

# ENFORCEMENT OF COMPETITION LAW AND POLICY IN INDIA & ITS NEIGHBOURING COUNTRIES (STUDY OF CHINA & PAKISTAN)

## 5.1 Introductory

Competition regulation became important around all jurisdictions. The appropriate design of competition law and policy for developing countries at different stages of development is recognized as an important step in implementing effective competition policies to foster development. The differences in competition law and policy among major trading nations often create a disparity in competitive conditions, which ultimately may cause the ease or difficulty of accession to the national market of other trading nations to vary. For example, if Country A's competition law prohibits a boycott to exclude foreign products but it is allowed in Country B, enterprises in Country B are at an advantage over their counterparts in Country A. In Country B, enterprises can exclude foreign competing products with impunity while enterprises in Country A cannot. This creates the sentiment that Country B's lax enforcement of competition law is unfair to enterprises of Country A, which could result in trade friction between the two countries. This paper discusses the existing state and future directions of competition regulation in India, Pakistan & china.

Competition law, just like any other law, is focused on ensuring justice. Competition law ensures justice in business by punishing those who violate it and bringing reparation to the market. This is done by identifying carefully the provision of the law and relating it to the violation. During this process, it is the competition authority in most cases that will either identify the violation or receive a complaint of a violation and identify a particular provision of the competition law that has been violated. While this is the reason why competition authorities are created, they may not always be correct in identifying the relevant violated provision/s or the interpretation thereof. Therefore, in an instance that the competition authority has erred in the interpretation, the same injustice that is sought to be eradicated may prevail. Therefore, there is need to have a third party to contribute to the interpretation of this law so that precedence is made and injustice curtailed.

This chapter discusses with an overview of governance arrangements within for the enforcement of competition law and policy in the context of the interplay of other policy objectives to satisfy

development initiatives. Chapter also discusses role of Lawyers in development & enforcement of competition law & policy.

## **5.2 Enforcement of Competition Law in India: A legal Frame work**

The main objective of competition policy is to promote efficiency and maximize welfare. The ultimate goal of competition is the interest of the consumer. The consumer's right to free and fair competition cannot be denied by any other consideration. Hence for ensuring this right of the consumer there is a need of supportive institutions to strengthen a competitive society notably, adequate spread of information throughout the market, free and easy communication and ready accessibility of goods<sup>1</sup> and this are the institutions responsible for enforcement of Competition law in India. In India basically there are three enforcement institutions namely: (1) Competition Commission, (2) Director General and (3) Competition Appellate Tribunal & (4) Supreme Court

### ***5.2.1 Enforcement Institutions***

Following are the principal institutions responsible for competition law enforcement in India.

1. Competition Commission of India
2. Director General
3. Competition Appellate Tribunal
4. Supreme Court of India

### ***Figure 5.2.1: Competition Law enforcement Institutions***

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1 Paul A. Samuelson & William A. Nordhaus: Economic, 16th Ed. 1998, p 54, (Tata McGraw – Hill Publication Co. Ltd., New Delhi).

Competition Commission of  
India

Competition Appellate  
Tribunal

Supreme Court

#### 5.2.1.1 Competition Commission of India

Competition Commission of India is expert bodies which functions as a regulator for preventing anti-competitive practices in the country and also have advisory and advocacy functions. CCI is a quasi-judicial and corporate body<sup>2</sup>. The objective of the competition Act are sought to be achieved through the CCI, which was established by the Indian Central government with effect from 14 October 2003. The CCI consist of a chairperson and 6 members appointed by the central government. These six members cover the divisions of Administration, Investigation, Economic, Combination, Antitrust and Legal. All members are appointed by the central government with each chairperson and member holding a term for five years with eligibility for reappointment. The CCI is assisted by investigation arm led by Director General who hold power to, among other things, summon and examine a person on oath, require the production of documents, and obtain warrants for searches and seizures<sup>3</sup>. It is the duty of the CCI to eliminate practices having an appreciable adverse effect on competition within India, promote & sustain competition, protect the interest of consumer and ensure freedom of trade in the market of India. The CCI is also require giving opinions on competition issue on reference received from a statutory

