



VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY:

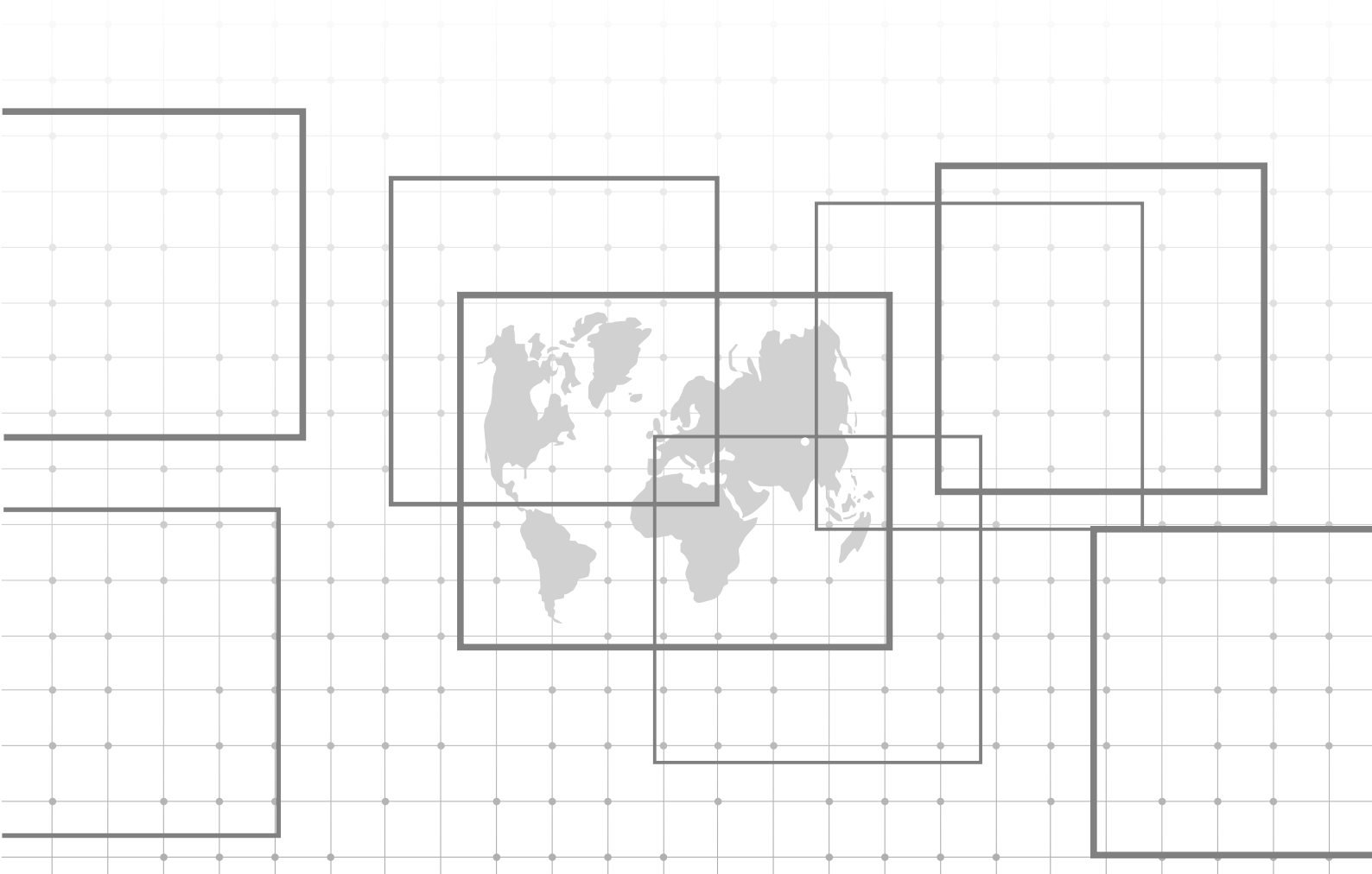
PAKISTAN





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I. Historical, political and economic context of the development of competition policy in Pakistan

1. Historical context

The origins of Pakistan come from the Indus Valley¹ civilization, one of the oldest in the world and dating back at least 5,000 years. During the second millennium B.C., remnants of this culture fused with the migrating Indo-Aryan peoples. Persians, Greeks, Scythians, Arabs (who brought Islam), Afghans and Turks successively invaded the region in subsequent centuries.

The Mughal Empire flourished in the 16th and 17th centuries and the British came to dominate the region in the 18th century. The separation in 1947 of British India into the Muslim State of Pakistan (with West and East sections) and a largely Hindu India was never satisfactorily resolved. Pakistan and India have fought two wars – in 1947–48 and 1965 – over the disputed Kashmir territory. A third war between these countries in 1971 – in which India capitalized on Islamabad’s marginalization of Bengalis in Pakistani politics – resulted in East Pakistan becoming the separate nation of Bangladesh.

In February 2008, Pakistan held parliamentary elections and in September 2008, after the resignation of former President Musharraf, elected Asif Ali Zardari to the presidency. The Pakistani Government and military leaders are finding control of domestic insurgents challenging, many of whom are located in the tribal areas adjacent to the border with Afghanistan. In January 2012, Pakistan assumed a non-permanent seat on the Security Council for the 2012–13 term.

2. Political context

Pakistan is an Islamic² democratic parliamentary federal Republic. A bicameral legislature system consists of a 100-member Senate and a 342-member National Assembly. The President is the head of State and commander-in-chief of the armed forces and is elected by an electoral college. The Prime Minister is usually the leader of the largest party in the National Assembly. Each province has a similar system of government, with a directly elected provincial assembly in which the leader of the largest party or alliance becomes Chief Minister. The President of the Republic is also responsible for appointing provincial governors.

The country is a federation of four provinces: Punjab, Sindh, Khyber Pakhtunkhwa and Balochistan, as well as the Islamabad Capital Territory and the Federally Administered Tribal Areas in the north-west, which include the frontier regions.

Local government follows a three-tier system of districts, tehsils and union councils, with an elected body at each tier. There are about 130 districts altogether, of which Azad Kashmir has

¹ Southern Asia, bordering the Arabian Sea, between today’s India in the east, Iran and Afghanistan in the west and China in the north.

² Islam is the State official religion in Pakistan.

ten and Gilgit–Baltistan seven. The Tribal Areas comprise seven tribal agencies and six small frontier regions detached from neighbouring districts.

The military Government was able to maintain relative political and economic stability between 2000 and 2007, and this was an important factor in attracting investment in this period. Only in early 2008 did investors begin to register concerns about political and social unrest. According to a report³ by the Economist Intelligence Unit on Pakistan, foreign direct investment (FDI) is expected to be adversely affected by the turbulent political, economic and security environment.

The main attractions for foreign investors are the telecoms industry, the oil and gas sector, the power sector and, to a lesser extent, financial services and chemicals. The Government is encouraging private sector involvement in areas that were previously reserved to the public sector, primarily through privatization.

The current Constitution of the Islamic Republic of Pakistan was drafted by the Government of Zulfikar Ali Bhutto and approved by the legislative assembly on April 10, 1973. It is Pakistan's first ever constitution by consensus.

When, in October 1999, the constitutionally elected Government was overthrown by a military coup, the constitution was suspended by the Proclamation of Emergency of 14 October 1999, read with Provisional Constitution Order No.1 of 1999. In May 2000, the Pakistan Supreme Court ruled against a review petition brought before it alleging illegality of the military takeover of the Government and by that judgment, validated the military regime. The Court based its judgment on the doctrine of State necessity.

The judicial system of Pakistan is organized hierarchically, with the Supreme Court at the apex, below which are High Courts, federal Shariat courts (one in each province and one in the federal capital), district courts (one in each district), judicial magistrate courts (in every town and city), executive magistrate courts and civil courts. Pakistan's penal code has limited jurisdiction in the Tribal Areas, where law is largely derived from tribal customs.

Although Pakistan's judiciary was completely separated from the executive in 2001, it still struggles to function efficiently. Several characteristics hamper the system, such as ineffective implementation of laws; poor security for judges and witnesses; delays in sentencing; and a huge backlog of cases.

