, such as the Ceylon Petroleum Corporation (CPC) and the Ceylon Wholesale Establishment (CWE), from the purview of Part III of the CPA. Section 50(a) is a continuation of the protection granted to public sector monopolies under the FTCA. The rationale for section 50(a) is based on a number of issues, for example national security in the case of the CPC, and government welfare policies in the case of the CWE. However, given the important role that these institutions play in the economy, it is essential that these public sector monopolies are also regulated via efficiency audits, to ensure that efficiency from economies of scale does eventuate.

Section 50(a) of the CPA exempts all public sector monopolies from the purview of Part III of the CPA.

Section 50(b) extends protection to any “institution or body that has been granted the exclusive right to supply such goods or services…” This section of the law is an attempt to accommodate the privatisation initiatives of the government.

Section 50(c) of the CPA provides a concession to person(s) with whom government transactions do not involve an exclusive right, but involve the granting of a monopoly in the “interests of the national economy”. Though the concession is granted for a period of three years, it creates a situation where the first-mover advantage accrues to the established firm, which may restrict or prevent competition in that market (Stackelberg Competition). An example is the Shell privatisation initiative.

7.2 Protection of Government Agreements

Section 81 of the CPA states that the provisions on monopolies, mergers and anti-competitive conduct (Part III of the CPA) will not apply to persons who supply goods and services under agreement with the government (government sponsored agreements). Section 81 provides added protection to government sanctions agreements, as long as the agreement is in force at the commencement of the Bill, and for the duration of the agreement.

Section 81 of the CPA states that the provisions on monopolies, mergers and anti-competitive conduct (Part III of the CPA) will not apply to persons who supply goods and services under agreement with the government

For example, the Shell privatisation initiative was granted, which included an exclusive five-year period from the beginning of December 1995 to the end of December 2000. Section 81 of the CPA in its present interpretation provides an unregulated exclusive market for Shell for the duration of the privatisation agreement. Shell is shielded from the purview of the competition authority with respect to monopolies, mergers and anti-competitive conduct for entire period of the agreement, that is for the 25 years beginning January 2001. Section 81 protects all privatisation agreements in force, for the full period of their duration, effectively sustaining monopolistic behaviour in a market as opposed to preventing it, thus running contrary to the basic principles of competition theory.

For those government agreements that are not in force at the time of the commencement of the CPA, section 50 provides exemptions from Part III of the CPA, either under sections 50(b) or 50(c).

7.3 Other Issues

A novel feature of the proposed legislation is the power of the Authority to conduct public and private sector efficiency studies at the request of the Minister.

A novel feature of the proposed legislation is the power of the Authority to conduct public and private sector efficiency studies at the request of the Minister. No government department undertakes such studies at present. However, since Section 50 exempts the public sector from the scope of the Act, the impact that such studies can have is questionable.

The investigative powers of the Authority have been expanded beyond those of the present DIT. The CPA provides for the Authority to investigate any complaint relating to the production, supply, shortage, transportation or sale of any goods that do not conform to the standards set by the Authority. It also covers the breach of an express or implied warranty or guarantee given by the trader or manufacturer. Further, the time limit within which a complaint can be made has been extended to three months from the present limit of seven days.

Ostensibly, the scope of the penalties has been enhanced, and the Council has the power to take whatever action is "necessary" to remedy or prevent the adverse effects of a merger, monopoly or anti-competitive action.

In addition, any increase in the retail or wholesale price of an article, which is prescribed by the Minister to be "essential to the life of the community", can only be made with the prior approval of the Council. However, if the increase is justified by the consideration of market forces, the Council cannot prevent such an increase. Further, investigative powers are given to the Council regarding excessive prices of goods and services of economic importance.

Under the proposed CPA, penalty provisions are within the ambit of the Council as per Section 41(c). Ostensibly, the scope of the penalties has been enhanced, and the Council has the power to take whatever action is "necessary" to remedy or prevent the adverse effects of a merger, monopoly or anti-competitive action. However, the continued lack of interim orders diminishes the remedial power of the Council.

