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Institutional Design of Select Competition Authorities in South Asia: Identifying Challenges and Opportunities

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Abstract
The development of a robust competition regime that ensures effective implementation of competition policy principles and promotes creation of a healthy competition culture depends on several factors. Primarily, it demands 'optimally designed' institutions. The South Asian block depicts a wide array of challenges and opportunities in this regard, and we attempt to offer an in-depth analysis into the designs of competition authorities in India, Pakistan and Bangladesh. From this, an important stage-specific 'framework of challenges and opportunities' emerges and is presented to sensitize emerging jurisdictions about the general nature of obstacles and help identify possible focus areas for design optimisation.

Keywords Competition · Antitrust law · Competition authority · Competition policy · South Asia

JEL Classification K21 · L40 · L49

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1 Introduction and Fundamental Facets of Institutional Design

1.1 Introduction

A market ecosystem that promotes competition has been widely recognised as a necessary prerequisite for prompting economic efficiencies, inducing and fostering innovation, increasing productivity of firms, and promoting consumer welfare.[1] Moreover, increased competition has the potential to improve the economic performance of a nation by opening the markets to investment opportunities and simultaneously reducing the costs of goods and services across sectors.[2] Furthermore, enabling competition in markets has also facilitated wealth creation and poverty alleviation, especially in developing nations.[3]

However, while developing and least-developing countries have increasingly adopted policies in favour of market liberalisation and foreign direct investment (FDI), it has also led to the emergence of unique regulatory challenges and unexpected exclusionary and exploitative practices that distort market competition. Hence, in order to check policy-led distortions to competition and tackle anti-competitive practices, jurisdictions have progressively adopted competition policy and law.[4]

Markedly, there has been a global explosion in the adoption of competition policy and law, and jurisdictions have progressively realised that effective enforcement of competition policy and law can curb anti-competitive practices, disciplines market players, and creates an overarching 'competition culture', which expectantly protects the economic interests of a country and advances consumer welfare (Mehta and Sengupta 2012, p. 16).

However, several scholars (Evenett 2005; Mehta 2007) rightly argue that competition policy and competition law are distinct concepts. Policymakers and other stakeholders generally consider them as synonymous despite their difference in scope (Mehta 2007). Competition policy is much broader and more comprehensive (see Fig. 1). This is because the core principles of competition law are usually limited to the prevention or correction of market behaviour that restricts competition and reduces consumer welfare (be it through exclusionary and exploitative practices and/or transactions). It has also been recognised that certain jurisdictional interventions might fall outside the scope of competition law (Evenett 2005). This generally

[1] See UNCTAD, 'Why competition and consumer protection matter', available at http://unctad.org/en/Pages/DITC/CompetitionLaw/why-competition-matters.aspx and OECD, 'Competition Assessment Toolkit, Principles', available at http://www.oecd.org/daf/competition/46193173.pdf.

[2] However, the connection between increased competition and investment has been fraught with debate. For a brief on the matter, see Dube (2009).

[3] See CUTS International (2015), 'Making Competition Reforms Work for the People, Evidence from Select Developing Countries & Sectors', available at http://www.cuts-ccier.org/crew/pdf/Making_Competition_Reforms_Work_for_People-Evidence_from_Select_Developing_Countries_and_Sectors.pdf and Godfrey (2008, p. 3).

[4] More than 130 countries/jurisdictions have laws that seek to safeguard and foster market competition. See (Aydin and Büthe 2016, p. 2).

includes consumer protection laws, protectionist trade policies such as anti-dumping duties, and policies towards FDI.[5]

The framing of a robust competition policy is wholly different from its effective implementation,[6] and it is pertinent to recognise that the majority of the new adopters of competition policy are struggling with its meaningful implementation (Aydin and Büthe 2016).

The successful transmission from a narrower competition law approach towards a holistic competition policy approach requires an effectively designed institutional setup. Fundamentally, this depends on the existence of a robust enforcement mechanism that is supported by strong and pro-active competition policy institutions.

The first natural step in this regard is to design competition institutions in a manner that is consistent with the socio-economic objectives of a particular country/region. This makes the 'institutional design' of competition agencies and related institutions (including mainly appellate bodies and to an extent, sectoral regulators, the executive and judicial arms) a critical element that determines the success of a particular competition regime, especially for developing economies.

Naturally, the design of fundamental competition policy institutions differs across jurisdictions and is dependent on various factors, which has understandably made it the subject matter of discussions at several international fora.[7]

With the objective of demystifying the advantages and disadvantages of diverse approaches, the forthcoming analysis examines select existing and upcoming competition institutions in the South Asian region and identifies specific lessons for institutions within and outside its geography.

Notably, competition institutions of India, Pakistan and Bangladesh—which currently lie at different stages of development—signify unique stage-specific challenges to institutional design. These challenges, along with opportunities, have been mapped in three stages—nascent, intermediate, and fairly advanced—and have been accordingly formulated into a framework. This framework has been generalised from the analyses of the three jurisdictions and is not necessarily exhaustive in scope and application.

One of the chief limitations of the analysis is that it does not cover other major jurisdictions in the South Asian region, such as Sri Lanka, Nepal and Afghanistan. This limitation exists due to the lack of adequate information and sources in public domain, particularly in relation with the design and detailed workings of the competition law of Nepal. Sri Lanka and Afghanistan were also preliminarily considered

[5] There can of course be exceptions to this. Several jurisdictions combine competition enforcement with consumer protection.

[6] Here, the term 'competition policy' is being used as an overarching term that covers competition law. Both 'competition policy' and 'competition law' are often used interchangeably, but there is a distinction between the two. See Mehta (2007, p. 43).

[7] See OECD (2015), 'Key points of the Roundtables on Changes in Institutional Design', available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M(2015)1/ANN9/FINAL&docLanguage=En and UNCTAD (2008), 'Independence and Accountability of Competition Authorities', United Nations Conference on Trade and Development, Intergovernmental Group of Experts on Competition Law and Policy, Ninth Session 15–18 July, TD/B/COM.2/CLP/67.

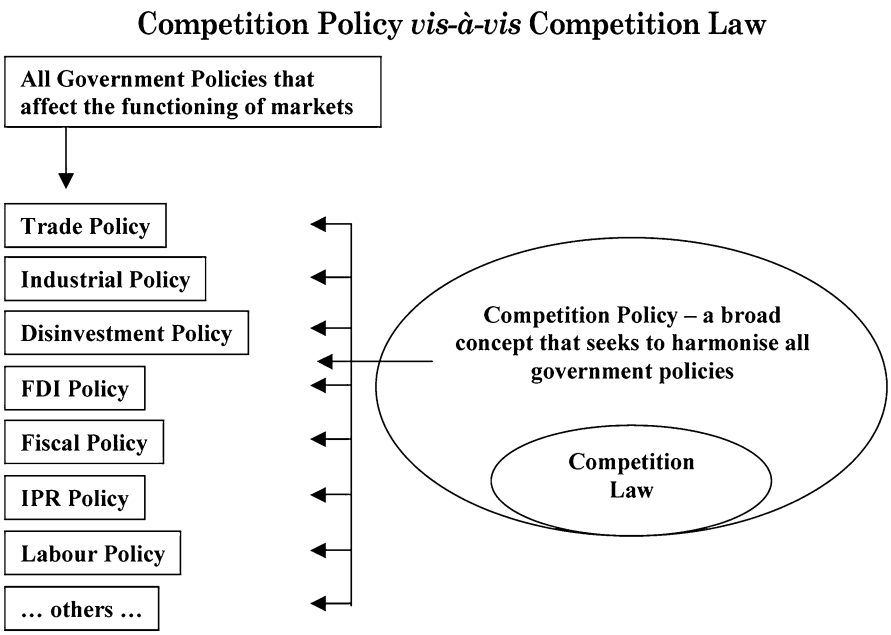

Fig. 1 Competition policy vis-à-vis competition law. *Source*: Mehta (2007, p. 55)

(adequate information was available in public domain), but owing to the fact that both jurisdictions have an institution which pursues consumer protection and competition promotion simultaneously (namely, the Consumer Affairs Authority in Sri Lanka and the Competition Promotion and Consumer Protection Directorate in Afghanistan), an institutional assessment from the design perspective in such a case would understandably demand a broader approach than the one that this study offers. Therefore, the study limits its scope to the analysis of select dedicated competition institutions in India, Pakistan and Bangladesh.

1.2 Challenges of Establishing an Optimal and Localised Institutional Design in Developing Nations

Developing an optimal design for competition institutions and localising the same in the presence of various political economy elements is a complex task, especially for developing nations where traction towards the competition reforms agenda is sluggish. Experience from select competition advocacy efforts[8] that have been led by consumer organisations in developing nations suggests that the road towards developing a robust competition regime, which includes an effective competition agency,

[8] See CUTS International's project websites for the four phases of the 7Up project, available at www.cuts-ccier.org/7Up1; www.cuts-ccier.org/7Up2; www.cuts-ccier.org/7Up3 and www.cuts-ccier.org/7up4.

is ridden with political-economy obstacles such as the following (Mehta and Sengupta 2012):

- Lack of prioritisation of competition issues in political milieu that lead to a slow or lacklustre movement of competition reforms processes;
- Lack of background knowledge, stakeholder engagement, and support for competition reforms engagement;
- Lack of continuity with the competition reforms agenda; and
- Low capacity for and little experience with competition administration.

In addition to these, experts suggest that there are other challenges that hamper the effectiveness of competition policy institutions (and possibly affect their design as well) that are listed below:

> (1) vested interests that dominate economic policy making, either through legal means (party financing, lobbying, influence in the nomination of the government, senior officials, or the council of the national competition authority (NCA) or illegal means (corruption, abuse of public service power, or cronyism); (2) inefficient public administration and regulatory systems that limit the capacity and effectiveness of public bodies, including the NCA. (Rodriguez and Menon 2016, p. 59)

These challenges, if not addressed and tackled carefully, might completely impede the development of institutional mechanisms vis-à-vis competition policy or might inadvertently lead to the emergence of mechanisms that are not designed optimally. This makes the development of an optimal and localised institutional design particularly challenging and significant from the developing nations' perspective.[9]

Furthermore, considering the fact that an effective competition regime is a quintessential economic instrument, especially for emerging nations, the focus of the emerging and nascent competition regimes ought to be on effective implementation of competition principles through moulding their competition policy institutions in an optimal manner. To this end, the experience of the South Asian block depicts a wide array of challenges and opportunities vis-à-vis designing competition policy institutions, the objective analysis of which can provide important lessons for policymakers and other stakeholders.

1.3 Fundamental Facets of Institutional Design

There is ample reason and evidence to suggest that institutional design is an important facet that determines the success of a particular competition policy and law system.[10] However, due to the political-economy dimensions that are discussed

[9] For a detailed insight into the practical interrelationship between politics and regulatory/institutional development, see Mehta and Evenett (2009).

[10] See OECD (2015), 'Key points of the Roundtables on Changes in Institutional Design', available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M(2015)1/ANN9/FINAL&docLanguage=En.

above and due to the fact that the diverse competition institutions around the globe are designed differently, defining a straightjacket formula for one 'optimal' design would be an arduous, or even a futile exercise.

Nevertheless, identifying the basic contours or universally agreed-upon facets of institutional design can give us an objective framework to view and assess current actual designs. The United Nations Conference on Trade and development (UNCTAD) Model Law on Competition[11] could be a foundational starting point in this regard, which was evidently formulated on the understanding that:

> the most efficient type of administrative authority for competition enforcement is likely to be one that (1) is quasi-autonomous or independent of the Government, with strong judicial and administrative powers for conducting investigations and applying sanctions; and (2) provides the possibility of recourse to a higher judicial body.[12]

It is important to note here that the above-mentioned facets, which have helped mould the Model Law on Competition, can be understood to be universally relevant but are not exhaustive in any way. Furthermore, some important concepts have been briefly explained below for conceptual clarity as these (among others) will be utilised as a central paradigm for analysing the institutional designs of select South Asian jurisdictions.

As the dedicated enforcement agency for competition law is the focal point of the overall institutional setup, the underlying comparison of the facets of actual designs will be conducted from the perspective of established competition authorities. Hence, the various facets have been accordingly conceptualised as under:

1.3.1 Conceptualising Various Facets

The first and foremost fundamental facet is independence. Independence of a competition authority is dependent on its legal personality and the level of structural separateness (in terms of mechanisms of appointments, funding, etc.) from the government.[13] Independence enables the objective, evidence-based, and transparent application of competition law principles and ensures that the enforcement of the law is not politicised, biased, or discriminatory.[14]

However, it is important to acknowledge the two widely accepted aspects of independence of an agency: de facto independence (the actual level of independence); and de jure independence (legally reflected independence that emanates from the

[11] See UNCTAD, 'Model Law on Competition', available at http://unctad.org/en/docs/tdrbpconf7d8_exerpt_en.pdf.