3. Economic context

Pakistan has the forty-seventh largest economy in the world in nominal terms and twenty-seventh largest in the world according to purchasing power parity (PPP).⁴ The country's economy is considered semi-industrialized, covering primarily food processing, chemicals, textiles and agriculture. The Indus River region is the home of the fastest growing economic poles of Pakistan. Karachi and Punjab's urban centres represent the most diversified economies in the country. Other provinces have much less developed markets. Decades of internal political disputes, a fast-growing population, volatile foreign investment and an

³ Country Commerce – Pakistan. Report by The Economist Intelligence Unit. Released October 2012.

⁴ World Economic Outlook - Growth Resuming, Dangers Remain. International Monetary Fund, April 2012. Available at: <http://www.imf.org/external/pubs/ft/weo/2012/01/pdf/text.pdf>

expensive and enduring conflict with bordering India have made the country's economy suffer.

As of 2011, the size of the Pakistani middle class was estimated at 20 million, out of a population of 180 million, representing 11 per cent of the population of the country.⁵

Growth in private consumption, which accounts for nearly 90 per cent of nominal GDP,⁶ will remain the primary driver of economic expansion for the foreseeable future. It is usually believed that economic growth can take place only in the presence of political stability, but the Pakistani case contradicts conventional wisdom. Nevertheless, economic expansion has continued to fall far short of potential, owing to energy and water shortages, security concerns and reduced investment in human capital, despite Pakistan having a large working-age population.

Pakistan has significant strategic qualities and development potential. The country is situated at the crossroads of South Asia, Central Asia, China and the Middle East. Thus it is at the fulcrum of a regional market with a vast population, large and diverse resources and unexploited potential for trade. The growing proportion of Pakistan's working-age population provides the country with a potential demographic dividend, but also with the crucial challenge to provide adequate services and increase employment.

In order to accomplish long-lasting development outcomes, Pakistan must face major economic, governance and security challenges. The unresolved border conflict with India and security concerns all over the country influence all aspects of living in Pakistan and hamper growth. An array of governance and business environment indicators suggest that deep improvements in governance are needed to unleash Pakistan's growth potential.

The sharp increase in world oil and food costs, along with frequent natural catastrophes like the 2010 and 2011 floods has had a destructive impact on the economy. The economy of Pakistan grew by an estimated 3.7 per cent in 2011/12, against the pre-flood target growth rate of 4.2 per cent. Inflation decreased, however it continued its four-year run in double digits and the fiscal deficit is also estimated to have reached about 8 per cent of GDP, double that budgeted for and fuelled, in part, by continuing energy subsidies. Notwithstanding, exports remained slightly positive and strong remittances crossed the \$13 billion mark for the first time. In addition, recent efforts to remove tax exemptions and broaden the tax base contributed to higher tax revenues, although the revenue to GDP ratio remains low, at about 10 per cent.⁷

Human development is the essential basis for sustained economic growth. There have been increases in net enrolment rates in education in the country but Pakistan is still behind other South Asian countries. Gender disproportions endure in education, health and virtually every economic sector. Pakistan has one of the lowest female labour force participation rates in the region and is ranked as one of the lowest spenders on education and health in the region (at about 2 per cent of GDP).⁸

⁵ Waraich, Omar. (02.20.2011) "Columnists | Could Pakistan Have an Egypt-Style Revolution?" Time.com. Retrieved 2012-11-19.

⁶ Gross Domestic Product.

⁷ The World Bank. Country Overview – Pakistan. Available at: <http://www.worldbank.org/en/country/pakistan/overview>. Visited on December 26, 2012.

⁸ Idem.

Pakistan has made impressive strides in reducing poverty⁹ over the past decade yet the country's challenge is to extend such a policy. The overall level of inequality remains stable and relatively low compared to other developing countries. However, some of the volatile border regions and rural areas within the provinces have a higher than average level of poverty.

Even while confronting complex challenges in the past few years, such as external and domestic economic distress, political instability and security problems, Pakistan has managed to put into practice many reforms, including under the recently expired "Stand-By Arrangement", which helped the economy circumvent a full-scale crisis. Conversely, prolonged security questions, unsettled structural problems (particularly in the energy sector), two major natural catastrophes and considerable fiscal deficits have made inflation persistently high, limiting growth and employment creation. All of these issues have left Pakistan's economy highly exposed and potentially vulnerable.

In the 1980s, Pakistan was one of the first countries in the region¹⁰ to begin liberalizing its economy. India, as a regional reference for instance, started its liberalization process in the 1990s. The Pakistani Privatization Commission carried out or approved 167 privatization transactions between 1991 (when Pakistan began to privatize its State-owned enterprises) and September 2012. The largest number of these occurred in the telecommunications sector, followed by the energy and banking sectors. The Government has been taking measures to deregulate the oil and gas sector. For instance, it deregulated the price of liquefied petroleum gas (LPG) in September 2000.

Although gas prices in Pakistan follow a market-based pricing formula, the Oil and Gas Regulatory Authority (OGRA) continues to revise gas prices every six months. The country also introduced a new telecommunications policy in mid-2003 that opened up the sector to private operators. Domestic aviation has been open to the private sector since 1991. Pakistani major State-owned firms continue to operate in sectors such as energy and natural resources, finance, trading, utilities, transport, television and broadcasting, cement, ghee, chemicals and fertilizers, among others.

A number of Government-sponsored foundations run business ventures to benefit retired and active defence personnel. With influence and resources at their command, the five main foundations¹¹ are powerful competitors in the local market.

⁹ According to the 1995 World Bank Report on Pakistan Poverty Assessment (No. 14397-PAK), national accounts and household income distribution helped consumption poverty in Pakistan decline from the early 1970s to the early 1990s. This trend has also been observed **between** 2001 and 2005. Additionally, the Pakistani Government and the World Bank have established social safety net systems. The Benazir Income Support Programme (BISP) is the country's national safety net. The cash transfer programme offers a monthly payment of Rs. 1,000 to qualifying households. In 2011 it is expected to cover about 7 million households or about one quarter of Pakistan's total population.

¹⁰ The Indian subcontinent is a southerly region of Asia, mostly situated on the Indian Plate and projecting southward into the Indian Ocean. Definitions of the extent of the Indian subcontinent differ but it usually includes the core lands of India, Pakistan and Bangladesh.

¹¹ (1) The Fauji Foundation (affiliated with the Army) has extensive holdings, including sugar and textile mills, cereal production facilities, power plants, gas and tobacco units, a fertilizer complex, a maize complex and a polypropylene project;

(2) The Shaheen Foundation (affiliated with the Air Force) has a significant presence in construction, aviation and air-cargo services, ready-made garments, electronics manufacturing, agricultural investments, a television station and real estate;

4. Investments

The Board of Investment reports that the top sectors attracting FDI to Pakistan in 2011/12 were oil and gas, chemicals, construction, financial business and textiles. The main origins of FDI were the United States of America, the United Kingdom of Great Britain and Northern Ireland, Switzerland, China, Hong Kong, China, and Germany.

Foreign investors are allowed to hold 100 per cent equity in all industrial sectors without prior permission, with the following exceptions: arms and ammunition, high explosives, radioactive substances and currency printing.

Pakistan has signed 59 bilateral tax treaties. It has also signed limited agreements with India, Jordan and Saudi Arabia concerning air transport and with Greece, the Islamic Republic of Iran and Kenya relating to shipping and air transport.

5. International trade agreements

Pakistan has engaged in free-trade agreements (FTAs) and preferential trade agreements (PTAs) with a number of countries and trading blocs. It signed FTAs with Sri Lanka, China, Malaysia and Mauritius that came into force between 2005 and 2007.

The country acceded to the Treaty of Amity and Co-operation in South-East Asia of the Association of Southeast Asian Nations in 2004. Pakistan is also a member of the 12-nation Economic Cooperation Organization and of the World Trade Organization. Pakistan's membership in the Commonwealth of Nations, which had been suspended after the military coup in October 1999, was restored in May 2004.

