



A SUI GENERIS
COMPETITION LAW
FRAMEWORK FOR
SRI LANKA
BASED ON THE DEVELOPMENT DIMENSION

Authored by

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Introduction

The absence of an effective competition law framework in Sri Lanka is more than an opportunity for policymakers to discuss academic proposals; it has real world impacts on citizens. For example, Sri Lankans share a common frustration over the unreliability of the internet services they receive. For the telecommunication sector of Sri Lanka, customer care is an afterthought, and service promises often turn out to be little more than marketing gimmicks. Part of the reason for this state of affairs is the current lack of effective competition in the telecommunication sector which leaves consumers vulnerable to the whims of a few dominant players. The concentrated market breeds complacency among service providers, resulting in subpar service, leaving consumers frustrated and businesses with lowered productivity. Therefore, a robust competition framework is not just an academic concern. It is a pressing reality unconsidered by the general public, due to their unawareness that poor service quality stems from the absence of a competitive market. Instead they view it as an isolated issue rather than a regulatory gap.

This paper explores the current state of the competition law framework in Sri Lanka and the urgent need for a clear and comprehensive competition law to address market failure, protect consumers and improve regulation. Currently, Sri Lanka does not have a comprehensive competition law. Instead, various laws relating to competition are spread across many statutes and sector-specific legislation, creating a complex and inconsistent regulatory system. Indeed, a recent study by Japan concerning anti-monopoly in Sri Lanka found provisions scattered across 37 laws (EconomyNext, 2024).

The paper begins by examining why Sri Lanka, or any developing country, urgently requires a cohesive competition framework. Delving into the economic and regulatory weaknesses created by the absence of a comprehensive competition law, the paper portrays how these gaps hinder the country's ability to prevent market abuses, enforce consumer rights and support healthy business growth. Thereafter, the paper traces the history of competition-related legislation in Sri Lanka. This provides context for the current framework's evolution and its limitations. The analysis then highlights the various deficiencies within the existing laws and the main takeaways that can be utilised in the development of a new competition law framework.

Building upon this assessment, the paper proposes essential recommendations for the development of a comprehensive competition law that has the ability to integrate and address the dispersed provisions within a single framework. Having examined successful international models, the recommendations advocate for policy change that can empower regulatory bodies with the authority to enforce fair competition and prevent consistent market abuses.

These recommendations are tailored for Sri Lanka. Having considered the country's economic context, the recommendations seek to create fair competition and protect consumers.

Literature Review

The literature on competition law concerning developing countries highlight the need to adopt legal frameworks that are capable of addressing unique economic and social challenges. The emerging consensus emphasises that traditional competition policies, that are inclined to prioritise market efficiency, generally overlook critical factors predominantly observed amongst developing countries, including structural inequalities, limited consumer choices and economic informality (Roberts, 2004).

Financial constraints, limited access to market information, and high barriers to entry due to significant startup costs and expensive technology are amongst the structural obstacles commonly faced by developing countries. However, their challenges are not limited to the above factors and their unique challenges concerning economic development, culture and political context, iterates the crucial need for tailored competition law frameworks and policies (Cheng, 2020). This perspective has been reinforced by the argument that national competition law must reflect developmental dimensions, making a one-size-fits-all approach impractical (Adhikari & Knight-John, 2004).

While the positive effects of stringent competition laws are more pronounced (Xede et al., 2022), the rigidity with which a competition law framework ought to be implemented must be carefully considered by developing countries (Paasman, 1999, 48). Whether a nation opts for a strict competition law framework that emphasises market efficiency depends on the economic conditions, developmental goals and socio-political priorities. Rigid adherence may suit some economies but may hinder progress in others, especially in those where a certain amount of flexibility is needed to address structural inequalities or promote inclusive growth. The ideal

balance of enforcement and adaptability in its competition policies must be assessed by each country (Trade and Development Board - UNCTAD, 2008).

Foundational research suggests that policymakers should intervene in economic activity or regulate the private sector only in accordance with specified criteria or procedures along with institutional arrangements which minimise rent-seeking (Lachmann, 1999). But in Sri Lanka balancing state regulation with market freedoms despite the liberalisation of the economy has become extremely challenging. While Sri Lanka's 1977 economic reforms were intended to stimulate investment and growth, inadequate regulatory frameworks and persistent policy inconsistencies have impeded sustained progress (Knight-John, 2002). This oversight has become evident in the inconsistent application of competition policy and legal frameworks, which has led to diminished market competitiveness and fostered rent-seeking behaviour.

The existing literature offers valuable insights into Sri Lanka's competition law and regulatory framework and analyses of historical legal structures. However, a gap exists in the literature that takes into consideration existing socio-economic and political realities of Sri Lanka to provide recommendations. To address these gaps, this paper will explore the main challenges facing Sri Lanka's competition law and policy framework, identify ways to strengthen competition enforcement, examine socio-economic and political factors that are crucial in developing a context-sensitive competition framework, and investigate necessary institutional reforms. In doing so, the paper aims to align competition policy with Sri Lanka's inclusive development goals drawing lessons from comparative jurisdictions to support equitable economic growth.

Research Methodology

To further explore the insights derived from the literature and address the unique challenges associated with competition law for Sri Lanka, this paper adopts a qualitative research methodology. Primary data was gathered through key person interviews with relevant stakeholders, including legal experts and policymakers to understand their perspective on Sri Lanka's competition law framework. Given the sensitive nature of their insights and professional positions, the interviews were conducted with their consent and a commitment to maintaining anonymity. The interview focused on historical developments concerning the competition framework in Sri Lanka, the impact of socioeconomic inequalities on market

competitiveness, and the institutional structure required to foster fair competition (please refer Annex 1 for the interview questionnaire).

Secondary data was gathered through the analysis of documents, especially reports from government agencies, case studies from comparative jurisdictions, intergovernmental discussions and academic sources on competition policy in developing economies. The dual-method approach allowed for triangulation, enabling cross-referencing of insights obtained from interviews with established academic findings and policy documentation. With the integration of these data sources, the paper aims to provide contextually relevant recommendations that address Sri Lanka's specific economic, social and political circumstances while drawing from the best practices in competition law from other developing countries.

While the qualitative research approach yielded valuable insights, certain limitation must be acknowledged. Since former competition legislation stands repealed for nearly two decades, accessing knowledgeable stakeholders familiar with its historical context was extremely challenging. Additionally, sensitive topics, such as potential political and corporate influence on the adoption of a competition framework, could not be thoroughly explored due to ethical considerations and potential risks to interviewees. Additionally, accessing significant literature was hindered by prohibitive costs and paywalls, limiting the scope of the literature review. Despite these challenges, the data gathered provides a strong foundation for addressing the research objectives.

Background

Overview of Sri Lanka's Economic Liberalisation

Sri Lanka initiated an extensive liberalisation of the economy in 1977, the first among its South Asian counterparts, accompanied by a strong surge in investment, doubling investments to 30% of Gross Domestic Product (GDP) within a course of three years (Herring, 1987, 326). However, irrespective of these developments, the public sector has continued to expand and retain a central role in the Sri Lankan economy to this day.

The policy shift in the developing world towards market mechanisms during this period required the State to be both a facilitator and regulator. Thus, the process of liberalisation and

privatisation was generally accompanied by a competition policy and rules-based regulatory systems to address distributional concerns.

A Competition Law or Anti-Trust Law seeks to promote and maintain market competition by regulating anti-competitive practices carried out by companies thereby facilitating competition between competing companies within a market. With a universal goal of prohibiting, supervising and regulating any activity which would restrict free trade and competition between businesses, the fundamental premise of this law is the protection of consumer interests and ensuring equal opportunity to compete in the market (Chandrasekera, 2019, 1).

Sri Lanka sought to liberalise the economy, by putting an end to the policy of consumer protection through consumer subsidies and price control (International Monetary Fund, 1996), and to follow a policy of promoting competition. However, the Fair Trading Commission Act, No. 1 of 1987 was enacted, almost a decade after liberalisation, to generally serve as the first legislation to deal with the control of monopolies, mergers and anti-competitive practices. The FTCA was repealed in 2003 and replaced by the Consumer Affairs Authority Act. Sector-specific legislation for regulating telecommunications, passenger bus transport, the securities market, banks and insurance companies were also being brought in later (Chandrasekera, 2019, 2). Nevertheless, while these formal institutional and legal structures exist, distortionary state intervention and bureaucratic micro-management by the State are not uncommon (Knight-John, 2002, 2), raising concerns regarding the flaws of the institutional and legal framework.