[12] See UNCTAD (2008), 'Independence and Accountability of Competition Authorities', United Nations Conference on Trade and Development, Intergovernmental Group of Experts on Competition Law and Policy, Ninth Session 15–18 July, TD/B/COM.2/CLP/67.

[13] Ibid.

[14] Ibid.

statute).[15] This distinction is important because the actual level of independence might not be a practical reflection of what is enshrined in a statute and can possibly be enhanced or diminished on the ground through external influence (Kovacic 2014).

Furthermore, to be truly independent from the government, not only must the institution be independent structurally, it must also be financially and operationally independent from the government. The executive ought not to be allowed either to interfere, or to arm-twist the competition regulator and restrict its administrative functions (Mehta 2013).

More important, as the institutions' responsibilities include advancing the objectives of competition policy and law, the government should ideally not be allowed to have unbridled discretion over the personnel and finances of the institution(s).

But, the meaning of independence if understood in isolation from the institutional concept of *accountability* would be ineffective and fruitless because if an agency is made completely independent—totally isolated from its external environment—it would become practically ineffectual (Mehta 2013; Kovacic 2014).

Hence, we seek to assess independence not in terms of complete isolation from political and external oversight, but a concept that is inherently accompanied by some form of accountability (for example, in the form of judicial review) so as justifiably to restrain the agency's/institution's powers. This reasoning can generally be interpreted as a situation where the competition authority is made subject to *fair and justifiable* external influence so as to ensure that the authority exercises its powers in consonance with the envisaged statutory objectives.

In addition to independence and accountability, which affect the enforcement efficiency of competition law (and are generally accepted facets of institutional design), an ideal institutional framework should also cover enabling provisions for the institution to advocate for overarching competition reform.

Competition advocacy by design enables the institution(s) to: (1) shape competition policy of a particular jurisdiction through awareness generation; (2) advocate for development of competition-friendly policies across sectors; and (3) work towards creation of an overall 'competition culture'. If inculcated as an important aspect of design, it gives an institution the ability to comment freely on and recommend improvements in public policy, regulation and legislation.[16]

[15] This paper will focus on de jure independence as well as provide evidence on de facto independence wherever possible. For more on these concepts, see Background Paper by the Secretariat for OECD Global Forum on Competition (2016), 'Independence of Competition Authorities - From Designs to Practices', available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=daf/comp/gf(2016)5&doclanguage=en and Guidi (2012).

[16] See ICN (2012), 'Advocacy and Competition Policy', available at http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf; See UNCTAD (2008), 'Independence and Accountability of Competition Authorities', United Nations Conference on Trade and Development, Intergovernmental Group of Experts on Competition Law and Policy, Ninth Session 15–18 July, TD/B/COM.2/CLP/67 and CUTS International (2013), 'Competition Reforms In Key Markets For Enhancing Social & Economic Welfare In Developing Countries', available at http://www.cuts-ccier.org/crew/Advocacy.htm.

1.4 Objective Framework for Analysis of Institutional Design

From the aforementioned discussion, the following multi-pronged framework (Fig. 2) emerges, which will aid in analysing the select jurisdictions' competition policy institutions:

2 Analysis of Select South Asian Institutions

2.1 India

2.1.1 Competition Reforms in India

In the wake of the 'second unbundling' of globalisation in 1990s,[17] India underwent a major economic policy readjustment, which was marked by policies of deregulation, privatisation, and trade liberalisation. These paved the way for a more competitive and open India owing to important industrial reforms, such as the removal of licensing requirements, the gradual reduction of barriers to entry, and significant trade policy liberalisation measures such as a reduction in the degree of regulation and licensing control over foreign trade (Banga and Das 2012).

To implement this revolutionary economic reform, the initial thought process of policymakers was that necessary amendments to existing policy frameworks and regulatory setups would be adequate to make space for the requisite participation of private sector firms (Mehta 2013). As the same proved to be practically unfeasible, a need to establish independent regulators for providing a competitive and secure market ecosystem was felt. As a result, independent regulators emerged in various sectors, which provided assurance and predictability of a level playing field to private players and effectively broke the erstwhile monopoly held by State Owned Entities (Mehta 2013). Thus, a renewed form of economic governance emerged, consisting of independent specialised sectoral agencies, that helped correct market failures and aided in producing competitive market outcomes through implementing objective and fair processes (Mehta 2013).

While the process of setting up of sectoral regulatory bodies started to benefit the economy, a need was felt to create an overall business environment that improves static and dynamic efficiencies and guards the economy from anti-competitive practices.[18] To this end, the previous competition law (the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969)—which was framed during the 'command-and-control' paradigm—was found to be redundant and was no longer sufficient to regulate the liberalised market and promote competition therein.[19] Hence, in order

[17] For more on the concept of globalisation and unbundling, see Baldwin (2016).

[18] See the Report of the High Level Committee on Competition Policy and Law available at https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf.

[19] See CUTS International, 'Competition and Regulatory Overlaps: The Case of India', available at http://www.cuts-ccier.org/IICA/pdf/Country_Paper_India.pdf.

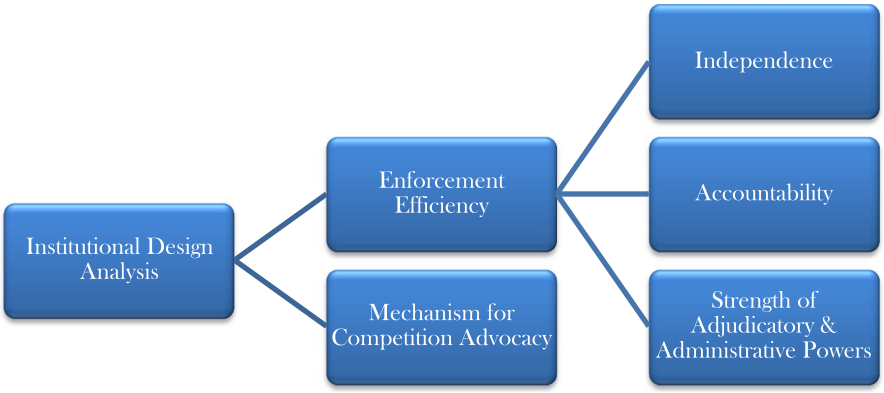

Fig. 2 Framework for analysis of institutional design

to revisit the MRTP Act, the Indian government commissioned a High Level Committee on Competition Policy and Law (also known as the Raghavan Committee), which recommended a complete overhaul and modernisation of India's competition regime. This initiated the process towards competition reforms in India and eventually led to the enactment and implementation of the extant Competition Act, 2002 (as amended, 2007).

2.1.2 The Design of Competition Institution(s) in India

Following the philosophy of modern competition policy principles, and unlike the erstwhile MRTP Act, the Competition Act deals with the prohibition of anti-competitive agreements, abuse of dominant position by enterprises (which causes or is likely to cause an appreciable adverse effect on competition within India), and the regulation of combinations (acquisition, acquiring of control and mergers and acquisitions).[20]

This led to the origin of the Competition Commission of India (CCI) and subsequently the Competition Appellate Tribunal (COMPAT), to administer competition law in India.[21] The primary enforcement institution that seeks to achieve the objectives that are enshrined in the Act is the CCI (the Commission). Its prerogative is to eliminate anti-competitive practices and promote and sustain competition, and thereby indirectly protect consumers' interests and ensure the freedom of trade in the markets of India.

[20] For details about the Competition Commission of India, see http://www.cci.gov.in/about-cci.

[21] COMPAT was established through the Competition (Amendment) Act, 2007. Notably, the Government of India has notified that on and from 26th May, 2017, any appeal, application, or proceeding pending before the COMPAT shall stand transferred to National Company Law Appellate Tribunal (NCLAT). The detailed procedure as to how this will play out will expectantly follow soon. Implications of this have been discussed subsequently. For more, visit http://compat.nic.in/upload/Notification%20attached%20here%20under.pdf and http://compat.nic.in/.

Apart from enforcing the law, the Commission is also required to offer policy opinions to other Indian statutory authorities on competition issues if they so seek and simultaneously to undertake competition advocacy by creating public awareness and imparting training on competition issues.[22]

2.1.2.1 Independence[23] *Structural Independence* One key aspect of de jure independence of a competition policy institution is structural independence. Recognising the need for proactive administration and enforcement of the Competition Act, the Raghavan Committee envisaged that the CCI's role should not merely be limited to that of a law enforcement agency, as the institution would also have to pursue holistic competition reform, which goes beyond identification of anti-competitive practices.[24] The Committee therefore envisaged that the Commission would be an independent, specialised agency; and in consonance with this rationale, the Act establishes the Commission as corporate body, which consists of a Chairperson and not less than two and not more than six other Members who are appointed by the Central Government.[25]

Notably, Section 9, which was amended in 2007, introduced a new selection process, according to which the Chairperson and other Members of the Commission are appointed by the Central Government from a panel of names that are recommended by a Selection Committee.[26] This amendment to some extent strengthened the structural independence of CCI, as it effectively curbed the discretion of the Central Government and introduced objectivity by including the Chief Justice of India (CJI, or his nominee), the Secretary in the Ministry of Corporate Affairs, the Secretary in the Ministry of Law and Justice, and two experts of repute as members of the Selection Committee.[27]

However, if examined critically, the role of the Selection Committee is limited to recommendation of a panel of names. It is still up to the Central Government to choose from the recommended names and select the Chairperson and other Members of the CCI. Although, the inclusion of the CJI (or his nominee) in the selection

[22] See Section 49 of the Competition Act 2002.

[23] The analysis under this sub-section is largely based on the contribution of the authors submitted to the Organisation of Economic Competition and Development (OECD) for the Global Forum on Competition, 2016 on the theme of 'Independence of Competition Authorities - from Designs to Practices'. It can be accessed at https://one.oecd.org/document/DAF/COMP/GF/WD(2016)62/en/pdf.

[24] See the Report of the High Level Committee on Competition Policy and Law, available at https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf.

[25] See Sections 7 and 8(1) of the Competition Act, 2002.

[26] Previously, the selection process was reliant on the procedure as prescribed by the Central Government. However, after the Supreme Court's judgment in the case of *Brahm Dutt v. UOI* (discussed below), several structural changes were made including the appointment procedure.

[27] The Competition Act (Amendment) Bill, 2012 proposes to separate the selection process of the Chairperson from that of the members. In the proposed amendment, the Chairperson would be selected by the same Selection Committee. However, the members of CCI would be selected by a Selection Committee that would also consist of the Chairperson himself, apart from CJI, the Secretary in the Ministry of Corporate Affairs, the Secretary in the Ministry of Law and Justice, and one expert of repute. If passed by the legislature, the Bill would strengthen the role and powers of the Chairperson substantially.

process is commendable, the final word still rests with the Central Government. The Selection Committee also consists of two members from the executive branch; and as per the Competition Commission of India (Term of the Selection Committee and the Manner of Selection of Panel of Names) Rules 2009 the Committee is convened by an officer not below the level of Joint Secretary who is nominated by the Ministry of Corporate Affairs.[28] Hence, the structural independence of the regulator is not clearly established—even after the amendment—and the pervasiveness and influence of government seems to persist.

In addition to the possibility of indirect executive influence vis-à-vis the establishment and composition of the Commission, the Central Government also enjoys several explicit powers under the Act. As per Section 54, the Central Government has the power to exempt any class of enterprises from the application of the Act, if such exemption is necessary in the interest of security of the State or public interest. Additionally, the powers or the performance of the Commission's functions under the Act are bound by such directions on questions of policy as passed by the Central Government, which concurrently also decides whether a question is of policy or not.[29] Section 56, which seems more intrusive, explicates that the Central Government has the power to supersede the Commission on grounds of non-performance of duties that are imposed by the Act. It also supersedes in the event that the Commission has persistently defaulted in complying with any direction given by the Central Government under the provisions of the Act.

These sections seem to provide certain unrestrained powers to the Central Government (Singh and Guha 2011).[30] The power to exempt enterprises from the Act on the grounds of 'public interest' provides wide discretion to the Central Government. The term 'public interest'[31] is nowhere defined in the Act and is subject to the interpretation of judicial orders in India. It is also pertinent to mention here that the Raghavan Committee also recognised that wide amplitude of 'public interest' can easily constrain the independent administration of competition policy.[32] In 2017, there were four instances where the Ministry of Corporate Affairs exercised this

[28] See Rule 4(4).