6. Price control

The private sector is generally free to set prices in Pakistan. Provincial and local authorities occasionally set the price of commodities supposed to be in short supply, and the Government fixes prices on locally manufactured goods granted tariff protection. In addition, the Government sets prices, mostly at the ex-factory stage, for certain products of State-owned enterprises, including petroleum and public utilities. It extends price support to farmers for certain crops, such as rice, cotton, sugar cane and wheat, and it may increase imports to keep prices stable.

The Government also controls fuel prices, power rates and gas rates, sometimes through Government-appointed regulators. It was announced that the Government eventually intends

(3) The Bahria Foundation (affiliated with the Navy) invests in financial, industrial and other commercial ventures; it has set up an experimental plant in Karachi for compressed natural gas and it seeks to assist in the construction of low-cost housing;

(4) The Army Welfare Trust owns several large farms, including a 4,000 hectare (10,000 acre) estate in Punjab province. It also has ghee factories, flour mills, engineering works, cotton-ginning plants, a travel agency, a bicycle plant, several banks and an insurance company, and interests in pharmaceuticals, cement and shoemaking;

(5) The National Police Foundation owns and manages a sheet-glass factory. The 1976 Foreign Private Investment (Promotion and Protection) Act provides specific guarantees against the nationalization of approved investments and a constitutional guarantee against State takeovers was promulgated in 1979.

to phase out electricity subsidies, since the country is facing critical power shortages that have impaired the economy's growth.

The Pak-Arab Refinery Company was established in September 2000, allowing the deregulation of the price of liquefied petroleum gas (LPG). The Government signed an agreement in July 2002 with Pakistan Petroleum (Pakistan's biggest gas producer) permitting it to operate a market-based gas-pricing formula. The agreement replaced the Petroleum Gas Price Agreement of 1982, which used to govern subsidies on gas prices. Gas subsidies were intended to be phased out by 2006, although this had not happened by 2012, and the Government had set no firm date to eliminate the subsidies.

The Oil Companies Advisory Committee (OCAC), consisting of representatives from Pakistan's oil marketing, refinery and pipeline companies, now determines the prices of some petroleum products. The Government deregulated diesel pricing in September 2002, allowing the oil-marketing companies to set their own rates.

Formal price controls for the private sector exist only for the pharmaceutical industry. The Ministry of Health used to set the prices of drugs and medicines using a system that required manufacturers to report cost changes. Although drugs had been classified into controlled¹² and decontrolled categories, the Government must approve price increases for both. Drug pricing has been calculated since November 1994 by linking the cost of domestic components of a drug to the consumer price index, and imported components to the rupee exchange rate.

7. Labour

According to the World Bank,¹³ the estimated official unemployment rate rose from 5.6 per cent in 2009/10 to 6 per cent in 2010/11, with rural and urban rates of 4.7 per cent and 8.8 per cent, respectively. The agriculture and related sector has the largest number of workers in Pakistan, accounting for 45.1 per cent of the total employed labour force in 2010/11. Of the total, manufacturing employed 13.7 per cent; wholesale and retail trade, 16.2 per cent; community, social and personal services, 10.8 per cent; and construction, 7 per cent.

8. Political instability and economic growth

Pakistan has had 23 Governments in the past 60 years; including 14 elected or appointed prime ministers, 5 interim Governments and 33 years of military rule under 4 different leaders.¹⁴ Excluding the military and interim Governments, the average duration of a politically elected Government has been less than two years.

The economic policy regime, conversely, has only changed twice in all of Pakistan's history. The liberal private sector-led growth model that was put in place in the 1950s and accelerated in the 1960s was rolled back by Zulfikar Ali Bhutto in the 1970s and became the socialist economic model. Since the rejection of this model in 1977 and the revival of the liberal model, the foundations of economic policy have remained untouched. There has been a broad consensus among all major political parties on the general principles that should underpin Pakistan's economic direction.

¹² Essential medicines.

¹³ The World Bank. Country Overview – Pakistan. Available at: <http://www.worldbank.org/en/country/pakistan/overview>. Visited on December 29, 2012.

¹⁴ McGrath, Allen. *The Destruction of Pakistan's Democracy*. New York. Oxford University Press, 1996.

Transitions from one political regime to another have been intricate, causing uncertainty and short-term reductions in the pace of economic advance in the country. The transfers of power from military to civilian regimes in 1971, 1988 and 2008 were marked with macroeconomic instability, a slowdown in economic activities, escalating unemployment and inflation and the adoption of a suspicious approach by investors. Nevertheless, economic recovery has been resilient, as temporary losses caused by political volatility have not been enough to offset the positive long-term secular economic movement.

9. Pakistan's new growth strategy

The Government of Pakistan recognizes that the economy has performed well below its potential and requires an annual average rate of 7 per cent to absorb youth labour growth.¹⁵ It has therefore formulated a new growth strategy (NGS).¹⁶ The NGS has been proposed in order to promote sustained growth by addressing what it considers to be the two main constraints to progress: (i) inadequate market development, caused by a lack of competition, policy distortions, entry barriers and poor regulation; and (ii) inefficient public sector management, especially in the provision of core public goods such as security of life, property, transactions and contracts, and in the accumulation of human and physical capital. The NGS encourages a joint Government and private effort to increase productivity by tackling non-competitive markets, poor governance, limited urban development, inadequate education, low openness and limited innovation due to limited research.

II. Pakistan competition policy and legislation

No major monopolies remain in Pakistan aside from public sector utilities,¹⁷ despite the pre-1970s dominance of cartels and monopolies controlled by a handful of powerful families. More specifically, the Pakistani economy used to be concentrated in the hands of 20 family groups. These groups collectively held two thirds of the industrial assets, 80 per cent of

¹⁵ IMF Country Report No. 12/35. Pakistan. February 2012.

¹⁶ Planning Commission of Pakistan, Pakistan: Framework for Economic Growth, May 2011.

¹⁷ In Pakistan the following are the natural monopolies in the public utility sector:

(a) M/s Sui Northern Gas Pipelines Limited. It caters for the transmission and distribution of natural gas besides construction of high-pressure transmission and low-pressure distribution systems in North Central Pakistan through an extensive network in Punjab, Khyber Pakhtoon Khwa and Azad Jammu & Kashmir. Regional monopoly.

(b) M/s Sui Southern Gas Pipelines Limited; It caters for the transmission and distribution of natural gas besides construction of high-pressure transmission and low-pressure distribution systems in Sindh & Baluchistan (Southern Provinces of Pakistan). Regional monopoly.

(c) M/s Pakistan Railways is the only undertaking engaged in the provision of rail transport services to the people of Pakistan. National monopoly.

(d) Transmission of Electricity: National Transmission and Dispatch Company. National monopoly.

(e) Electricity Distribution Companies (DISCOS) such as Islamabad Electric Supply Company (IESCO), Lahore Electric Supply Company (LESCO), Multan Electric Power Company (MEPCO), Gujranwala Electric Power Company (GEPCO), Faisalabad Electric Supply Company (FESCO), Hyderabad Electric Supply Company (HESCO), Peshawar Electric Supply Company (PESCO), Quetta Electric Supply Company (QESCO), Sukkur Electric Power Company (SEPCO). Regional monopolies.

(f) Water Transmission - Water and Power Development Authority (WAPDA) - Ministry Level. National monopoly.

(g) Water distribution: local governments, local development authorities. Regional monopoly.

banking and 70 per cent of the insurance sector in Pakistan.¹⁸ However, a World Bank report completed in January 2007 stressed that proven or suspected cartels have existed and many may still exist in several industries.

The Pakistani economy is a mix of old, politically attained industries and a “new”, competition supportive private sector. The role of the Competition Commission of Pakistan (CCP)¹⁹ is to support the approach of the “new” Pakistani private sector, free from old political and economic oligarchies, by enforcing the Competition Act regardless of the origin and control of enterprises.

CCP is very well oriented on its responsibility to guide private sector and Government in competition issues. However, depending on each sector of the Pakistani economy and how it is influenced by old fashion political power, Government may be more or less open to CCP advice and guidance.