CHAPTER-VIII

Conclusion

Sri Lanka does not have an overall economic policy on competition that encompasses different product and geographic markets.

Competition policy means much more than the presence of a competition law and an authority to enforce it. It consists of the systematic application of a broad agenda of policies, both macro and micro, that impact on the level of competition in an economy. Sri Lanka does not have an overall economic policy on competition that encompasses different product and geographic markets. The government response thus far has been an ad hoc approach to industrial and trade development policies etc, focusing on specific issues for redress within the different sectors of the economy.

The Sri Lankan competition regime consists only of a legal and an institutional framework.

The aim of this paper was to highlight the salient features of the competition regime in Sri Lanka. In doing so the report traces a number of issues relating to the public policy arena, as well as competition law and the competition authority in Sri Lanka. The Sri Lankan competition regime consists only of a legal and an institutional framework. However, as stated in the introduction to the report, the mere presence of a regime on market behaviour and consumer interests is insufficient. A competition culture which promotes competition as a process, sets the agenda for superior individual performance, and leads to greater levels of industrial efficiency is essential for an effective competition regime.

Among the key factors to face the Sri Lankan competition regime at present, are the issues arising as a result of the new competition law, the CPA.

Among the key factors to face the Sri Lankan competition regime at present, are the issues arising as a result of the new competition law, the CPA. The CPA is pending parliamentary approval and despite several rounds of amendments, is flawed. It effectively generates an uneven playing field, which is counter to the very basic premise of competition policy. Thus, it is unlikely that this new regime, encompassing both consumer protection law and fair trading law will provide a credible competition framework for Sri Lanka in the future. Policymakers and lawmakers alike have attempted to fashion the proposed new competition regime around the existing policies of the government. This supports existing monopolies, as well as any government sponsored transactions that result in monopolies.

It is unlikely that this new regime, encompassing both consumer protection law and fair trading law will provide a credible competition framework for Sri Lanka in the future.

NRG Meeting Summary

One of the important components of the 7-Up project was the formation of a National Reference Group (NRG) in each of the project countries. The main objectives of forming NRGs were to deliberate on the inputs prepared in each country, and to create a base for launching advocacy for a healthy competition culture. The NRGs comprised of representatives of the following categories of organisations/persons:

The main objectives of forming NRGs were to deliberate on the inputs prepared in each country, and to create a base for launching advocacy for a healthy competition culture.

- Consumer organisations and other civil society organisations with a demonstrated interest in economic issues
- Experts/interested persons from academia and the media
- Business and chambers of commerce
- Competition & regulatory authorities
- Government (External Trade, Internal Trade and/or Consumer Affairs Departments)
- Politicians and/or parliamentarians
- Trade union leaders

In Sri Lanka, two NRG meetings were organised during the first phase of the project. The meeting provided a good platform to bring together several experts and to deliberate on various aspects of competition law besides discussing some project specific issues. The Phase-I country report and case studies to be taken up during Phase-II of the project were discussed in detail and finalised after a general consensus.

In Sri Lanka, like most other developing countries, the problem lies mainly with the implementation of the competition law and not with the law itself.

The highlights of the discussions can be summarised as follows:

In Sri Lanka, like most other developing countries, the problem lies mainly with the implementation of the competition law and not with the law itself. The competition authority of Sri Lanka is weak, not because it does not have legal power, but because it does not have the authority to implement the law. It is commandeered by a Board of Directors appointed by the Minister in charge of the FTC. The Board of Directors is also frequently changed according to the whims of politicians. This has led to a lack of responsibility, accountability or incentive to take serious action. It is generally described to be "having teeth and not biting".

There is a need for radical competition laws that create an impact on the stakeholders of society such that consumers are energized into making use of the law to remedy anti-competitive behaviour.

The other major problem is that of leadership and independent sources of funding. In addition, the authority is deficient in staff and financial resources. Although appeals have been made over the years for more funds so that the authority could pay higher wages and attract more qualified personnel, these requests have been turned down on the basis that the proposed Consumer Protection Authority (CPA) would resolve these issues.