[29] See Section 55 of the Competition Act, 2002.

[30] The underlying rationale is perhaps to ensure checks and balances on the Commission.

[31] In this regard, the South African experience is noteworthy. South Africa's competition law was transformed in 1999, with the coming into effect of the current Competition Act, 1998. This statute introduced the somewhat unusual element of public interest in competition law. The concept of public interest is woven into the fabric of the Act. Even in the preamble, it is noted that, given the injustices of the past, the objectives of the Act include providing all South Africans with equal opportunity to participate fairly in the economy and regulating the transfer of economic ownership in keeping with the public interest. The concept of public interest is carried through into the prohibited practices provisions, where one of the grounds for exempting otherwise anticompetitive conduct from the provisions of the Act is that it promotes the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive.

[32] See the Report of the High Level Committee on Competition Policy and Law (p. 20, pp 3.2.0), available at https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf.

discretion and exempted entities from the ambit of specific sections of the Act.[33] In all such notifications, the term 'public interest' appears, but without any objective quantification or qualitative reasoning.

Also, the power to issue certain directions is vested in the hands of the Central Government. Although the CCI has a right to express its views before the directions are passed, the Central Government still has the final word in deciding whether the question is of policy or not. Section 56, which lays down wide discretion to the Central Government might also be used to suppress the functioning of the Commission, and the subjective nature of the wording of the provision can compromise its independent functioning.

Hence, apart from issues with regard to the composition of the Commission and selection of its members, there seem to be several statutory provisions that set possible limitations on the application of the law and simultaneously affect the independence of the CCI.

Financial Independence Another important aspect of efficiency of design is financial independence. Allocation of budgets and funding directly influences the operations of an enforcer of competition policy and if the same is solely subject to governmental control, it might restrict the authorities from advancing the objectives of the legislation. The Indian Act's framework for assigning and utilising funds is somewhat replete with provisions that tend to dilute the financial independence of its agency.

As per section 50 of the Act, the Central Government has the discretion to provide grants to the CCI as it deems fit and appropriate for utilisation for the purposes of the Act. The Act does not explicitly specify the preparation of the budget for the CCI. But, u/s 51, the Act provides for the constitution of the 'Competition Fund'. All of the relevant government grants are credited to this Fund. The Fund is applied for meeting the salaries and allowances of the Chairperson and other members and also for meeting the administrative expenses of the CCI.

Moreover, the Fund also meets all miscellaneous expenses of the CCI in connection with discharge of its functions. Under section 51(3) of the Act, the Fund is administered by a Committee of Members of the Commission, and the selection process of the Members is done by the Chairperson. The salaries are determined by the Central Government. It has the power to lay down rules for the same under the Act.

It is clear from the provisions of the Act that the discretion of granting funds for the functioning of the regulator lies wholly with the Central Government. The Central Government is not even mandated to consult the Commission before allocating the grants. Hence, the CCI is entirely dependent on government grants for carrying out the required functions enshrined under the Act.

This dependency could result in unnecessary hindrances to effective functioning of the CCI when the funding falls short of the required amount. Moreover, complete

[33] All notifications are available at http://www.mca.gov.in/MinistryV2/competitionact.html. In one of these instances, exemption has been provided for a term of 10 years. For details, see http://www.mca.gov.in/Ministry/pdf/Notification_31082017.pdf.

financial dependence creates a situation wherein the regulator has to implore the line Ministry time and again for supplementary funds. This might also lead to arm-twisting by the executive and even influence the CCI's adjudicatory and administrative decisions. In the long run, this statutory reliance could lead to a distortionary effect on the effective functioning of the Commission.

2.1.2.2 Accountability Alongside independence, it is essential to perceive the design of competition policy institutions from the other side of the same coin, which is represented by accountability.

As competition enforcement remains one of the chief functions of the Commission, it is important first to analyse the rubric of judicial accountability by examining the appellate procedure that is enshrined under the law. In order to provide a system of checks and balances, the Act established the COMPAT.[34] The adjudicatory powers to decide the case lies totally with the Appellate authority and finally with the apex court of India.[35]

A significant development in this regard has been the complete transfer of COMPAT's functions to the National Companies Law Appellate Tribunal (NCLAT) via an amendment to the Finance Act, 2017.[36] Notably, the constitutionality of the Finance Act, 2017 has been challenged in the form of a writ petition filed in the High Court of Madras.[37] The contention is that the amendment (among several others) violates the fundamental constitutional principles of separation of powers and the independence of the judiciary (Goel, 2017).

Be that as it may, this development has practically led to the winding up of COMPAT (along with several other tribunals) with the underlying rationale that India's tribunal-based system needed streamlining (Ghosal and Mani 2017). Understandably, with the transfer of powers of COMPAT to NCLAT, experts have raised concerns about the ability of the Company Law Tribunal to deal with competition issues: The prime concern is that NCLAT might not have the ability and capacity to handle the additional workload, alongside its responsibilities that are mandated under the Companies Act.[38]

This seems to be a valid argument because evidence demonstrates that despite COMPAT's sole responsibility of resolving appeals from CCI's orders, an average of 46 percent of the appeals before COMPAT at the beginning of a given year remained pending for over 12 months (Kumar and Ahmed 2017, p. 16). Furthermore, the erstwhile COMPAT was a specialised judicial body that effectively managed to keep accountability of CCI intact and passed several important appellate orders *vis-à-vis* procedural fairness and natural justice, which aided in the evolution

[34] See Section 53A of the Competition Act, 2002.

[35] The Central Government's power is restricted to filing an appeal if it is not satisfied with the Commission's decision.

[36] See The Business Standard, 'Govt. to scrap 8 appellate tribunals; NCLAT to take over COMPAT's duties', available at http://www.business-standard.com/article/economy-policy/govt-to-scrap-8-appellate-tribunals-nclat-to-take-over-compat-s-duties-117032200553_1.html.

[37] See *Madras Bar Association v. Union of India & Anr*, Writ Petition 15147–15148 of 2017.

[38] Ibid.

of competition law enforcement in India (Shrivastava 2017). NCLAT might not be capacitated to offer the same level of judicial scrutiny.

The Supreme Court of India has also played a crucial role in strengthening the accountability under which India's competition law institutions function. Various orders of the apex court, such as *CCI* versus *Steel Authority of India Limited (SAIL)*[39] and *Excel Crop Care Ltd.* versus *CCI and Another*,[40] laid down important precedents, which had a positive impact on the de facto design of India's competition policy institutions. The Indian competition regime has come a long way in establishing a strong procedure for maintaining checks and balances and inculcating procedural fairness vis-à-vis the enforcement of competition law, and the same needs to be protected from judicial arbitrage in the future.

Likewise, it is pertinent also to examine the rubric of institutional accountability from the perspective of utilisation and allocation of finances. Provisions that govern accounts and auditing require the CCI to maintain proper accounts and other relevant records and prepare an annual statement of accounts.[41] Thereafter, this is audited by the Comptroller and Auditor-General of India (CAG), which is a constitutional authority that was established under Article 148 of the Constitution of India. As per Section 53, the CCI has to prepare an annual report as well and give a true and full account of its activities and forward a copy to the Central Government. The copy of the report is then laid down before each House of Parliament. Although the administration of the fund and utilisation is up to CCI's Committee of Members, the regulator is still accountable to the Line-Ministry for its activities.

The fact that accountability of the regulator is associated with the Line-Ministry endangers its independence and makes it vulnerable to vested interests, which can be channelled through the executive branch. It is important to note that the accounting and auditing is done with the aid of the CAG, which is an independent constitutional body; but the accountability and furnishing of returns, etc., is to be made to the executive branch or the Central Government. This dichotomous provision makes CCI's accounts subject to the constitutional branch and functional reporting subject to the executive. Although checks and balances are important, the subjectivity and accountability to the Line-Ministry does not provide the most optimal solution and might render the regulator's independence susceptible to vested interests. Thus, it might be better to ensure accountability of the regulator towards a Parliamentary Standing Committee instead of the Line Ministry, so that curbs on regulatory autonomy and independence can be avoided.

[39] (2010) 10 SCC 744, available at: http://judis.nic.in/supremecourt/imgs1.aspx?filename=36828. In this landmark judgement, the apex court's judicious oversight effectively demarcated the boundaries of exercise of power of both CCI and COMPAT and demystified ambiguities regarding the extent of such powers. For a summary, see Sobti and Chaudhary (2010).

[40] Civil Appeal No. 2480 of 2014, available at: https://barandbench.com/wp-content/uploads/2017/05/excel-crop-v-cci.pdf. The Supreme Court in this landmark judgement upheld the decision of COMPAT and held that the penalty for anticompetitive practices that were found to be in violation of the Competition Act should be on the basis of "relevant turnover" that relate to the particular product, and not on the total turnover on multi-product companies. This essentially moulded CCI's procedure of levying penalties and made the procedure more accountable and less arbitrary.

[41] See Section 52 of the Competition Act, 2002.

2.1.2.3 Adjudicatory and Administrative Powers A functional, flexible, and proactive design of competition policy institutions demands some level of autonomy and strength to administer competition law and encourage its adherence. These powers directly influence the scope of competition law enforcement and provide an agency with the ability to encourage the uptake of pro-competitive policies amongst lawmakers.

With the intent of institutionalising an effective competition regime, the Raghavan Committee proposed that the Commission should have two separate wings to administer investigative, prosecutorial (the Director General), and adjudicative functions (CCI).[42]

Vis-à-vis enforcement, the CCI has been vested with wide ranging powers; and as per Sections 3, 4, and 5 of the Act, it can look into: (1) prohibition of anti-competitive agreements; (2) prohibiting abuse of dominant position; and (3) regulation of combinations. The CCI can inquire into these matters upon information received from any individual, upon reference of the Central Government, or even suo moto.

However, when CCI thinks that there exists no prima facie case, it is still mandated under section 26(2) to pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government. This entails that the Commission cannot close the matter *prima facie* without giving a formal order to the Central Government.

CCI's power to pass orders penalising the entities is fairly wide. The regulator has exercised its discretion in the matter and has taken significant enforcement actions in the past, levying huge fines and penalties.[43]

The orders and assessment have to conform to principles of natural justice, and rightly so. CCI has practised appreciable autonomy, and the scope of governmental control is negligible in this regard. However, judicial oversight is quintessential, and there have been several legal challenges as well as orders from the appellate bodies.

Apart from the adjudicatory functions, the efficacy required from the investigative process has been ensured by the formation of its independent investigative arm: the office of the DG under Section 41, which has to investigate when directed by the Commission. The DG also has the same powers as that of an Indian Civil Court. However, evidence suggests that implementation remains a challenge, and the count of the number of cases that are pending before the DG have steadily increased over the years (Kumar and Ahmed 2017, p. 12). In addition to this, despite the requirement to follow due process of the law, there have been several instances where concerns have been raised with regard to the legality of the office's arbitrary investigative techniques.[44] This indicates that although the adjudicatory and administrative

[42] See the Report of the High Level Committee on Competition Policy and Law (p. 20, pp 6.1.5), available at https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf.

[43] See LiveMint, 'Seven large penalties imposed by CCI', available at http://www.livemint.com/Politics/28q9vf3FP7bU8JaIPpX0pL/Seven-large-penalties-imposed-by-CCI.html.

[44] See for instance, the issues that were raised in *In Re: Alleged cartelization by steel producers*. Case No.: RTPE No. 09 of 2008, available at http://www.cci.gov.in/sites/default/files/092008_0.pdf.

powers on paper might look strong, the scenario of implementation on the ground can play out quite differently.

2.1.2.4 Mechanism for Competition Advocacy in India As noted before, CCI's mandate extends beyond enforcement of competition law, and under Section 49 the Commission has been given the task of undertaking competition advocacy. It is important to acknowledge the role that tools such as competition impact assessment (CIA) play in the formulation of a country's economic policies. However, the fact that in India, it is optional for the Central Government to formulate policies in accordance with competition policy principles (the review of policies from a competition perspective has not been made mandatory under Section 49) weakens the mechanism of competition advocacy in India.