The Securities and Exchange Commission of Pakistan, the capital markets regulator, administers the companies’ law and the *Modaraba* law that governs Islamic business relations. The Monopoly Control Authority (MCA) used to act under the Monopolies and Restrictive Trade Practices Ordinance 1970 to register monopolies and monopolistic practices. The Competition Commission then replaced MCA in November 2007.

1. Constitutional foundations of the Pakistani competition legislation

The current constitution of Pakistan considers the freedom of trade and business, as well as private property, as fundamental rights.

Article 18 further establishes that nothing in its text shall prevent the regulation of trade, commerce or industry in the interest of free competition therein. It is the provision in the Pakistani constitution that refers directly and expressly to free competition, and it reads as follows:

Art. 18. Freedom of trade, business or profession.

Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business:

Provided that nothing in this Article shall prevent:

- (a) the regulation of any trade or profession by a licensing system; or
- (b) the regulation of trade, commerce or industry in the interest of free competition therein; or
- (c) the carrying on, by the Federal Government or a Provincial Government, or by a corporation controlled by any such Government, of any trade, business, industry or service, to the exclusion, complete or partial, of other persons.

¹⁸ UL HAQ, Mehbub. *The Poverty Curtain: choices for the third world*. Columbia University Press. New York, 1976.

¹⁹ www.cc.gov.pk.

Article 23 also provides that every citizen shall have the right to acquire, hold and dispose of property in any part of Pakistan, subject to the constitution and any reasonable restrictions imposed by law in the public interest.

Subsequently, Article 24 provides for the protection of property rights by establishing that no person shall be compulsorily deprived of his property, save in accordance with law.

Furthermore, Article 142 of the constitution stresses that the National Parliament (*Majlis-e-Shoora*) shall have exclusive power to make laws with respect to any matter in the “Federal Legislative List”. This document lists all matters for which the National Parliament has exclusive lawmaking power and comprises “all regulatory authorities established under a Federal law” (Item 6 of Part II of the list), including the Competition Commission of Pakistan.

Article 151 sets inter-provincial trade rules that affect competition; providing that trade, commerce and intercourse throughout Pakistan shall be free, except in the cases where the National Parliament (*Majlis-e-Shoora*) imposes by law such restrictions on the freedom of trade, commerce or intercourse between one province and another or within any part of Pakistan, as may be required in the public interest.

On judicial review, Article 199 (2) of the constitution stipulates that “subject to the Constitution, the right to move a High Court for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II shall not be abridged”. Therefore, decisions from the High Courts may be appealed to the Supreme Court, including on competition questions, if it is the case. As the Competition Appellate Tribunal²⁰ is now functional, matters will no longer be directed to the High Courts but appeals to the Supreme Court will remain possible.

2. Evolution of the competition legislation

The first competition legislation in Pakistan was the Monopolies and Restrictive Trade Practices Ordinance (MRPTO) of 1970,²¹ with the Monopolies Control Authority (MCA) acting under its authority. The MRPTO was enacted with the aim of preventing undue concentration of economic power in the hands of a few. The Ordinance considered offences to the Pakistani competition regime as any undue concentration of economic power; the growth of unreasonable monopoly power; and any unreasonably restrictive trade practices.

The scope of the MRTPO was severely constrained by the initiation of the Economic Reform Order of 1972, a broad nationalization process that took place right after the promulgation of the Ordinance.

According to the contribution of Pakistan to an OECD round table on competition in regulated sectors²² presented in 2005, during the early 1970s, 32 large manufacturing units were nationalized²³ and virtually all heavy industry was transferred to the public sector.

²⁰ See Section 3.3.1., below.

²¹ Pakistan is one of the few developing countries which has had a competition law in place for more than three decades.

²² Organization for Economic Cooperation and Development, Global Forum on Competition: Round table on bringing competition into regulated sectors. Contribution from Pakistan.9 Feb. 9 2005. Available at <http://www.oecd.org/dataoecd/14/44/19936969.pdf>.

²³ Nationalized undertakings were denationalized in the 1980s and 1990s.

State-owned enterprises (SOEs) were exempt from the application of the MRTPO under Section 25.²⁴

The erstwhile MCA was considered not capable of effectively enforcing the legislation due to the incompleteness of the legal framework and the lack of expertise of its staff. Those deficits and the increased exposure of the country to the challenges of global trade have made it imperative to modernize the Pakistani competition regime.

One additional reason for the poor performance of MCA was that MRTPO did not require any professional qualifications or expertise for the members of the Authority. In addition, MCA was considered to be heavily understaffed. Half of the technical posts available at the Authority were vacant and no economist was hired by the Research and Investigation Department. As a result, there was no significant research, competition and consumer advocacy, monitoring of prices, or initiation of enquiries.²⁵

To further minimize the role and independence of the Authority, in 1981 the MCA, together with the Securities and Exchange Authority, were placed as departments into a newly formed Corporate Law Authority (CLA) and the Government discouraged enforcement of MRTPO, as it could dissuade investment.²⁶

Hence, the insufficient substantive provisions and the institutional capacity of MCA together rendered the competition regime in Pakistan ineffective and a deep change in the legislation and the institutional framework were considered imperative.

The Competition Ordinance, passed in October 2007, replaced the Monopolies and Restrictive Trade Practices Ordinance 1970. The same ordinance was enacted and went into force as the Competition Act in October 2010. The new law, based broadly on international best practices and the model laws of OECD and UNCTAD, better empowers the Competition Commission to take action against anti-competitive behaviour, covers both the services and

²⁴ Section 25 of the MRTPO reads as follows: “Ordinance not to apply to certain undertakings. This Ordinance shall not, unless the Central Government by notification in the Official Gazette otherwise directs, apply:

(a) to an undertaking which is owned by the Central Government or a Provincial Government, or
(b) to an undertaking which is owned by a body corporate established by the Government by law or whose Chief Executive is appointed by or with the approval of the Central Government or by a Provincial Government, or

(c) to anything done by any person or undertaking in pursuance of any order of the Central Government or a Provincial Government, or

(d) to anything done by a trade union or its members for carrying out its purposes, or

(*a) to the activity or functions of an undertaking or undertakings as are regulated, prescribed, determined or required to be approved by a Regulatory Authority.

Explanation: For the purposes of clause (e) the expression “Regulatory Authority” means:

(i) the National Electric Power Regulatory Authority established under the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (XL of 1997),

(ii) the Pakistan Telecommunication Authority established under the Pakistan Telecommunications (Reorganization) Act, 1996 (XVII of 1996),

(iii) the Oil and Gas Regulatory Authority established under the oil and Gas Regulatory Authority Ordinance, 2002 (XVII of 2002); and

(iv) Any other Regulatory Authority as the Federal Government may, by a notification in the official Gazette, specify.”

²⁵ Wilson, Joseph. At the Crossroads: Making Competition Law Effective in Pakistan. *Northwestern Journal of international Law & Business*. Chicago. 26:565, 2006.

²⁶ Wilson, Joseph. *Op. Cit.*

public sectors and increases penalties to a maximum of PRs 75 million and PRs 1million per day (from a maximum of PRs 100,000 and an additional PRs 10,000 per day).

The new competition law was initially promulgated in the form of the Competition Ordinance of 2007²⁷ and eventually appeared in its permanent form as the Competition Act of 2010²⁸ - an act of Parliament as opposed to temporary legislation by the President.²⁹

The Commission is a Federal Agency and is exclusively mandated under the Competition Act and the rules, regulations, directives and guidelines issued thereunder to ensure free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behaviour across Pakistan.

In terms of section 59 of the Competition Act, the provisions of any other statute that either have conflicting provisions or if the provisions thereof are inconsistent with the provisions of the Competition Act, the latter shall hold the field and shall have precedence i.e. the provisions of Competition Act.

3. Overview of the competition law

Divided into 6 chapters and 62 sections, the 2010 Competition Act of Pakistan is a contemporary, full content and international standard competition law that puts in the hands of the Pakistani Competition Authority all power and legal and investigative instruments to enforce it.