The setting up of a CPA has been in the pipeline for several years and there does not seem to be any attempt to set it up given the current political climate. Pushing for the setting up of the CPA must be a top policy priority. There is a need for radical competition laws that create an impact on the stakeholders of society such that consumers are energized into making use of the law to remedy anti-competitive behaviour.

There is a lack of awareness on consumer rights amongst the general public. In addition, there is no forum to which the consumer can address complaints.

The problem with regards to consumer protection is multifaceted. There is a lack of awareness on consumer rights amongst the general public. In addition however, even if consumers were aware of their rights there is no forum to which the consumer can address complaints. Setting up the CPA along with building up strong consumer organisations and disseminating information on competition policy and consumer protection is necessary. It was suggested that a cheap and effective solution such as a tribunal commission should be considered. The consumer court system in India was felt to be working extremely well and it was suggested to prepare a definite action plan on this front along the lines of the Indian system.

It was felt that the project could go a long way in improving competition and consumer protection in the country by:

- helping to locate sources of funds for the CA;
- creating awareness on competition policy and consumer protection issues;
- facilitating training of personnel and identifying staff to man complaints desks in the existing consumer entity; and
- researching the viability and promoting the idea of consumer courts.

Synopsis of the Synthesis Report

The Synthesis Report is the culmination of the work undertaken in Phase I of the 7-Up project. This synopsis provides a summary of the Synthesis Report.

The Synthesis Report is the culmination of the work undertaken in Phase I of the 7-Up project, which is a comparative study of the competition regimes of seven developing countries of the Commonwealth namely, India, Kenya, Pakistan, South Africa, Sri Lanka, Tanzania and Zambia. It brings together the results and findings from the individual country reports that provide details of the structure, functioning and efficiency of the institutional framework for enforcing competition law in the country.

The synthesis compares the experiences of the seven countries, providing a benchmark by which countries can evaluate their own progress and offering an opportunity for them to learn from developments elsewhere. This synopsis provides a summary of the Synthesis Report.

The 7-Up countries differ in terms of their geographical locations, population sizes, and specific developmental challenges.

The 7-Up countries differ in terms of their geographical locations, population sizes, and specific developmental challenges. They are also at different stages in terms of the development of their competition regimes. While India has had competition legislation in place since 1969, Tanzania and Zambia first enacted competition laws in 1994 and 1995 respectively. Accordingly, the countries have different levels of experience as regards the implementation of competition policy.

Every country in the study is undergoing a process of economic reform and market restructuring. In this sense, the project countries are not only developing, but also transition countries. This process has involved liberalisation of the economy, including a reduction of barriers to international trade and reduced state involvement in commercial enterprises.

Every country in the study is undergoing a process of economic reform and market restructuring. In this sense, the project countries are not only developing, but also transition countries.

Large state-owned enterprises have been privatised and replaced by profit-driven bodies. In this context, competition policy is extremely important in order to ensure that a smooth transition towards a well-functioning market occurs, and to avoid the danger of transferring dominant market positions to private enterprises. This would ensure a broader choice of goods at cheaper prices for consumers, and an efficient allocation of the economy's resources.

As part of the more general programme of reforms many of the countries have recently changed, or are in the process of changing their competition laws. As with other policy changes, this represents a shift in emphasis away from government control (e.g. price controls) towards the encouragement of market-driven efficiency, through competition.

As part of the more general programme of reforms many of the countries have recently changed, or are in the process of changing their competition laws.

However, some of the laws include objectives that are not directly related to the promotion of competition; for example one of the objectives of the South African Competition Act, 1998, is to "promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons", and the Sri Lankan Fair Trade Commission takes the control of inflation into consideration in its activities. In general, the key objectives are efficiency and consumer welfare, with a recognition that there may be a trade-off between static and dynamic efficiency.

Three main areas are generally considered to be the core concerns of competition policy in any country:

i) Restrictive trade (or business) practices;
ii) Control of monopoly power or a dominant position; and
iii) Mergers and acquisitions.