Although the Commission has undertaken several initiatives to spread general awareness with the aim of creating a competition culture in India and also partnered with like-minded institutions/civil society to conduct competition impact assessments (CIAs) of important pieces of legislation, the same is not binding on the government.[45]

Furthermore, the Commission is duty bound to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India and thereby acts as an economy wide regulator of competition.[46]

However, after India adopted liberalisation in the early 1990s, sectoral regulators in India were also given the prerogative to inter alia promote competition (Mehta and Mehta 2017). Due to the absence of clear lines between promoting competition and checking anti-competitive practices, several sectoral regulators have entered into the realm of tackling anti-competitive practices.

This has led to several turf wars between sectoral regulators and the CCI. This is a clear example of a design-oriented loophole that can be suitably plugged through inculcating mandatory provisions of consultation between sector regulators and the competition authority.

This also shows the disadvantages of not having a holistic competition policy in place; if implemented, this policy could go beyond the extant competition law and strengthen the existing design of India's competition agency.[47]

2.1.3 Challenges and Opportunities

2.1.3.1 The Legal Challenge of Inherent Design-Related Irregularities One of the major pending legal challenges in the context of the appropriate design of India's

[45] To see all initiatives of CCI, see http://www.cci.gov.in/glimpses-competition-advocacy-initiatives.

[46] See Section 18 of the Competition Act, 2002.

[47] There is already a draft National Competition Policy, 2011 (NCP, 2011) formulated by the Ministry of Corporate Affairs, Government of India, but it has not been adopted by the Cabinet. It is available at http://www.mca.gov.in/Ministry/pdf/Revised_Draft_National_Competition_Policy_2011_17nov2011.pdf.

premier competition institution (CCI) is its seemingly inherent inconsistency with the constitutional principles of separation of powers and judicial independence (Ramesh 2016, p. 286). But first, this discussion deserves a brief historical context. After the Supreme Court's landmark judgement in the case of *Brahm Dutt v. Union of India,*[48] which essentially gave the legislature an opportunity to fix the apparent unconstitutionality of the provisions that were related to the structure, powers, and functions of the CCI, there were several changes made to the erstwhile Act via the 2007 amendment (Ramesh 2016, p. 261).

The Court held that:

> If an expert body is to be created as submitted on behalf of the Union of India consistent with what is said to be the international practice, it might be appropriate for the respondents to consider the creation of two separate bodies, one with expertise that is advisory and regulatory and the other adjudicatory.

The legislature intended to separate the regulatory functions from the adjudicatory by inter alia creation of the appellate adjudicatory body—COMPAT—through the 2007 Amendment Act and the CCI was contemplated to be an 'expert body'. But, it has been observed that the requisite amendments that were aimed at changing the structure of CCI into a regulatory expert body were not enough and were essentially against the *dictum* of the *Brahm Dutt* judgement (Ramesh 2016, p. 277). Despite the amendments, CCI still functions essentially as an adjudicatory body, and this apparent irregularity of design has made CCI the subject matter of further legal dispute.[49] The same is further aggravated by the fact that the appointment of Members and Chairperson of CCI remain dependant on the Central Government while the institution imparts adjudicatory functions. One government official has also indicated that it is important for the Commission to act as a regulator and not as a tribunal or court.[50] In the same vein, the media has reported that a plan to amend the competition law is in the works and it might restrain the adjudicatory functions of the Commission, the intention behind which is to bring in a framework that ensures

[48] See *Brahm Dutt v. Union of India* (2005) 2 SCC 431. The essential challenge was on the basis that the Competition Commission envisaged by the Act was more of a judicial body having adjudicatory powers on questions of importance and legalistic in nature. In the background of the doctrine of separation of powers recognized by the Indian Constitution, the right to appoint the judicial members of the Commission should rest with the Chief Justice of India or his nominee and further the Chairman of the Commission had necessarily to be a retired Chief Justice or Judge of the Supreme Court or of the High Court, to be nominated by the Chief Justice of India or by a Committee presided over by the Chief Justice of India. In other words, the contention was that the Chairman of the Commission had to be a person connected with the judiciary who was picked for the job by the head of the judiciary and it should not be a bureaucrat or other person appointed by the executive without reference to the head of the judiciary (p. 3). Notably, the apex court gave the Central government an opportunity to fix this irregularity and held that "it would be appropriate to postpone a decision on the question after the amendments, if any, to the Act are carried out and without prejudice to the rights of the petitioner to approach this Court again with specific averments …" (p. 5).

[49] See *Mahindra and Mahindra Ltd. v. Competition Commission of India* (pending), WP (C) No. 6610 of 2014 (Del).

[50] See Injeti Srinivas, Secretary, Ministry of Corporate affairs addressing the audience at CCI Annual Lecture 2018, available at https://www.youtube.com/watch?v=Tva6EtzrD8Y&feature=youtu.be.

greater synergy between sector regulators, including the Reserve Bank of India, Securities and Exchange Board of India, Telecom Regulatory Authority of India and Insurance Regulatory and Development Authority, and the CCI.[51]

Be that as it may, this imbalance might have affected the efficacy of enforcement of competition law in India and might have been a contributing factor that encouraged the COMPAT to set aside CCI's orders due to *want for* procedural fairness and natural justice (Nathani and Nair 2017).

Despite this legal challenge, the Commission has been able to build its own niche in terms of exercising its adjudicatory and other powers. Thus, before any amendment is proposed to change this design related irregularity, a rigorous cost–benefit analysis ought to be conducted. The balance could perhaps be instilled through the below-mentioned recommendations.

2.1.3.2 Lack of Appetite for Competition-Friendly Policymaking The fact that competition review, mandatory consultations, and CIA have not been infused in the national economic policymaking processes indicates the general lack of governmental appetite/awareness towards competition policy. Remarkably, competition distortions emanate from policies that substantially distort market conditions and impede the growth of other regulators and public institutions.[52] Also, it increases the propensity of growing disharmony between sectoral regulators and the CCI, which eventually tends to increase policy uncertainty in the market, thereby distorting competition.

At the institutional level, addressing the distortions that are induced by government policies and statutes could be problematic due to several reasons: First, it is generally the case that the distortive component of the policy is accompanied by a corresponding justification or assumption.[53] These justifications are generally not a result of political exercise and lack economic rationale. Secondly, refuting the underlying rationale requires the support of economic evidence. When there is no comprehensive mechanism that is dedicated to the exercise of competition-friendly policy formulation across the economy, it becomes an extremely large task for the agency alone.

Furthermore, this lies much beyond the limited scope of the competition law of India and requires holistic institutional attention. Fortunately, there is a draft National Competition Policy of India that would address such challenges when implemented, which awaits approval from the Empowered Group of Ministers.[54]

[51] See the Financial Express, 'Competition Law: Regulatory conflicts to ease in redrafting', available at http://snip.ly/1oi9kg/https://www.financialexpress.com/india-news/competition-law-regulatory-conflicts-to-ease-in-redrafting/1174899/.

[52] See CUTS International (2013), 'Policy distortions hurt competition and growth in India-A CUTS Research Report', available at http://www.cuts-ccier.org/pdf/Policy_distortions_hurt_competition_and_growth_in_India-A_CUTS_Research_report.pdf.

[53] Ibid.

[54] Ibid.

2.1.3.3 Strengthening the Framework of Accountability[55]

The first opportunity to tackle the aforementioned challenges is to strengthen the current framework of administrative and judicial accountability.

Considering the crucial role that the CCI plays in promoting efficient and competitive markets across all sectors of the economy, the agency should be directly responsible for its administrative activities to the legislature: preferably through a Parliamentary Standing Committee. Parliamentary supervision has several benefits, as it negates the possibility of executive intervention (through the Line Ministry) and empowers the agency through imparting a strong sense of independence, responsibility, and accountability towards the public at large. It also makes it hard for vested interest groups effectively to put pressure on the market regulator. Therefore, replacing the Line-Ministry's control by Parliamentary supervision can be an efficiency-enhancing design adjustment.

Currently, the Act requires the Commission to prepare an annual report that gives an account of its activities and to forward that report to the Central Government. After this step, a copy of the report is laid out in both the Houses of the Parliament.

Ideally, the scenario should be that the Parliament should discuss the report of the Commission and such a discussion should be led by a Parliamentary Standing Committee. The Commission is in the best position to explain semantic issues, procedures, and the extent to which the objectives of the Act have been met or not directly to the Parliamentary Standing Committee, and the Line-Ministry's role can be annulled.

Vis-à-vis judicial accountability, in order to retain the same level of expertise that was offered by COMPAT, the NCLAT should ideally hire capacitated experts who work in the field of competition law and economics and ought to allocate significant resources to deal with competition issues. To ensure procedural fairness during investigations and adjudicatory actions, clear mandatory guidelines on the application of obscure provisions is required.

2.1.3.4 Allocation of Budget and Funding Through Legislative Process[56]

In consonance with the previous recommendation, it is suggested that the financial requirements of the competition agency should be communicated to and approved by the Parliamentary Standing Committee. The Commission should be consulted before the grant is approved, and CCI's budget should ideally be a charged expenditure on the Consolidated Fund of India instead of the Competition Fund (which is currently governed by the Central Government).

In addition to this, to avoid financial over-dependence, the Commission should be allowed to generate and spend resources through alternative means, such as fees,

[55] This recommendation in part concerns an expansion of previous work of the authors. It is based on the contribution that was submitted to the OECD for the Global Forum on Competition, 2016 on the theme of 'Independence of Competition Authorities - from Designs to Practices'. It can be retrieved from https://one.oecd.org/document/DAF/COMP/GF/WD(2016)62/en/pdf.

[56] This recommendation is an embodiment and extension of general suggestions that were put forth by Mehta (2013, p. 53).

tax surcharges, etc. The basic proposition is that the Central Government's power to grant funds should be shifted directly to the Parliamentary Standing Committee and the legislative process should govern the financial dependence (or independence) of the competition authority. This will allow the regulator to maintain distance from the Line Ministry and would ensure CCI's independence from possible micro-management of the Line Minister.

2.1.3.5 Ensure Structural Adherence to Constitutional Values and Devise an Appropriate Appointment Procedure The multifarious role played by the Commission and its underlying de-jure design has rendered it vulnerable to constitutional challenges. Safeguarding adherence to principles such as the separation of powers has been a constant challenge and needs to be fixed. This requires structural readjustments to India's competition law. An appropriate start could be to revisit the appointment procedure.

As the envisaged role of the CCI is that of an 'expert body' and it also exercises quasi-judicial functions, the selection process of its members should ideally reflect this balance and the process should aim at the appointment of a unique and balanced mixture of experts who reflect legal as well as economic acumen. Equal and proportional involvement of the executive and the judicial branch in the selection process could help in reaching a positive reconciliation.

To ensure this, the Chairperson and Members of the CCI may be appointed by the President of India on the recommendation of the Prime Minster. The Prime Minster can choose these names from a panel of two or three names that are empanelled by a Committee that is composed of the Chief Justice of India, the Chairperson of the Union Public Service Commission (UPSC), the Cabinet Secretary, the Chairperson of the competition authority, and an independent expert.[57]

Alternatively, the selection process as proposed by the 2012 Amendment also seems quite balanced.[58] Such an appointment procedure will go a long way in ensuring the independence of the Commission and simultaneously be a step forward *vis-à-vis* constitutional adherence, which would facilitate the agency's effective functioning.

2.2 Pakistan

2.2.1 Competition Policy and Law in Pakistan

It was in 2007 that competition law in its modern form was introduced in Pakistan via the Competition Ordinance 2007. This Ordinance eventually took the form of the formal Competition Act, 2010 after going through several legal and political hurdles (Sayyeda 2012). It replaced the Monopolies and Restrictive Trade Practices (Control

[57] This recommendation is an embodiment and extension of general suggestions which were put forth by Mehta (2013).

[58] For details, refer to discussion in Sect. 1.2.1.

and Prevention) Ordinance 1970 (MRTPO), whose focus was to tackle chiefly the concentration of wealth and monopoly outcomes in the market (Ali 2007).

A new competition law was necessary, considering the speed at which global and national economic environment was changing. The MRTPO, 1970 was rendered inadequate in terms of effectively addressing modern competition issues and meeting the expectations of consumers and producers at large.[59] This led to the establishment of a new competition law regime in Pakistan, initially under the Competition Ordinance, 2007, and subsequently under the Competition Act, 2010, which was inspired by the principles of the Treaty of Rome. It collated best practices taken from instruments, such as the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (UN SET 1980), and various OECD recommendations and best practices on competition law and policy (Ahmed 2017).