The current Competition Act has much broader objectives than the previous MRPTO, such as ensuring free competition in all spheres of commercial and economic activity; enhancing economic efficiency; and protecting consumers from anti-competitive behaviour.³⁰

The Act applies to all undertakings, whether governmental or private, and to all actions or matters that may have the effect of distorting competition within Pakistan.

In Chapter I, the law lists all relevant definitions to its interpretation and application. Chapter II lists all the substantive provisions, to wit: anti-competitive practices, merger regimes and exemptions and deceptive marketing practices. Chapter III describes the structure, composition, terms of office and meetings of the Competition Commission of Pakistan. Chapter IV deals with the functions and powers of the Commission, also establishing rules on proceedings; orders from the Commission; rules to enter and search premises, including forcible entry and the power to call for information and enquiries. Chapter V lays down rules on penalties and appeals, and Chapter VI addresses general issues such as documents, confidentiality and internal regulation.

²⁷ The Competition Ordinance, 2007 (Published in the Gazette of Pakistan Extraordinary, Oct. 2, 2007).

²⁸ The Competition Act, 2010, Act No. XIX of 2010 (Published in the Gazette of Pakistan Extraordinary, Oct. 13, 2010)

²⁹ The MRTPO was restored and first promulgated as a Presidential Ordinance in 2007; experiencing two re-promulgations and a 45-day suspension prior to ratification by Parliament and enactment as Competition Act in October 2010 (the Act). The lapsing of the Ordinance and suspension of law soon after the succession of the Chair of CCP on recommendation of her predecessor made the situation even more challenging. In such defiant environment, effective relationship of CCP with media and different stakeholders helped the successful enactment of the new law and, consequently, the very existence of the Commission and its sustainability.

³⁰ Wilson, Joseph. Crossing the Crossroads: Making Competition Law Effective in Pakistan' (2011), 8(2), Loyola University Chicago International Law Review, pp. 105/ 106.

4. Definition of the relevant market

Section 2 of the Competition Act 2010 stipulates that the relevant market is “the market which shall be determined by the Commission with reference to a product market and a geographic market. A product market comprises all those products or services that are regarded as interchangeable or substitutable by the consumers by reason of the product’s characteristics, prices and intended uses. A geographic market comprises the area in which the undertakings³¹ concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring geographic areas because, in particular, the conditions of competition are appreciably different in those areas”.

The definition of relevant market in section 2 (k) of the Competition Act, which is exactly the same as the EU Notice,³² deals only with demand side substitutability. Additionally, Pakistan merger regulation and guidelines do not refer to supply-side substitution. However, the EU Notice includes a section concerning supply substitution,³³ as effects are often equivalent to those of demand substitution.

5. Abuse of dominance

Specifically in relation to dominance, the 2010 Competition (section 2, subsection e) defines a dominant position as the ability of one or more sellers in a market to behave to an appreciable extent independently of competitors, customers, consumers and suppliers; or if an undertaking’s share of the relevant market exceeds 40 per cent.

The Competition Act (section 3, subsections 2 and 3) prohibits the abuse of a dominant position through any practice that prevents, restricts, reduces or distorts competition in the relevant market. These practices include, but are not limited to, limiting production or sales, unreasonable price increases, charging different prices to different customers without objective justifications, tie-ins that make the sale of goods or services conditional on the purchase of other goods or services, predatory pricing, refusing to deal and boycotting or excluding any other undertaking from producing, distributing or selling goods, or providing any service.

Additionally, section 29 of the CCP General Enforcement Regulation 2007 prescribes that the Commission, in assessing the competitive effects of abuse of dominant position in the

³¹ According to Section 2 (q) of the 2010 Competition Act, “undertaking” means any natural or legal person, governmental body including a regulatory authority, body corporate, partnership, association, trust or other entity in any way engaged, directly or indirectly, in the production, supply, distribution of goods or provision or control of services and shall include an association of undertakings.

³² European Commission Notice on the definition of relevant market, paragraph 7.

³³ Supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices. When these conditions are met, the additional production that is put on the market will have a disciplinary effect on the competitive behaviour of the companies involved. Such an impact in terms of effectiveness and immediacy is equivalent to the demand substitution effect (Section 20 – Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C372/03). Accessible at: [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y1209\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y1209(01):EN:NOT).

relevant market, may consider the following factors of dominance including, but not limited to, commonly used measures such as:

(a) Market share. Market share of the concerned undertaking and for this purpose may use information from a variety of sources including the main parties, other competitors, customers, buyers, suppliers, trade associations and market research reports. Market share can be measured in terms of revenues, volumes, production capacities or outputs, depending on the markets concerned and the information available;

(b) Concentration measures. Measures of the degree of concentration may generally be looked at as an indicator of the ability of leading undertakings in a market to exercise market power. Other competitive constraints will need to be considered before finding that these undertakings have such market power;

(c) Structural factors: There may be other structural factors that can provide indications of current competitive conditions within the market.

6. Prohibited agreements

Section 4 of the Competition Act prohibits undertakings or associations from entering into any agreement or making any decision in respect of the production, supply, distribution, acquisition or control of goods or the provision of services, which have the object or effect of preventing, restricting or reducing or distorting competition within the relevant market unless exempted by the Commission.

Such agreements include, but are not limited to, market sharing and price fixing of any sort; fixing quantities for production, distribution or sale; limiting technical developments; as well as collusive tendering or bidding and the application of dissimilar conditions. However, the Competition Commission is empowered to authorize exceptions.

7. Exemptions

The Competition Act prescribes that the Commission may grant exemptions from prohibited agreements of Section 4 to a particular practice or agreement upon request. The exemption will be subject to conditions set out by the Commission and must include a specific period. If CCP understands that there has been a material change of circumstances it may cancel the exemption or impose additional or withdraw conditions and obligations.

CCP may also grant block exemptions if agreements from a particular category fall within the criteria of section 9.³⁴ In any case, CCP must give transparency to such proceedings by publishing its proposed order in order to bring the matter to the awareness of possible affected parties. Section 9 provides the criteria for individual and block exemptions.³⁵

³⁴Section 9 - The Commission may grant individual or block exemptions in respect of an agreement, which substantially contributes to: (a) improving production or distribution; (b) promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; or (c) the benefits of that clearly outweigh the adverse effect of absence or lessening of competition. The onus of claiming an exemption under this Act shall lie on the undertaking seeking the exemption.

³⁵ See the section on Agency resources, caseload and personnel incentives below.

The Commission has granted individual exemptions in an array of cases, including template distribution or dealership agreements, licences and franchise agreements. While granting exemptions, the Commission has imposed conditions, such as: (i) not to fix minimum resale price; (ii) not to restrict party's spouse and children from engaging in similar business; (iii) allowing shelf space to other parties; and (iv) amendment of lopsided termination clauses so as to give each party equal rights in terminating the agreement.³⁶

The number of individual exemptions has been relatively high: 91 between 2008 and 2009, 44 between 2009 and 2010 and 66 in 2010. Among those 66 individual exemptions granted in 2010, 25 related to distribution agreements.

To date, no block exemption has been granted by CCP, as the Commission has yet to receive any applications for such exemptions.

8. Deceptive marketing practices

The competition legislation also prohibits deceptive marketing practices, considered as any advertising or promotion that misrepresents the nature, characteristics, qualities or geographic origin of goods, services or commercial activities.³⁷

Section 10 of the Competition Act prescribes that no undertaking shall enter into deceptive marketing practices. The Competition Act considers that a deceptive marketing practice shall be deemed to have been resorted to or continued if an undertaking resorts to: (a) the distribution of false or misleading information that is capable of harming the business interests of another undertaking; (b) the distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, suitability for use, or quality of goods; (c) false or misleading comparison of goods in the process of advertising; or (d) fraudulent use of another's trademark, firm name, or product labelling or packaging.

9. Mergers and acquisitions

The Competition Act requires prior notice of proposed mergers or acquisitions that meet the notification thresholds stipulated in regulation 4 of the Competition (Merger Control) Regulations 2007.