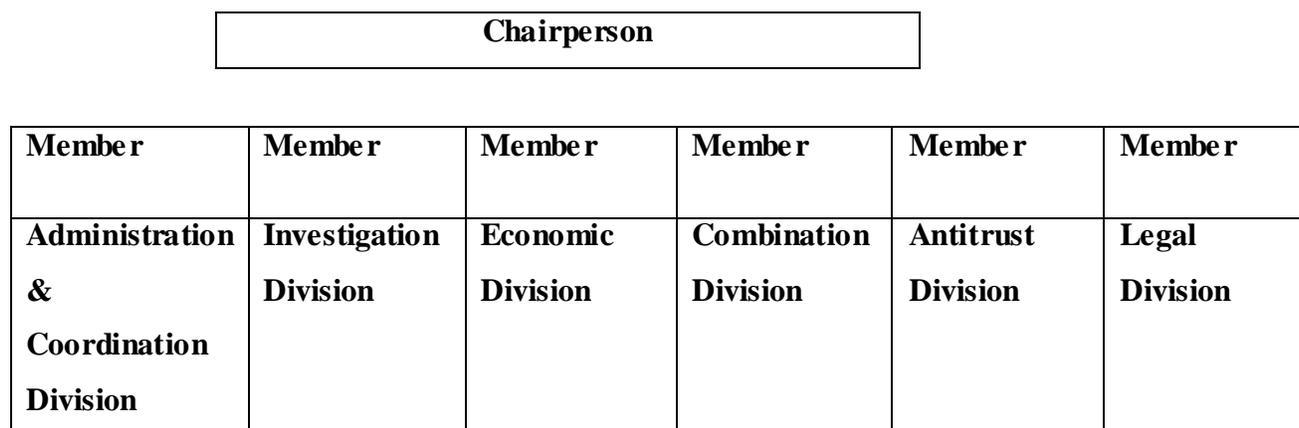
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<sup>2</sup> Rini Mitra, 'Enforcement of Competition Law in India: A Comparative Analysis With U.K & EU' (2010) <<http://legalservicesindia.com/article/article/enforcement-of-competition-law-in-india-a-comparative-analysis-with-u-k-&-eu-392-1.htm>>, accessed on 19 March 2013.

<sup>3</sup> Suzanne Rab, *Indian Competition law: an International Perspective*, (Wolters Kluwer (India) Pvt Ltd 2012)

authority established under any law and to undertake competition advocacy, create public awareness and impart training on competition issue<sup>4</sup>. Following is the basic structure of CCI.

**Figure 5.2.2: Basic Structure of CCI**



*Source: Based on CCI website*

#### 5.2.1.2 Director General

The Central Government shall appoint a Director General for assisting CCI in conducting inquiry into contravention of any provisions of the Act or to perform other functions as provided by or under the Act.<sup>5</sup> The director shall, when so directed by the commission, assist the Commission investigating into any contravention of the provisions of this Act or any rules or regulations made there under. The Additional, joint, Deputy and Assistant Director General or such officers or other employees so appointed shall exercise his powers and discharge his functions, subject to the supervision and direction of the Director General. The Director-General shall have all powers as are conferred upon the commission under section 36(2)<sup>6</sup>.

#### 5.2.1.3 Competition Appellate Tribunal

<sup>4</sup> *Ibid.*

<sup>5</sup> Competition Act 2002, s 16(1).

<sup>6</sup> Competition Act 2002, s 43(3).

Earlier when Competition Act 2002 was enacted there was no mention of Competition Appellate Tribunal. It was only after the filing of case *Brahm Dutt v. Union of India*<sup>7</sup> the Competition (Amendment) Act 2007 provided for the establishment of CAT. It is a quasi judicial body and consists of Chairperson and not more than two other members appointed by Central Government. The Chairperson shall be person who is or has been judge of S.C or C.J of H.C. Member of CAT shall be a person of ability, integrity and standing and who has special knowledge of and professional experience of not less than 25 years in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public, affairs, administration or in any other matter which, in the opinion of the C.G, may be useful to the appellate tribunal.

