Why Should Consumers be Interested in a Competition Law & Policy?

Written by
Pradeep S Mehta

25 years 1983 2008 CUTS International

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Editor's Note

Since a long time we have been pursuing the authorities in India that it is important to orient and inform consumer activists on the benefits of a competition law and policy. After all, one of the goals of a competition regime is consumer welfare. The Competition Act in India, as a replacement to the outdated Monopolies and Restrictive Trade Practices Act, 1969, was enacted in 2002. Alas, due to some litigation on appointments, the law was not implemented fully until an amendment was adopted by the Parliament in 2008. Since, May 2009, the new Competition Commission of India is fully operational. Only one part of the law, i.e. on combinations (mergers etc.) is yet to be operationalised due to many businesses feeling that this will thwart the growth of Indian enterprises.

In spite of the fact that merger regulation is not part of the law, other equally important sections dealing with anti-competitive practices, such as cartels, abuse of dominance and so, are a part of a functional competition regime. This has to be conveyed widely to the civil society, and hence this exercise. I discussed the idea with Shri Dhanendra Kumar, Chairman, Competition Commission of India who readily agreed to do it. He also spoke with Shri Rajiv Agarwal, Secretary, Department of Consumer Affairs, Government of India who too was ready to support it. It was thus agreed that we should organise a sort of capacity building event for consumer groups from all over the country who could be exposed to the contours of a competition law and how it will benefit them.

This idea has percolated into a National Conference on "Competition Regime – Benefiting the Consumer" organised by the Competition Commission of India, Department of Consumer Affairs and CUTS International at New Delhi, on October 20, 2010. This publication has been prepared as a Backgrounder for this event and others that will follow.

It has been prepared from several existing CUTS publications by me with assistance from Vikas Kathuria, a new colleague. This is not meant for the serious competition scholar or expert, as the purpose is to expose the lay person on various dimensions of a competition law without going into finer details.

Jaipur
October 2010

Pradeep S Mehta
Secretary General
CUTS International

Abbreviations

ACCC	Australian Competition and Consumer Commission
COMPAT	Competition Appellate Tribunal
CCI	Competition Commission of India
COPRA	Consumer Protection Act
CSO	Civil Society Organisation
CSP	Cellular Service Provider
DTH	Direct-to-Home
EU	European Union
FBI	Federal Bureau of Investigation
FCO	Federal Cartel Office
FMCG	Fast Moving Consumer Goods
FTC	Fair Trade Commission
IPR	Intellectual Property Right
KFTC	Korea Fair Trade Commission
M&As	Mergers and Acquisitions
MRFTA	Monopoly Regulation and Fair Trade Act
MRTPC	Monopolies and Restrictive Trade Practices Commission
MSO	Multi System Operator
NCP	National Competition Policy

NORAD	Norwegian Agency for Development Cooperation
OPEC	Organisation of Petroleum Exporting Countries
RBI	Reserve Bank of India
RTP	Restrictive Trade Practice
TCPA	Tanzania Consumers Protection Association
TRAI	Telecom Regulatory Authority of India
UNCTAD	United Nations Conference on Trade and Development

Introduction

Competition is a process of economic rivalry between market players to attract customers. These market players can be multinational companies, domestic firms, wholesalers, and retailers, selling both goods and services. Such a competitive situation may also be affected by market contestability, where competition comes not only from existing players, but also from new players that could enter the contest in the market.

In a free market, competition is a ruthless force, which ensures that only those firms/enterprises survive which are fittest. It drives firms to become more efficient and offer a greater choice of products at lower prices because of the fear that only the efficient ones will survive in the market. This ensures best possible utilisation of available resources.

Fair competition benefits consumers and the economy. Consumers' purchasing power increases as a result of lower prices. For example, a poor person used to buy his bread for ₹5 each. Due to competition the prices have come down to ₹2. The poor fellow saves ₹3, which he uses to buy something else.

Moreover, competition prevents concentration of wealth and serves the overall development of economy. Article 39 of the Indian Constitution enjoins upon the government to ensure that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

However, the natural tendency to make profits on the part of firms at times result in certain practices which distort competition, directly or indirectly. This is not a modern day phenomenon, and is probably as old as the market itself. The history of competition distortions and regulations goes back to 400 BC in India, when one reviews Kautilya's Arthashastra where there is a vivid description of market practices and their regulatory institutions and practices. It is also mentioned in historical texts of the Roman Empire's laws and administrative structures in the beginning of this century.

Therefore, to ensure that consumers and businesses enjoy maximum benefits, competition must be maintained in the market. Mind you even businesses are customers of other goods and services, and hence need protection from anti-competitive practices of other businesses. Herein comes the role of the government, in general, and the competition authority, in particular. They should keep an eye on the market behaviour and use several tools to promote competition on one hand through various policies such as industrial, trade etc. On the other hand, they are required to check anti-competitive practices through the effective enforcement of a competition law(s), thus promoting the interest of the consumer, the producer and the whole nation.

More so, consumers and their representatives themselves have to be alert in order to keep the government as well as the competition authority of their country active in implementing competition rules. This becomes more important in the liberalised era, where less regulated market players are well informed and organised, while consumers are still ignorant and unorganised.

This paper aims at generating awareness that could be helpful for a common person to identify anti-competitive practices in the market place and seek action to rectify the same.

The paper is divided into four sections. Section I describes various facets of competition. Section II deals with certain common myths about competition in the market while Section III which forms the main part of the document describes various types of hurdles to competition. In an annexure, we carry several examples of competition action on commonly consumed goods and services in the form of real cases from across the world. Section IV introduces competition law and policy to the reader and Section V concludes.

I
Types of Competition

Competition can be broadly divided into two parts.

Price Competition: This is a form of competition among suppliers where the suppliers try to win customers by offering them a product at a price which is lower than their competitors' price. Lowering down of price is expected to bring about an increase in the market share of the lower priced product. But this strategy may not click for those customers who are loyal to any particular brand and are not price conscious.

Non-price Competition: This is a form of competition among suppliers where they try to win customers not by lowering prices but by advertising, offering after-sales-service, using sale promotion tools, etc.

Ways of Competition

Fair Competition: This relates to the adoption of fair means by firms, such as producing quality products, becoming cost-efficient, optimising the use of resources, adopting the best available technology, investing in research and development, etc.

Unfair Competition: This relates to the adoption of unfair means such as fixing prices with the rivals, setting a price which is lower than cost in order to throw out competitors from the market, advertising that belittles others' product, etc.

Different Forms of Competition in the Market

Before understanding different forms of competition in the market, it is essential to understand what market is.