Policy Setting in Sri Lanka

Empowered by the Constitution of Sri Lanka and directed through the Directive Principles of State Policy specified therein, public policy in Sri Lanka remains the joint responsibility of the executive and the legislative branches. The Directive Principles explicitly state the establishment of a just social order where the means of production, distribution, and exchange are not concentrated and centralised in the State or in the hands of a privileged few but are dispersed among and owned by all the people of Sri Lanka. Additionally, the State is tasked with eliminating economic and social privilege, disparity, and the exploitation of man by man or by the State.

However, these fundamentals of good governance have been rarely adhered to. The checks and balances between the executive and the legislation are constantly undermined by short-term partisan politics. With the aim of winning, parties in power implement *ad hoc* policies

reflecting narrow, short-term political interests in every electoral cycle. A prime example of this is the Anti-Dumping and Countervailing Duties Act, enacted in 2018, but with no regulations implemented by the Minister for six years, rendering the Act ineffective.

Despite successive governments since the 1980s making explicit policy statements defining state-market relations, intending the State to assume the role of facilitator and regulator and the private sector to be the growth engine, the State still has what can be characterised as an ‘inefficiently excessive’ presence in the economy (Knight-John, 2002, 3). This presence has led these successive governments to be influenced by the opinions and objections of trade unions, public sector employees and the misinformed public in policy development, resulting in significant and frequent policy inconsistencies between governments. Additionally, the absence of cohesive national policies has left the economy increasingly vulnerable to inflation and pressures on the external reserves due to weak macroeconomic management. Though, fiscal and external current account deficits have declined, there has been no commensurate improvement in the overall balance due to diminished capital inflows, increasing pressure on external reserves and domestic budgetary financing. A culmination of these issues were seen in the economic crisis of 2022.

The unsustainable and ever-expanding budget deficit which reached, 10.9 percent and the signing of a Stand-By Arrangement with the IMF in 2001, with attached conditionalities on structural reforms contributed to a more concerted policy effort to embrace Public-Private Partnerships (PPP) through a range of modalities. Viewed by policymakers as a means of developing vital infrastructure, the most prominent examples of PPPs include Sri Lanka Telecom Ltd., South Asia Gateway Terminal, Air Lanka, and Colombo Gas Company. However, while these reformation processes were ongoing, the government made a fundamental error by not paying sufficient attention to the need to build effective competition policy and regulatory systems to support the reform process. Though some PPPs were successful, the absence of a competition framework, compounded with policy inconsistency led to the failure of many projects, gradually increasing liabilities and placing a sustained financial burden on the general public (Verite Research, 2021).¹

¹ It is worth noting that a spat between the government and Sri Lankan Airlines led to its renationalisation, which has since proven detrimental and anti-competitive. This decision disrupted the airline's successful trajectory under Emirates management, leading to a series of losses and undermining the intended benefits of privatisation and competition. As a result, every Sri Lankan now owes a considerable amount to the national carrier, further burdening the public with the financial consequences of the airline's mismanagement. According to financial statements published in 2020, the company had a negative net asset value of LKR 262 billion.

This oversight underscores broader issues often associated with efforts of privatisation. It has been argued that privatisation of state assets offers only a one-off opportunity for rent extraction to those who control the state; once privatised, that opportunity disappears making the one-time ‘loss’ worthwhile as a more effective industry emerges. However, to the contrary, when privatising a public utility that was a State monopoly, the buyer of the incumbent monopoly has an incentive to avoid pro-competitive regulations. The regulatory structure and the composition of the regulatory body itself becomes a critical component to the evolution of competition in the industry. The regulatory body can either aggressively pursue pro-competitive policies or entrench the market power of the new private firm. If individuals who use their political power to profit from privatisation and extract rent are also able to control the composition and mandate of the regulatory body, there is a double dividend from the process. Followed by anti-competitive regulations, the privatisation would be more privately profitable for such persons.

This provides a reasonable explanation as to why a government that apparently committed to radical market-friendly policies, might have shifted from pro-competition to anti-competition stances in privatised industries. A hold on the levers of regulatory processes ensure that rent extraction can be consistently maintained, and the policy shifts in the telecommunication sector of Sri Lanka is rather consistent with such interpretation and logic (Jayasuriya & Knight-John, 2002). Thus, privatisation initiatives have failed to deliver increased competition on many occasions as state monopolies were replaced by private sector monopolies, often motivated by short-term revenue-raising (International Financial Corporation, 2022).

The Need for a Competition Framework to harness Economic Growth in Developing Economies

Under the continued inevitability of the globalising economy, effective regulation of competition is pivotal to foster economic growth and equitable market participation. As economies, particularly developing ones, strive to integrate into the global market through trade agreements and by managing the dynamics between State-Owned Enterprises (SOEs) and Small and Medium Enterprises (SMEs), the need for a robust competition law and policy has become increasingly evident.

Market Failure

When the allocation of goods and services through market forces is inefficient, leading to a net social welfare loss, it creates market failure. In the absence of a competition law monopolies and oligopolies can dominate markets, by manipulating prices, limiting supplies and stifling innovation to maximise their profit. Given that the markets are much smaller and less competitive in developing countries, the problem turns severe for the dominance of a few firms can significantly impact the cost of living and the quality of goods and services

Weak competition laws further increase the possibility of anti-competitive practices like cartels, price fixing, and market division to flourish, harming consumers by restricting choices and driving up prices, leading to inefficiency and economic stagnation (Cseres, 2005, 153).

Competition is a key driver of innovation, and firms in competitive markets constantly strive for their products and services to stay ahead. In the core of his primary thesis, Adam Smith argued that through free trade and opening the markets up to domestic and foreign competition, people's natural self-interest would promote greater prosperity than stringent government regulations (Boyle, 2024). However, without competition laws, dominant operators have little incentive to innovate given that their market position remains secure. This would lead to technological stagnation, disrupting division of labour and thereby disrupting productivity and the internal and external economies. Furthermore, an decrease in the returns to scale may be observed, since these elements directly correlate with technological progress, development in machinery and the market size. (Ucak, 2015, 666)

Without competition, resources are not allocated to their most productive uses, for monopolies and oligopolies do not face pressure to minimise costs. This inefficiency leads to higher production costs, restricted choices and higher prices for consumers, thereby resulting in lower overall consumer satisfaction, increased financial strain on households, and diminished standards of living perpetuating socio-economic inequalities within these countries.

Additionally, the high barriers to entry in markets without competition law remain a significant issue, since the dominant operator can engage in predatory pricing, temporarily lowering prices to drive competitors out. Additionally, the dominant operator is well-positioned to secure exclusive deals with suppliers, distributors, preventing new entrants, thereby stifling entrepreneurship and limiting opportunities for SMEs to grow.

Developing economies and free trade agreements

In developing countries, innovation is crucial for economic development, for without competitive pressures, these economies fall further behind technologically advanced nations, widening the development gap.

Thomas Cheng highlights the importance of competition law in fostering innovation within developing countries (Cheng, 2020). While these nations do not lead in cutting-edge technological advancements, their ability to adapt and integrate existing technologies to suit local needs constitutes a vital form of innovation. Built on acquiring tacit knowledge and incrementally improving production, this process can play a crucial role in economic stability. However, Cheng argues that a competition framework is essential in encouraging this type of ‘laggard innovation’ since the pressures created by competitive markets drive businesses to innovate.² Empirical evidence strongly supports the understanding that enforcing competition laws contribute significantly to economic stability and growth in developing economies (Cheng, 2020).

Furthermore, developing countries mainly innovate by adapting technologies to local conditions, and competition law can facilitate this adaptation by fostering a competitive environment whereby firms are incentivised to introduce customised solutions. The facilitation of continuous small-scale improvements in technology known as incremental innovation, through this method is pivotal for developing countries. The Kenyan Mobile Payment innovation, led by services such as M-Pesa offer a glimpse of how technological adaptation and incremental innovation have benefitted by competition. Such innovation has bridged telecommunication providers and financial institutions while banking the unbanked thereby greatly benefiting the public and positioning Kenya as a global leader in mobile banking solutions (Mas & Radcliffe, 2011, 173).

Among recent trends of International Trade, the incorporation of competition chapters within Multilateral Free Trade Agreements have emerged as an element to create a level playing field for businesses, which benefit consumers through better quality products, lower prices and increased choices. Consequently, the United Nations Conference on Trade and Development

² The question then becomes whether competition promotes laggard innovation, which includes acquiring tacit knowledge for the purposes of technological adaptation, imitation, and process innovation; this author contends that it does.

(UNCTAD) and the Organisation for Economic Co-operation and Development (OECD) have acknowledged the importance of a competition framework.