The proceedings before CAT are deemed to be judicial proceedings. Appeal against the order of the CCI can be filed before CAT and provisions with respect to the same are provided in Sections 53A to 53U. The CAT will hear and dispose of appeals against order of CCI and adjudicate claims for compensation and pass orders for recovery of compensation. The compensation can be claimed under Section 42A or 52Q (2) of the Competition Act. The appeal can be filed by C.G, S.G or enterprise or any person who is aggrieved by decision, direction or order of CCI. Appeal should be filed within 60 days. The tribunal will give opportunity of hearing to other party and then will pass the order. Copy of order will be sent to the parties to appeal and CCI. CAT can review its own decisions. In case of contraventions of CATS order without reasonable grounds, punishment of imprisonment up to 3 yrs and penalty up to Rs. 1 crore can be imposed by CMM, Delhi. Appeal against CATS order can be made to S.C within 60 days. The Appellate Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government. The Appellate Tribunal shall have, for the purposes of discharging its functions under the Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908). Every order made by the Appellate Tribunal shall be enforced by it in the same manner as if it were a decree made by a court in a suit pending therein<sup>8</sup>.

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<sup>7</sup> AIR 2005 SC 730.

<sup>8</sup> Retrieved From <<http://compat.nic.in/Introduction.html>> accessed on 19 March 20, 2013.

#### 5.2.1.4 Supreme Court

Appeal against Competition Appellate Tribunal's order can be made to S.C within 60 days. In *Competition Commission of India v Steel Authority of India & Anr*<sup>9</sup>. Supreme Court has ruled that the authority of the Competition Commission of India ('CCI') to direct investigation into unfair trade practice by companies cannot be challenged before the Competition Appellate Tribunal ('Appellate Tribunal') putting curtain on a contentious issue between the CCI and Appellate Tribunal and laying down their respective jurisdiction in matters of anti-competitive agreements and abuse of dominant position.

### 5.3 Enforcement of Competition Law in Pakistan: A legal Framework

The Government of Pakistan seeks to promote sustainable economic development and improve the well-being of all citizens by protecting and promoting competition in the economy. Private and public barriers to competition need to be prevented from hindering the development path, so as to guarantee maximization of consumer and producer welfare in a dynamic framework. Competition policy and its regulatory framework will support an environment in which entry, and growth is fostered, anti-competitive behavior by all firms is prevented, and abuse of market power by dominant firms is restrained.<sup>10</sup>

The history of competition law in Pakistan dates back to the 1970s when Pakistan promulgated the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970. The Monopoly Control Authority was established to enforce this law. However, considering the changed economic conditions and various limitations of this legislation, the Government of Pakistan completely overhauled its competition regime in 2007 by enacting a new legislation, namely the Competition Ordinance of 2007 - a modern competition law essentially based on the European Legal principles. The Ordinance also established the Competition Commission of Pakistan (hereinafter referred to as the Commission) to implement the new competition law. The Ordinance of 2007 was enacted as an Act of Parliament in October 2010. Briefly, the law prohibits actions that tend to lessen competition such as abuse of market dominance, agreements

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<sup>9</sup> [2010] 98 CLA 278.

<sup>10</sup> *Competition Law & Policy in Pakistan* available at [www.competitionlaw.cn/upload//temp\\_08031111539215.pdf](http://www.competitionlaw.cn/upload//temp_08031111539215.pdf) accessed on 20 March 2013.

that restrict dominance, and deceptive marketing practices. The law sets out procedures relating to review of mergers and acquisitions, enquiries, imposition of penalties, grant of leniency, and other essential aspects of law enforcement<sup>11</sup>.

### **5.3.1 Enforcement Institutions**

Following are the principal institutions responsible for competition law enforcement in Pakistan.

1. Competition Commission of India
2. Competition Appellate Tribunal
3. Supreme Court of India

#### **5.3.1.1 Competition Commission of Pakistan**

The CCP is a legal framework principally liable for the implementation of competition laws, providing aid to ensure healthy competition, and developing competition culture within the country<sup>12</sup>. Commission shall be consisting of not less than five members & not more than seven members<sup>13</sup>. Members of the commission shall be appointed by the federal government. Also chairman of the commission shall be appointed by the federal government amongst the members of the commission. All the members shall serve on full time basis. The Chairman shall be the chief executive of the commission & responsible for the administration of the affairs of the commission<sup>14</sup>. When the position of the chairman is vacant, or he is unable to perform his functions due to any cause, most senior member of the commission will act as acting chairman of the commission until the appointment of the chairman on regular basis.<sup>15</sup> All the members & chairman shall enjoy the office for the term of three years and also eligible to reappointment<sup>16</sup>.