The Competition Act, 2010 embraced modern competition principles and signified the shift from an 'anti-monopoly' and 'registration' regime towards a robust economic approach of the promotion of a competitive and level playing field for entities. The law was envisaged as a necessary prerequisite to Pakistan's implicit policy of promoting sustainable economic development and improving the lives of the people through competition in the economy.[60]

The new Competition Act was enacted with the objective to ensure free competition in all spheres of commercial and economic activity, enhance economic efficiency and protect consumers from anti-competitive activities.[61] It also established the Competition Commission of Pakistan as the main enforcement agency and the Competition Appellate Tribunal as the appellate body, and also conferred competition appellate jurisdiction on the Supreme Court of Pakistan.

2.2.2 Design of Competition Policy Institution(s) in Pakistan

The establishment of the Competition Commission of Pakistan (CCP) and its initial stages of implementation were fraught with political and legal challenges in the background, and the manner in which the institution successfully tackled the same has made Pakistan's experience worth learning from.[62] Its progress over the years evidently depicts several challenges and has important lessons in store for other jurisdictions that are at a nascent stage of drafting or implementation of competition policy or law.[63]

To provide a brief background: The CCP has been established as per Section 12 of the Act, which states that the Commission "shall be a body corporate

[59] See more about the Competition Commission of Pakistan at http://www.cc.gov.pk/index.php?option=com_content&view=article&id=59&Itemid=103&lang=en.

[60] See the World Bank (2007), 'A Framework for a New Competition Policy and Law for Pakistan', Finance and Private Sector Development Unit and Department for International Development.

[61] See the Preamble of the Competition Act, 2010.

[62] See UNCTAD (2013), 'Voluntary Peer Review of Competition Law and Policy: Pakistan', UNCTAD/DITC/CLP/2013/14, 3.

[63] Ibid.

with perpetual succession and a common seal".[64] Its major mandate is to enforce the provisions of the Competition Act and initiate proceedings in case there are any contraventions.[65]

Apart from checking anti-competitive practices – such as abuse of dominance, anti-competitive agreements, and reviewing combinations—the Commission is also mandated to conduct competition advocacy for creation of a 'competition culture' within the country.[66] The following section provides a brief analysis of the institutional design from the perspective of CCP:

2.2.2.1 Independence *Structural Independence* While envisaging what the new competition regime of Pakistan would look like, it was observed that the institutional setup of the erstwhile 'Monopoly Control Authority' (MCA) needed to be revisited and changed.[67] The change was necessary because the MCA acted mainly as a government department and exercised a limited mandate (Ahmed, 2017).

Additionally, it had to face several challenges, such as a chronic shortfall in funding (allocations out of the federal budget), inadequacy of professional manpower, insufficiency of physical infrastructure, and a limited database regarding market/industry-related information—all of which collectively added to its institutional handicap (Ahmed 2017). Hence, while envisioning the framework of Pakistan's new competition regime, due attention was given to the prerequisite of having a professional and autonomous institution that could enforce the law effectively (Ahmed 2017).

The importance of structural independence was emphasised, and the government realised that an independent and efficacious agency with strict accountability safeguards would determine the success of effective implementation of Pakistan's competition policy and law.[68]

This perhaps led to the framing of a provision in the Act itself, which stated:

> Commission shall be administratively and functionally independent, and the Federal Government shall use its best efforts to promote, enhance and maintain the independence of the Commission.[69]

Ensuring functional or structural independence first of all demands a transparent and fair selection process. It has been widely acknowledged that transparent,

[64] See Section 12(2) of the Competition Act, 2010.
[65] See Section 28(a) of the Competition Act, 2010.
[66] See Section 12 of the Competition Act, 2010.
[67] See the World Bank (2007, p. 5), 'A Framework for a New Competition Policy and Law for Pakistan', Finance and Private Sector Development Unit and Department for International Development.
[68] See the World Bank (2007, p. 7), 'A Framework for a New Competition Policy and Law for Pakistan', Finance and Private Sector Development Unit and Department for International Development, available at http://documents.worldbank.org/curated/en/875361468283497835/Pakistan-A-framework-for-a-new-competition-policy-and-law.
[69] See Section 12(3) of the Competition Act, 2010.

objective and qualitative selection criteria can go a long way in tackling threats to institutional independence.[70]

Moreover, the design of the CCP is such that, although its general composition of five to seven members is statutorily mandated, the specific appointment and selection process remained subjective, until the Supreme Court judgement of *Muhammad Ashraf Tiwana* etc. *v. Pakistan* etc.[71] The Act provides that the members and subsequently the Chairman are appointed by the Federal Government.[72]

While the Competition Act and the Rules framed therein do not define the specific manner of selection, the aforementioned Supreme Court decision (passed in the matter of the appointment of the then-Chairman of the Securities and Exchange Commission) has given substantial clarity over the manner in which appointments are to be made. Earlier, three offices in Pakistan were responsible for the appointment of Commission Members; the Chairman of the Commission, the Minister for Finance, and the Prime Minister (Wilson 2011, p. 119).

Currently, the Federal Government advertises vacancies and follows a competitive recruitment process for members of the CCP,[73] and evidence shows that the competitive process of selection has already been implemented to recruit highly qualified members for the Commission.[74] An interesting exercise (which lies outside the scope of the current research) would be to compare the efficacy of this selection process with the Indian model (which statutorily provides for a 'Selection Committee' that is composed of representatives from the executive and judicial branch). At the outset, it seems that Pakistan's model is faster; but owing to the additional level of scrutiny provided by the Selection Committee, the Indian model appears more rigorous and relatively freer from arbitrary interference of the executive branch.

Another noticeable aspect of CCP's design is that it operates as a collegial body of Members, as opposed to other designs, which hold an individual (generally the Chairman) responsible for an agency.[75] As it can be seen from a simple reading of Section 14(2)[76]: The Members are regarded to be on equal footing, and the Chairman is *primus inter pares* (first among peers) (Wilson 2011, p. 116). Thus, the design promotes collective responsibility of the Members.

[70] See the Background Paper by the Secretariat for OECD Global Forum on Competition (2016, p. 11), 'Independence of Competition Authorities - From Designs to Practices', available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=daf/comp/gf(2016)5&doclanguage=en.

[71] See the Constitution Petition No. 59 of 2011 and CMAs Nos. 326 and 633 of 2012 and Crl. O. P. 94 of 2012 in Const. P. 59/2011, available at http://www.supremecourt.gov.pk/web/user_files/File/Const.P.59of2011dt-9-4-2013.pdf.

[72] See Section 14(2) of the Competition Act, 2010.

[73] For instance, see recent advertisement available at http://finance.gov.pk/jobs/adv_26022017.pdf.

[74] See notification by the CCP vis-à-vis appointment of two CCP members through a competitive process, available at http://www.cc.gov.pk/index.php?option=com_content&view=article&id=523&Itemid=137&lang=en.

[75] Unlike Pakistan, several jurisdictions— such as Canada and Norway—follow the non-collegial system and have an individual at the top of the management.

[76] Section 14(2), which states that, "The Members shall be appointed by the Federal Government and from amongst the Members of the Commission, the Federal Government shall appoint the Chairman."

However, the fact that the Federal Government as per Section 14(1) is empowered to change the numeric strength of the Commission (provided the Act is amended) and that the Act mandates that not more than two members of the Commission shall be employees of the Federal Government,[77] can distort independence, sustainability and efficacy of the Commission. In the presence of a selection procedure administered by the Federal Government, such provisions might enhance the probability of government influence in the appointment process as well as the functioning of the Commission.

Financial Independence Financially, the Commission is entirely dependent on the Competition Commission Fund (CCF), which consists of allocations and grants by the Federal Government, charges and fees levied by the Commission, foreign contributions, investment returns, and also a percentage of fees and charges levied by other regulatory agencies in Pakistan.[78]

Evidently, there are several routes through which funding can be garnered by the Commission, it is—*at least on paper*—not solely dependent on funds from the Federal Government, which is in tandem with the statutory objective of maintaining a financially autonomous institution.

However, the Commission's experience has shown that it has to depend predominantly on the government for funds; as a result, it has constantly faced financial constraints. Evidence suggests that the budget allocations that come from the Federal Government in the initial years remained fixed, and the non-payment of contributions from other regulators (3% of their fees and charges) has remained a disputed issue.[79]

Fortunately, there has been some progress on both fronts: The budget of the CCP has shown a gradual increase (5% from 2015–2016[80]), and the Securities and Exchange Commission of Pakistan has reportedly been making payments to the CCP since July 2015, and other regulators are expected to follow suit in 2018.

Nevertheless, due to the fact that majority of the funding comes from the government, the Commission's de facto autonomy remains a concern; as a result, the Commission has repeatedly had to implore the Federal Government alone to fulfil its budgetary needs, especially within the first 5 years of the Commission's functioning.[81]

[77] See Section 14(4), which states that, "Not more than two Members of the Commission shall be employees of the Federal Government".

[78] See Section 20 of the Competition Act, 2010.

[79] See UNCTAD (2013, p. 12), 'Voluntary Peer Review of Competition Law and Policy: Pakistan', UNCTAD/DITC/CLP/2013/14.

[80] See the Global Competition Review, 'Rating Enforcement 2017, Pakistan's Competition Commission', available at https://globalcompetitionreview.com/benchmarking/rating-enforcement-2017/1144843/pakistans-competition-commission.

[81] Notably, the phrase "Although the CCP is still operating under significant financial constraints," has found its way into two consecutive Annual Reports (2011 and 2012) and as per the Chairperson's remarks in 2010, "continuous fiscal constraints and struggle for financial autonomy which directly has impact on our survival as well as sustainability" depicts one of the greatest challenges that the Commis-

2.2.2.2 Accountability The most basic form of accountability—which finds its place in almost all competition policy designs across jurisdictions—is judicial accountability.[82] As per the design of the Competition Act of Pakistan, cases of contravention can be heard by one or more members of the Commission.[83] Further, an appeal can be made to the Appellate Bench (when an order is passed by any member or authorised officer of the Commission) or the Competition Appellate Tribunal (when an order is passed by two or more members), and subsequently the Supreme Court of Pakistan.[84]

However, it was only in 2015 that the Competition Appellate Tribunal (CAT) began to hear appeals against the Commission's orders.[85] Since then, the CAT has decided 18 cases: upholding the Commission's order in 13 cases, and in five instances ordering against. With a specialised appellate tribunal operational, parties have preferred to approach the CAT rather than the appellate bench in the Commission.

Concurrently, the CCP has also abandoned the practice of hearing cases and passing orders by single members, and the general practice is that orders are passed by two or more than two members. This has considerably streamlined the appellate procedure and provided positive reinforcement for Pakistan's competition enforcement strategy. It has also helped cure challenges *vis-à-vis* implementation of design which the Commission faced in its earlier days.

For instance, the discretion of intra-commission appeal (which, according to Wilson (2011, p. 123), appeared to be in contradiction to the collegiate system of the Commission) is seldom practised now. Implementation of the intra-communication appellate system defeated the purpose of collective responsibility and brought in rank differentiation in design. It unnecessarily complicated the process of decision making by introducing the element of confrontation rather than promoting internal consultation and debate.

There are other long-term benefits as well: The chief advantage of a functional and efficient judicial review process in the long-run is that it increases judicial certainty, upholds due process, and promotes the healthy growth of competition law jurisprudence. Plus, bearing in mind the unfortunate reality of increased pendency of lawsuits, the optimisation of the appellate process will help in easing the financial stress on the Commission as penalties imposed (but not paid by entities due to pending appeals) through the Commission's orders will hopefully be collected faster.

Footnote 81 (continued)
sion had to face in its initial years of operation. All annual reports are available at http://cc.gov.pk/index.php?option=com_content&view=article&id=254&Itemid=166&lang=en.

[82] It is pertinent to note that the concept of accountability is not limited to judicial accountability, but for the sake of uniform assessment it has been taken as an indicator. For a broader view on accountability, see (Kovacic and Winerman 2015, p. 2090).

[83] As per Section 41(3) of the Competition Act, 2010, in case of a split decision between members, the original decision would hold.

[84] See Section 43 of the Competition Act, 2010.

[85] See the Global Competition Review, 'Rating Enforcement 2017, Pakistan's Competition Commission', available at https://globalcompetitionreview.com/benchmarking/rating-enforcement-2017/1144843/pakistans-competition-commission.