As Sri Lanka engages in discussions to join the Regional Comprehensive Economic Partnership (RCEP), the incorporation of robust competition law requirements into FTAs have become mandatory (Abeyratne, 2024). FTAs create competition, and a competitive market environment encourages firms to innovate in order to obtain a competitive edge. For developing economies like Sri Lanka, as highlighted above, fostering innovation is crucial for economic advancement, and an integrated competition framework can create a predictable and fair business environment that attracts both domestic and foreign investments. The absence of a robust competition law, in the status quo, has allowed large firms to engage in practices that distort markets, consistently harm smaller firms and stifle market entry, which is apparent by Sri Lanka having a relatively low firm entry rates and consequently a high share of old firms (International Financial Corporation, 2022).

While FTAs such as RCEP can help harmonise standards and regulations, making it easier for Sri Lankan businesses to integrate into regional and global value chains, the participation in a FTA with a comprehensive competition framework can help strengthen institutional capacity and bolster Sri Lanka's reputation as a reliable partner. Additionally, developing negotiation skills and capacity is crucial to maximise these benefits, enabling Sri Lanka to secure favourable terms.

Competitive Neutrality of SOEs and Benefits for SMEs

It is fundamental that a competition framework ensures that all market players, irrespective of whether state-owned enterprises (SOEs) or privately owned, operate on a level playing field, with due regard to the principle of competitive neutrality (OECD, 2024). Competitive Neutrality is the recognition that significant government business activities which are in competition with the private sector should not have a competitive advantage or disadvantage simply by virtue of government ownership or control (UNCTAD, 2014).

In Sri Lanka's current context, SOE reforms have been prioritised, due to the recognition that SOEs were a significant contributory factor for the economic crisis of 2022 and a drain on public resources. However, these reforms must not only consider improving corporate governance within SOEs, but also the implementation of competition laws to prevent public

monopolies from transforming to private monopolies, which would further perpetuate market inefficiencies and stifling competition (David, 2024).

Competition law serves as a safeguard against the market distortions that can arise when SOEs benefit from state support or preferential treatment. Without stringent competition regulation, it is likely that SOEs might exploit their state-backed advantages to engage in practices that undermine fair competition in the ways mentioned above.

Building on the discussion between the private sector, competitive neutrality and competition law, it is particularly important to consider the impact on small and medium-sized enterprises (SMEs). When competition is truly fair, SMEs find themselves in a more conducive environment for innovation and operational efficiency, further fuelling creativity and productivity within the SME sector. SMEs are the bedrock of Sri Lanka's economy comprising 75% of all active enterprises and 52% contribution to the Gross Domestic Product (GDP), according to the Ministry of Finance Annual Report of 2015 (Kulasinghe et al., 2018). The prevention of SOEs from monopolising or unduly dominating markets, allow SMEs to compete on their merits rather than being overshadowed by the market power of state-backed entities, with clarity over market dynamics and regulatory measures available to address any unfair practices that may arise.

In the process of economic liberalisation, privatisation and SOE reforms, a competition framework is indispensable to create a truly competitive environment, thereby creating a more balanced and equitable market landscape that benefits SMEs, enhances consumer protection and supports sustainable economic growth.

History of Competition Law in Sri Lanka

Comparison of the Repealed General Competition Law of Sri Lanka against current Global Trends

As mentioned above, a competition law framework was initially introduced with the enactment of the Fair Trading Commission Act (FTCA), which provided for the establishment of the Fair Trading Commission (FTC) for the control of monopolies, mergers and anti-competitive practices under sections 5 and 11, and for the formulation and implementation of a national price policy under sections 5 and 18.

In analysing the establishment and the powers of the FTC, it is worth noting that the Minister was endowed with the power to appoint the Chairman and the members of the FTC under section 4 of the FTC. However, with reference to provisions 3 and 12 of the Schedule to the FTCA in accordance with section 4(3), the Minister has the capability to terminate the appointment of the Chairman or of any member of the Commission, without assigning any reason, and the jurisdiction of the court with regards to this has been ousted, indicating the extensive power that had been provided to the Minister.

In carrying out its investigations under section 11, with regards to monopolies, mergers and anti-competitive practices, the FTC was required to give special regard to provisions under section 6. Accordingly, matters affecting the interests of consumers, provision of necessary incentives to producers, the necessity for ensuring reasonable rates of return on capital employed in the production of articles, the allocation of resources among different sectors of the economy, the efficient operation of public corporations in the production of articles and the control of inflation, should be considered. Investigations can be made either on a complaint made to the FTC or on its own motion, but the latter option was never really used by the FTC.

Monopolies

Section 12 of the FTCA dealt with monopolies and identified five instances whereby monopoly situations may exist, namely, in relation to the supply of goods, supply of services, export of goods in specific circumstances, export of goods generally and in relation to the export of goods to a particular market. Accordingly, within these five instances, a monopoly is specifically defined by a Single Entity Control, an Interconnected Entities Control or a Group Control. However, it has been pointed out that such a wide-ranging definition of a monopoly situation is not conducive to the growth and development of commercial activity in Sri Lanka (Kelegama & Casie Chetty, 1993).

Accordingly, the test utilised for the determination of the existence of a monopoly is the ‘prescribed percentage test’. While the test ascertains a specific cut-off point determined by the Minister on the recommendation of the FTC, that generally ranges between 40% and 50%, the FTC further specifies that the prescribed percentage should not be less than one third of the supply of goods or services and export of goods of any description. While the test’s reliance on a fixed percentage limits the scope of the FTC, business entities may even structure their operations and agreements to avoid the prescribed percentage or prescribed article, leading to

market manipulation. The ACL Cables' buyout of Kelani Cables exemplifies this, for it gave ACL Cables an estimated control of over 70% of the market. However, the FTC could not investigate into the matter under section 12, since the cables were not gazetted as a prescribed article, and instead had to resort to Section 13 to investigate. It has been pointed out that this test minimises the cost of identifying a monopoly and provides for an adequate and acceptable entry point for the investigation of monopoly situations (Kelegama & Casie Chetty, 1993). Thus, given the relatively limited scale of the country's economy and the financial and staff constraints of the FTC, the policymaker may have opted for this test.

Yet the most widely used test, along with its various adaptations, is the 'dominant position test'. According to the European Courts, the test involves defining the relevant market, which is generally a prerequisite for any assessment of whether the undertaking concerned holds a dominant position. This is because it defines the boundaries within which an assessment must be made as to whether that undertaking is able to behave to an appreciable extent independently of its competitors, customers and consumers (*NV Nederlandsche Banden Industrie Michelin v Commission*, 1983).

Since the dominant position test captures a more dynamic array of market power and competition, the integration of certain elements of the dominant test could offer for a more robust mechanism in identifying and regulating monopolistic behaviour.

Mergers

Building on the discussion of monopolies, it is crucial to consider how mergers that tend to significantly impact market dynamics were regulated under the competition framework. Regulated primarily through section 13 of the FTCA, a merger situation arises when an entity acquires shares or assets from another body corporate or individual, potentially resulting in the acquiring entity gaining control or dominance over the market for goods or services. This control or dominance was assessed based on whether the acquiring entity, along with its related bodies corporate, can substantially influence the market. The FTCA employed a 'public interest' test under section 15(1)(a) to determine whether a merger should be authorised or prohibited, in contrast to the 'effective competition' test used in other jurisdictions such as the European Commission.³

³ Effective Competition Test considers the merger's impact on the competitive dynamics of the market, including the potential for unilateral and coordinated effects. The test aims to assess whether the merger will lead to a

However, critics have argued that the effective competition test was unnecessary and based on a misunderstanding of economist's regarding dominance in oligopoly markets. According to them, retaining the dominance standard⁴ under the European Community Merger Regulation was important for legal certainty, and lawyers have felt that focusing on dominance was sufficient and that the effective competition rest was not required to assess market-wide effects of mergers (Monti, 2010, 7). Furthermore, the effective competition test appeared to overreach, potentially interfering with the regulatory landscape and shifting towards industrial policy, which many argued was beyond the scope of traditional merger control (Monti, 2010, 19). The European Commission now utilises the Significant Impediment to Effective Competition (SIEC) test for merger assessment, which is broader and maintains a more flexible standard compared to the earlier dominance test (Foncel et al., 2007). While the public interest test in the FTCA is broader, considering factors beyond competition, the question remains whether a SIEC test or a public interest test is better suited for Sri Lanka, which will be discussed later in the paper.

Furthermore, the requirement for all mergers and acquisitions to be notified to the FTC burdened the competition authority staff and strained financial resources. However, in practice, non-compliance with this pre-notification was common in Sri Lanka. While the FTC was granted powers commensurate to that of a District Court, to call for information, the FTC rarely initiated merger investigation, even following parties notifying them as seen in the Glaxo Wellcome-SmithKline Beecham (GSK) merger, where the FTC Commissioner cited lack of extraterritorial jurisdiction as a reason for not engaging in the investigation (Knight-John et al., 2003, 22).