Competition commission of Pakistan may conduct all or any of the following function<sup>17</sup>:

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<sup>11</sup> *Competition Law of Pakistan: Guidelines for employee* available at <[www.engro.com/wp...v1.0/.../CompetitionLawsOfPakistan&Test.pdf](http://www.engro.com/wp...v1.0/.../CompetitionLawsOfPakistan&Test.pdf)> accessed on 20 March 2013.

<sup>12</sup> Competition Act 2010, s 12.

<sup>13</sup> Competition Act 2010, s 14.

<sup>14</sup> Competition Act 2010, s 15.

<sup>15</sup> Competition Act 2010, s 16.

<sup>16</sup> Competition Act 2010, s 17.

<sup>17</sup> Competition Act 2010, s 28.

Please note that here Competition Act 2010 refers to the Competition Act of Pakistan.

- To initiate proceeding in accordance with the procedures of this Act and make orders in cases of contravention of the provisions of the Act;
- To conduct studies for promoting competition in all sectors of commercial economic activity;
- To conduct enquiries into the affairs of any undertaking as may be necessary for the purpose of this Act;
- To give advice to undertakings asking for the same as to whether any action proposed to be taken by such undertakings is consistent with the provisions of this Act, rules or orders made there under;
- To engage in competition advocacy; and
- To take all other actions as may be necessary for carrying out the purpose of this Act.

The Competition Commission of Pakistan shall have, for the purposes of discharging its functions under the Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908.<sup>18</sup>

#### 5.3.1.2 Competition Appellate Tribunal of Pakistan

Any person aggrieved by the order of the commission may within 60 days of the communication of the order prefer an appeal to the Competition appellate Tribunal<sup>19</sup>. Appellate tribunal constituted by federal government consist of Chairperson who shall be a person who has been a judge of the Supreme Court or a retired Chief Justice of a High Court & two technical members who shall be person of ability, integrity and have special knowledge and professional experience of not less than ten years in international trade, economics, law finance and accountancy. Chairperson & members shall hold office for a period of three years and shall be eligible for reappointment for a similar term and shall cease to hold office on attaining the age of 68 year or the expiry of the term whichever is earlier. Appellate tribunal may make an rules governing the proceeding before the Tribunal<sup>20</sup>.

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<sup>18</sup> Competition Act 2010, s 33.

<sup>19</sup> Competition Act 2010, s 42.

<sup>20</sup> Competition Act 2010, s 43.

### 5.3.1.3 Supreme Court of Pakistan

Any aggrieved by an order of the Competition Appellate tribunal may prefer an appeal to Supreme Court within sixty days<sup>21</sup>. The SC, being a court of unlimited jurisdiction, has the capacity as well as the jurisdiction to deal with competition related matters after decisions of the Appellate Bench/ Tribunal. The model jurisdiction for all federations with a written constitution, the United States also provides a direct appeal to the Supreme Court from the decision of the Federal District Court in anti-trust matters of public importance. The proceedings should not be protracted unnecessarily and a leave with appeal to the Supreme Court from a decision of the Appellate Tribunal can achieve this<sup>22</sup>.

## 5.4 Enforcement of Competition Law in China: A legal Framework

The idea of a comprehensive anti-Law for the People's Republic of China surfaced in 1987, in response to the diverse and incoherent existing laws such as Anti-Unfair Competition Law, Price Law, Foreign Trade Law. Representatives from various agencies and academic institutions began drafting the new Law in 1994. However, the initial drafts often reflected divergent and inconsistent goals among its various agencies<sup>23</sup>. The final version of the law was finally adopted by the People's Congress on 30 August 2007<sup>24</sup> and took effect on 1 August 2008. Largely following the model of EU and German competition law, the Antimonopoly Law comprises three broad sets of rules:

- conduct rules prohibiting restrictive agreements and the abuse of a dominant market position (Chapters II and III of the Law)
- Merger rules to control large M&A activity and prevent mergers that restrict competition (Chapter IV of the Law)

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<sup>21</sup> Competition Act 2010, s 44.

<sup>22</sup> Business Recorder, *Constitution of Competition Appellate Tribunal Approved by Prime Minister* (2011), <<http://www.accessmylibrary.com/article-1G1-262244074/constitution-competition-appellate-tribunal.html>> accessed on 20 March 2013.