In addition to judicial accountability, the Commission is financially accountable to the government, and it has to prepare an annual statement of accounts, which shall be audited by the Auditor General of Pakistan or an authorised nominee.[86]

Moreover, the Commission is also statutorily mandated to prepare an Annual Report about its activities—including enforcement actions and advocacy initiatives—which is to be submitted to the Federal Government, in addition to the auditor's report.[87] This report is then presented to both Houses of Parliament and published in the official Gazette.[88] As also highlighted above, increased dependence on the Federal Government alone can be detrimental to the independent and autonomous functioning of an agency. This is evident from CCP's Annual reports (2010–2012), which highlight that "*although the Commission is still operating under significant financial constraints, it has been operationally active, judiciously deploying limited resources as optimally as possible*."[89] A positive sign is that the Federal Government has taken note of the same and gradually increased the budget over the years.

2.2.2.3 Adjudicatory and Administrative Powers The functions and duties of the Commission were envisaged to be wide ranging, thereby demanding strong adjudicatory and administrative powers. The Commission plays the role of an investigator and adjudicator, as well as an advocacy institution.[90] Investigations can be initiated suo-moto, upon complaint that is filed by a private party, or upon information that is filed by the Federal Government. The Competition Act confers wide-ranging powers on the Commission for the purpose of proceeding or enquiring under the Act, and the CCP holds the same powers as vested in a civil court.[91]

In addition to this, to ensure effective enforcement of the law, the Commission can authorise its officers to enter and search premises subject to certain conditions.[92] It is also empowered to make its own regulations to carry out its functions under the Act.[93] The Commission has been quite pro-active in terms of enforcement and has issued a total of 96 orders, including the ones related to abuse of dominant position, prohibited agreements and deceptive market practices.[94]

Until 2015—during the absence of a functional appellate tribunal—the enforcement of competition law remained at a loss, and the judicial intervention of the courts hampered the growth of the competition regime of Pakistan. (Wilson 2011, p. 124) Several appeals remained pending in different High Courts and the Supreme

[86] See Section 21 of the Competition Act, 2010.
[87] See Section 22 of the Competition Act, 2010.
[88] See Section 22(2) of the Competition Act, 2010.
[89] All reports are available at http://cc.gov.pk/index.php?option=com_content&view=article&id=254&Itemid=166&lang=en.
[90] This is unlike its Indian counterpart, where a separate office of the Director General is established to conduct investigations.
[91] See Section 33 of the Competition Act, 2010.
[92] See Section 34 of the Competition Act, 2010.
[93] See Section 58 of the Competition Act, 2010.
[94] This includes orders by the Appellate Benches.

Court. This situation depicts the importance of implementation of actual designs and its possible impact on the efficacy and strength of adjudicatory powers that are exercised by an agency.

Data available on the CCP website also depicts that during the last 3 years the Commission has focused its enforcement efforts mainly to address consumer protection issues and has passed several orders that are related to deceptive marketing practices.[95] As a result, more than half of the total amount of fines that were levied by the CCP was a result of these efforts.[96] On the downside, seemingly prominent and exceedingly harmful anti-competitive practices such as abuse of dominance and collusion have managed to escape the radar of the Commission.[97] It has been suggested that this could be a consequence of sub-optimal design as the present powers of search-and-inspection vested with the CCP might be inadequate.[98]

This highlights the intricate interrelationship between implementation of actual designs (especially during the nascent stage) and the adjudicatory powers that are exercised by an agency and could be a learning point for other jurisdictions that are implementing competition law and policy.

2.2.2.4 Competition Advocacy Competition advocacy has been a statutory mandate for the Commission. Section 29 states, "the Commission shall promote competition through advocacy", which includes: creating general awareness; reviewing policy frameworks; holding open hearings on competition matters; and making all of its orders, decisions, and guidelines publically available.[99]

Competition advocacy has been a strong suit of CCP. Being aware of the challenges that developing nations face while developing a competition culture, the Commission has pursued the advocacy agenda quite vigorously and has developed several initiatives, such as the formulation of the Competition Consultative Group (CCG), which is essentially an informal 'think tank' and sounding board for the Commission.[100] Pakistan's focus on competition advocacy is a great example of a nascent jurisdiction giving equal importance to the creation of a competition culture in addition to focusing on enforcement actions.[101]

[95] All decisions and orders are available at http://www.cc.gov.pk/index.php?option=com_content&view=article&id=168&Itemid=106&lang=en.

[96] See the Global Competition Review, 'Rating Enforcement 2017, Pakistan's Competition Commission', available at https://globalcompetitionreview.com/benchmarking/rating-enforcement-2017/1144843/pakistans-competition-commission.

[97] Ibid.

[98] Ibid.

[99] See Section 29 of the Competition Act, 2010.

[100] The CCG meets quarterly to discuss matters related to competition and consists of several regulatory bodies such as The Oil and Gas Regulatory Authority (OGRA); Pakistan Electronic Media Regulatory Authority (PEMRA), National Energy & Power Regulatory Authority (NEPRA), Pakistan Telecommunications Authority (PTA), State Bank of Pakistan (SBP), Civil Aviation Authority (CAA), and the Securities and Exchange Commission of Pakistan (SECP). See 'Competition Commission of Pakistan, The Competition Consultative Group', available at http://www.cc.gov.pk/index.php?option=com_content&view=article&id=176&Itemid=50&lang=en.

[101] For all competition advocacy initiatives, see http://www.cc.gov.pk/index.php?option=com_content&view=article&id=64&Itemid=130&lang=en.

2.2.3 Challenges and Opportunities

2.2.3.1 Tackling Political Economy Challenges One key challenge—which is not exclusive to Pakistan's experience—is the complicated political economy situation.[102] Developing nations generally face a challenging political-economy atmosphere, which acts as an impediment to the growth and efficient functioning of institutions and also affects the investment potential of a jurisdiction.[103] The CCP has reportedly faced challenging political and economic times that are characterised by institutional friction, an unpromising law and order situation and generally low economic growth.[104] Despite such challenging circumstances, the CCP has made significant progress.

Regardless, there is still scope for the Federal Government to promote, support, and improve the political conditions in which the agency functions. Given that competition law institutions generally rely on the government for funding and that advocacy for policy reform requires the support of the government, the lack of political will towards the competition reforms agenda can significantly impede the development of competition policy and law.

Moreover, if the foundational economy of a nation is not healthy, providing impetus to competition-friendly markets becomes increasingly important and equally challenging for an institution. Hence, while designing competition institutions and framing their structure *vis-à-vis* its relationship with the government, a jurisdiction ought to be wary of the political-economy constraints. Moreover, they should simultaneously recognise the impact of over-reliance on the government and the impregnable role of political economy on the de facto structural independence of an institution.

2.2.3.2 Tackling Budgetary Constraints and Improving Institutional Coherence One of the key challenges that the CCP has faced since its inception is the lack of requisite financial support. This includes the lack of funding from other regulatory institutions, despite that funding's being statutorily provided for.[105] This indicates that generating momentum in favour of competition policy among governmental institutions is an additional task that a competition agency can expect to face—especially in emerging economies.

The CCP has also struggled to recover fines, as defendants take advantage of the sluggish court system, which has possibly exacerbated the situation. Overall, this indicates that there is a critical need to improve institutional coherence to promote

[102] See UNCTAD (2013, p. 13), 'Voluntary Peer Review of Competition Law and Policy: Pakistan', UNCTAD/DITC/CLP/2013/14.

[103] Validated through CUTS International's experience from various advocacy initiatives, see http://www.cuts-ccier.org/pdf/Reforming_Competition_Law_Regimes_in_the_Developing_World_through_the_7Up_Programme.pdf; http://www.cuts-ccier.org/7Up2/ and Sengupta and Dube (2008).

[104] See UNCTAD (2013, p. 13), 'Voluntary Peer Review of Competition Law and Policy: Pakistan', UNCTAD/DITC/CLP/2013/14.

[105] See The News International, 'Lack of funds major challenge for CCP', available at https://www.thenews.com.pk/archive/print/310496-lack-of-funds-major-challenge-for-ccp.

holistic competition reform. The fact that CCP has remained constrained by issues elsewhere in the jurisdictional setup[106] proves that a whole-systems approach towards competition policy needs to be adopted.

Meanwhile, one recommendation in this regard could be that the competition authority should concentrate its limited resources on specific priorities and implement its statutory powers accordingly (Lowe 2008). The inherent design of an institution calls for flexibility, alongside the desired factors of independence and accountability.

Possibly, the authority could be mandated to prioritise the sectors and markets that affect consumers and producers the most, and then concentrate its limited resources towards the same (Lowe 2008). Alongside this, revitalising other institutions and improving coherence can definitely improve the jurisdiction's capability of promoting holistic competition reform.

2.3 Bangladesh

2.3.1 A Budding Competition Regime

Bangladesh represents one of the most incipient competition law jurisdictions of the South Asian region. At the time that Bangladesh became independent in 1971, it inherited a broad economic policy of import substitution, which entailed protectionist measures in favour of its infant industries (Rahman and Mohammed 2007). Before the enactment of the competition law in Bangladesh, the market has predominantly witnessed a number of competition distortions, such as cartels; the arbitrary rise in prices of essential goods and services; abusive and exclusionary practices by dominant entities; etc. (Rahman and Mohammed 2007). This resulted in substantial harm to consumers and has endangered market efficiency.[107]

Notably, ever since independence, the economic functions in the country have been dominated by State-Owned Enterprises (SOEs). Generally, the SOEs report directly to line ministries, except in some cases, such as the Biman Bangladesh Airline. SOEs have complete control over rail transport, whereas private companies compete freely in air and road transportation.[108] The banking sector has also been dominated by state-owned banks but recently the private sector has begun to show some promise.

But owing to a slowdown in economic growth and sluggish exports, the country's economic policy opened up, and a more liberalised trade policy was adopted. In furtherance of this policy, Bangladesh enacted the Competition Act in June 2012 in a

[106] See the Global Competition Review, 'Rating Enforcement 2017, Pakistan's Competition Commission', available at https://globalcompetitionreview.com/benchmarking/rating-enforcement-2017/1144843/pakistans-competition-commission.

[107] See Vertex Chamber' s Law Note (2013), 'Comparing Apples and Oranges – the problem with the Competition Act 2012', available at http://www.vertexchambers.com/LawNotes/LawNote%201_February%202013.pdf.

[108] See US Department of State, '2015 Investment Climate Statement – Bangladesh', Bureau of Economic and Business Affairs, available at http://www.state.gov/e/eb/rls/othr/ics/2015/241475.htm#10.

bid to "prevent, control and eradicate collusion, monopoly and oligopoly, abuse of dominant position in the market and other anti-competitive practices".

The same year, the Government of Bangladesh established the 'Bangladesh Competition Commission (BCC)' under the aegis of the Ministry of Commerce (MoC). The BCC is designed to maintain healthy competition in the market. Its role is to ensure the enforcement and implementation of the Competition Act, which primarily prohibits anti-competitive activities, such as abuse of dominance and anti-competitive collusive practices.

After almost 4 years since its establishment, the BCC started to function officially just recently; and in the interim, competition-related issues were being handled by the World Trade Organisation (WTO) cell of the MoC.[109] It has been indicated that the vested interests of the bureaucracy and strong opposition from business conglomerates (which have been functioning in an anti-competitive manner) had been successful in delaying the implementation of the law.[110]

However, a ray of hope has enlightened the otherwise dark path to implementation of the competition regime. In April 2016, officials of the MoC of Bangladesh were successful in appointing the Chairperson and two Members of the Commission. But the Commission has yet to start its functions fully.

Broadly, the chief obstacles that currently face the BCC include: moderately poor logistical backing; an inadequate legal support system; and the lack of capacitated manpower, experts, and analysts, which are all important prerequisites for efficient functioning. In light of the fact that the Commission is in its budding phase, Bangladesh should revisit and learn from the experiences of similarly placed countries in South Asia, such as India and Pakistan. This will enable Bangladesh to achieve the benefits from the effective implementation of a competition regime in the country.

2.3.2 Design of the Commission

2.3.2.1 Independence *Structural Independence* As per the provisions of the Competition Act of Bangladesh, 2012, the Bangladesh Competition Commission (BCC) has been established as a statutory body.[111] As per the Act, the BCC would comprise a Chairperson and not more than four Members, who would be appointed by the government.[112] However, the act does not define the exact selection process, which possibly impacts the de jure independence of the Commission.

Moreover, considering the country's volatile political environment, dependence on the government in terms of appointment, allowances, and other factors that directly affect the Members could impact the Commission's autonomous functioning and could also influence the focus of its enforcement actions.[113]

[109] Ibid.

[110] See The Dhaka Tribune, 'No Commission, no enforcement', available at http://www.dhakatribune.com/business/2013/08/01/no-commission-no-enforcement/.