Market is an exchange mechanism that brings together sellers and buyers of any commodity or service. It is simply a transaction, not a place that is usually supposed to be, where a buyer agrees to pay a price for the product that he buys from a seller. Forms of competition in the market can be distinguished according to the structural characteristics of the market such as: number of sellers and buyers, the type of goods produced, the nature of entry barriers, i.e. new firms cannot enter the market, etc.

Generally, there are four forms of market and the associated competition:

1) Large number of sellers and buyers, identical goods, free entry and free exit: This form of competition is called *Perfect Competition*. The existence of a very large number of sellers, producing identical goods, results in same price for these goods.

Existence of a unique price implies that in this form of competition, firms are price takers and not price setters and can sell any quantity of the products they desire at the existing market price.

A single individual producer whose share in the market is very small cannot influence the market. The degree of competition (price or non-price) is so low that it can be said that competition is virtually absent here. Moreover, on account of entry and exit being free and easy in this market, firms make only normal profits in the long run (i.e. normal return on capital employed which is comparable to that obtainable in other equally risky markets plus a bonus for the risk bearing function that the producer undertakes).

Example: Perfect competition is an ideal situation and does not exist in practice but a near perfect competition can be seen in the market for vegetables. Almost everywhere in the world where there are large number of buyers and sellers, the buyers have perfect information about the market and no individual seller can usually influence the market on his own.

2) *Single seller, large numbers of buyers, no close substitutes of the product, high entry barriers:* This form of competition is called *Monopoly*. In this market form, the monopolist (i.e. the only seller) is the price and output setter. The monopolist can set price and allow demand to determine output or, can set output and allow demand to determine price. There may be reasonably adequate substitutes but not close substitutes. For example, road transport services (public and private), airlines etc. are reasonably adequate substitutes for railways but not close substitutes. Because of absence of close substitutes, competition is absent in the railway sector.

Example: In most of the developing countries of the world, public utilities such as railways, electricity are examples of monopoly where the State is the sole supplier and there are no close substitutes. Telephone too was another such service but fortunately no longer.

3) *Large number of sellers and buyers, existence of close substitutable products, no entry barrier:* This form of competition is called *Monopolistic Competition*. Existence of large number of sellers and buyers may give an impression that this form of competition resembles perfect competition. But it is unlike perfect competition. Here the existence of a large number of buyers and sellers does not imply that only a single price prevails in the market. Rather, several prices exist in this market form. Each firm enjoys certain price setting power over its product because of product differentiation. Firms do not engage in price competition in this market form since the effect on the demand for the product of the low-priced firm is negligible. Instead, they engage in non-price competition, such as product differentiation, to attract more customers, not as a reaction to the decision taken by other firms.

Example: In most of the countries of the world, markets of the fast moving consumer goods (FMCGs) such as soap, toothpaste and other toiletries are examples of monopolistic competition where a large number of close substitutes are available. However, in order to remain in competition, the suppliers actively engage in product differentiation to attract customers.

4) *Very few sellers, large number of buyers, large number of branded products, high entry barrier:* This form of competition is called *Oligopolistic Competition*. The number of sellers is so small that they are conscious of their interdependence (be it in price, product or promotion). They take into account the competitors' possible reactions while deciding their strategy. Firms, in this market form, tend to produce large number of branded goods in order to diversify the product line and thus compete on non-price terms (such as brand loyalty) and strengthen this with high advertising budgets.

Example: The Direct to Home (DTH) industry in India can be regarded as oligopolistic, although it is growing fast. In 2008, the industry's key players included DishTV, TataSky, BigTV, Digital TV and SUN Direct, with Videocon as a near entrant. However, the first three players above were very dominant with a combined market share (CR3) of 98 percent, while the last two could only manage two percent. They offer the same services but competition is generally on non-price basis, as they try to capture markets by advertising and having more services (entertainment, news, sport channels etc.) than competitors. Today, there are more new players coming into the market.

Table 1: Different Forms of Competition				
Models of competition	**Number of buyers**	**Number of sellers**	**Nature of products**	**Barriers to entry and exit**
Perfect competition	Very Large	Very Large	Identical products	None
Monopoly	Very Large	One	Single Product	Very Large
Monopolistic competition	Very Large	Large	Minimum differences	None
Oligopolistic competition	Very Large	Very few	Large differences	Large

II
Some Myths and Realities

Despite competition being beneficial for consumers and economy, certain sections in society are sceptic about competition policy and law. Competition policy and law are tools to regulate and encourage fair competition in the market. However, while consumers welcome a competition law, business classes take it as threat to their existing business. Many in the civil society look at it as another market access push by western countries to open up our market. Few of these myths and realities are addressed here to get a better understanding of the situation.

Myth: Competition policy and law will allow foreign firms to come in and undermine domestic firms.

Reality: The effect of foreign entry into the market depends upon capabilities of domestic firms. If anything, competition law provides some protection to domestic firms from foreign firms that use anti-competitive practices to capture the national market.

There are instances and experiences from various countries where multinationals had to pay heavy fines for their engagement in anti-competitive activities. One of these is the vitamin cartel where several leading and sophisticated drug manufacturers were involved in a global conspiracy to fix the prices of bulk vitamins. Action was taken against the cartel in the US, European Union (EU), Canada and Australia, as a result of which a fine of over a billion dollars was levied on the perpetrators. Even Brazil, a developing country took action by getting cooperation from the US Department of Justice.

Myth: Competition law and policy are tools for rich and urban societies.

Reality: In order to address this misconception, reference can be made of a poor peasant widow, who used the law to get redressal against a moneylender.

Rukmini Devi, a poor, elderly and illiterate widow, lives in a small village near Chittorgarh in Rajasthan. She had applied for loan from local cooperative bank at Rashmi, under the government's Integrated Rural Development Scheme.

As per the bank requirements, Rukmini Devi had to affix passport-size photographs to the loan papers. Rukmini approached two local studios to get her photo taken but both denied, forcing her to go to a usurious money lender. Both the studios, it emerged, were in league with the moneylender.

Rukmini Devi took help of a local consumer activist and complained to the local district forum under the Consumer Protection Act (COPRA) against the studio owners. She won the case and collected damages from one studio and the illegal agreement between the studios was broken.

This real-life example shows how cartels can operate at all levels and sap people and the economy. It also shows that the poor do benefit from action against competition abuses, if they can access justice.

Myth: Competition law and policy works for the rich and affluent sections only.

Reality: This doubt again can be dispelled through simple real-life examples.