<sup>23</sup> Nathan Bush, Chinese Competition Policy, China Business review available at

<<https://www.chinabusinessreview.com/public/0505/bush.html>>, accessed on 20 March 2013.

<sup>24</sup> Antimonopoly Law of the People's Republic of China of 30 August 2007, Presidential Order No 68.

- Rules prohibiting the abuse of administrative power that leads to restrictions of competition (Chapter V of the Law).

The Antimonopoly Law has a very broad scope of application. It applies to all “undertakings”, defined in the Law as any natural or legal person, or any other organization, that produces or deals in goods or provides services. Article 7 of the Antimonopoly Law contains somewhat ambiguous language concerning the Law’s application to state-owned enterprises (SOEs), but the majority view is that the Antimonopoly Law applies equally to all undertakings, irrespective of whether they are privately owned or owned by the State. The three enforcement agencies (NDRC, SAIC and MOFCOM) have all stated that they would not afford any preferential treatment to SOEs in the application of the Antimonopoly Law. Some of the early cases they investigated involve SOEs. The only economic sector that is expressly excluded from the scope of the Law is agriculture and the activities of rural economic organizations<sup>25</sup>. The Antimonopoly Law is one of three statutes of general application that protect competition on the Chinese markets. The other two are the Price Law of 1998 and the Anti-Unfair Competition Law of 1993. The Chinese competition authorities and the Chinese courts will often rely on several of these statutes, leading to a broad approach to competition law enforcement that goes beyond addressing purely antitrust concerns.<sup>26</sup>

#### ***5.4.1 Enforcement Institutions***

A distinctive feature of the Chinese competition law regime is that its administration and enforcement are shared among different authorities:

- A) Administrative Enforcement
- B) Judicial Enforcement

Both are discussed in detail below:

#### **A) Administrative Enforcement**

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<sup>25</sup> Antimonopoly Law 2007, Art. 56.

<sup>26</sup> A Norton Rose group Guide (2012), ‘*Antimonopoly Law in China*’ available at [www.nortonrose.com/.../download-antimonopoly-law-in-china-6382...](http://www.nortonrose.com/.../download-antimonopoly-law-in-china-6382...) accessed on 21 March 2013.

The State Council shall establish an anti-monopoly commission to be in charge of organizing, coordinating and guiding anti-monopoly work and to perform the following duties<sup>27</sup>:

- (1) Studying and drafting policies on competition;
- (2) Organizing investigation and assessment of competition on the market as a whole and publishing assessment reports;
- (3) Formulating and releasing anti-monopoly guidelines;
- (4) Coordinating administrative enforcement of the Anti-Monopoly Law; and
- (5) Other duties as prescribed by the State Council.

The composition of and procedural rules for the anti-monopoly commission shall be specified by the State Council. Anti Monopoly commission is the highest executive organ of the state. The Commission is in charge of organizing, coordinating, and supervising AML-related activities.

Also there are some other authorities designated by anti monopoly commission to enforce AML. Currently three AMEAs have parallel authority to enforce the AML: MOFCOM, which is mainly responsible for merger control review;<sup>28</sup> the National Development and Reform Commission<sup>29</sup> (“NDRC”), which is mainly responsible for enforcement against restrictive agreements and abuse of dominant positions that are price-related and the State Administration for Industry and Commerce<sup>30</sup> (“SAIC”), which is mainly responsible for enforcement against restrictive agreements and abuse of dominant positions that are non-price-related. According to SAIC’s website of January 2011, the Jiangsu branch of SAIC (Jiangsu AIC) fined the Committee for Concrete (which belongs to the Lianyungang City Construction Material and Machinery Association) RMB 200,000 for illegally organizing a cartel in the local concrete market. According to news from online media, Jiangsu AIC also fined five participants of the cartel RMB 530,723.19 and confiscated their illegal profits amounting to RMB 136,481.20. These actions were taken by Jiangsu AIC in response to the participants’ illegal division of the concrete sales market. This was the first fine under the AML that was handled and imposed by SAIC. China’s National Development and Reform Commission

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<sup>27</sup> Anti-Monopoly Law 2007, s 9.