[111] See Section 5 of the Competition Act, 2012.

[112] See Section 7(2) of the Competition Act, 2012.

[113] See Bertelsmann Stiftung, 'BTI 2016-Bangladesh Country Report', available at https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2016/pdf/BTI_2016_Bangladesh.pdf.

The Commission has been established just recently (despite the passage of the law in 2012) and the Chairperson and members have been appointed by the government of Bangladesh. Regardless, it seems that at such a nascent stage, the Commission's actions remain constrained due to the absence of governmental clearances, and it has yet to adopt formal rules and regulations.[114]

Financial Independence Financially, the Commission's activities are dependent on a dedicated fund known as the Competition Fund.[115] Money credited to this fund includes government grants, fees, and any other sources that are not prohibited under the Act.[116] In addition to this, the government is also responsible for determining the status, salary, allowances, and other ancillary facilities of the Chairperson and Members.[117] However, the Act is flexible as to the manner in which the Commission allocates the funds. It stipulates that the Commission would be independent in respect of expense of money and the government should allocate a specific amount of money for expenses to the Commission for every financial year.

The Commission is *not* mandated to acquire permission from the government to spend the money in the approved and specified heads of its budget.[118] This would expectantly provide substantial scope for the Commission to prioritise on enforcement and advocacy actions as it deems fit. The BCC has been given wide powers that range across investigatory, adjudicative, and advisory functions,[119] and it must utilise this flexible provision with regard to the allocation of finances to prioritise its activities and focus on the optimisation of resources to get the maximum from enforcement and advocacy. Hence, until the agency's rules and regulations are in place and before BCC starts to function officially as an institution, it ought to think deeply about resource allocation and action prioritisation.

2.3.2.2 Accountability The design of the institution provides that the Chairperson and Members are accountable to the Government for the discharge of their duties.[120] Furthermore, the Act provides an interesting procedure for review and appeal: As per Section 29, a person who is aggrieved by an order of the Commission may make an application to the Commission itself for review; or to the Government for an appeal.[121] Moreover, it has been enshrined that the order passed by the Commission in review and the order passed by the Government in appeal, as the case may be, shall be deemed to be final.[122]

As mentioned earlier and seen in the case of India and Pakistan, it is crucial to have a robust appellate structure in place in order to check judicial arbitrariness of

[114] See The Financial Express, 'Competition Commission still in the works', available at https://thefinancialexpress.com.bd/editorial/competition-commission-still-in-the-works-1507994141.
[115] See Section 31 of the Competition Act, 2012.
[116] See Section 31(3) of the Competition Act, 2012.
[117] See Section 10 of the Competition Act, 2012.
[118] See Section 32 of the Competition Act, 2012.
[119] See Section 8 of the Competition Act, 2012.
[120] See Section 7(4) of the Competition Act, 2012.
[121] See Section 29 of the Competition Act, 2012.
[122] See Section 29(4) of the Competition Act, 2012.

the commission. In the case of Bangladesh, the current legal architecture that governs the procedure of review and appeal can turn out to be even more problematic because unlike India, the investigative, regulatory and adjudicatory powers have been all combined under the aegis of the BCC.

At this juncture, it is indispensable for stakeholders in Bangladesh to realise that the Competition Commission will essentially act as an economy-wide regulator and will levy penalties by playing a quasi-judicial function. To this end, a sub-optimal accountability procedure without proper judicial checks and balances can actually go against the essence of competition enforcement. This could also lead to a situation wherein the legality of the Act could be challenged on grounds of constitutional inconsistency (as seen in the case of India, where the constitutional validity of the Act was challenged on the grounds of separation of powers).

Hence, it would be beneficial to establish an independent appellate judicial body that can optimally guide and oversee the evolution of Bangladesh's competition jurisprudence. For regulatory and administrative functions, accountability of the Commission towards the government might practically work; but adjudicatory actions ought to be made subject to rigorous examination by a judicial body.

2.3.2.3 Adjudicatory and Administrative Powers The responsibilities, powers, and functions of the BCC relate to eradication of anti-competitive practices, which adversely affect competition in the market and encourage and maintain healthy competition.[123] As mentioned above, the BCC enjoys administrative, regulatory, and investigative powers, as well as adjudicative powers.

To this end, the Commission can exercise powers similar to that of civil courts of Bangladesh.[124] The BCC's actions seem to be wholly overseen by the government, but the investigative and adjudicative powers that are provided under the Act are identical to that of a civil court. As mentioned in the previous section, this can lead to a dichotomous situation.

Interestingly, it seems that in order to enforce the orders that are passed by the Commission and to prevent its contravention, the Act also stipulates criminal liability in the form of imprisonment for a term not exceeding 1 year (or fine not exceeding 100,000 taka for each day of non-compliance of its orders).[125]

Any offence of contravention of orders of the Commission would be heard by the Magistrate of First Class, upon complaint of the Commission.[126] Considering that the statutory qualifications of members do not require them to have a working

[123] See The Financial Express, 'Competition Commission to get going next month', available at http://www.thefinancialexpress-bd.com/2016/03/18/21904.

[124] See Section 8(3) of the Competition Act, 2012.

[125] See Section 24 of the Competition Act, 2012. Also, as the Commission exercises the powers of a civil court, section 8(7) states that, "If any person interferes in the exercise of the power of the Chairperson or any person authorized under sub-section (3) or intentionally fails to comply with the order made under the said sub-section shall be an offence under this Act and such person shall be punishable with imprisonment for a term not exceeding 3 (three) years or fine or with both.".

[126] See Section 25 of the Competition Act, 2012.

experience of the law, the imposition of criminal liability based on contravention of the Commission's orders seems to be too much of a stretch.

2.3.2.4 Mechanism for Competition Advocacy The provision that enshrines the duties and powers of the BCC seeks to give special weight to competition advocacy activities. This includes the powers to make rules, policy, instructions of notifications, or administrative directions that relate to competition, and to give advice and to assist the Government for implementation of the same.[127]

Furthermore, it is also empowered to conduct capacity building and awareness generation activities.[128] Special focus on competition advocacy in the Act itself is a welcome development; and given the current early-development phase of BCC, it would be highly beneficial for the agency to concentrate on advocacy efforts.

2.3.3 Opportunities for Bangladesh to Optimise and Localise Design

Regardless of the obscurity of legal provisions with regard to the structural architecture of the Competition Act, the BCC seems to be facing bigger issues with respect to its actual deployment and has only recently started to function.[129] At this point, considering that the implementation of the design of BCC is the chief contentious issue, several opportunities and action points are available.

With resources constrained and the immense need to build capacity, it could be beneficial for BCC to focus first on the advocacy component of its design. It is important to note that advocacy requires building internal capacities first, and BCC can take the assistance of civil society organisations (CSOs) that are based in Bangladesh or India, or even contact neighbouring competition authorities.

The Commission need not wholly rely on the government in this regard and needs to make extra efforts to gain momentum towards competition reforms. This would also help in building stakeholder (especially consumer) appetite and put pressure on government to take the competition agenda forward. Moreover, this would help the Commission to utilise its time wisely while it waits for the Government to approve the Rules and Regulations of its functioning.[130]

During this process, the Commission would also be able to identify core sectors, which are currently hurting the consumer and activate the collaborative part of the design so as to leverage support from other regulators or institutions of neighbouring countries. Our analysis in the previous sections has shown that over-reliance on the government for its budget can be counter-productive for the sustainability of the institution.

[127] See Section 8(d) of the Competition Act, 2012.

[128] See Sections 8(f)–(h) of the Competition Act, 2012.

[129] See The Financial Express, 'Competition Commission yet to be fully functional', available at http://www.thefinancialexpress-bd.com/2016/06/14/34049/Competition-Commission-yet-to-be-fully-functional.

[130] The draft rules have reportedly been framed and are currently awaiting the Bangladesh Governments approval.

At this stage, there is immense potential for the Commission to build an inherent system that avoids (as much as possible) the omnipresent gale of political actors and tries to build a support system for competition that is bottom-top in nature. This will also help in building a level of stakeholder collaboration and generating collective support for the competition reforms agenda and will help the Commission to gather momentum. Last of all, it would be beneficial for the Commission to learn from its neighbouring jurisdictions which had to go through similar conditions, and collaboration would be most important for the Commission's successful implementation.

3 Conclusion: Devising a Framework of Challenges and Opportunities

An objective analysis of the design of the three South Asian competition institutions reveals several challenges; they are legal, political and/or economic in nature.

Understandably, however, the statutory designs of competition agencies of the three countries are different than their de facto designs. This difference is mainly due to the dynamic interaction between two objectives of an optimal design: (a) the need to ensure the autonomous functioning of the institution on one hand; and (b) to ensure that the institution remains accountable and politically relevant on the other.[131]

From the discussion of the actual designs of the three institutions, it can be said that maintenance of this fine institutional balance is a challenging yet important task. India, Pakistan and Bangladesh have noticeably made several efforts to infuse and preserve this balance since the inception of their competition frameworks and continue to do so.

A brief comparison of the key features of the three jurisdictions' systems is provided in Table 1.

From the respective experiences of the three jurisdictions, we can hypothesise that this dynamic interplay between the policy objectives continues to play out differently depending upon the stage of development of the institution. For instance, while Bangladesh's competition regime remains at its nascent phase, the desire to keep the BCC under political control supersedes the statutory objective of making it independent and autonomous, which has evidently affected the very establishment of the institution.

Pakistan, however, has predominantly faced challenges *vis-à-vis* a lack of political will towards the competition reforms agenda. Although the CCP is fairly independent and autonomous, it has faced budgetary constraints in the recent past owing to the lack of attention from the side of the government as well as other regulators.[132] This indicates that the institutions have to strive constantly to maintain an

[131] Political relevance to an extent is important because it prevents the enforcement agency or policy institution from being completely isolated from its external environment, thereby ensuring that it does not become practically ineffectual. However, political relevance should not reinforce political influence or control.

[132] See Pakistan, Sect. 2.2.

Table 1 Comparison of key features

Comparative institutional design analysis		
India	Pakistan	Bangladesh
Indicator 1: Structural and financial independence		
Structurally, CCI appears fairly independent from governmental control Selection of Chairperson and members is prima facie objective and a Selection Committee has been statutorily provided for However, possibility of over-reach by Central Government cannot be ruled out, as there are several provisions that confer certain powers to the Central Government Financially, CCI is wholly dependent on the Central Government, and there is substantial scope to improve its autonomy	Principle of independence has been recognised under the Act The selection process has evolved with time and has become fairly objective and competitive Members are collectively responsible and are regarded as equals. The Chairman is first among peers Financially, the CCP is fairly autonomous on paper, and it is not solely dependent on funds from the Federal Government. However, evidence on the ground indicates that the Commission remains financially constrained	Structurally, the BCC has been established as a statutory body but in order to discharge the statutory functions, it remains highly dependent (indirectly) on the government (both in terms of appointments as well as financially) The Act does not define the exact selection process of the Chairperson and the members and simply states that appointment will be done by the government. This evidently impacts the de jure independence of the Commission Financially, the BCC is fairly autonomous to the extent that it is free to allocate its resources in a manner that it deems fit However, there is an overarching sense of governmental supervision and control throughout the Act, which can in the long run impede the financial and structural independence of the BCC. The Commission expects that in course of time, the government will take necessary steps to make the law more effective through necessary amendments

Table 1 (continued)

Comparative institutional design analysis		
India	Pakistan	Bangladesh
Indicator 2: Accountability		
Judicial accountability has considerably improved over the years. First appeal lies with the NCLAT (earlier, appeals were heard by COMPAT) and the second lies with Supreme Court Appellate bodies have instilled and protected integral principles of natural justice and procedural fairness through various orders With the winding up of COMPAT and transfer of all present and upcoming appeals to NCLAT, the importance of maintaining the quality of judicial scrutiny has become more important	The structured manner of appeal makes the Commission prima facie fairly accountable for its enforcement actions The Act provides for three levels of appeal: intra-commission appeal; Competition Appellate Tribunal (CAT); and then to the Supreme Court. Intra-commission appeal is now a relic of the past, and appeals usually go straight to the CAT The CAT started its functions in 2015, thereby streamlining the appellate process The Commission is financially accountable to the government and has faced consistent financial constraints in the past. Commission's *de facto* autonomy remains a concern	The accountability architecture is sub-optimal The BCC has been given wide-ranging powers (including adjudicative as well as investigative), but the appellate structure allows the aggrieved party to file for review (with the Commission itself) or to file an appeal with the government. This indicates a sub-optimal judicial review mechanism, and the orders of the government or commission are deemed to be final Financially, the BCC is accountable to the government