An example of tied sales shows that competition law and policy works not only for the rich but also for the poor sections of the *society. Take this example, sometime in the 1990s in Rajasthan, when government ration shops started selling goods like razor blades, tea, etc. at higher than market prices; poor consumers did not buy them. As a solution, ration shops started tied selling, i.e. the consumer had to purchase a quantity of tea and razor blades if they had to pick up the required quota of wheat and/or kerosene. This practice was stopped only when the consumer movement protested.*

Thus, competition policy and law can also benefit the poor.

III
Hurdles to Fair Competition

There are three major ways through which business can engage in anti-competitive practices. These can be explained as follows:

A. Anti-competitive Agreements

Once Napoleon said: "There are only two forces that unite men: fear and interest". Competition being a formidable force of the market gives both these reasons to firms to come together, connive and thwart the cherished fruits of competition hurting the interests of not only consumers but the economy as well.

Firms can engage in various agreements, either with firms at the same level of production – supply chain and which are competitors to each other (horizontal agreement) or with the firms that are at different level of production – supply chain (vertical agreement). Regardless of the nature of such agreements, all have the ultimate objective of raising prices and increasing their profits.

A cartel is an agreement between firms to act in concert on prices, production levels and territories. The elimination of rival firms that formerly competed is accomplished not by integration of production activities, as would happen in the case of a merger. Instead, the formal rivals maintain separate firms but act jointly in fixing prices or dividing the market, or even both. Cartels can also construct private barriers to prevent entry, such as threat of retaliatory or predatory price wars and patent pooling. For all these reasons, cartels are the most egregious of all anti-competitive practices and afford the firm the luxury to remain inefficient.

Box 1: "Our Competitors are Our Friends, Our Customers are the Enemy"
Do not be surprised! The statement cited above was actually made by a person sitting in a meeting of colluders in the US who had been involved in a famous cartel in the animal feed additives (lysine) business; Archer Daniels Midland. The world heard it because undercover agents from the US Federal Bureau of Investigation (FBI) recorded it on audio and videotapes. The tapes exposed the cartel mentality, which was so contemptuous of its customers and antitrust laws, thus providing conclusive and incriminating evidence of conspiracy. What had made these tapes such an effective deterrent is not just the unnerving notion that the FBI might be watching, but the fact that the high level executives went to jail and their companies paid heavy fines as a result of their cartel activity. No wonder it has been said that cartels are 'the most egregious violations of competition law' – and they are ubiquitous.
Source: Mehta, Pradeep S (2007), Competition and Regulation in India, 2007, Book, XXXII+220, CUTS/CIRC, Jaipur. Pg.104-105

Horizontal agreements work in following ways to thwart competition.

1.Price Fixing: The colluding firms undertake these kinds of activities in order to eliminate price competition between them. Sometimes they also follow this route in order to eliminate entry of any potential competitors into the market. A successful cartel raises price above the competitive level and reduces output.

Consumers would have no option but to pay the higher price for the cartelised product, as these are mostly essential products.

Box 2: Barbed Wire Manufacturers in Rajasthan
As per earlier Rajasthan government policy, a certain quota of barbed wire was to be procured from local manufacturers. This was supposed to have led to formation of a 'cartel' under the name of Rajasthan Barbed Wire Manufacturers Association in mid-80s. This association hiked the prices, and with an implicit arrangement allocated the total requirement of barbed wire amongst its members. Consequently, poor quality of barbed wire was procured at a high price, with almost no quality checks by the government. Local manufacturers depended solely on government patronage rendering them uncompetitive. With a changed government procurement policy, local units closed down and the association broke up.
Source: Manish Agarwal and Prabhat Dayal, 'State Government Policies and Competition', Towards A Functional Competition Policy for India, Pradeep S Mehta (Ed), CUTS International and Academic Foundation, 2005.

2. Bid Rigging or Collusive Bidding: Competitors might agree on who would win a tender or bid, mostly government tenders, and allows the winner to quote higher prices than under competition and win. The other members of the collaboration will either decline to participate in the tender or will make fake offers, called "cover bids". These are known as bid rigging cartels.

Mechanisms for bid rigging are numerous and varied such as:

Bid suppression: One or more competitors agree to refrain from tendering or to withdraw a previously submitted tender so that another firm can win the tender.

Complementary bidding: The competing firms agree among themselves as to who should win a tender, and then agree that the others will submit artificially high bids to create the appearance of vigorous competition.

Bid rotation: The competitors take turns in winning tender, with others submitting high bids.

Box 3: Railways Procurement of Concrete Sleepers

The extent of the malice can be gauged from the fact that even the Parliamentary Standing Committee on Railways (2004) while discussing the question of procurement of concrete sleepers observed, "The procurement of concrete sleepers have become a very sensitive matter because a lot of unscrupulous existing manufacturers have formed a cartel to secure orders by unfair means or tempering with procedure and simultaneously keeping the new competitors out of the race. The Committee is constrained to notice that there exists a regional imbalance in the setting up of concrete sleeper manufacturing units. The Committee also express its unhappiness that new entrants are not encouraged which ultimately strengthen the cartel of old/existing manufacturers". In procuring 160 lakhs broad gauge sleepers, the Railways awarded contracts to the existing 71 firms, and ignored the new 24 firms entirely.

3. Allocating Markets: Competitors can agree to allocate geographic territories or type of goods or customers among themselves, and avoid competing with each other in the areas to allow each other opportunities to enjoy super normal profits. This is known as marketing allocating agreements. The agreement between two firms to allocate market is a very serious anti-competitive practice, and may have a greater impact on competition due to price fixing.

Box 4: Sugar Producers in Spain Hauled Up
Four sugar producers in Spain were engaged in market allocation agreement (apart from price fixing, sales quota agreements) that restricted sugar supply to the level at which maximum monopoly profits could be earned. As a result, Spanish sugar prices, for many years, were five to nine percent higher than those in the rest of Europe. Based on a complaint from associations of businesses that purchase sugar, and based on the information collected through a raid, the Spanish Competition Authority uncovered the sophisticated cartel and slapped US$12mn fine on four producers.
Source: Report of the Ministerial level meeting of the OECD, 2000

4. Limiting Output: Competitors might agree to limit the output they produce or supply into the market, so as to cause some artificial shortages of the product, resulting in excess demand for the product and opportunities to raise prices. These are known as output restricting cartels.