While each of these is covered under all of the 7-Up country laws, the manner in which they are covered differs somewhat.

No country prohibits all RTPs per se, but in some countries those practices that are regarded as particularly damaging are singled out for this type of prohibition.

Most countries identify specific actions that constitute an RTP; the others give a more general definition. In several of the 7-Up countries the definition of restrictive trade practices (RTPs) is related to the idea of a horizontal or vertical agreement between firms that restricts competition. In other countries RTPs also include restrictive actions by single enterprises.

No country prohibits all RTPs per se, but in some countries those practices that are regarded as particularly damaging are singled out for this type of prohibition. All countries include a 'rule of reason' provision whereby some practices can be justified either in the public interest, or on efficiency, technological progress or export grounds. The onus is usually on the offending party to make a case for itself, though in Sri Lanka the burden of proof is reversed. It is difficult to determine the precise criteria on which 'rule of reason' decisions will be based, but this process should develop over time to provide more predictable outcomes for enterprises, while allowing competition authorities the necessary flexibility to support developmental needs and other public policy aims.

Most of the 7-Up countries adopt a two-step approach to determining the abuse of monopoly power and dominant market positions.

Most of the 7-Up countries adopt a two-step approach to determining the abuse of monopoly power and dominant market positions. Firstly, they must establish that a position of dominance exists, and secondly, they must establish that this position is being abused. A prerequisite for this process is identifying the relevant market, in terms of its 'geographical' and 'product' dimensions. Most of the laws do not provide a clear prescription for how this should be done. India's new Competition Bill, although not yet in force, will be the only competition law to specify which factors should be taken into consideration in this regard.

Once the relevant market has been determined, dominance is assessed. The major factor for determining this in all countries is market share. Although there is no one-to-one relationship between a high market share and market dominance, which makes it difficult to set a threshold, this method is used as an important indicator in jurisdictions all over the world. The levels above which dominance is presumed in the 7-Up countries fall between 30 and 50 percent. India's new Bill takes a more behavioural approach, taking into account other factors such as the size and importance of competitors, technical advantages and the overall structure of the market. It is not yet clear how much weight will be allocated to each factor.

Once it has been established that a firm is in a dominant position, the second step is to determine whether this position is being abused.

Once it has been established that a firm is in a dominant position, the second step is to determine whether this position is being abused. Dominant firms are subject to the same prohibitions as other firms, while in some cases behaviour that is legitimate for non-dominant firms is also not allowed.

The only country that does not follow the two-step approach is Pakistan. Here, once market dominance is determined it is up to the dominant enterprise to justify its position on the grounds that it contributes substantially to efficiency, technological progress or the growth of exports.

In addition, the economic circumstances that prevailed in the country in 1970, when the MRTPO was enacted, led the law to prohibit excessive 'personal' market power per se. At that time there was a vast concentration of the country's wealth into the hands of 22 business families. The MRTPO set a threshold of 300 million Pakistani Rupees, above which an individual's assets are deemed to constitute an undue concentration of economic power. The remedy in these cases is divestiture of ownership.

All 7-Up countries have provisions to the effect that mergers and acquisitions likely to result in situations where competition will be limited are prohibited. Requirements on pre-notification, however, differ.

All 7-Up countries have provisions to the effect that mergers and acquisitions likely to result in situations where competition will be limited are prohibited. Requirements on pre-notification, however, differ; Pakistan requires that all mergers are notified to the authority; Kenya, Tanzania and Zambia require that all horizontal combinations are notified and approved (this limits their scope to deal with cases of vertical mergers with anti-competitive implications); South Africa requires pre-notification above a certain threshold; and India requires no pre-notification in either the existing Act or the proposed Bill. In Sri Lanka all mergers are notified, though the law actually only requires this in cases where combinations result in either the acquisition of a dominant position, or the strengthening of an existing one. The policy towards pre-notification has significant implications for the workload of competition agencies. In South Africa, this was part of the motivation for the amendment that introduced the threshold below which notification is not required.