The law prohibits mergers that would substantially lessen competition by creating or strengthening a dominant position in the relevant market. If the Commission determines this to be the case, it can prevent mergers or acquisitions, set conditions or require divestitures. The law makes no distinction between horizontal and vertical mergers.

³⁶ Wilson, Joseph. Crossing the crossroads: making competition law effective in Pakistan. Loyola University. *Chicago International Law Review*, Vol. 8, Issue 2, p. 68. Chicago, 2011.

³⁷ According to the definition in U.S. Lanham Act (Trademark Act), 15 U.S.C.A. § 1125(a), Section 9 of the Competition Act reads: "[T]he criteria for individual and block exemptions: (1) The Commission may grant individual or block exemption in respect of an agreement, which substantially contributes to:

(a) Improving production or distribution;
(b) Promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; or
(c) The benefits of that clearly outweigh the adverse effect of absence or lessening of competition.
(2) The onus of claiming an exemption under this Act shall lie on the undertaking seeking the exemption".

CCP enforces section 11 in addition to the pre-merger notification requirements of reg. 4 of the Competition (Merger Control) Regulations 2007, which provides for a mandatory pre-merger notification for those merger transactions above thresholds relating to the size of the transaction and size of the parties. These thresholds capture the majority of the transactions likely to have an impact on a relevant market in Pakistan. In “first phase” cases the Commission is expected to issue an approval decision within 30 days.³⁸ If the Commission fails to make a determination within 30 days for the first phase review, it means that there is no objection to the intended merger. A filing fee set at varying levels, dependent on the size of the merging parties, is payable upon notification.

For second phase cases³⁹ the Commission shall review the information and give its decision on the proposed transaction within 90 days.⁴⁰ Failure to render a decision within that time frame means that the Commission has no objection to the intended transaction. Time limits for applicants are not restrictive as they can apply as soon as they agree in principle with the transaction or sign a non-binding letter of intent for the merger.

If, after the second phase review, the Commission determines that the intended merger substantially lessens competition, it may nonetheless approve the transaction, if it is shown that (a) it contributes substantially to the efficiency of the business, (b) such efficiency could not reasonably have been achieved by a less restrictive means of competition, (c) the benefits of such efficiency clearly outweigh the adverse effect of the absence or lessening of competition, or (d) it is the least anti-competitive option for the assets of the failing undertaking, if it is a case of actual or imminent financial failure.

If the Commission decides that the transaction under scrutiny does not qualify for approval, it may: (a) prohibit the consummation of the transaction; (b) approve it subject to conditions; (c) approve it given that the undertakings involved enter into agreements specified by the Commission.

Section 11 of the Competition Act bars any merger between undertakings that substantially lessens competition by creating or strengthening a dominant position in the relevant market. The Act deals with any concentration, without exemption for public companies or governmental bodies, as the definitions in section 2 of the Competition Act underline that an undertaking comprises any governmental body including a regulatory authority in any way engaged, directly or indirectly, in economic activity. The term “merger” in section 11 also covers joint ventures;⁴¹ therefore they are subject to Commission approval, provided that they meet the notification thresholds.

The relevant legislation on merger control is section 11 of the Competition Act and the Competition (Merger Control) Regulation, along with CCP merger guidelines. The Merger Regulation provides details of the thresholds, exemption conditions and merger procedures (phase I and II reviews), including the applicable form of pre-merger application. It lists some factors that the Commission shall take into account for the assessment of the merger. These factors include the level of import, ease of entry, level and trends of concentration,

³⁸ Section 11(5) of the Competition Act.

³⁹ Section 11(8) of Competition Act.

⁴⁰ The Act refers to 30 & 90 days, however Merger Regulation declares these time limits as working days, which exclude the weekends and festivals.

⁴¹ “Merger” means the merger, acquisition, amalgamation, combination or joining two or more undertakings (See section 2 of the Competition Act).

degree of countervailing power, characteristics of the market, vertical integration, failing firm and the removal of effective competitors. The merger guidelines exhaustively clarify the factors that the Merger Regulation refers to under the headings of market share, possible effects of mergers (coordinated and non-coordinated effects), buyer power, likelihood of entry, efficiencies and failing firms.

Article 4 of the Merger Regulation sets the thresholds, as section 11(2) of the Competition Act states that undertakings should apply for clearance from the Commission if they meet pre-merger thresholds set in the regulations. According to subsection (2) of Article 4, if the value of gross assets (annual turnover) of the undertaking is higher than 300 million rupees (500 million); or the combined value (turnover) of the acquirer and the shares of the target undertaking or the merging parties is more than 1 billion rupees, parties are required to make an application for clearance. Despite these figures, parties should apply, depending on the value of the acquired assets and also of the percentage of total voting shares of the acquirer.⁴²

Since the Pakistani merger guidelines are very closely modeled on the EU merger guidelines,⁴³ they may address some issues since the substantive test in Pakistan may differ from the EU. The wording of the Competition Act refers to the dominance test, however the merger guidelines indicate both market dominance and substantial lessening of competition, and even make reference to a significant impediment to an effective competition test. As this may lead to legal uncertainty for the evaluation of mergers, it is advisable that a careful theoretical and empirical support for those approaches is laid down.

Section 11(13) of the Act provides that the Commission may, within one year, review the order of approval of mergers for the conditional decisions, on its own or upon request from the parties on the grounds that the circumstances of the market or of the undertakings have changed. Although there have not been any decisions in which the Commission reviewed its order, this section, if and when applied, must be *cum grano salis*⁴⁴ and with full reasoning and substantiation, as this may lead to legal uncertainty.

Section 31 of the Competition Act stipulates that the Commission in the case of a merger may, in addition to the options above: (i) authorize the merger, possibly setting forth the conditions to which the acquisition is subject; (ii) decide that it has doubts as to the compatibility of the merger with the prescriptions of the law and thereby open a second phase review; or (iii) undo or prohibit the merger, as a conclusion of the second phase review.

In the financial year 2010–11, most of the mergers reviewed by the Commission were considered not harmful to competition and “No objection” certificates were issued within 30 days of receipt of the pre-merger application, without further investigation.

Remedies

Section 28 of CCP General Enforcement Regulation stresses that, without prejudice to the generality of the powers conferred upon the Commission under section 31 of the Competition Act, the Commission may consider any of the following types of remedies, including, but not limited to: (a) remedies that are intended to restore all or part of the market structure, such as

⁴² See article 4 of the Merger Regulation.

⁴³ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03).

⁴⁴ With common sense.

(i) prohibition of an anticipated merger; (ii) divestment of a completed acquisition; and (iii) partial prohibition or divestment; (b) remedies that are intended to increase the competition, such as: (i) requiring access to essential inputs/facilities; (ii) dismantling exclusive distribution arrangements; and (iii) removing “no competition” clauses in customer contracts; and (c) remedies aimed at excluding or limiting the possibility that the merged undertaking will take advantage of the increased market power resulting from the merger to behave anti-competitively or to exploit its customers or suppliers, such as: (i) a commitment to non-discriminatory behaviour; (ii) an obligation to increase the transparency of prices; and (iii) an obligation to refrain from conduct, the main purpose or effect of which is to inhibit entry.

The Regulation also states that the remedial action that the Commission may decide to take will always depend on the facts and circumstances of the case.

Further, that in deciding on an appropriate remedy, the Commission shall consider the effectiveness of different remedies and their associated costs and may have regard to the principle of proportionality.

Finally, in addressing the question of appropriate remedies which provide a comprehensive solution such as is reasonable and practicable, the Commission may take account of how adequately the action would remedy, prevent or mitigate the competition concerns.

Section 31(a) of the Competition Act also sets the guidelines for structuring remedies in cases involving abuse of dominant position. The provision allows the Commission to formulate behavioural and structural remedies. The latter involve dissolution, divorcement and divestiture, as well as requiring access to an essential facility and mandatory licensing.

Section 31(a) read with section 38(2) empowers the Commission to impose penalties for abusive conduct, in addition to framing remedies. Since the commencement of its activities, the Commission has ordered behavioural and structural remedies, as well as imposed penalties for abuse of dominant position.