Box 5: Hindustan Pilkington's Regulating Glass Product Output
Hindustan Pilkington Glass Ltd. in India entered into a market sharing arrangement with Surat Cotton to prevent it from making or selling certain glass products in consideration of payment of an agreed compensation. Surat Cotton was to sell its stocks to Hindustan Pilkington Glass Works Ltd. and keep the plant and machinery idle and not to associate with anyone for making or selling glass products. This was held to limit the supply of glass products and hence restrictive.
Source: Law of Monopolistic & Unfair Trade Practices, S.M. Dugar, Third Edition, 1997

Agreements between, firms which are at different stages or levels of production chain, can also stifle the competition. This can happen through certain imposed conditions.

1. Tie-in Agreement: Here the supplier sells a product (tying product), which is dependent on the purchase of some other product, usually a slow moving product (tied product). This tie-in arrangement is such that even if the customer does not want to buy the tied product, he has to buy it in order to get the desired product.

Box 6: Tie-up Sales of Gas Stoves with Supply of Gas Connection

Shyam Gas Company, was the sole distributor of Bharat Petroleum Corporation Ltd, of cooking gas cylinders at Hathras (Uttar Pradesh), which was allegedly engaged in the following restrictive practices:

- giving gas connections to customers only when they purchased a gas stove or hot plate from the company or its sister enterprise, Shyam Jyoti Enterprise; and
- charging customers for the supply of fitting and appliances at twice the market price.

The MRTPC held that the company was indulging in a restrictive trade practice (RTP) that was prejudicial to public interest. When charged, Shyam Gas Co. agreed to stop the RTP and the Monopolies and Restrictive Trade Practices Commission (MRTPC) directed the company to abide by the undertaking.

Source: Monopolies Trade Regulation & Consumer Protection, DPS Verma, 1985

2. Exclusive Dealing Agreements: Here upstream firms (e.g. producers) force an agreement upon downstream firms (e.g. retailer), whereby the latter is prohibited from dealing with

competing producers or distributors. This dealing arrangement can act as a barrier for new entrants and hence affects competition adversely.

Box 7: Bangalore Jute Factory
Bangalore Jute Factory engaged itself in exclusive dealing arrangement and it was evident from a clause written to its distributor, reading: "You shall not, without our consent in writing, deal in any product manufactured by any other party local or foreign – which is similar to the product covered by this agreement". The MRTPC in India held this practice to be restrictive.
Source: Law of Monopolistic & Unfair Trade Practices, S. M. Dugar, Third Edition, 1997

3. Exclusive Distribution Agreements: This agreement is between the supplier and the distributor, where the former dictates the latter on his/her market. That means, whether or not the distributor will sell to any particular region or to particular class of customers is to be decided by the supplier. Again these are marketing strategies, generally followed by firms, but sometimes these practices may pose competition concerns.

Box 8: McDowell & Co. and its Distributors
McDowell & Co. Ltd., in India, imposed territorial restriction on its franchise-holders manufacturers/bottlers, to the effect that they were to confine their selling operations to areas allocated to them and prohibited them from selling their products at any place outside the respective areas. The MRTPC held this practice to be a restrictive one.

Contd...

The Commission observed that in view of the relatively small share of McDowell in the soft drink industry and relatively large areas allocated to each bottler, the territorial restriction was not substantial and did not restrict or discourage competition but the possibility of these restrictions inhibiting competition at a later stage cannot be ruled out if and when the market share of McDowell increases significantly.

Source: Law of Monopolistic & Unfair Trade Practices, S. M. Dugar, Third Edition, 1997

4. Refusal to Deal: In such cases firms decide among themselves not to sell or buy from certain customers. In other words, they refuse to deal with any third party, normally a competitor of one of them. Though this may be a fair marketing strategy for optimum profit, sometimes such practices may reduce competition in the market and consequently could be restrictive in nature.

Box 9: The Case of Bata

Bata has a dominant presence in the footwear market in India. It is engaged in the manufacture of leather and rubber canvas footwear. It entered into agreements with small-scale manufacturers for purchase of footwear to be sold by it under its own brand. These manufacturers comprised of mostly poor cobblers and leather workmen. The agreement prohibited the small manufacturers from purchasing raw material and components from parties other than those approved by Bata.

The MRTPC after due inquiry, ruled that the conditions imposed by Bata constituted RTP and were prejudicial to public interest.

Source: Mehta, Pradeep S (2007), 'Competition and Regulation in India, 2007', Book, XXXII+220, CUTS/CIRC, Jaipur. Pg.104-105

5. Resale Price Maintenance: Here the producer dictates the resale price of goods that would be charged by the retailers. When resale price maintenance is imposed, the price of goods becomes uniform at all points of resale irrespective of the difference in location, character and quality of the services provided. This practice, however, need not always be anti-competitive.

Box 10: Apple Computers Admonished by Japanese FTC
Apple Computer Inc. was suspected to be pressurising retailers not to sell its iMac desktop and iBook notebook computers below retail list prices. Japan's anti-monopoly watchdog, the Fair Trade Commission (FTC) held such a practice to be restrictive and issued a warning to its Japanese unit over suspected resale price maintenance.
Source: The Economic Times, October 04, 2000

B. Abuse of Dominant Position

Dominance by an enterprise is to be judged by its power to operate independently of competitive forces or to disadvantage its competitors or consumers in its favour. Abuse of dominance can also be collective, such as a cartel not allowing new entrants into the market. It is not necessary that a single firm possess a high market share to abuse its dominance. However, consequences for competition can be severe if the firm is dominant.

Abuse of dominance is broadly of two types: Exploitative and Exclusionary abuse

1. *Exploitative abuse* means exploiting customers by ignoring the needs of customers and competitors. For example, a hike in cable charges despite the Telecom Regulatory Authority of India's (TRAI) tariff orders is no surprise to cable TV subscribers across

India. Cable operators have the discretion to abuse their monopoly because all the operating areas are neatly divided among them. Efforts by competing operators usually witness dirty rivalry, such as cutting cables or physical threats. Thus, consumers do not have the choice to use the services of another cable operator but to accept the rates and service as provided in their area.

The various ways in which exploitative abuse could be exercised are:

- refusal to deal, such as denial of essential facilities;
- tying, bundling, forced line selling;
- predatory pricing;
- non-price predation;
- price discrimination;
- intellectual property rights (IPRs) abuses; and
- excessive pricing or price gouging.

Abuses due to IPRs are a very serious and often actioned under competition laws. For e.g. in a recent case, Monsanto Mahyco has been hauled by the MRTPC for excessive pricing of its Bt Cotton Seeds. It charges a high royalty for its IPR on the seed. The Commission ruled against the seed company but they filed an appeal in the Supreme Court which has not yet decided the case.