The Act empowered the FTC to investigate mergers either based on complaints or on its own initiative, a power that was expanded by amendments in 1993. However, despite these provisions, the FTC often failed to proactively initiate investigations. This approach contrasts with systems in countries like the United States, where notification requirements are based on transaction size rather than encompassing all mergers, highlighting the need for a more proactive and systematic approach to merger investigations in Sri Lanka.

significant reduction in competition that could harm consumers through higher prices, reduced output, or diminished innovation.

⁴ The Dominance Test focuses on whether the merger would create or strengthen a dominant position within the market. A dominant position is defined as one that allows a firm to behave independently of competitors, customers, or consumers, particularly by raising prices or reducing output profitably.

Anti-Competitive Practices

Under section 14 of the FTCA, anti-competitive practices were defined as any conduct that restricts, distorts, or prevents competition in the production, supply, or acquisition of goods or services. While this broad definition covers a range of behaviours, it has been critiqued for its lack of specificity compared to definitions utilised in other jurisdictions.

It is worth noting that even the repealed Indian Monopolies and Restrictive Trade Practices Act, No. 54 of 1969 (IMRTPA) provided detailed descriptions of various restrictive trade practices, including specific horizontal and vertical agreements, thereby more precisely addressing and preventing anti-competitive conduct. The Indian Competition Act, No. 12 of 2003, enforced at present, introduces a more streamlined and flexible approach broadly defining anti-competitive agreements and practices. While many of the specific agreements enumerated in the IMRTPA have been retained, the new Act presents them within a broader framework emphasising more on the effect rather than on the specifics of the practice. Furthermore, though the IMRTPA was more prescriptive in its approach, the new Competition Act focuses on whether an agreement causes or is likely to cause an appreciable adverse effect on competition within India, shifting the focus to assess the actual competitive impact.

The lacunas of the broad definition were further compounded by the fact that the Sri Lankan courts interpreted the section narrowly, excluding practices such as predatory pricing and discriminatory rebates from its scope, even though they are generally accepted as anti-competitive behaviours. This restrictive interpretation, which will be discussed later in the paper, further limited the FTC's ability to address a range of strategic market behaviours that could potentially harm competition.

Orders of the Fair Trading Commission

The FTC was granted the authority to issue various orders upon concluding investigation into monopolies, merger situations or anti-competitive practices, that operate against the public interest, under section 15 of the FTCA. Accordingly, the FTC had the capability of ordering the division of any business, appointment of a person to carry out specific activities as per the terms of the FTC, terminate any anti-competitive practice and to take any additional action it considers necessary to address a particular issue.

The determination process for issuing these orders involved a two-tiered approach. At first, the alleged act must fall within the scope of Section 12, 13 or 14 of the FTCA and secondly, must

operate against the public interest. Additionally, for a monopoly, it must also pass the prescribed percentage test.

The public interest consideration has been central to the FTC's decision making process, and thereby the FTC was expected to consider various factors such as promoting effective competition, consumer interests, cost reduction, development and balanced distribution of industrial activity and employment.

Critics have argued that the FTC's power, particularly in dividing undertakings and transferring property, may be excessive and that a preventative approach with deterrent measures might have been more effective. Furthermore, while the FTCA included criminal offences for contraventions, these were not sufficiently deterrent compared to the criminal penalties and treble damages imposed under the Clayton Act in the United States (Chandrasekera, 2019, 7).

Price Control

Prior to amendments, the FTC was endowed with considerable authority over price control. Among its powers, the FTC was able to set prices or establish a pricing framework for specific goods upon the request of the Controller of Prices. Additionally, the FTC had the mandate to investigate pricing issues referred to by the Minister, and to review and report on the prices of goods or charges for services, all with the view to advise the Minister on necessary adjustments. Furthermore, if it was found that the price was unreasonable and that promoting competition through imports was necessary, the FTC could recommend to the Minister the appropriate custom tariff to be levied on such imports, placing the FTC to play a pivotal role in regulating market prices, ensuring fair practices and protection of consumer interests.

However, with the introduction of the Industrial Promotions Act, No. 46 of 1990 (IPA) much of the powers of the FTC with regards to price control was curtailed. Under section 32 of the IPA, the FTA was only allowed to fix and vary the maximum retail price of pharmaceuticals.

The FTCA was enacted following the passing of the Consumer Protection Act, No. 1 of 1979 (CPA) which provided for the establishment of the Department of Internal Trade (DIT). Accordingly, in principle, the DIT was responsible for the regulation of day-to-day transactions between traders and consumers, while the FTC was supposed to provide industry oversight with emphasis on anti-competitive behaviour and price manipulation. Nevertheless, in the practical functioning of these two institutions, a degree of *ad hoc-ism* arose due to the overlap

in the functions delegated to them. Therefore, only a decade later, policymakers passed the Consumer Affairs Authority Act, No. 9 of 2003 (CAA Act) which the public believed was intended to address the issue of overlapping jurisdiction.

A Restrictive Judicial Interpretation of the FTCA

While section 14 of the FTCA broadly defined anti-competitive practices as mentioned above, the Court of Appeal in *Ceylon Oxygen Co. Ltd. v Fair Trading Commission and Another* offered a disappointingly narrow interpretation. In this case, Ceylon Oxygen entered into exclusive agreements with bulk purchasers, requiring them to buy all of their products solely from the company. Following an investigation under section 11 of the FTCA, the FTC quite correctly determined that this conduct constituted anti-competition, involving predatory pricing, exclusive dealings and discriminatory rebates. However, the Court of Appeal overturned this decision, citing procedural flaws.

It was the argument of the Court that the FTC has broadened the investigation beyond its original scope without providing adequate notice to Ceylon Oxygen. However, in this critical juncture, the court did not take into consideration the evolving nature of competition investigations. Furthermore, the Court took issue with the FTC's failure to hear from the purchasers involved in the agreement and questioned whether the FTC had sufficiently considered how the conduct undermined the public interest. While it is important to ensure due process, this decision appeared to prioritise procedural technicalities over substantive implications of anti-competitive practices.

The decisive blow was when the Court ruled that the FTC had no authority under section 11 to investigate the conduct in question, even though the statute clearly covers monopoly situations, mergers and anti-competitive practices. By focusing more on administrative law principles rather than the competition law issues, the Court's restrictive approach undermined the very crux of the FTCA.

This ruling reveals a significant mishap in understanding and enforcing competition law, effectively diminishing the FTC's deterrent effect, since companies may no longer feel compelled to comply out of concern for potential enforcement actions.

Shortcomings in the Consumer Authority Act

The Consumer Affairs Authority Act, No. 9 of 2003 (CAA Act) is the key piece of legislation directed towards consumer protection. Apart from provisions relating to consumer protection, the CAA Act maintains some aspects of competition enforcement. However, such provisions are not adequate for it to be classified as a comprehensive competition law framework.

The Act primarily focuses on consumer protection and the regulation of unfair trade practices rather than competition. While it does address anti-competitive practices, including restrictive trade agreements, price arrangements and abuse of dominant positions, the emphasis continues to remain more on consumer welfare rather than fostering a competitive market environment. This is clearly suggested under the objectives of the CAA, focusing on quality, price and availability of goods, as outlined under section 8 of the Act.

Controlling anti-competitive practices is a vital component of any competitive law framework. However, it must also proactively promote competition by establishing clear guidelines to incentivise businesses to compete fairly rather than merely reacting to complaints. While the current focus on enforcement and investigation under the CAA Act, as detailed in sections 34 and 35, may create a reactive enforcement environment, the systemic issues contributing to anti-competitive behaviour has not and cannot be addressed.

The provisions relating to investigations under section 34 are noteworthy. However, requiring the Authority to complete investigations within a hundred days, amid bureaucratic hurdles and potential delays remains a significant concern. Conversely, the absence of clear timelines for decision-making processes may hinder the timely resolution of anti-competitive practices.

The Act does not adequately address the complexities of contemporary markets, especially considering the dynamic landscape of global competition alongside e-commerce. Industries are undergoing rapid transformation due to technological advancement and a competition law framework must incorporate provisions that address these changes. The unique challenges of data-driven business models, digital platforms and network effects are not recognised by the CAA Act.

The lack of provisions for merger control raises critical concerns. The potential for anti-competitive mergers and acquisitions remain unregulated by the CAA Act, and has already led

to concentration of market power that has stifled competition in various sectors.⁵ A competition framework must include tools for reviewing mergers and acquisitions to assess their impact on market competition, since this is essential for preventing monopolistic behaviour.