In addition to the three main areas, some of the laws include provisions on unfair trade practices or consumer protection. In other countries these are covered under separate consumer protection laws, although Kenya and South Africa do not have any legislation covering either area.

Certain activities are shielded from the purview of competition law in some countries. In some cases this is because they fall under sector-specific regulatory regimes. However, the division of authority between the competition agency and the sector-specific regulator is often unclear.

Certain activities are shielded from the purview of competition law in some countries. In some cases this is because they fall under sector-specific regulatory regimes (this applies to many utilities, which are regarded as natural monopolies), however, the division of authority between the competition agency and the sector-specific regulator is often unclear. Both the Kenyan and the Indian governments have wide powers to exempt any enterprise that performs a 'sovereign duty'. Pakistan's Monopolies and Restrictive Trade Practices Ordinance specifically exempts all state enterprises. In South Africa firms can apply to the Competition Commission for exemption for a specific practice on various grounds, including the maintenance or promotion of exports or preventing the decline of an industry.

Some of the laws make use of the 'effects' doctrine, whereby foreign firms can be prosecuted for violations of competition laws that have an adverse effect in the domestic jurisdiction.

Some of the laws make use of the 'effects' doctrine, whereby foreign firms can be prosecuted for violations of competition laws that have an adverse effect in the domestic jurisdiction. However, as in the rest of the world, even where specific provisions for extra-territorial abuses are included this is not a guarantee that they will be effective in dealing with them. The South African Competition Commission and Tribunal have both recognised that they are unlikely to oppose a large international merger that has already been approved in the US or the EU, given the relative size of the South African economy. The second phase of the 7-Up project will examine these issues in more detail.

Various types of sanctions and relief are provided for in the competition laws of the 7-Up nations. These include cease and desist orders, fines, imprisonment and compensation to injured parties.

Various types of sanctions and relief are provided for in the competition laws of the 7-Up nations. These include cease and desist orders, fines, imprisonment and compensation to injured parties. The fines are often very low; in Kenya the maximum fine is approximately US$1,300 and in Tanzania it is approximately US$3,750. Such fines will not deter large enterprises from anti-competitive practices. The South African and the new Indian legislation may be more effective since they relate the maximum fine to the size of the enterprise involved.

The powers of the competition authorities can be separated into 'investigative' and 'adjudicative' powers. Whether or not these powers are separated varies across the project countries, but all countries allow for appeal and final adjudication by and independent judiciary body.

The powers of the competition authorities can be separated into 'investigative' and 'adjudicative' powers. Whether or not these powers are separated varies across the project countries, but all countries allow for appeal and final adjudication by and independent judiciary body. The South African set-up with a 'self-contained' separate judicial system for competition cases is recommended by the World Bank-OECD Model law. However, such a set-up might not be constitutional in countries that provide for final Supreme Court jurisdiction in all cases, as is the case in India.

After the introduction of the new law in Tanzania, the Kenyan authority will be the only one that is administratively part of a government department. However, this does not mean that the other authorities have sufficient autonomy from central government. In Pakistan for example, an attempt to curtail cartelisation and collusive pricing in the cement industry resulted in government intervention to fix prices at a 'mutually acceptable level'. Several factors influence the level of an authority's autonomy, including the method by which funds are allocated. In addition to funds from central government, Sri Lanka and South Africa receive some of their income from the filing fees that they receive. This increases their independence.

The lack of funds has generally resulted in competition authorities with inadequate facilities and resources to carry out their functions, and insufficiently attractive salaries to draw high-calibre staff.

In most cases the authorities' budgets are extremely low. The lack of funds has generally resulted in competition authorities with inadequate facilities and resources to carry out their functions, and insufficiently attractive salaries to draw high-calibre staff. The largest portion of the budgets is usually spent on salaries, with very little on research and investigations, or meetings and conferences.

Many of the authorities are understaffed. There has been some difficulty in finding appropriate candidates to fill positions, and many research positions remain vacant. Though India has a large staff, this is dominated by support staff and there are few professionals. In most 7-Up countries there is also a shortcoming in the amount of on-the-job training for existing staff. In addition, authorities do not have access to adequate information on market structure; several of the countries have no industry database. In conjunction with the lack of experience and suitably qualified staff this will make complex tasks like assessing market dominance very difficult.