2. Exclusionary abuse involves exclusion of competitors. For example, in some states in India, truck operators are not allowed to load and unload goods within the route unless they become part of the truck association. The truck association charges tariffs almost 35-40 percent higher than the prevailing market rates to the non-member truck owners. It happened in Makrana in Rajasthan where the marble sawing plants had to shut down and move to Kishangarh.

The way in which exclusionary abuse could be exercised is given below:

- Exclusive dealing arrangements (distributors cannot sell another supplier's goods or services)

For determining whether a specific undertaking is dominant the geographical and product market is to be understood. Geographical dimension includes the geographical area within which the competition takes place. Product market includes all such substitutes that the consumer would shift to, if the price of the relevant product were to increase.

For example, if Coca Cola, together with its rival cola drink Pepsi, in a parallel price movement and not necessarily through collusion, decide to increase their prices unreasonably, consumers can shift to other cheaper soft drinks. The only argument here would be about consumers who want only a cola drink for reasons of taste or peer pressure, and then may find it difficult to shift to another soft drink.

Both the cola giants are engaged in aggressive competitive behaviour, and in capturing a bigger market share than what the other has. There is nothing wrong in that. But there is a fine distinction between defending one's market position or market share, which is perfectly legal and legitimate and may involve aggressive competitive behaviour, and exclusionary and anticompetitive behaviour, which is prohibited under the new law.

C. Combinations (Mergers and acquisitions etc.)

Merger is a fusion between two or more firms whereby the identity of one (or more) is lost and results in a single firm. Acquisition (or takeover) of one firm by another usually involves purchase of all or a sufficient amount of the shares of another firm to enable it to exercise control.

Such mergers and acquisitions (M&As) might be horizontal, vertical or conglomerate.

1. *Horizontal M&As*: These involves firms that are competitors, i.e. at the same level of production-supply chain. For example, two firms producing toothpaste merge together.

2. *Vertical M&As*: These involves firms that are at different level of production-supply chain. For example, a firm producing cold drinks merges with the other producing bottles to contain such cold drinks.

3. *Conglomerate M&As*: These involves firms in diversified and unrelated business. For example, a firm producing cars merges with a firm that deals in finance. While horizontal mergers may raise competition concerns, vertical and conglomerate mergers, generally, do not raise any competition concern.

When two competitors merge together, it is but obvious that the market share of the merged entity would be more than that they individually used to share. Broadly there could be three cases due to any horizontal merger:

(a) a monopoly situation may arise;
(b) the merged entity may become a dominant player in the market; or
(c) even the merged entity cannot capture enough market power.

While cases (a) and (b) might pose competition concerns, case (c) is unlikely to give rise to any competition concern, if there remain other competitors in the market. Hence, the issue from the point of view of competition law and policy is not merger in itself, but whether such merger results in a monopoly situation or a dominant market player.

Box 11: Merger between Biscuit Manufacturers in Australia

The Australian Competition and Consumer Commission (ACCC) considered a case of merger involving two biscuit manufacturers (say A and B). A had 55 percent share of the biscuit market, while B had 15 percent share. Both decided to merge. ACCC wanted to block the merger as it would result in a dominant market player.

One argument that merging entities put forward was that the 'market' to be considered here should be the 'market for snacks' and not mere 'market for biscuits'. Consequently, the market share of A would be 10 percent and that of B would be mere one percent. So, the main issue to be decided by the Commission was that 'whether it is a market for biscuits or a market for snacks'. The Commission ultimately disallowed the proposed merger, deciding it as a market for biscuits.

Source: Report of the Asia-Pacific Regional Workshop on Competition Law, CUTS and UNCTAD, Jaipur, India, April 16-17, 2000

There are other issues surrounding the matter of 'combinations' which mean any type of partnership between two or more firm which leads to a bigger entity. These could include mergers, joint ventures, takeovers, acquisitions etc.

As this paper is being written, the sections governing regulation of combinations under the Competition Act, 2002 have not yet been notified due to pressure of business lobbies.

Box 12 speaks about the recent takeovers/mergers of Indian pharmaceutical companies by foreign companies which have been consummated without any check. It is feared that such new entities would suppress the production of generic medicines and focus on production of their own more expensive patented medicines, thus leading to a higher cost of health care for Indian consumers.

Box 12: Recent Takeovers/Mergers of Indian Pharmaceutical Cos.
While it can be said that the Competition Commission of India (CCI) would be monitoring the companies when they are in the market, other competition authorities, who are more experienced in monitoring and investigating cases than CCI, have taken steps at controlling potential abuse during the M&A approval stage. In the most recent case, Pfizer sold its swine vaccine business to Harbin in China when asked to do so by the Chinese competition authority as a condition for its merger with Wyeth in China, otherwise Pfizer-Wyeth would have controlled half the market for swine vaccines. Furthermore, Pfizer was required to provide technical assistance to Harbin for three years. In South Africa, GSK's merger with Aspen Pharmacare was approved but subject to them selling their generic medicines business to other generic drug manufacturers. The EU approved the acquisition of Zentiva by Sanofi-Aventis on condition that it divest 15 drugs from their production line in six EU member states.
Source: Mehta, Pradeep S, 'Overseeing Pharma Mergers through Competition Lens?' The Financial Express, June 20, 2010

IV
Mechanisms to Safeguard and Promote Competition

Since competition furthers consumer interest and nourishes economy, it becomes pertinent for the government to promote healthy competition in the market. This can be achieved by implementing competition policy and law.

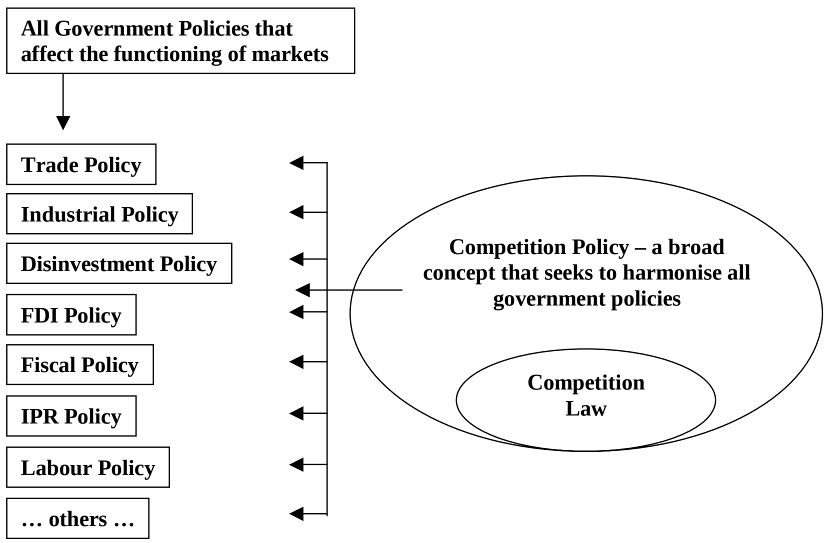
Competition policy is essentially understood to refer to those governmental measures that directly affect the behaviour of firms and the structure of the industry. A consistent and realistic competition policy should include both:

i) *Economic policies* adopted by government, that enhance competition in local and national markets (such as trade policy, industrial policy, consumer policy etc and also economic de-regulation and privatisation etc.); and

ii) *Competition law* designed to check and stop anti-competitive business practices by firms and unnecessary government intervention in the market.

