

# VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY IN PAKISTAN

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# Outline of the Presentation

- The Pakistani development of competition law and policy
- Competition Legislation
- Appeals, Courts and private bar
- Competition advocacy
- The Competition Commission of Pakistan: profile and capacity building
- Conclusions and recommendations

# The Pakistani competition law and policy

- Economic Context

- 47<sup>th</sup> largest economy in nominal terms and 27<sup>th</sup> under the purchasing power parity (PPP) . Semi-industrialized: food processing, chemicals, textiles and agriculture
- Large and diverse resources
- GDP in Pakistan expanded 3.59% in 2012-13
- From 1952 until 2013, Pakistan GDP Growth Rate averaged 4.94 Percent
- GDP has been growing an average 5 % a year since 2005

# The Pakistani competition law and policy

## ■ Social-Political Context

- Fast population growth
- Growing proportion of Pakistan's working-age population
- In 2011, Pakistani middle class was estimated at 20 million, representing 11% of the total population
- Growing economy primarily based on consumption increase
- Political and institutional stability still in progress
- Improvements in law enforcement and governance would increase private investment
- Rises in net enrollment rates in education and investment on health but still behind other South Asian countries
- Impressive poverty gains over the past decade

# Competition Legislation

- 1970 - Monopolies and Restrictive Trade Practices Ordinance (MRPTO). Pakistan's first competition legislation. Monopolies Control Authority (MCA)
- 1972 - The Economic Reform Order of 1972, a broad nationalization process, severely constrained the scope of MRTPO
- 2007 - The MRTPO was revamped and first promulgated as a Presidential Ordinance; experiencing 2 re-promulgations and a 45-day suspension prior to ratification by Parliament
- 2010 - Enactment of the Competition Act

# 2010 Competition Act

- Applies to all undertakings, public or private, and to all actions or matters that may prevent, restrict or reduce competition
- Ex-ante merger control
- Introduces provisions regarding deceptive marketing to protect consumer interests
- CCP investigative capacity is strengthened through provisions for search and inspection, forcible entry and leniency
- Penalties under the Act are much higher than those provided in MRTPO. Advocacy is part of the statutory mandate under the Act

# 2010 Competition Act (Cont.)

## ■ Market definition

- Same as EU
- Deals only with demand side substitutability. Regulations and Guidelines do not refer to supply side substitution

## ■ Dominance Assessment

- Not percentage alone
- Also ability to behave independently from competitors, customers, consumers and suppliers
- Presumption of dominance has been kept at 40%
- Commission may consider : market share, concentration measures (HHI, C<sub>4</sub>) and structural factors

# 2010 Competition Act (Cont.)

- **Prohibited agreements and exemptions**

- In line with best international practices
- All agreements that have the effect of preventing, restricting or reducing competition
- Exemption is available, but narrow scope
  - Places the onus of proof on the parties
  - Individual and block exemptions possible if agreement:
    - (a) contributes to the efficiency of production;
    - (b) the benefit(s) could not be obtained without restricting competition; and
    - (c) the benefit(s) clearly outweigh(s) the adverse effect(s) of lessening competition



# 2010 Competition Act (Cont.)

## MERGER REVIEW

- Mandatory regime for merger notification
- Act prohibits mergers that:
  - Substantially lessen competition
  - Create or strengthen a dominant position
- CCP may:
  - Prevent/prohibit/undo mergers or acquisitions
  - Approve with or without conditions or require divestitures

*Time for merger review is 30 days (phase I) and 90 days (phase II)*

# 2010 Competition Act (Cont.)

## REMEDIES

- Principle of proportionality
- Behavioral and structural remedies allowed
- Structural: dissolution, divorcement, divestiture, access to essential facilities and mandatory licensing
- CCP may:
  - Require to take actions to restore competition
  - Annul or require amendment(s) to agreements

# 2010 Competition Act (Cont.)

## PENALTIES

- Up to 75 million rupees (USD 750,000)
- Or 10% of annual turnover
- Settlements are not possible
- Failure to comply with a CCP order is a criminal offence, punishable with imprisonment (1 year) or a fine of 25 million rupees (USD 250,000)
- CCP Guidelines provide parameters for penalties

# 2010 Competition Act (Cont.)

## ENFORCEMENT TOOLS

- Leniency
  - Only for the first to make a full disclosure
  - Reduction in penalty depends on:
    - The stage of the investigation
    - Evidence already in CCP possession
    - Quality of information provided
  - Regulations make clear that the exemption/immunity cannot exclude third party claims relating to losses suffered