Lastly, section 31(b) stipulates the rules for building remedies in cases involving prohibited agreements. The provision, nevertheless, limits the discretion of the Commission to primarily making cease and desist orders. CCP can either annul the agreement in total or the provision(s) of the agreement contrary to section 4 of the law.

10. Consumer protection and unfair competition

The Pakistani Competition Law also stipulates prohibition of “deceptive marketing practices”, aiming to protect consumers and avoid unfair conduct from undertakings. The substantive provisions have been successful in integrating competition policy and consumer protection policy.

The Competition Act⁴⁵ refers to practices such as the distribution of false or misleading information to undertakings or consumers; false or misleading comparison of goods; or fraudulent use of another’s trademark, firm name or product labelling or packaging.

⁴⁵ Section 10.

Section 31(c) of the Act empowers the Commission to formulate cease and desist orders, to take the necessary actions to restore the previous market conditions and to confiscate and destroy goods used as or in a deceptive marketing practice. Section 31(c) combined with section 38(2) authorizes CCP to impose penalties, additionally to building remedies for section 10 violations.

An Office of Fair Trade (OFT)⁴⁶ has been created within CCP specifically to oversee consumer protection issues, under section 10 of the Act.

OFT has decided a substantial number of cases involving misleading advertisements and the fraudulent use of another's trademark, both proscribed under section 10 of the Act.

11. Penalties

Section 38 of the Competition Act empowers the Commission to direct any undertaking or individual to pay, by way of penalty, a sum specified in an order, if it determines that such an undertaking or individual has been found to have engaged in any prohibited activity, has failed to comply with an order of the Commission, has failed to supply documents and information to the Commission, or has furnished any document or information believed to be false, inaccurate or that knowingly and negatively interferes in the work of the Commission.

The Commission, in such situations, after giving the undertaking or individual concerned the opportunity of being heard, may impose penalties at the following rates: (a) for an anti-competitive or deceptive marketing conduct an amount not exceeding 75 million rupees⁴⁷ (approximately 767,000 US dollars⁴⁸) or an amount not exceeding 10 per cent⁴⁹ of the annual turnover of the undertaking; (b) for non-compliance an amount not exceeding 1 million rupees (approximately 10,000 US dollars⁵⁰), and (c) for clause (e) in sub-section (1), an amount not exceeding 1 million rupees.

Clause (e) specifically envisages situations e.g., where the Commission is conducting an enquiry and exercising its powers under section 33 of the Act or is conducting a search and inspection under section 34 of the Act and while exercising its power the undertaking concerned knowingly abuses, interferes with, impedes, imperils, or obstructs the process of the Commission. In such an eventuality, the said undertaking can be penalized for such a contravention after being given an opportunity of being heard.

It is interesting to emphasize that the Competition Act also makes clear that a failure to comply with an order of the Commission constitutes a criminal offence, punishable with imprisonment for a term that may extend to one year or with a fine of up to 25 million rupees (approximately 250,000 US dollars) and in addition, or in lieu of, the Commission may initiate proceedings in a court of law.

⁴⁶ See Section 3.2.1(h), below, for more details on OFT.

⁴⁷ From October 13, 2010. Previously 55 million rupees.

⁴⁸ Exchange rate: 97,74 Pakistani Rupees = 1 U.S. Dollar, on January 22nd, 2013.

⁴⁹ From October 13, 2010. Previously 15%.

⁵⁰ Idem.

The Commission guidelines on the imposition of financial penalties⁵¹ provide parameters for determining the quantum of the penalty, stipulating the factors that the Commission will take into consideration while calculating the sanctions. Those factors are:⁵²

- The seriousness of the infringement
- The duration of the infringement
- Aggravating or mitigating factors
- Other relevant factors, e.g. deterrent value.

The guidelines are recommendatory and not binding on the Commission.

12. Leniency

The Competition Law (section 39) allows CCP to impose a lesser penalty on an undertaking that is party to a prohibited agreement or is alleged to have violated the law if it has made a full and true disclosure in respect of the alleged violation. Subsection 2 extends such a possibility to a full exemption and, in either case leniency is possible only for the first undertaking making a full disclosure. The Commission, though, may revoke leniency in case of a failure to comply with the leniency conditions or of false evidence.

A considerable number of stakeholders interviewed during the UNCTAD fact-finding mission have emphasized that CCP has managed to create a leniency policy in Pakistan that is appreciated. The business community now looks for legal counsel on competition issues in advance, showing that, among other CCP policies, the leniency programme has brought an increased sense of awareness and responsibility in the country.

Under the applicable regulations,⁵³ the Commission may grant an undertaking the benefit of exemption or total immunity from financial penalties if: (i) the undertaking is the first to provide the Commission with evidence of prohibited activity under the law, provided that the Commission does not already have sufficient information to establish the existence of the alleged activity; (ii) the undertaking: (a) provides the Commission with all the information, documents and evidence available to it regarding the prohibited activity; (b) maintains continuous and complete cooperation throughout the proceedings and until the conclusion of any action by the Commission arising as a result of the proceedings; (c) refrains from further participation in the alleged activity from the time of its disclosure to the Commission; and (d) must not have taken any steps to coerce another undertaking to take part in any of the activities prohibited under the law.

If an undertaking does not qualify for total immunity, it may still be entitled to a reduction in the financial penalty of up to 100 per cent if: (i) the undertaking seeking the reduction is the first to provide the Commission with independent, additional, corroborating or contemporaneous evidence of any of the activities prohibited under the law; and (ii) this information is given to the Commission: (a) prior to issuance of a show cause notice; or (b) after initiation of proceedings but before the Commission has passed any order confirming infringement and violation under the applicable legal provisions.

⁵¹ CCP Guidelines on Imposition of Financial Penalties (Fining Guidelines). Accessible at: http://www.cc.gov.pk/images/Downloads/guidlines/imposition_of_financial_penalties.pdf. Accessed on January 30, 2013.

⁵² *Idem*. Section 4.

⁵³ CCP Competition Leniency Regulations, 2007.

Additionally, an undertaking may benefit from a reduction in the financial penalty up to 85 per cent if: (i) the applicant undertaking gives information to the Commission prior to the conclusion of the proceedings before the Appellate Bench of the Commission or prior to participation in proceedings before the Competition Appellate Tribunal, where the original order is passed by two or more members, or prior to recovery of the penalty imposed upon passing of the original order by a single member; and (ii) the applicant undertaking submits additional evidence previously unknown to the Commission that represents significant added value with respect to the evidence already in the Commission's possession, thus further substantiating the infringement under the Act.

Any applicant shall also: (i) admit infringement of the offence unconditionally; (ii) abandon its participation in any prohibited activity forthwith; and (iii) make full and true disclosure of all the facts in their knowledge relating to the prohibited activity.

All possible reductions in the financial penalty under the regulations are discretionary and the Commission shall take into account: (i) the stage at which the undertaking comes forward; (ii) the evidence already in the Commission's possession or relied upon by the Commission; and (iii) the quality and nature of the information provided by the undertaking.

Further, leniency may only be granted provided that the undertaking cooperates genuinely, fully and on a continuous basis from the time it submits its application throughout the Commission's administrative procedure.

If the Commission is satisfied that an undertaking that has been granted an exemption from penalty, or a reduction in the level of penalties, has failed to comply with the conditions of exemption or reduction of penalty, or is found to have given false evidence, the Commission may revoke the lenient treatment granted to the undertaking.

An undertaking that has made an application for lenient treatment in respect of a violation of the provisions of the Act in respect of one market (first market) and is also involved in a violation of the Act in another market (second market), may apply for exemption from penalty or a further grant of reduction in penalty in the first market.

Upon request by the applicant, the Commission may endeavour, to the extent that is consistent with its obligations to disclose or exchange information, to keep the identity of undertakings, which come forward with evidence of any of the prohibited activities, confidential until the decision of the Commission to grant leniency under applicable regulations or later, at the discretion of the Commission.