<sup>28</sup> See <<http://english.mofcom.gov.cn/aarticle/newsrelease/significantnews/201112/20111207856748.html>> accessed on 21 March 2013.

<sup>29</sup> See <<http://en.ndrc.gov.cn/>> accessed on 21 March 2013.

<sup>30</sup> See <<http://www.saic.gov.cn/english/index.html>> accessed on 21 March 2013.

(NDRC) and State Administration for Industry and Commerce (SAIC) are the two authorities in charge of investigation and supervision of “monopoly” agreements and abuses of dominant market position.<sup>31</sup>

### **B) Judicial enforcement**

One of the additional features of China’s Anti Monopoly Law is private enforcement. The Antimonopoly Law provides that, where an undertaking causes other parties to suffer loss as a result of abusing its dominant position or entering into a monopoly agreement, it may face civil liability in the courts<sup>32</sup>. The civil courts’ jurisdiction does not appear to be limited to the award of damages: consistent with general principles of civil and contractual law, courts may also declare agreements that breach the Antimonopoly Law to be invalid and may grant injunctions and cease-and-desist orders. Private litigation has been a feature of antimonopoly law enforcement since its entry into force in August 2008. While only few plaintiffs have been successful to date, there have been reports of lawsuits involving online services, railway ticketing services, car repair services, and telecommunications<sup>33</sup>.

Under China’s administrative law, parties whose legitimate rights and interests are infringed upon by a specific administrative act generally have two channels of remedy. As provided in China’s Administrative Litigation Law, parties may either apply for review of the administrative act by an authorized administrative agency (“administrative reconsideration”) or file a suit against the administrative agency in a Chinese court (“administrative litigation”)<sup>34</sup>. Moreover, parties who choose to apply for administrative reconsideration may still file for administrative litigation if they are dissatisfied with the result<sup>35</sup>. Article 53 of the AML, however, distinguishes between two types of review of agency decisions. Based on the notion that the judiciary is perceived as a far more impartial arbiter than government agencies, the Administrative Litigation Law contemplates a mechanism under which immediate judicial review of administrative act would be available in most circumstances.

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<sup>31</sup> Alex an, NDRC and SAICs Actions in 2011 and Prospects in 2012 (2012) McDermott Will & Emery (2012) <<http://www.antitrustalert.com/tags/ndrc/>> accessed on 22 March 2013.

<sup>32</sup> Anti-Monopoly law, Art.50.

<sup>33</sup> A Norton Rose group Guide (2012), ‘*Antimonopoly Law in China*’ available at [www.nortonrose.com/.../download-antimonopoly-law-in-china-6382...](http://www.nortonrose.com/.../download-antimonopoly-law-in-china-6382...) accessed on 21 March 2013.

<sup>34</sup> See the Administrative Litigation Law, art. 37.

<sup>35</sup> See *id.* Art. 38.

## 5.5 Conclusion

A fair and transparent process for selection of regulators needs to be reinforced to ensure that the regulatory system is insulated from interference. There are several common factors such as independence, accountability and predictability that need to be universal. Further, a uniform process of the selection of chairmen and members of the regulatory agency and their tenure, age limit, etc, has been prescribed, as currently it varies from sector to sector. Not only has each ministry evolved its own approach to designing and manning the regulator, it is often inconsistent with sound management science. The requirement that the selection committee for a regulatory body/appellate tribunal shall consist basically of serving and retired bureaucrats makes no sense. Currently, all regulators are retired bureaucrats and one can hardly find good, credible talented persons who can enhance the capacity and quality of these institutions. The selection committee should include non-government representatives, academia, civil society representatives and professional bodies. This would enable selection of experts from a wider field. The issue of jurisdictional overlaps between the sector regulators and/or competition authority has not been addressed adequately in Indian Competition Act 2002. Further, to avoid a possible conflict between sectoral regulators and the CCI, mandatory consultations should be held between them in cases that lie in the intersection of jurisdictions. If the sector regulators and/or the CCI fail to resolve the issues amicably, the same could be resolved by a committee comprising of the chairpersons of the existing appellate tribunals, who are all retired judges. It can be said that the current regulatory reform initiative is reflective of the mounting pressure to streamline regulatory processes and promote regulatory competence. Also, in the current economic and political climate, there is an imperative for a cost-effective yet highly productive regulatory system.