Competition law working in tandem with a comprehensive competition policy can create a healthy and vibrant market. In India, the MRTP Act, 1969, which was enacted to check restricted trade practices in trade proved inadequate and a new law, the Competition Act 2002, was subsequently enacted due to strong lobbying by the consumer movement, lead by CUTS in 1990s.

Figure 1: Competition Policy *vis-à-vis* Competition Law



The new Act constitutes Competition Commission of India (CCI) as competition authority and the Competition Appellate Tribunal (COMPAT) as the appellate body. The act empowers the CCI in several ways to check anti-competitive practices. Broadly, the CCI has following four essential functions, which are, in general, performed by separate wings of the authority.

1) *Investigation:* The competition authority makes inquiries about anti-competitive practices in the market either on receipt of information or on its own knowledge.

2) *Prosecution:* After the inquiry, if the competition authority finds that any firm is posing hurdles to fair competition then it makes charges against the defaulting firm and prosecutes them.

3) *Adjudication:* The authority has been endowed with quasi-judicial powers. It takes necessary decisions including the imposition of restrictions on or granting injunctions or levying

penalties against the defaulting firm. In many countries, the competition authority does not have judicial powers, which are discharged by general or special courts or tribunals.

4) *Advocacy:* This can be broken into two parts. Firstly, the Commission may advise or recommend the government, while making any policy or enacting any law, that such policy or law has anti-competitive effects. Secondly, it informs and educates the business, consumers etc. on competition issues, conducts studies and publishes reports on anti-competitive practices, comes out with press releases, etc.

Advocacy is something which did not exist in the MRTP Act, but like many other laws in the world, advocacy has been made a responsibility of the CCI. For example in a recent move, the RBI has asked public sector companies to deposit their moneys only with the public sector banks, which is plainly distortive of the competition process. In fact it was in August, 2007 that the CCI had cautioned the RBI to not to do such things (see Box 13).

Box 13: 'Need not Meddle with Market Forces'
According to CCI, the banking sector will reap the full benefits of competition only if the RBI restricts itself to framing of prudential norms for banks and leaves all other issues to market forces. If the RBI has to take note of CCI's suggestions, it will need to incorporate specific clauses in its regulations to prevent anti-competitive practices. Significantly, the CCI has suggested that public sector banks be not given any preference over the private sector ones. It has also pitched for greater operational freedom for private banks. There still are several entry barriers in branch licensing and ATM licensing besides locational restrictions, which were

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leading to distortions in the market, leaving just a few private players in the sector. These distortions have only grown because of heavy investments by banks in government securities, leading to 'lazy banking', directed credit and cross-subsidisation of public sector banks.

Source: The Financial Express, August 10, 2007

The CCI is not empowered to award compensation as it's predecessor, MRTPC, could do. This power has been given to the COMPAT, which also hears appeals against the orders of the CCI. The final appeal lies before the Supreme Court.

V
Conclusion

As we see competition is enormously beneficial for the consumers and the economy. In the words of Adam Smith competition is the 'Invisible Hand' that keeps the society on track, assuring that, it produces the goods and services it needs. However, uncharitable market players resort to unethical and illegal practices to thwart competition. In a situation like this, the tasks of law enforcement agencies become very crucial. Especially, with regard to a vibrant and expanding economy like India, strict enforcement of competition law is all the more necessary, given that new sectors have been opening for new private players every day. The CCI, although in a fledgling state now, has a mammoth task ahead and is expected to establish a vibrant competition regime.

It is also important to have a National Competition Policy (NCP) like Australia. After globalisation and liberalisation and a consistent high growth since reforms were adopted in 1990s, we have now become one of the largest economies of the world. In such an economy we need better policies to ensure that misguided government policies do not thwart competition. Efforts in the direction of envisaging competition policy should now be expedited.

Above all, consumers should stand for their own rights. Consumers are stakeholders in any matter affecting competition; hence, they must remain aware on the issues concerning their welfare. Civil society shares the onus equally. Especially, in developing countries such as India, competition agencies have limitations pertaining to financial resources that hinder their ability to effectively implement their laws. Civil society, therefore, fills in the vacuum through mobilising consumers to seek redressal against anti-competitive practices.

It is, therefore, collective responsibility of the government, civil society organisations (CSOs) and consumers themselves, with their respective resources to establish and improve the competition culture in India, so that we can grow and create more jobs for the poor.

Annexure

Competition Case Laws:
Lessons for Consumers

One of the basic objectives of competition in any economy is that the gains of competition should be equally distributed among various sections of the society. The question of availability and affordability emerges in the case of basic needs, such as food, clothing, healthcare, education, energy, transportation etc. which are essential for survival. It can be analysed through examples as to what kind of distortions plague these sectors and how the consumers can make themselves aware.

1. Healthcare: World over healthcare delivery system suffers from information asymmetry. People by and large depend upon private health facilities for their healthcare needs. Yet, no systematic information is available about the quality and types of services, as well as the prices charged by different private hospitals. Besides, pharmaceutical companies tie up with doctors to prescribe their medicines, and thus make profits higher than normal. In fact the consumer has no choice at all, who has to go by the doctor's advice.