# 2010 Competition Act (Cont.)

## ENFORCEMENT TOOLS

- **Reward payment scheme**
  - Information vis-à-vis a 'cartel formation'
  - Does not apply to those involved in cartel activity as they can seek benefit under the Leniency Regulations
  - Financial rewards granted to informants based on the veracity and usefulness of information provided
  
- **Search/inspection and forcible entry**
  - No need of a warrant (judicial consent)
  - Investigators must be authorized by CCP
  - Increasing acceptance among the business community

# Appeals

- A CCP single Member decision can be appealed to a bench of two or more CCP Members
- For decisions passed by multiple Members, the appeal is filed before the Competition Appellate Tribunal (CAT)
- Appeals against a CAT decision lay before the Supreme Court of Pakistan

# Courts and private bar

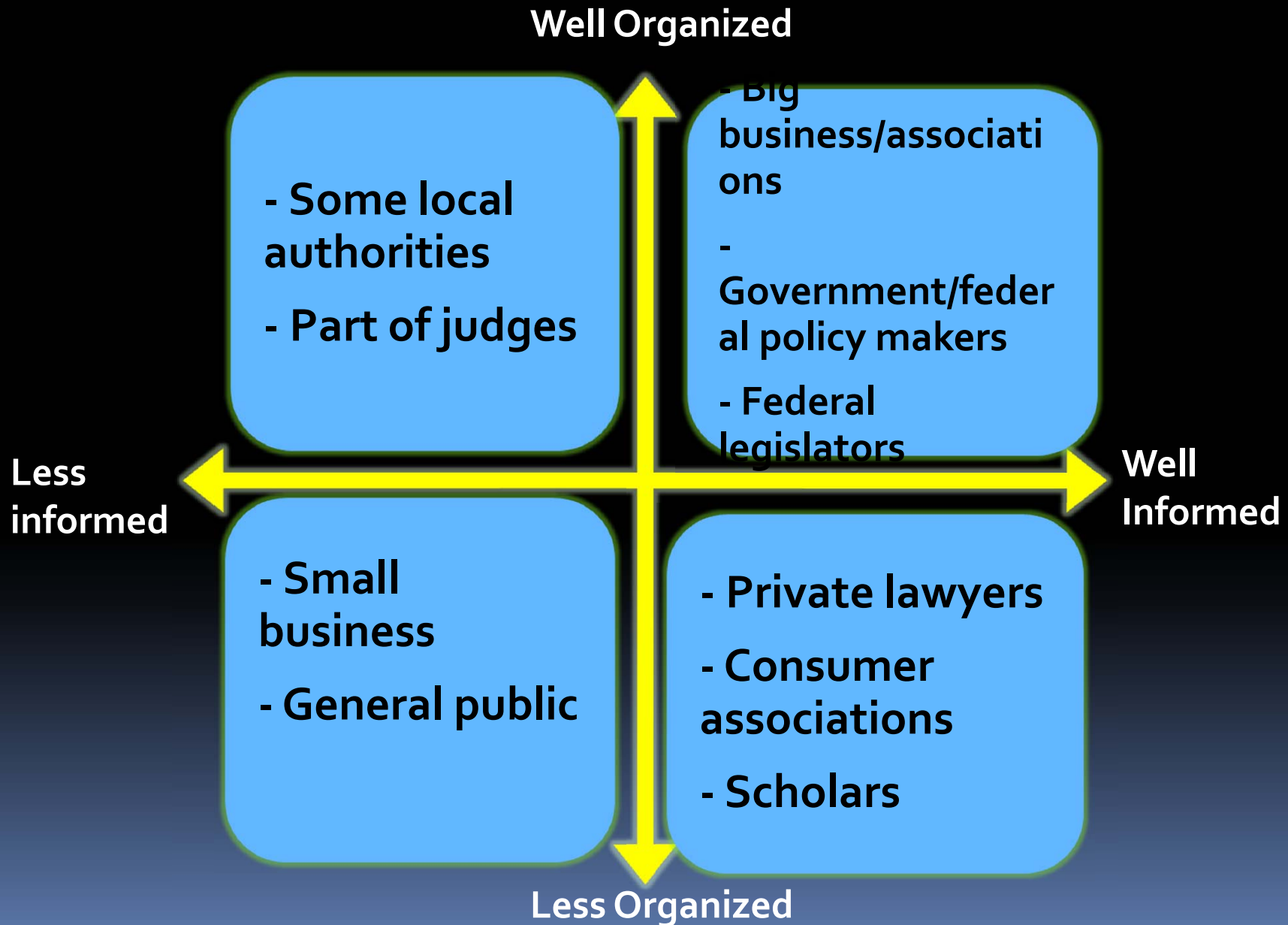
- Backlog of around 200 pending court cases
- Overburdened courts, delays, emphasis on procedures over substance and lack of understanding of the subject are the hallmarks of judicial system
- Courts normally do not change CCP decisions at first, but rather issue restrain orders until final judgment
- Most CCP decisions have been appealed and are pending before different high courts and the Supreme Court
- No case has been decided on merits so far