In most 7-Up countries there is also a shortcoming in the amount of on-the-job training for existing staff.

In many respects South Africa is better equipped than the other countries to carry out its functions. The office has a fully electronic information resource centre, and all reference material is available online. The Commission also uses a case management and tracking system, which allows users to keep track of the progress of cases. The Tribunal also has continuous training and development programmes and provides funding for staff to pursue higher study. However, even the South African authorities have difficulty in attracting high-calibre staff.

The introduction of a market economy has been relatively recent in the 7-Up economies, so there is a particular need to promote understanding in the general population on the benefits of competition and the costs of anti-competitive behaviour.

The introduction of a market economy has been relatively recent in the 7-Up economies, so there is a particular need to promote understanding in the general population on the benefits of competition and the costs of anti-competitive behaviour. Despite this need, the advocacy and outreach programmes of the competition authorities have been limited and most countries spend very little on publications and raising awareness.

On the whole, the 7-Up countries now have laws that are comprehensive enough to deal with the variety of practices and activities that infringe on the level of competition in their markets. Certain improvements would be necessary to complete this picture.

On the whole, the 7-Up countries now have laws that are comprehensive enough to deal with the variety of practices and activities that infringe on the level of competition in their markets. Certain improvements would be necessary to complete this picture. The main problems, however, are in the effective implementation of the laws. On the whole, the main barrier to this lies in the weakness in the capacities of the competition authorities, and their inexperience. Overcoming these difficulties will be much easier if governments and civil society are educated on competition issues.

7-UP COUNTRY PROFILES

	India	Kenya	Pakistan	South Africa	Sri Lanka	Tanzania	Zambia
Population[1] Millions (1999)	998	29	135	42	19	33	10
GDP Millions US$ (1999)	459,765	10,603	59,880	131,127	15,707	8,777	3,325
GNP/Capita US$PPP (1999)	2,149	975	1,757	8,318	3,056	478	686
Adult Illiteracy (1998):							
% Male (>15)	33	12	42	15	6	17	16
% Female (>15)	57	27	71	16	12	36	31
Poverty[2]							
% <National poverty line	40.9	42.0	34.0	-	40.6	51.1	68.0
% <$1/day	44.2	26.5	31.0	11.5	6.6	19.9	72.6
Exports % GDP							
1990	7	26	16	24	30	12	36
1999	11	25	15	25	36	20	29
Imports % GDP							
1990	10	32	23	19	37	35	58
1998	13	35	21	25	42	27	34
Currency	Indian Rupee	Kenyan Shilling	Pakistani Rupee	South African Rand	Sri Lankan Rupee	Tanzanian Shilling	Zambian Kwacha
Exchange Rate Currency / US$ (2000)	43.3[3]	76.2	51.7	6.9	75.1	800.4	3,110.80
Annual budget of CA US$ (2000)	406,582	235,892	325,919	7,742,678	97,870	162,056	193,005
Annual Govt Budget Millions US$ (2000)	68,840	3,230	13,560	23,270	3,395	1,010	340
% Government Budget	0.00059	0.00731	0.00240	0.03327	0.00288	0.01604	0.05619
Pattern of expenditure -% share (2000)							
Salaries & honoraria	66	54	33[4]	41	43	18	81
Establishment cost	31	36	16	21	53		0
Books, periodical etc	2.21	-	0.49		0.80		0
Research & investigation		-		7.1	0.39		11
Printing/publications		-			2.33		1.98
Meetings/conferences	0.66	0.33		3.6	0.18		5.87
Other		0.27					
Staff (2000/2001)							
Full time members	4	1	3	1	1	5	
Part time members	0	0	-	8	5	-	12
Professional	7	24	5		7	-	5
Support staff	85	6	25		7	-	6
Total	**96**	**31**	**33**	**78**	**20**	**5**	**23**

1 Data in the table comes from the World Development Report 2000, the World Bank, and the country reports.
2 Latest available year.
3 Budget and exchange rate figures for India are for 1999 (2000 not available).
4 Pattern of expenditure for Pakistan is for 1999.