Box 14: Bristol-Myers Settles Fraud Allegations
In a landmark case, Bristol-Myers Squibb Co. had to pay more than US$515mn to settle fraud allegations involving kickbacks to doctors and inflated drug prices. Bristol agreed to settle charges that the drug maker illegally compensated doctors to induce them to prescribe Bristol drugs to patients, ostensibly for their participation in various programmes, which included trips to luxurious hotels. Bristol was also accused of conniving with Apothecon, for setting and maintaining fraudulent and inflated prices.
Source: The Hindu Business Line, September 29, 2007

Box 15: Cartel in the Medical Oxygen Supply Market
In July 2005, the Competition Authority of Argentina found four medical oxygen foreign companies, viz Air Liquide (France), Praxair (US), AGA (Germany) and Indure (Chile), guilty of entering into an agreement to distribute customers among themselves and also bid rigging. The Authority levied a fine of amounting to US$24mn on these companies.
Source: Chapter on Argentina, Competition Regimes in the World: A Civil Society Report, Book, LVIII + 638, Pradeep S Mehta (Ed), CUTS International Jaipur. Pg.543

2. Food: Despite being the most basic need, food sector has also witnessed practices which stifle competition and artificially raise the prices. Unlike other sectors, it is very easy for the consumers to be victims of over pricing in the food sector.

Box 16: Bringing Down Milk Prices in Mauritius

Mauritians have to rely upon powdered milk to meet their and their children's nutritional demand as fresh milk was not available in the country. The powdered milk market was dominated by a handful of players. One of them enjoying 60 percent of the market share (clearly a dominant position) decided to raise the prices of the product abruptly. The price rose to a peak Mauritius Rupees (MUR) 190 per kg during 2004-2006. The company was enjoying a profit margin of nearly 41 percent in the retail market, at that time.

At this point of time, as a result of CUTS project on competition policy and law issues (7Up3), implemented in seven countries of Eastern and Southern Africa, including Mauritius, with assistance from Norwegian Agency for Development Cooperation (NORAD) and the Department for International Development (DFID) – the level of awareness and understanding on competition issues in the country had improved considerably.

Pursued by continuous lobbying by the Institute for Consumer Protection (ICP), CUTS' local partner, the government eventually intervened in the market and fixed the margin of profit for the sector at 14 percent. This led to decrease of price, which later stabilised between MUR 90-120 per kg across the country. Currently, the government is also contemplating further liberalisation of this sector, which is likely to force the price down further.

Source: Some Evidences of Impact of CUTS Competition Projects on Citizen's Welfare Across the Developing World – A Note for DFID, UK: www.cuts-ccier.org/pdf/Impact_of_CUTS_Competition_Projects.pdf

Box 17: Dairy and Meat Product Cos. Abuses Market Dominance
In a case in 1995 in Ukraine, the Vinnysta Meat Industry and Vinnysta Milk Processing Industry, joint stock companies were monopolies in relevant regional markets of meat products and butter, respectively. Both enterprises increased wholesale prices for meat and milk products to the level of monopolistic prices. Moreover Vinnysta Milk Processing Industry had previously decreased the production volumes of butter, which caused shortage of this product in the market. After the authorities took action, the two ceased violating the regulations and remitted the illegally gained profits to the state budget.
Source: Chapter on Ukraine, Competition Regimes in the World: A Civil Society Report, Book, LVIII + 638, Pradeep S Mehta (Ed), CUTS International Jaipur. Pg.521

3. Transportation: In a globalised world need of efficient and cheaper transportation has increased. The recent growth in this sector has led transporters to resort to illegal competition distortion practices.

Box 18: Cambodian Boaters Engaged in Collective Price Fixing
To leave for Siem Reap, the most popular tourist town in Cambodia, boats are the most popular means, especially for tourists. Boat transportation services are provided by eight private companies. Competition among these boat companies has driven down the prices beyond the profitable level and thus caused extensive losses to some of the boaters.

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Recently, the companies decided to sit down together and resolve the problem. Even though no written agreement was recorded, the companies have agreed to fix their service prices to 40,000 riles for Khmer nationals and US$20-25 for foreigners. The eight companies further agreed that they would not compete with each other anymore and would share their departure schedules. According to their verbal agreement, only one boat may provide boat transportation service in a day by taking turn from one company to another. The bigger companies have more quotas to provide the service.

There is no competition law yet in Cambodia and hence action against the cartel of boaters has not been taken. However, the local authority can take action under some other laws.

Source: Chapter on Cambodia, Competition Regimes in the World: A Civil Society Report, Book, LVIII + 638, Pradeep S Mehta (Ed), CUTS International Jaipur. Pg.33

Box 19: Hike in the 'Daladala (City Bus)' Fares in Tanzania

In 2003 in Tanzania Consumers Protection Association (TCPA) lodged complaint with the Fair Competition Commission against petroleum companies that decided to raise petrol prices in pursuit of profits without any increase in corresponding cost price of petrol. Consequent to the rise in petrol prices, bus fares and food prices also rose.

The complainant's threat to litigate and publicise the issue provoked the opposition. The publicity forced the government to act in a firm manner by threatening to cancel the licences of any bus service provider who hiked prices. Consequently, bus operators reverted to old fares.

Source: Chapter on Tanzania, Competition Regimes in the World: A Civil Society Report, Book, LVIII + 638, Pradeep S Mehta (Ed), CUTS International Jaipur. Pg.291

4. Fuel: Although the oil cartel of Organisation of Petroleum Exporting Countries (OPEC) is known to all, alas, nothing can be done as it is considered to be a sovereign activity of governments. However, cartelisation in oil sector at the local level adds to the woes of common consumers.

Box 20: Anti-competitive Practices of Fuel Distributors in Czech Republic
In 2001, six fuel distributors were engaged in concerted practices aimed at fixing fuel prices at petrol stations. At the end of 2001, these distributors simultaneously increased prices by almost the same amount. Moreover, there was no objective justification for such a rise in fuel prices, as purchase costs of this product had been decreasing since the middle of May 2001. This behaviour was thoroughly investigated by the Office for the Protection of Competition, which found that these distributors had numerous mutual contacts in their association, exchanged e-mails and also informed each other of their price strategy via press statement. The Office found these firms of concerted pricing and imposed fines amounting to US$13mn on the six fuel distributors.
Source: Chapter on Czech Republic, Competition Regimes in the World: A Civil Society Report, Book, LVIII + 638, Pradeep S Mehta (Ed), CUTS International Jaipur. Pg.351

Box 21: Action against Gas Cartel in Germany
In 2008, the German Federal Cartel Office (FCO) initiated more than 30 proceedings against gas suppliers from all regions of Germany against charging excessive gas prices to household and small commercial customers. However, in most proceedings the gas suppliers involved voluntarily offered to reduce their prices, and the FCO accepted the commitments. According to a 2006 online report by E.ON Ruhrgas AG, an energy giant, the number of dwellings with a gas-fired space-heating system was about 18.2 million (equivalent to 48 percent of the total number of dwellings in Germany) in 2006. Imagine the total amount of benefits that accrued to these households due to the intervention of the FCO!