While the CAA's ability to investigate anti-competitive practices and abuse of dominant positions is crucial for the maintenance of market integrity, it cannot *prima facie* be considered independent due to the reliance on government oversight and funding under section 49. This can lead to potential conflicts of interest and limit the autonomy of the CAA. Additionally, the subject Minister has been vested with extensive power to terminate any officer under section 3 of the Act, and the Chairman or any other full-time member under section 7 of the Act, completely uprooting the independence of the CAA.

The Act promotes consumer education and the establishment of consumer organisations. However, no reference to any mechanisms to foster a culture of competition among businesses have been specified. Encouraging fair competition requires more than punitive measures. An environment which supports and incentivises innovation and ethical practices is imperative. A comprehensive competition framework must provide clear guidelines on acceptable business conduct, promote competitive pricing and encourage businesses to engage in fair practices rather than resorting to anti-competitive behaviour.

Additionally, the fragmented nature of regulatory enforcement can create inconsistent enforcement of competition frameworks. The CAA and other regulatory bodies should have been provided with tools to collaborate and thereby foster cooperation and coordination towards a holistic approach to address the complexities of competition law effectively.

While the CAA Act can be identified as a stronger legislative enactment, it is less effective solely as competition legislation which cribs and controls acts committed against the interests of consumers, for it neither directly addresses or differentiates between the recognised anti-competitive practices such as unfair mergers and acquisitions, cartel activities and monopolies (Chandrasekera, 2019, 8). The CAA Act was never intended to be the competition law framework of Sri Lanka. The government intended to enact a dedicated competition law to replace the FTCA, upon repealing it. However, for reasons that remain unclear, this initiative

⁵ The rice monopoly, energy monopoly, acquisition of Lanka Ceramics by Royal Ceramics, the recent merger between Dialog and Airtel creating a combined market share of 64%, are some instances of anti-competitive mergers that can be observed upon a casual glance.

was abruptly halted, leaving a significant gap in the regulatory landscape for competition in Sri Lanka.

Unfair Competition under the Intellectual Property Act

The concept of unfair competition stipulated under section 160 of the Intellectual Property Act, No. 36 of 2003 (IP Act) provides limited relevance in the broader context of competition law. Rooted in the WIPO Model Provisions on Protection Against Unfair Competition, these IP focused provisions target specific forms of anti-competitive conduct that may harm a competitor's goodwill or mislead consumers. Prohibiting acts that mislead consumers, create confusion or misappropriate another business's reputation and emphasising on ethical practices dealing specifically with intellectual property, this provision would effectively protect against false advertising, misuse of trademarks or any other attempt to deceive consumers regarding a product's origin or quality.

The provision lacks the scope to tackle anti-competitive behaviour impacting the broader market and cannot extend to structural issues in competition, such as monopolistic behaviour, cartelisation or price fixing. General competition law operates with a wider focus on healthy market competition and its remedies are designed to restore fair competition and ensure market accessibility. In contrast to this, remedies under section 160 of the IP Act, focusing on individual business interests include injunctions and damages. Therefore, the unfair competition under the IP Act serves a distinct purpose and cannot stand as a substitute for a competition law framework.

Sector-Specific Competition

A Snapshot of Sector-specific Competition Regulation

The sector-specific regulatory framework of Sri Lanka reveals a multifaceted landscape marked by varying degrees of effectiveness and independence across different industries, whereby insights into potential lessons and components for drafting a general competition can be obtained.

In 2001, Sri Lanka undertook significant reforms in the utilities sector by establishing the Public Utilities Commission of Sri Lanka (PUCSL). Being a multi-sector regulatory body, it was designed to oversee several essential utility sectors, including water and electricity, and

aimed to address the shortcomings of previous sector-specific regulatory agencies. The rationale behind this approach was to enhance regulatory effectiveness by centralising oversight, thereby reducing susceptibility to political pressures that had plagued sector-specific agencies. Accordingly, the PUCSL was intended to operate independently of line ministries, reporting directly to higher government bodies such as the Parliament, Constitutional Council and the President's Office, to mitigate political interference and improve accountability.

However certain sectors such as Liquefied Petroleum Gas (LPG) have been excluded from the PUCSL's mandate, perhaps, as part of the government's strategy to maximise revenue through granting monopoly power to incumbent operators, even though the PUCSL has already formulated necessary standards to regulate LPG (PUCSL, 2021).

The telecommunication industry of Sri Lanka is regulated by the Telecommunications Act, No. 25 of 1991 (as amended) leading to the establishment of the Telecommunication Regulatory Commission (TRCSL), with the intention of bringing a more diverse perspective to regulatory decisions. However, as per section 3, the independence of the TRCSL is constrained by the involvement of the Secretary to the Ministry of Telecommunications as its ex-officio Chairman. Despite these developments, the TRCSL has the mandate to oversee tariff regulation, interconnection charges, and public interest considerations, including service quality and universal service obligations (USOs).

Accordingly, the TRCSL's regulatory framework incorporates the public interest criterion, aiming to ensure reliable and efficient service provision and promote competition. Yet, the TRCSL's practical effectiveness is limited by its reliance on network licences for detailed price regulation and USOs, which has led to inconsistent application across operators. The lapses with interconnection agreements⁶ and limited scope of quality-of-service standards (TRCSL, 2024) underscore the need for a more comprehensive and uniformly applied regulatory approach.

⁶ The Interconnection Rules of 2003 do touch on issues of market dominance but are primarily aimed at improving the accessibility and affordability of communication services, while also aiming to nurture a competitive market. An interconnection agreement is likely anti-competitive, if: (a) it limits competition between the signing parties, for instance through price fixing or dividing markets ; (b) It excludes or limits competition from entities not part of the agreement, such as when it stipulates interconnection on an exclusive basis; and (c) it results in one party using commercially sensitive information for competitive advantage outside the scope of the agreement. Currently, denial to negotiate, discriminatory access to information and delaying tactics can be identified as competition concerns.

The passenger bus transport sector is regulated under the National Transport Commission (NTC) established by Act, No. 37 of 1991. While the NTC was established to oversee private bus operators and ensure equitable service provision, its functionality has largely derogated to merely a permit-issuing body irrespective of its mandate to regulate service quality, route permits and competition. Political and Ministerial interferences on the control over appointments and decisions have hampered the NTC's effectiveness, showcasing the inability of the regulatory framework to balance public interests against private interests in the transport sector.

The Securities and Exchange Commission of Sri Lanka (SEC) established under the Securities Council Act, No. 36 of 1987 oversees the securities market. The SEC's diverse composition and powers including licensing, rule-making, and enforcement, reflect a relatively independent structure. However, limitations in investigative powers, such as the inability to seize documents or summon individuals have impeded its regulatory effectiveness.

The banking sector is governed by the Banking Act, No. 30 of 1988 which provides extensive supervisory powers to the Monetary Board of the Central Bank of Sri Lanka. The Act imposes limits on shareholding to prevent dominance in the banking industry, contributing to a balanced and competitive environment. Similarly, the Insurance Board of Sri Lanka (IBSL) operating under the Insurance Act, No. 43 of 2000 maintains a diversified board structure that promotes regulatory independence.

Fundamental Insights for a General Competition Law

In analysing sector-specific regulation in Sri Lanka, it is worth noting that regulatory independence is crucial for effective competition law enforcement. The constraints on the TRCSL and NTC highlight the importance of minimising ministerial interference and ensuring regulatory bodies with a high degree of autonomy. Accordingly, under section 4 of the PUCSL Act, the five-member Commission is appointed by the Minister in charge of Policy Development with the agreement of the Constitutional Council, thereby depoliticising the public service.

The recently enacted Electricity Act, No. 36 of 2024 grants several key powers to the PUCSL, reflecting its role as a regulator for the electricity industry. Accordingly, a clear regulatory authority being established, under section 5, prevents jurisdictional conflicts and streamlines the enforcement effort. The authority to grant, modify and revoke licences for electricity

generation, transmission and distribution is crucial for ensuring compliance with competition principles, preventing monopolistic behaviour and deterring any anti-competitive behaviour.

The continuous monitoring of licensee performance and the ability to issue enforcement orders to secure compliance with conditions or requirements, ensure that entities are not capable of exploiting their market position to engage in anti-competitive practices. The provision granting the power to prevent anti-competitive market practices, mergers and acquisitions, and the abuse of dominant positions directly align with the core objectives of a competition framework.

Additionally, under section 12, the Electricity Act has accounted for effective dispute resolution mechanisms for addressing conflicts that may arise between market participants. Furthermore, the PUCSL has been enabled to set tariffs for various stages of the electricity supply chain, ensuring cost reduction and competitive procurement practices that could be incorporated into the general competition law with guidelines for pricing and procurement to prevent collusion.

Competitive procurement practices, specified in section 4, are essential for maintaining market dynamism because as a cost reduction strategy, it directly benefits consumers and promotes market efficiency. Furthermore, the PUCSL's engagement in long-term power system development planning and stakeholder consultation ensures that regulatory decisions consider the interests of all market participants and consumers. This inclusive approach is vital for balanced and well-informed regulatory frameworks.