ANNEXURE-1

Exchange Rates

	1980	1990	1999	2000
LKR/US$	16.5	40.1	69.7	75.1
Source: World Bank, (2001).				

ANNEXURE-2

ABOUT 7-Up

The 7-Up Project is a two- year research and advocacy programme being conducted by the Consumer Unity & Trust Society (CUTS) with the support of Department for International Development (DFID), UK for a comparative study of competition regimes in seven developing countries of the Commonwealth.

The countries selected for the Project are India, Kenya, Pakistan, South Africa, Sri Lanka, Tanzania and Zambia, which have similar legal systems, and are at similar levels of economic development.

Main Objectives

The project primarily aims to:

- Evaluate the existing competition law and its implementation on a few basic principles: budgets, autonomy, composition and structure of the competition regime and authority;
- Identify typical problems and suggest solutions, including on the basis of good practices elsewhere;
- Suggest ways forward to strengthen existing legislation and institutions dealing with competition and consumer protection issues;
- Assess capacity building needs of the government, its agencies and the civil society;
- Develop strategies for building expertise among the competition agency officials, practitioners and civil society to deal with anti-competitive practices, including cross-border abuses more effectively; and
- Help build constituencies for promoting competition culture by actively involving civil society and other influential entities during this exercise.

Project Implementation

The project is being implemented by CUTS Centre for International Trade, Economics & Environment (CITEE) under the close supervision of an international advisory committee who are experienced in competition and related issues. The research and advocacy work of the project at country level is being done by local partners/ research institutions in the relevant countries. The following institutions have been involved in the project as partners:

- *India:* National Council of Applied Economic Research, New Delhi and CUTS, Jaipur
- *Kenya:* Institute of Economic Affairs, Nairobi
- *Pakistan:* Sustainable Development Policy Institute, Islamabad and The Network for Consumer Protection, Islamabad
- *South Africa:* Institute for Global Dialogue, Johannesburg
- *Sri Lanka:* Law & Society Trust, Colombo and Institute of Policy Studies, Colombo
- *Tanzania:* Economic and Social Research Foundation, Dar-es-Saalam and Christian Council of Tanzania, Dodoma
- *Zambia:* CUTS Africa Resource Centre, Lusaka and Zambia Consumers Association, Kitwe

The Project comprises of two phases, where Phase-I studied the institutional framework for enforcing the competition law in the project countries and Phase-II deals primarily with cross border competition issues.

The project, implemented under the close supervision of an international advisory committee, has two components: research and advocacy.

The research output of the project is designed to be based on:

- Study of relevant existing literature
- Field study, and
- Consultation with local stakeholders

The advocacy component of the project includes raising awareness among the various groups of stakeholders through meetings and publications and building constituencies that would help shaping a healthy competition culture. In this regard a National Reference Group, involving various stakeholders, has been formed in all the project countries.

It is expected that the project will be extended to implement some of the results of the project including providing capacity building and technical assistance to governments and civil society, as well as advocating for a healthy competition culture at different levels.