# Competition advocacy

- CCP & Public Procurement Regulatory Authority work on a MOU considering public procurement a key economic activity with a wide impact on competition
- CCP has issued 13 policy notes and 2 opinions so far
- CPP held international conferences hosting representatives from an array of countries
- Competition Consultative Group (CCG) holds quarterly meetings, on an invitational basis. Includes representatives from the private sector, the federal and provincial Governments and regulatory agencies



# Competition stakeholders



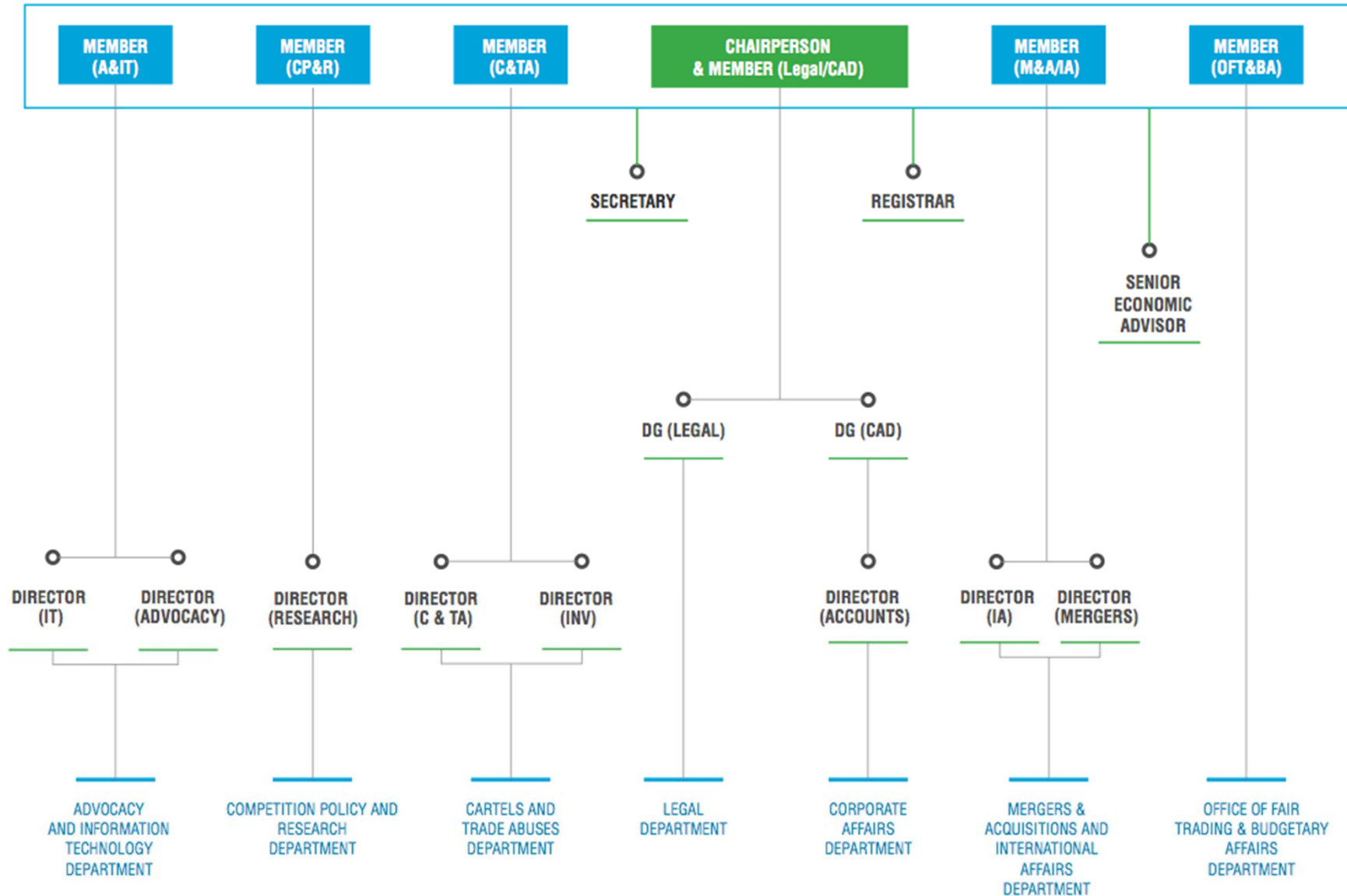
# The CCP: profile and capacity building