The Electricity Act, with its comprehensive framework for regulating the electricity industry, serves as a strong foundation for a general competition law. Many of its elements including clear regulatory authority, robust monitoring and enforcement, prevention of anti-competitive practices, effective dispute resolution, and inclusive planning, are essential for a comprehensive competition framework. Adopting these principles in a general competition law would promote a fair, efficient, and competitive market environment across various sectors, ultimately benefiting consumers and fostering economic growth.

Furthermore, the general competition law should incorporate robust investigative and enforcement powers. While the SEC's structure is designed to promote independence together with a broad mandate, the SEC faces dire limitations in investigating market malpractices due to its inability to seize documents or summon individuals for questioning during investigations.

This limitation hampers the SEC's ability to conduct thorough and effective investigations into potential market abusers.

Finally, integrating public interest considerations with competition principles can be identified as an essential factor. While sector-specific regulations include public interest criteria, a general competition law, however, should balance these considerations with the need to foster competitive markets and protect consumer interests. Thus, an integrated approach to regulation whereby sector-specific regulations are harmonised with general competition principles is required.

Recommendations for a *Sui Generis* Framework based on the Development Dimension

A moving target and integration with Public Interest

The global landscape of competition framework has evolved significantly over the past decades. While only a handful of developing countries had a competition law initially, a 2023 study revealed 125 countries now have competition laws, with the vast majority of them conducting active competition enforcement activities (Mansur, 2023). Since the adoption of liberalisation policies and the rise of privatisation, the World Trade Organization's Doha Ministerial Declaration has highlighted the need for competition frameworks. This underscores the importance for developing countries to understand the domestic and international ramifications of effective competition laws. (Ismail, 2007, 26).

Despite the fundamental need for competition laws to address anti-competitive behaviour, abuse of dominant position and regulation of mergers, the vast socio-economic, political and cultural differences between and amongst advanced and developing nations, suggest that a universally applicable formula for competition framework is unfeasible. A one-size-fits-all approach cannot cater to the unique needs and objectives of different countries

Accordingly, competition legislation should not be viewed in isolation but as an integral component of a country's overall public policy. It supports several other objectives, including pluralism, decentralisation of economic decision-making, preventing abuses of economic power, promoting SMEs, equity and fairness. Therefore, the goal of competition law must be

decided by each country since the standard for illegality under its competition framework will hinge on whether consumer welfare, total welfare (wider economic goals) or broader goals are at the crux of the objective. The United States enforcement agencies have consistently followed a consumer welfare standard, but Australia and Norway highlight that protection of total welfare was the goal of their competition law.⁷

Nevertheless, in the analysis of Sri Lanka, it can be observed that public interest has historically been at the centre of its regulatory framework, inclusive of social or political goals, rather than broader economic goals. Objectives such as promoting employment, regional development, economic stability, social progress, poverty alleviation, national security interests have been predominant. This approach aligns with the observation by the OECD Secretariat that specific objectives behind merger control can differ between jurisdictions and that public-interest based authorisation procedures may extend beyond generally accepted ‘core’ competition policy (Competition Law and Policy OECD, 2003, 3).⁸ Accordingly, different countries’ competition laws reflect their unique socio-economic contexts. Section 1 of the Canadian Competition Law (R.S.C., 1985, c. C-34), for example, ensures that SMEs have an equitable opportunity to participate in the Canadian economy, while the Anti-Monopoly Law of China of 2007 in Article 1, maintains that its goal is to protect fair competition in the market, the interests of consumers and also the promotion of the healthy development of the socialist market economy. As a developing economy, South Africa’s approach focuses on increasing the spread of ownership, particularly among historically disadvantaged communities, addressing the legacy of apartheid (Mncube & Grimbeek, 2016, 337).

⁷ In Australia, the Australian Competition and Consumer Commission (ACCC) has the authority to grant exemptions from competition law under certain conditions, specifically when the public benefits of anti-competitive conduct are considered to outweigh the potential harm it might cause. In Norway, the objective of the Competition Act is to promote competition, thereby contributing to the efficient use of society's resources. Accordingly, under total welfare, while consumer welfare is considered an important end goal, other stakeholders such as competing businesses and groups other than consumers are considered equally important. The public benefit is considered of major importance.

⁸ Among OECD countries, there appears to be a shift away from use of competition laws to promote what might be characterised as broad public interest objectives, and use of public-interest based authorisation procedures, exemptions or political overrides (collectively, “public interest objectives”) in competition laws, that contemplate a consideration of factors which extend well beyond what appear to be the generally accepted “core” competition policy objectives of promoting and protecting the competitive process, and attaining greater economic efficiency (the “core competition objectives”). This shift is reflected either in an elimination of, or less frequent or more restricted use of, legal tests or political overrides in domestic competition laws that would permit (i) an anti-competitive merger or restrictive trade practice to proceed on the basis of broader public interest considerations; or (ii) a pro-competitive merger or trade practice to be blocked or remedied on the basis of such considerations.

Provided the competitive outcomes achieved through competition, including the reduction of prices in goods and services, the increase in quality and innovation thereby resulting in consumer welfare, competition law has been characterised as a type of public interest law (Leslie, 2012, 887).

Upon considering the unique socio-economic context and the developmental objectives of Sri Lanka, it may seem that the public interest is better suited over the aforementioned SIEC test, since the public interest test encompasses broader goals, such as labour rights, equity and regional development, which are the cornerstone of a developing economy. In the post-economic crisis context, where a further compromise on social welfare cannot be considered, a public interest test integrates the national priorities while providing a flexibility to address the diverse needs of the population.

However, entrusting competition authorities with public interest goals can be contentious, since critics argue that such goals can be ambiguous and susceptible to capture by politically strong private interests. This concern is particularly pertinent in developing economies, where political and economic power is often concentrated among a few large players.

Conversely, a strict focus on consumer surplus that seeks to prioritise the lowest possible prices and highest possible output may overlook broader social benefits. For example, in the United States, the consumer welfare standard has guided antitrust enforcement primarily focusing on price effects and output level. While this approach has been effective in fostering competition in many sectors, it can neglect other important aspects including employment levels or regional development.

On the other hand, using competition restrictions to achieve broader policy objectives can also entail social costs. For instance, the competition law in South Africa targets the redistribution of economic power among historically disadvantaged groups with the goal of advancing black economic empowerment on a large scale (Mncube & Ratshisusu, 2023). Although this objective is essential for correcting historical injustices, it occasionally runs counter to accepted theories of competition.

Nevertheless, this argument will only be valid if the alternative ways to fulfil the broader policy objectives do not entail a social cost larger than that which would arise if the competition authority were to pursue these objectives directly. Allowing another agency to fulfil these objectives may end up being more costly to society than entrusting it to the competition

authority. Therefore, it is crucial to ensure that efforts to redistribute economic power or address historical injustices do not inadvertently lead to reduced market efficiency, higher prices or stifled innovation, which will ultimately undermine the very goals that these policies aimed to achieve. The challenge is to ensure that the social benefits of these policies do not outweigh the economic efficiencies that competition laws aim to protect.

Accordingly, authorities must take into consideration the existing legislation and case law, in the development of competition law and policy in Sri Lanka, to ensure that it works in unison with other government industrial policy instruments achieving the aforementioned aspects. In this regard, it is necessary that the policy and the law is constructed in a way that allows them to perform the traditional functions of promoting and maintaining competition rooted on international norms and practices while making provision for the special needs of Sri Lanka, as a developing state. Achieving a balance between equitable interests and conventional competition principles is a challenge, but African merger control regimes, especially South Africa, have demonstrated that these elements are not inherently in conflict. With proper alignment, they can, in fact, complement one another effectively (Naidu et al., 2023). Thus, the competition law framework must seek to promote free and active market competition, efficiency, transparency, and growth, while addressing structural imbalances and supporting state objectives for equitable distribution and development. Such a dual mandate for the competition authority, to promote market dynamism while incorporating public interest consideration, could mitigate the risk of regulatory capture, ensuring a more restrained application of both these applications.

To maximise effectiveness given limited resources, South Africa follows a prioritisation framework based on three key criteria; the impact on the poor consumers, the importance of accelerated and shared growth, and the likelihood of substantial competition concerns. In the wake of the economic crisis, Sri Lanka's poverty rate has surged to nearly 30% (Kotagama, 2024). The path to reduce poverty will likely be both gradual and extremely challenging in the country. The ability of the government to allocate resources amidst such challenges will be limited. Therefore, to stimulate economic recovery and development effectively, it is essential for Sri Lanka to identify sectors with significant market failure and address them. A prioritisation model similar to that of South Africa being adopted can assist the government to allocate the limited resources more effectively.