ENDNOTES

1 Nagaoka S, (1998).. International Trade Aspects of Competition Policy," National Bureau of Economic Research working paper op 6720, p 3.
2 Stewart T, (2000). "Globalization Competition Policy and International Trade Negotiations" p1.
3 Sampson, C, (1993).
4 World Bank, (2001).
5 Ibid.
6 The decline over the last two years can partly be explained by changes made to the definition used in the labour market survey; for at present it includes unpaid family workers to in the labor force.
7 Gunatilake, N, ("Basic MIMAP Poverty Profile Sri Lanka", 2000). The figures are only available up toas at 1996.
8 These goods are drugs, milk powder, sugar, potatoes, cooking oil, dried fish and textiles.
9 Such as lorries and tractors.
10 Such as crude oil.
11 GDP at Factor cost.
12 These include food and drink.
13 This category includes motor cars, radios, tyres, pharmaceutical products etc.
14 Central Bank of Sri Lanka selected Economic Indicators December (2000), p12.
15 GDP at Factor Cost.
16 The category of agriculture includes, tea, rubber, coconuts, paddy, and others
17 Includes the processing of tea, rubber, coconuts kernel products, and factory industry, as well as SMEs.
18 Includes imports, exports and domestic sectors, of which the biggest contributor was the import sector.
19 As per information received by Malathy Knight-John.
20 Sahlih, (2000).
21 Kelegama, (1992).
22 Central Bank, (1999), *Annual Report 1999* p 26-27.
23 The local bank, National Development Bank and the local subsidiary of Citibank International bought over the interest of these two financial institutions respectively.
24 Ceylon Oxygen v. Fair Trading Commission, C.A. Minutes 30.04.1996.
25 Sections 19 through to 22 deals with these areas.
26 These sections refer to the refusal to sell, denial of possession and hoarding of goods respectively.
27 In Ceylon Oxygen Ltd. vs. Fair Trading Commission, C.A. minutes 30.04.1996.
28 By the National Reference Group Members at the 2nd NRG meeting held on 01.11.2001.
29 No. 25 of 1991 amended by Act No. 27 of 1996.
30 No. 37 of 1991.
31 The issue of who is an officer for the purpose of the FTCA, has not been addressed in the act.
32 Annual Rreport of the FTC (1996). Although the Annual Reports gives the above figures, the questionnaire as filled out by the FTC indicates that the sanctioned cadre is 34 while the actual workforce is 23. The discrepancy between these two documents may be as a result of double counting by the FTC in including both the members both part time and full time members as a part of the professional cadre employed at the FTC.
33 This information is taken from question no. 17 of the questionnaire filled out by the FTC. The numbers indicate the proportion of a full-time staff-member's time that is allocated to dealing with the area in question.
34 FTC,The *Annual Report 1999*.
35 This information is taken from question No. 34 of the Questionnaire – the figures are in LKRs. Mn.
36 This information is taken from question No. 27 of the Questionnaire – the figures are in LKRs. Mn.
37 FTC, *Annual Report 1996*.
38 Information as to the contents of the Bill is taken from the draft of the Bill that was available in June 2001. The Bill has been presented to Parliament and is referred to a Parliamentary Select Committee for further consideration.
39 The proposed ActCT seeks to include the discipline of Eeconomics as a field of expertise, which is not a criterion for selection for the FTC under the present law.
40 The Council comprises of an Attorney at law, with "wide experience" in commercial law, a person with "wide experience" in the management of business enterprise, and an economist with "wide experience" in trade practices and consumer affairs as per Section 39(2) of the CPA. As per Section 79 there is no guidance as to the exact meaning of "wide experience" in Section 39(2).
41 Sections 15(a)(iv) and 15(a)(v) of the FTCA respectively.

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INSTITUTE OF POLICY STUDIES

The Institute of Policy Studies of Sri Lanka (IPS) is an autonomous, national institution for research into economic policy, established by an Act of Parliament in 1988. It formally came into operation in 1990. The mission of the Institute is to contribute to the prosperity of a democratic and united Sri Lanka, and to the enhancement of the quality of life of its people by supporting and informing policy-makers through independent, high quality, research-based analyses of medium and long-term national policy issues. Though closely linked to the policy-making establishment, its financial and administrative independence enables IPS to be an authoritative, independent voice on Sri Lankan economic policy.

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The Law & Society Trust (LST), established in June 1982 under the provisions of the Companies Act of 1982, is a non-profit making body committed to improving public awareness on civil and political rights and social, economic and cultural rights, and equal access to justice. The LST has taken a leading role in promoting cooperation between government and society within South Asia on questions relating to human rights, democracy and minority protection, and has participated in initiatives to develop a global intellectual and policy agenda for the next decade. The Trust attempts to use law as a resource in the battle against underdevelopment and poverty, and is involved in the organization of a series of programs aimed at members of the legal community, including publications, workshops, seminars and symposia.