- 135 employees in total
- 48 non-administrative staff, including Members
- 10 lawyers, 11 economists and 28 other professionals, including: Business, Finance, Statistics, IT and Communication.
- Total Budget for 2012-2013 was 200 million rupees (USD 2 million)
- CCP has passed a total of 64 orders since 2007
- CCP had processed a total number of 321 merger applications up to :
  - 4 have gone through phase II review. Out of those, 3 have been approved with conditions.

# The CCP: profile and capacity building

- CCP has concluded 35 enquiry reports
- Issued 416 show cause notices
- Carried out 18 search & inspections
- Processed 405 exemptions
- Carried out 13 various sector studies
- So far, CCP has imposed penalties totaling PKR 8.577 billion on various undertakings and associations

# CCP Organization Chart



# Conclusions and recommendations

- Legal community is impressed with CCP's achievements with little learning curve time
- Landmark leniency decision in which a multinational company filed 233 documents in support of findings was rightly termed as 'phenomenal achievement' and 'regulatory breakthrough'
- Softening of sector regulators' resistance towards CCP, more companies seeking advice, increased exemption and merger applications and 100% compliance in deceptive marketing orders are indicative of CCP's effectiveness

# Conclusions and recommendations

- Ensuring financial autonomy for CCP sustainability is critical
- 3% of the revenue of Pakistani regulatory agencies should finally integrate CCP Fund
- It is expected that more economists should also become Members
- A pre-established and open method for the appointment of Members of the Commission should be stipulated
- Terms of office should be increased to 5 years, with no re-appointment.
- Staff should be more exposed to experiences from other competition agencies

# Conclusions and recommendations

- Harmonize Government Policies with Competition Law
  - Identify existing policies that are likely to adversely impact competition
  - Prioritize policies that should be reviewed first. Such priorities could be decided jointly by representatives from the Government and CCP
  - Review of sector policies should be undertaken by sector specific regulators in conjunction with CCP
- Activities of the Research Department in relation to economic review of cases could be expanded
- CCP relationship with academia is to be developed
- Legislative change could be considered to establish that the law should apply not only to all undertakings, actions or matters that take place in Pakistan, but also elsewhere since they have any effect in Pakistan

# Conclusions and recommendations

- CCP leniency regulations could be further detailed by including criteria, limits and deadlines
- Specific regulations on the acceptance of parties' specialized opinions and studies would contribute to avoid disputes on procedural timing and discretionary decisions
- CCP could make more use of forms of recording for use in cartel proceedings. It is also imperative that CCP establishes a well equipped audio laboratory



# Conclusions and recommendations

## LENIENCY

- Under CCP regulations, leniency may be invoked even after the findings and decision of the Commission have been made
  - Such policy could be fruitful if further strengthened under strict parameters within the Act

# Conclusions and recommendations

## MERGER REVIEW

- The creation of the Acquisitions & Mergers Facilitation was a positive idea for avoiding time loss and bureaucracy
- An enhanced participation of all Members in the decision making process would bring more transparency, accountability and knowledge of antitrust analysis
- Merger Regulations should include a reference to supply side substitution analysis in the determination of the relevant market
- CCP may increasingly shift from behavioral to structural remedies

# Conclusions and recommendations

## ADVOCACY

- Enhancement of Competition knowledge amongst academic community
- CCP could seek membership in different Government Committees as an approach to boost advocacy within the public sector
- Equipment and investigative resources of CCP forensics laboratory should be up-graded, as it is a key activity for conducting investigation and prosecution

# Conclusions and recommendations

## CAPACITY BUILDING

- Subject to resource availability, CCP could increase incentives for staff to apply for exchange programs in foreign competition agencies

## PUBLIC PROCUREMENT

- CCP and the Pakistan Public Procurement Regulatory Authority could better profit from their MOU through techniques to identify possible collusion in procurement proceedings and to disseminate those techniques to provincial procurement counterparts

# Conclusions and recommendations

## CONSUMER AFFAIRS

- CCP Office of Fair Trade should further develop relations with private consumer protection associations and NGOs throughout the country, creating networks for disseminating best practices and awareness

## JUDICIAL REVIEW

- Government and Judiciary should recognize that matters of economic importance with general impacts need to be prioritized.
- As there is a huge backlog of competition cases, the constitution of a Special Bench could enable expeditious disposal