Enabling a Climate for Competition

Transitioning from the broader discussion on balancing efficiency and public interest within competition law, it is crucial to recognize the distinct developmental challenges faced by developing countries, including Sri Lanka, for the effective implementation of a competition law and policy.

As mentioned above, the economic function of competition is fundamentally to align production with consumer needs to ensure that goods and services supplied in the long run adequately meet demand, alongside allocative efficiency and distributive efficiency. Furthermore, these static economic functions are complemented by dynamic functions such as fostering technological development and innovation, that lead to higher ‘national competitiveness’. Accordingly, it is important to understand that it is companies which are competing, and not nations, and therefore, an economically successful country is a country which hosts many internationally competitive firms creating and sustaining the comparative advantage of the country.

However, in developing countries, these theoretical benefits of competition generally remain unattained due to a host of structural challenges. Historical evidence suggests that countries which adopted the strategy of import substitution, as opposed to export promotion, lagged in economic development, and continue to face persistent economic backwardness (Cherif & Hasanov, 2024).

In situations where a population’s basic needs are not ensured, similar to Sri Lanka’s experience during and even post-economic crisis, the primary goal for most people becomes survival. Consumer sovereignty is impossible to guarantee under these circumstances. The struggle to survive hinders consumers from taking decisions freely, alongside a general lack of financial resources, and the possibility of obtaining information is hindered by a lack of infrastructure and education (Lachmann, 1999). Productivity is significantly hindered by various factors, including low levels of education and technical and business knowledge. In many developing countries, additional challenges such as malnutrition and disease further diminish workforce productivity. Additionally, SMEs, in particular, struggle with financial constraints, lack of transparency in information, high initial fixed costs and expensive technology also serve as a substantial barrier to market entry.

Given these circumstances, the preconditions for a working competition market are often absent in developing countries, increasing the likelihood of competition itself killing competition. If the market is left alone, competition will not prevail (Lachmann, 1999). A competition law and policy are imperative for a country to secure the welfare gains attained through national and international competitiveness. Therefore, in developing countries, where preconditions for a working competition are missing, competition law and policy are even more necessary, not only to face the dangers imposed on competition through Restrictive Business Practices (RBPs) but above all to ensure a favourable environment for the development of competition nationally and internationally.

As such, there is a greater responsibility on governments to create an environment conducive to competition. The intervention by the government must not only focus on traditional economic efficiency but also address the broader developmental agenda of the country, since only a supportive environment will allow for productivity growth. Government funded research, joint projects between research institutes, funding for R&D with the involvement of universities, strategic subsidiaries and creation of 'industry groups' to exchange technology and knowledge sharing are pertinent examples from both developing and developed nations on decisive characteristics of nations that have allowed its firms to sustain competitive advantage in particular fields. A competition framework tailored to such a country must not only be workable and effective, but also capable of driving market agents to act in ways that go beyond the traditional economic functions.

Institutional Designs for the Competition Authority

Together or Separate: Consumer Protection and Competition

Sri Lanka already maintains a Consumer Affairs Authority empowered for the promotion of effective competition and consumer protection, together with other sector-specific regulatory institutions. With regard to the designs of other nations, an ambivalence regarding the wisdom on whether to separate or merge the two functions continues to exist (Fox, 2010,478). Provided that both policies are directed at ensuring that markets function effectively and at correcting market failures, but approach this goal from different perspectives, each function can be used to advance the goals pursued by the other. This was highlighted by the UNCTAD Secretariat with reference to the benefit of competition policy for consumers (Trade and Development Board - UNCTAD, 2014).

Allan Ergas and Henry Fellas highlight three major advantages to integrating the primary responsibility for enforcing competition and consumer protection within a single institution, including increased flexibility, expertise sharing, and increased community awareness and understanding of the issues (Ergas & Fellas, 2014, 17). While this could also be considered as a cost-saving mechanism, South Korea has highlighted that the objective in merging the two institutions was to make consumer policy more consistent with the competition framework (Lee, 2015). The growing recognition of behavioural issues in competitive markets strengthen the rationale for such close collaboration.

Having repealed the Consumer Protection Act of 1979, which established an unified institutional framework, the Sri Lanka government introduced the FTCA creating separate institutions. Subsequently, the government enacted a separate CAA Act which repealed FTCA. However, a replacement for the FTC was in consideration, but was later dismissed. Nevertheless, an inclination towards separate institutions can be observed.

Ergas and Fellas indicate that since competition policy is formally enforced through laws and with limited public interaction, consumer policy remains more varied, encompassing the diverse instruments and a decentralised approach. Therefore, they caution that consumer policy might receive less attention and resources within a competition agency (Fels & Ergas, 2014). Additionally, effective consumer protection often requires multiple distinct agencies, especially in regulated industries, thereby limiting the feasibility of complete integration. Perhaps the tendency of Sri Lanka to opt for separate institutions may stem from its adherence to the English tradition in commercial law, where these functions are handled separately. Additionally, the ongoing discourse on competition is supported by Japan, a country that also maintains distinct institutions for competition and consumer protection, further influencing this approach (Liu, 2024).

Given these historical and legal precedents, it would be more prudent for Sri Lanka to continue with the separate institutions, allowing for a more focused and specialised treatment of the different objectives. While one may argue that the PUCSL is an umbrella agency regulating electricity, water and petroleum industries, it must be noted that all these industries fall under the umbrella of natural monopolies. Furthermore, separating these functions enables more effective regulatory oversight, particularly in sector-specific regulations. This approach ensures that consumer protection receives its dedicated resources while allowing the consumer policy to be enforced through its formal legal frameworks without the risk of overshadowing

consumer concerns. However, it further raises an important question about the role of sectoral regulators when enforcing competition law. Should competition law enforcement be handled solely by the competition authority with the assistance from sectoral regulators, or should the sectoral regulators have the power to apply competition law within their industry? This issue will be explored in the next section.

Sectoral Regulation and Competition

In the aforementioned segment, the sector-specific legislation was already discussed, similar to the methodology adopted by the United Kingdom, whereby sectoral regulators have been provided with the power to apply competition law in relation to their particular industry. Accordingly, the question remains whether Sri Lanka should continue with the present format, or whether the powers of the sectoral regulators must be incorporated into the new competition authority.

Certain jurisdictions, such as Australia, New Zealand and Spain, have sector regulators integrated into the competition authorities with the objective of ensuring consistency in enforcement. The benefits of this approach include better coordination between competition and regulation, reduction of regulatory capture, while being able to foster a competition culture in sectors which are generally natural monopolies and ensuring operational efficiency. According to Ergas and Fels, internalising competition and regulatory instruments within a single authority can improve decision-making by preventing a "silo mentality" that can hinder effective decision-making (Fels & Ergas, 2014,30).

However, against these advantages it is important to note that there is a sense of complexity attached to the management of these different functions. Furthermore, the mixture of different cultures and approaches amongst the staff members of the authority must be considered, provided that regulators tend to have an *ex ante* approach, while competition enforcers maintain an *ex post* approach (Fels & Ergas, 2014, 24). Additionally, it is important to consider whether the merging of competition law enforcement and regulatory responsibilities into a single institution is pragmatic.

Therefore, in consideration of Sri Lanka's economic history such as post-crisis recovery and market failures alongside its legal history of maintaining institutional separation, the need to maintain regulatory independence and past experiences of the country in the area of deregulation, it would be unwise to strip the powers provided to bodies like the PUCSL,

TRCSL, NTC, etc. and transfer them on to the competition authority. Instead, Sri Lanka must seek to prioritise the establishment of a well-defined division of responsibilities among these institutions, inclusive of a formal protocol for sharing information, resolving disputes and aligning regulatory approaches to guarantee that both consumer protection and competition objectives are effectively met.

Prosecutorial Model v Administrative Model

A prosecutorial model involves a competition authority that will prosecute the case in a courtroom using adversarial proceedings. The United States, Canada and Australia follow this model whereby the impartiality of the proceedings are better protected due to the separation of the investigation process and the adjudication process (“Competition Authorities: Prosecutorial/Non Prosecutorial Systems and the Fight Against Cartels,” 2016,11). The benefit of a more transparent and credible process can be attributed to a prosecutorial model because the proceedings are conducted in court. In addition, it has been argued that it would lower the number of appeals in comparison to a situation where a competition authority makes a decision.

However, in the context of Sri Lanka, where judicial proceedings drag on for years, and commercial entities generally resort to arbitration and mediation proceedings, a prosecutorial model might not be prudent. Additionally it is worth noting that competition cases are complex by nature, and an ordinary court might not have the adequate specialisation to understand the underlying economic issues. Furthermore, provided the workload a court may already have, such a complex case involving more understanding of the underlying economic issues may not be given high priority by the courts.