Table 1 (continued)

Comparative institutional design analysis		
India	Pakistan	Bangladesh
Indicator 3: Adjudicatory and administrative powers		
Adjudicative and investigative responsibilities have been separated under the Act. CCI is empowered with wide-ranging powers to examine anti-competitive agreements and abuse of dominance, and it also regulates combinations. The office of DG investigates when directed by the CCI CCI plays an important quasi-judicial role as it enforces the law and tackles contraventions of the Act. It simultaneously acts as a regulatory body which has essentially been set-up by the executive. However, this has put a question mark over the constitutional validity of Indian Competition Act and has raised issues regarding its adherence to the principle of separation of powers Implementation of DGs role as the chief investigator has been challenging, and cases remain pending for long durations. Concerns regarding adherence to due process of the law have also been raised against the office. Collection of fines has also remained an issue	Adjudicative and investigative responsibilities are combined. CCP investigates and adjudicates, as well as acts as an advocacy agency The Act confers wide ranging powers to CCP for the purpose of proceeding or enquiring under the Act and it holds the same powers as vested in a civil court The CCP has exercised its powers judiciously, despite financial constraints. However, owing to design related challenges such as institutional incoherence and lack of adequate enforcement tools, seemingly prominent and exceedingly harmful anti-competitive practices such as abuse of dominance and collusion have managed to escape the radar of the commission. The CCP has also struggled to recover fines	The BCC enjoys administrative, regulatory, and investigative power, as well as adjudicative powers to check contraventions of the Act. To this end, the Commission can exercise powers similar to those of the civil courts of Bangladesh Although the powers have been equated to those of a civil court, a concurrent accountability mechanism to ensure that due process of the law is followed is absent Any contravention of the orders of the Commission can incur criminal liability (after trial by the Magistrate of First Class) Considering that the law does not mandate the officials to have a working experience of the law, imposition of criminal liability based on the Commission's orders seems unwarranted

Table 1 (continued)

Comparative institutional design analysis		
India	Pakistan	Bangladesh
Indicator 4: Mechanism for competition advocacy		
Mechanism of competition advocacy has been enshrined under the act. It is mandatory for the CCI to create awareness and impart training about competition issues. CCI has pro-actively undertaken several important steps and initiatives in this regard CCI is also empowered to advise the Central Government to frame or revisit policies, but the Government is not bound by the recommendations of the CCI Lack of coherence between sectoral regulators and the CCI Need to have a mechanism that mandates collaboration and consultation between CCI, the Central Government and sectoral regulators	Competition advocacy has been a statutory mandate for the Commission and has been utilised quite effectively by the CCP Advocacy initiatives such as the Competition Consultative Group have enhanced collaboration between the Commission and other sectoral regulators	Competition advocacy has been given special significance. Although the word 'advocacy' does not feature in the Act, Sects. 8 (g) and 8 (h) of the law clearly catch the essence of advocacy activities, by empowering the BCC to develop mass awareness by conducting research and undertaking capacity building activities that relate to competition This can act as a good starting point for the Commission and can help the Commission to utilise its resources optimally

optimal level of design-balance once they are established and have exited the initial stages of implementation.

Furthermore, India's experience shows that CCI is currently facing challenges, which are predominantly legalistic in nature and should aim at strengthening the independence and autonomy of the institution.[133] Political relevance does not seem to be a major issue in India, however, with issues surrounding natural justice and constitutionality of adjudicatory design cropping up; ensuring the institution's *de jure* as well as de facto independence has been perplexing.

At the outset, several similarities are evident in the design of all three frameworks, and the enforcement agencies have also faced or are currently facing analogous political-economy challenges. Based on this understanding, there is evident room to pursue institutionally salutary exercises that encourage inter-commission collaboration, cross-learning, knowledge-sharing, and cooperation, through formal or informal mechanisms.

This will in itself be a challenging task (bearing in mind the political baggage of the past), and framing the contours of the same would require equal, if not greater initiative from the respective governments. Notwithstanding the inherent political obstacles, such an exercise is bound to strengthen the respective institutional frameworks of the three jurisdictions and might assist the institutions collectively to design novel solutions to address common challenges.

Nevertheless, diverse challenges at different levels of development of an institution have several lessons in store for other emerging jurisdictions that seek to frame an optimal design for implementation of competition policy or law. As per the analyses above, these have been divided into the following three stages.[134]

3.1 Stage 1: Nascent

The initial stages of implementing statutory design of a competition enforcement agency are generally ridden with political-economy challenges. This is evident from Bangladesh's experience. The BCC has been statutorily established since 2012 but has only recently started to operate officially.

The legality of the appellate procedure as laid down in the Competition Act of Bangladesh also appears debatable. Evidence from India and Pakistan shows that design-related irregularities, such as possible constitutional inconsistency, if not checked in the very beginning, can make the institutions susceptible to legal challenges.

This indicates that while the legislature initially envisages the design of a competition authority, it ought to be cautious of the forthcoming and immediate political hurdles that might come in the way of effective functioning of the institution

[133] See India, Sect. 2.1.

[134] Stages have *not* been designed to portray the level of advancement of the competition agencies of India, Pakistan, or Bangladesh. It is a mere simplification derived from the general nature of challenges that the institutions have faced since their inception.

and also be wary of long-term legal challenges that emanate from design related irregularities.

To ensure that the initial legislative process is itself objective and unbiased, an external expert agency could be assigned the role of recommending an optimal and localised design.[135] There is also scope to explore collaborations with neighbouring agencies if possible.

Furthermore, considering the pervasiveness of economic challenges in emerging jurisdictions, the institutional design should ideally allow the flexibility for an agency to focus on advocacy initiatives and establish external collaborations before diving into enforcement actions. This would help build internal capacities of the institution as well as aid in building awareness amongst relevant stakeholders.

Furthermore, the institutional framework has to be designed keeping in mind that legal challenges *vis-à-vis* independence or accountability might eventually occur, but political economy challenges will precede the same. The central governments have a crucial role to play during this phase and must ensure the stability of the institutional setup. Alternatively, jurisdictions can also identify individual champions who can lead institutional progress and help generate initial momentum towards competition reform.

This stage has been shown in Fig. 3.

3.2 Stage 2: Intermediate

After a competition institution has been designed and has subsequently begun to implement the law or policy, it starts to face a unique set of unforeseen challenges. These have been derived from the experience of Pakistan, where despite the fairly strong *de jure* design, the CCP has faced hurdles that are related to budgetary allocations and de facto structural independence.[136]

The fact that the Commission's design is such that it relies mainly on funding from the Federal government and other regulators but has consistently faced issues in accruing the same should make emerging jurisdictions cautious about over-reliance on government budgets—especially if the country is facing political instability. It also supports a 'whole-systems' approach and indicates the importance of institutional coherence. The manner in which the CCP has managed to overcome these challenges is especially worth noting.

[135] For example, the Indian government commissioned a High Level Committee on Competition Policy and Law—the Raghavan Committee—to recommend changes to the MRTP Act. See the full report at https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf; Similarly, Pakistan commissioned the World Bank to put forth recommendations, full report available at http://documents.worldbank.org/curated/en/875361468283497835/Pakistan-A-framework-for-a-new-competition-policy-and-law.

[136] See Pakistan, Sect. 2.2.

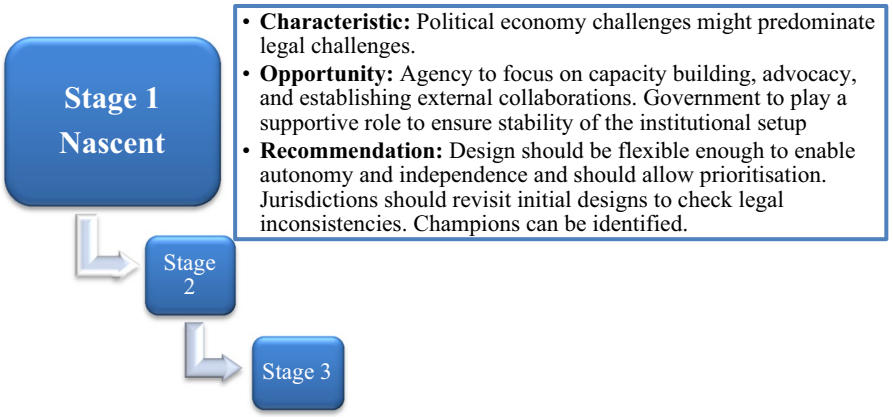

Fig. 3 Stage 1—nascent

Further, from Pakistan's experience, it should also be recognised that the structure of judicial review or appellate procedure that an enforcement agency is made subject to, should be simple and efficient.[137]

Efficient appellate procedures help enforcement institutions to collect penalty amounts faster and simultaneously keep accountability intact. As the institutions should expect to face a mixture of legal and political challenges, it would be beneficial for jurisdictions to make the relevant statutory or practice-related design readjustments. This stage has been depicted in Fig. 4.

3.3 Stage 3: Fairly Advanced

As competition agencies begin to gain experience and build their capacities, they start to become increasingly relevant to the economic and political landscape of a jurisdiction. Stakeholder awareness about competition policy and law tends to increase, and the initially sluggish movement towards a competition culture starts to gain momentum. However, there are several legal challenges that might arise at this fairly advanced stage (see Fig. 5) and might go on to test the design of the institution.

India's experience in this regard is relevant: Alongside the prominence of disputes with regard to the constitutionality of the Competition Act and relevant Amendments that were required to the law, it seems that there are still some statutory loopholes, which might need fixing.[138] The constitutionality of Pakistan's Competition Act also remains open to debate and raises similar issues.[139] The nature of

[137] Ibid.

[138] See India, Sect. 2.1.

[139] See the Global Competition Review, 'Rating Enforcement 2017, Pakistan's Competition Commission', available at https://globalcompetitionreview.com/benchmarking/rating-enforcement-2017/1144843/pakistans-competition-commission.

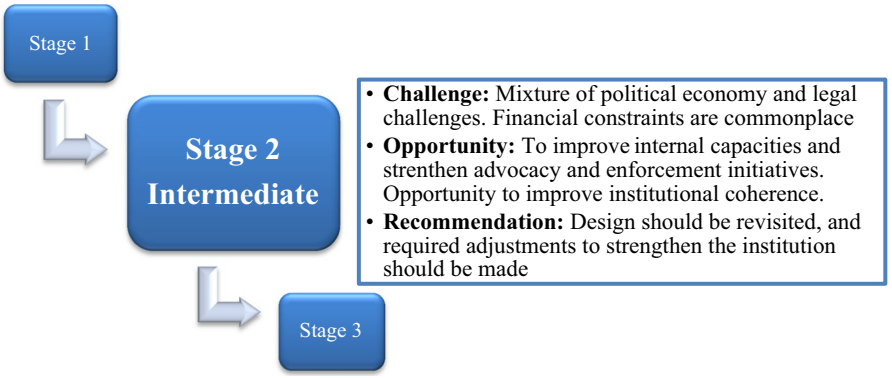

Fig. 4 Stage 2—intermediate

Fig. 5 Stage 3—Fairly advanced

Bangladesh's appellate procedure might raise similar issues. Moreover, the momentum towards generating a 'competition culture' is significantly slowed if a jurisdiction lacks a robust and encompassing competition policy.

At this stage, there is also room to go beyond the scope of enforcement activities and also promote economic reform through a holistic competition policy approach. While pursuing such an endeavour, tensions with sectoral regulators might also arise and need to be checked. Although the CCI is quite pro-active in terms of tackling anti-competitive practices and regulating combinations, distortions to competition that emanate from policies still remain a huge concern.

This requires the undivided attention of an independent competition policy institution, which is designed to check policy-led distortions to competition. Hence, jurisdictions at this stage would be required to revisit their existing actual designs of competition enforcement agencies and would have to consider coherent solutions to policy distortions to competition.

As a recommendation, an independent institution that could cure policy distortions to competition can be designed alongside the competition enforcement agency. Considering that the amplitude of competition policy is wider than competition law, an independent institution that is designed to check policy distortions could decrease the burden on the law enforcement agency (as it would focus on adjudicating anti-competitive market practices and regulating combinations).

If a jurisdiction faces capacity and financial constraints and cannot frame two different institutions, it is utmost important that the design mandates that regulators and the competition institution should collaborate, cooperate, and coordinate in order to tackle policy distortions.

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