5. Miscellaneous

Box 22: Bhaskar Monopoly in Jaipur
There is a natural monopoly of cable TV at the Multi System Operator (MSO) and local cable operators levels in Jaipur and many other cities, which is symptomatic of larger cities. Taking advantage of this, the MSO 'Bhaskar' charges arbitrary rates on an incremental basis with poor standards. They periodically increase their subscription charges, in clear violation of TRAI's Telecommunication (Broadcasting and Cable) Services Tariff Order 2004. There is no redressal forum at the local level to redress grievances of cable TV consumers who are suffering from such a monopoly. The only respite is for consumers to give up cable TV and go in for a Direct-to-Home (DTH) system, as many have done. Furthermore, such satellite services perform better than cable TV due to no cables or amplifiers in a cable TV network. The downside if any is the availability of programming.
Source: Mehta, Pradeep S (2007), Competition and Regulation in India, 2007, Book, XXXII+220, CUTS/CIRC, Jaipur. Pg.123

Box 23: Significant Cartel Case on School Uniforms in Korea

In Korea three school uniform makers hindered the cooperative buying plan launched by the Parents' Association, and agreed not to supply to the sales agencies participating in such cooperative buying.

Such a practice was in violation of Article 19 of the Monopoly Regulation and Fair Trade Act (MRFTA). Korea Fair Trade Commission (KFTC) imposed a surcharge of US$8651.52, and prosecuted seven individuals and four entities. This case was significant as it involved both horizontal and vertical cartels, and had direct effects on consumer welfare.

Source: Chapter on Korea, Competition Regimes in the World: A Civil Society Report, Book, LVIII + 638, Pradeep S Mehta (Ed), CUTS International, Jaipur. Pg. 95

Box 24: Competition in Australian Banking Sector Helps Consumers

A more open competitive sector was introduced in the early 1980s in Australia, which resulted in intense competition between banks. The intense competition has brought with it a lot of benefits to consumers. Competition has driven down interest rates to their lowest levels in 30 years, and also resulted in much wider products and services for customers. The lower interest rates resulted in substantial benefits for home buyers, which saved thousands of dollars on mortgage payments each year, due to the squeeze on the margins between official rates and home loans. The margin fell until it was about 2.5 percent narrower than a decade before. It is estimated that the squeeze on margins due to competition saved the average home buyer more than US$92 a week.

Source: 'Competition Benefits Consumers', Australian Bankers Association, online at www.bankers.asn.au

Selected Publications on Competition

RESEARCH REPORTS

1. Analyses of the Interaction between Trade and Competition Policy

This study not only provides information about the views of different countries on various issues being discussed at the working group on competition, but also informs them about the views of experts on competition concerns being discussed on the WTO platform and the possible direction these discussions would take in the near future.

pp 150, #9913, Rs.100/US$30,ISBN: 81-87222-33-6

2. Putting our Fears on the Table
Analyses of the Proposals on Investment and Competition Agreements at the WTO

It provides analyses of the proposals on investment and competition agreements at the WTO, especially in the areas taken up and/or proposed at Doha for possible future negotiations.

pp 112, #0312, Rs.300 for India/US$25 for OECD Countries/US$15 for other, ISBN 81-87222-84-0

3. Towards a Functional Competition Policy For India – An Overview

Edited by Pradeep S Mehta, this report comprises of 22 chapters, which highlight various systematic and sectoral issues dealing in competition in the country. This overview version presents a brief account of competition regime in the country for busy readers.

pp 248, Rs 495/US$32.95, ISBN: 817188449-0

4. Multilateral Competition Framework: In Need of a Fresh Approach

The paper identifies the relevant competition problems and suggests a way forward for international cooperation to deal with them. It suggests that a brand new organisation, dedicated solely to competition issues under the auspices of the UN, will be most suitable.

pp 68, #0506, Rs.100/US$25, ISBN: 81-8257-055-7

5. Competition Regimes in the World – A Civil Society Report

This report is a compilation that maps out competition regimes around the world from the civil society perspective. It covers about 120 countries. The country papers in this huge compilation provide a glimpse of the competition scenario in the selected countries.

pp 670, #0607, Rs 3000/US$150, ISBN: 81-8257-064-6

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This research volume covers a wide range of issues such as how political economy underlying the implementation and enforcement of competition and regulatory laws and regimes, how barriers posed by vested interests to the free and fair functioning of competition and regulatory regimes and why the often choppy relationship between competition enforcement agencies and regulators attributable to functional overlap, which often delays decisions and is, therefore, detrimental to the welfare of any country.

Hard Back Book, pp 468, 2009 Edition, ISBN 13:978-81-7188-725-5, Rs 1195/US$69.95

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This volume, second in the series, published under the Competition, Regulation and Development Research Forum (CDRF) project is compilation of nine papers which were presented at the symposium marking the culmination of the research efforts of the 1st research cycle of CDRF. The research papers covered the experiences of a wide range of developing countries as seen mainly through the eyes of developing country authors.

8. Competition and Regulation in India, 2007

This Report examines the present and future scenario in the context of competition and regulation in India. Sectoral studies of telecommunications, electricity and two social sectors, i.e., education and health, help to show the need for methodological flexibility not just in analysis but also in implementation.

pp 256, #0715, Rs 285/US$25, ISBN: 978-81-8257-091-7

9. Competition and Regulation in India, 2009

This Report tries to examine the evolution of regulation/regulatory problems from a political economy perspective and assess the quality of regulation in terms of the suitability of content for tackling market failures, the effectiveness and independence of the regulator and the extent to which the set of sector regulations fosters competition.

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pp 32, # 9908, Rs.50/US$10, ISBN: 81-87222-25-5

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In this monograph, an attempt has been made to compile briefly, the current state of Competition Law in some select countries, on which information is readily available.

pp 40, #2002, Rs.50/US$10, ISBN: 81-87222-31-X

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This monograph maps out the issues concerning multilateral competition policy from the southern perspective. It concludes that there is a need for a realistic assessment of the extent to which developing countries would be able to control Transnational Corporations under the discipline of competition law.

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This monograph clarifies the areas of interaction between trade and competition through case studies and shows that such interactions are on the rise. Most importantly, the paper brings forward the debate *vis-à-vis* multilateral competition policy that is currently taking place at various fora.

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pp 56, #0814, Rs 200/US$15, ISBN: 978-81-8257-107-5

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pp 126, #0815, Rs 195/US$40, ISBN: 978-81-8257-108-2

Vietnam, Uganda, Namibia and Malawi toolkits are also available online

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