Under these circumstances, the administrative model implemented under the FTCA would be appropriate, but with a different type of configuration. In a European Council study on the institutional design of competition authorities, the administrative model was further categorised into an administrative model with a functional separation (multi-member) and an administrative model with a unitary structure, the latter which was followed in the FTCA (European Commission, 2014). Both India and South Africa follow a multi-member structure with a focus to ensure efficiency and transparency in its operations. The key benefit of this model is the separation of investigation and adjudication offering an alternative viewpoint when reviewing the evidence. Additionally, this structure encourages greater information being shared by the parties since the decision-maker remains independent from both the investigator

and the defence. However, balancing the independence of the investigative and adjudicative functions with ensuring that adjudicators are not overly reliant on the information provided by the investigators can be challenging. Additionally, duplication of efforts or reduction in the quality of the investigation can lead to more problems.

Independence of the Competition Authority

Structural and Operational Independence

Section 4 of the FTCA established a commission inclusive of seven members and led by a Chairman. A similar approach has been taken in the CAA Act. Such a body allows for the possibility of members having different areas of expertise, thereby legitimising the decisions concerning competition, especially if the competition authority were to follow the aforementioned multi-membered administrative model. Additionally, a body of persons is less susceptible to capture than if the competition authority was led by a single individual. Unlike the FTC, the CAA operates with its own distinct legal personality, as per section 2(2) of the CAA Act, a feature that should be incorporated in the creation of any new competition authority.

Both the FTCA and the CAA Act enable the Minister to appoint members to their respective bodies. However, in order to safeguard the competition authority from the risk of executive capture, ensure that its decisions remain impartial and driven solely by the logic of competition and public interest, its officials must be protected from arbitrary influence. To achieve this, appointment should be made solely through the Constitutional Council, established under Chapter VII A of the Constitution, and any removal of members must require a formal motion in Parliament, in accordance with the provisions of the Sri Lankan Constitution. This approach would offer better protection against the executive removing members based on personal or political motives.

Amongst other powers, the competition authority must have full independence in the decision-making process, provided with the power to enact rules regarding administrative aspects and the power to implement regulations.

Financial Independence

The most common reason for the failure of competition authorities is inadequate funding (CUTS International Group, 2008), exemplified by the failure of the FTC in Sri Lanka.

Insufficient resources can undermine the quality and integrity of decision-making. Relying entirely on government funding poses a risk, as the government has the ability to punish the competition authority by cutting off its budget if it pursues cases that the government disapproves or delivers unfavourable rulings, thereby threatening the independence of the competition authority. On the other hand, if the authority has a direct financial interest in the outcomes of the cases it investigates, there is a risk that the decisions might not be based solely on legal and economic merit.

A good case study in this regard is the Turkish Competition Authority, which provides a model for self-funding. Under the Turkish Competition Act, the Authority's revenue is generated through three primary sources: funds allocated to it in the budget of the Ministry of Customs and Trade, a tax of 4/1000 on the capital of all newly established or expanded limited liability partnerships, and revenues from its own publications or other activities. Since its inception in 1997, the Turkish Competition Authority has successfully relied entirely on the tax on limited liability partnerships, never having to draw from the Ministry's budget (OECD Group, 2016). In a similar move, Italy has mandated a contribution from companies incorporated in Italy, whose turnover exceeds the threshold of 50 million euros, which has removed the requirement of competition authority to negotiate with the government to secure financial resources (*Autorita' Garante Della Concorrenza E Del Mercato*, 2024). Therefore, it is apparent that such a self-funding structure can ensure its financial independence and operational stability, avoiding the pitfalls of both government dependency and conflicts of interest arising from over-reliance on fines or penalties.

This model demonstrates the viability of self-funding for competition authorities, offering an approach that can safeguard their independence while ensuring sustained financial resources. Moreover, funding the competition authority or regulatory authority through contributions from the regulated firms, rather than relying on taxpayer money, could be particularly appealing in a cash-strapped country like Sri Lanka. However, this approach may inadvertently lead to higher costs for the formation and expansion of limited liability companies, potentially discouraging business growth and investment.

A Skilled Workforce

The bottomline is that the success of any competition authority is dependent on its ability to deliver thorough and accurate investigation. Therefore, the staff must possess strong skills in antitrust law, market analysis and a working knowledge of the economic policy of the country.

Given this requirement, the creation of cross-functional teams from various talent pools is imperative, for it is necessary to promote knowledge sharing among team members, contributing to professional growth and retaining talent by providing diverse learning opportunities. The regular reassessment of these criteria ensures that the competition authority remains agile and responsive to new challenges.

Attracting competent individuals is only half the battle, retaining them is equally important. Preventing turnover, especially when the staff is highly skilled and in demand both in the public and private sectors will be a key challenge for the competition authorities. Amongst the strategies to retain talent, offering ongoing education and training programmes to help the staff stay updated, ensuring a clear pathway for promotion and professional growth and offering competitive salaries and benefits is essential to enhance job satisfaction.

Conclusion

This paper has critically examined the landscape of competition law in Sri Lanka, particularly in the context of the country's ongoing economic challenges in a post-crisis era. The primary research objective was to analyse the socio-economic circumstances and political realities to determine a legal framework and the institutional design of the competition authority, assess its implementation, and identify the broader implications on market efficiency, consumer welfare and economic development of Sri Lanka. Throughout the analysis, it became evident that while Sri Lanka has established various regulatory frameworks aimed at promoting competition and protecting consumer rights, significant gaps remain. Such lapses can be traced back to the lack of coordination between the government and different regulatory bodies, insufficient funding, and inadequate enforcement mechanisms.

To address the aforementioned issues, several recommendations have been proposed, including the need to enhance coordination between the CAA, the proposed Competition Authority and sector-specific regulators via formal protocols for information sharing and dispute resolution. This will facilitate a unified approach to competition enforcement that will ultimately lead to more effective enforcement and regulation. Additionally, a shift towards a multi-member commission model for the competition authority would promote expertise, encourage independent decision making and minimise the risk of regulatory capture.

Another critical consideration is the establishment of a self-funding model for the competition authority, akin to that of Turkey, which can reduce the reliance on government budget allocations and ensure the authority's financial viability and independence. Furthermore, equipping competition authority personnel with necessary skills to address complexities in competition enforcement and regulation is imperative.

However, there are several policy challenges that ought to be navigated to successfully implement these changes. Perhaps the most significant challenge is the entrenched bureaucratic culture within existing regulatory agencies, which generally resist reforms aimed at enhancing competition and consumer protection. Additionally, the political landscape in Sri Lanka often influences regulatory decision-making, posing a risk to the independence and effectiveness of the competition authority. The legacy of a heavily regulated economy has built market structures that are not conducive to competition requiring the integration of the competition framework with broader economic development. Additionally, retaining skilled personnel in the competition authority, upon implementation, and regulatory authorities will be extremely challenging.

Provided the awareness of the general public regarding economic mismanagement following the crisis, the implementation of a competition law framework along with a national competition policy would be a timely measure that addresses both market dynamics and the needs of the population.

In conclusion, the future of competition law and policy in Sri Lanka hinges on the ability to adapt to the changing economic realities and challenges faced by the nation. By enacting a competition law framework, implementing the proposed recommendations, and addressing the identified policy challenges, Sri Lanka can establish a robust competition regime that will not only drive economic growth but further enhance consumer welfare.

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Annex 1

1. What has prevented Sri Lanka from adopting a competition policy framework for such a long time period?
2. What were the underlying issues in the Fair Trading Commission Act?
3. How prevalent are monopolistic and oligopolistic practices in Sri Lankan markets? Can you provide examples of sectors where these issues are most apparent?
4. Considering that there is no comprehensive competition policy in Sri Lanka right now, what is the impact it has on small and medium enterprises (SMEs) in Sri Lanka? Are there any other specific provisions to protect these businesses from unfair practices by larger firms?
5. How do Sri Lanka interact with its international trade agreements, when it does not have a competition policy? Are there any conflicts or synergies that arise from this interaction?
6. In your opinion, what formal mechanisms could enhance the independence of these agencies, such as appointment procedures and financial autonomy? Has this been a part of the ongoing dialogue with regards to the competition framework?
7. How do you perceive the relationship between competition policy and economic development in Sri Lanka?
8. Do you think public interest must be a factor in competition law enforcement?
9. What is your opinion on sector-specific legislation in competition policy? Do you think sector specific legislation must coexist with a new competition framework or do you think it must be repealed?
10. With regards to the judicial process under a competition law framework, do you think it must be done through ordinary courts or specialised courts or even though an in-house mechanism independently maintained?