Leniency regulations also pave the way for private enforcement, as they make clear that the exemption or total immunity granted by the Commission cannot exclude claims by third parties who may have suffered loss as a result of the activities in respect of which immunity is granted. Third parties, therefore, shall have the right to pursue private claims for damages before the court of competent jurisdiction.

CCP is now perhaps the only agency in the world that allows an undertaking to invoke leniency provisions even after a decision and findings of the Commission on cartelization, albeit prior to initiation of proceedings before the court.

During the interviews carried out by the peer review team there were opinions amongst the competition, legal and business communities that were against and in favour of the CCP policy toward leniency. The great challenge is, therefore, to maintain a leniency regime that encourages undertakings to come forward to the competition authority, but that creates an environment propitious to the development of deterrence also.

Reward payment scheme

Besides the leniency programme, CCP maintains a reward payment scheme⁵⁴ aimed at attracting the collaboration of employees of undertakings who are involved in any illicit practice. The scheme involves the payment of rewards for an amount ranging from a minimum of 200,000 rupees to a maximum of 5 million rupees. The reward is paid in phases depending on the level of help and information provided and the stage of the process. At the time of writing the report, the reward payment scheme had been used once, in the cellular mobile telecom operators (CMTO) cartel case.

The reward will take into account the usefulness of the information provided, the seriousness of the cartel, efforts made by the informant, and the level and nature of the informant's contribution and cooperation.

It shall be paid subject to the condition that the information provided by the informant is accurate, verifiable and useful. The informant's identity shall be kept secret, unless they agree to give evidence in subsequent proceedings. The Commission also ensures that any information provided is carefully safeguarded and handled.

The payment shall be made in four stages: (i) initial payment upon receipt of information; (ii) upon conclusion of preparatory enquiry; (iii) upon the violation being established to the Commission's satisfaction, on the basis of information received and the issuance of the Commission's order in this respect; and (iv) upon recovery of the penalty.

Specific regulations prescribe that the Commission may designate specially trained officers to deal with informants and that it would be in the informants' own interest to approach the Commission before they had obtained all the information they might potentially have access to.

The Commission may discuss with the informant in advance the possible risks in obtaining the information and how such risks may be reduced. It is within the discretion of the Commission not to accept the intended information provided by the informant or grant the financial reward claim, based on the veracity and usefulness of the information supplied.

Settlements are not possible under the competition legislation of Pakistan. However, while building sanctions, CCP still adopts a "lenient approach" toward other parties that are not the leniency applicants.

13. Appeals within the Commission

Any person aggrieved by an order from the Commission may submit, within 30 days, an appeal to the Appellate Bench of the Commission. Such Appellate Benches, constituted by

⁵⁴ Competition Commission of Pakistan revised guidelines on "Reward payments to informants scheme".

the Commission, must comprise at least two members not involved in the decision under appeal.

The decisions of the Appellate Bench shall be unanimous or by a majority of votes. In the case of a split verdict, the original order that is under appeal shall hold and have effect.

Accordingly, a single member of the Commission decides most of the matters under the Pakistan competition legislation in the first instance.⁵⁵ Appeal against the order of a single member, or authorized officer, may be preferred before an appellate bench comprising no less than two members of the Commission, not including the member who originally heard the case.⁵⁶ The Appellate Bench, constituted by the Commission, has the power to “confirm, remand, set aside or cancel the impugned order or enhance or reduce the penalty or make such other order as it may deem just and equitable in the circumstances of a case”.⁵⁷ The order of the Appellate Bench can then be appealed against before the Competition Appellate Tribunal,⁵⁸ and then finally, before the Supreme Court of Pakistan.

Prior to the Appellate Tribunal becoming functional, appeals from CCP Appellate Bench decision were challenged in the high courts of the country, and, eventually, in the Supreme Court of Pakistan.

As we propose in the following sections of this review, the Commission should make final decisions by hearing the matters at first instance by a bench comprising of all members. That would be better for a collegiate body such as CCP as it would potentially reduce the time to reach a final decision.

14. Procedural aspects

Section 33 of the Competition Act establishes that the Commission shall, for the purpose of a proceeding or enquiry, have the same powers as are vested in a civil court, while trying a suit, in respect of the following matters: (a) summoning and enforcing the attendance of any witness, (b) discovery and production of any document as evidence, (c) accepting evidence on affidavits, (d) requisitioning of any public record from any court or office, and (e) issuing of a commission for the examination of any witness or document.

Any proceeding before the Commission shall be deemed to be a judicial proceeding in relation to intentional insult or interruption to public servants sitting in judicial proceeding and false evidence; and the Commission shall be deemed to be a civil court for the purposes of offences relating to documents given in evidence.

15. Intellectual property law

Pakistan is a signatory to the WTO Trade-Related Aspects of Intellectual Property (TRIPs) agreement. To comply with TRIPs obligations, Pakistan has enacted laws on copyright, industrial designs, layout of integrated circuits, trademarks and patents. These include the Patent Ordinance 2000 and the Trademarks Ordinance 2001, which provided, for the first

⁵⁵ Wilson, Joseph. *Op. Cit.*, p. 122.

⁵⁶ Section 41 of the 2010 Competition Act.

⁵⁷ Section 22 of the Competition Commission (Appeal) Rule (2007). Available at:

http://www.cc.gov.pk/images/Downloads/rules/cc_appeal_rules_2007.pdf.

⁵⁸ See the section on the Competition Commission and the courts below.

time, for the registration of service marks for eight categories of services. Protection of trademarks has traditionally been challenging in Pakistan, with rights of prior use not recognized by the Trademarks Registry in some cases.

The Patents Ordinance 2000 offers protection for both products and processes, and a 20-year patent term. Copyright Ordinance 1962 (which is modelled on British law), and the Copyright (Amendment) Ordinance 2000 govern copyright protection. The amendment provided for better enforcement, including harsher penalties for infringement and civil search orders without notice to the defendant. Pakistan is also a signatory of the Universal Copyright Convention.

Although patents, industrial designs and models, trademarks and copyrights are legally recognized, enforcement of intellectual property laws is improving only very slowly, as in many other developing economies. In a price-conscious market like Pakistan, plagiarism is a fact of life and is common for books, videocassettes, audiocassettes and textile designs.

Indeed, although the International Intellectual Property Alliance (IIPA) made no recommendation on Pakistan in 2012, it recommended in February 2011 that the United States Trade Representative (USTR) keep Pakistan on its priority watch list (where it remained in the annual update of April 2011).

According to figures from a 2011 study by the Business Software Alliance, the rate of illegal conduct in business software in Pakistan was 86 per cent as against 84 per cent in 2010; the commercial value of unlicensed software increased to US\$278m from US\$217m in 2010. This compares unfavourably with neighbouring India, where the rate was 63 per cent in 2011; however, the commercial value of unlicensed software in India was US\$2.93bn.

In July 2002, the Government acknowledged that the country's intellectual property rights (IPR) organizations were ineffective and required a major overhaul. It passed the Pakistan Intellectual Property Rights Organization Ordinance in August 2005, laying the groundwork for establishing an umbrella organization, the Intellectual Property Organization of Pakistan (IPO).

The IPO, which held its first meeting in August 2005, oversees the offices of the patents and industrial designs registrar, trademark registrar and copyright registrar. It reports directly to the Prime Minister and is a one-stop shop to address all IPR-related issues in Pakistan.

Legislation related to intellectual property

Reciprocal agreements for the protection of inventions and designs exist with Australia, New Zealand, Sri Lanka and the United Kingdom and with Canada for inventions only.

Basic legislation includes: the Patents Ordinance 2000; Designs Ordinance 2000; Trademarks Ordinance 2001 and Trademarks Rules, 2004; Copyright (Amendment) Ordinance 2000 and Registered Layout-Designs of Integrated Circuits Ordinance 2000.

The duration of patents is 20 years from the date of filing. Terms of patents granted under the Patents and Designs Act 1911, however, remain at 16 years.

Conditions for patentability establish that an invention must be new (state of the art), have involved an inventive step and be capable of industrial application. Patents may not be granted for animals or plants or biological processes for the production of animals or plants other than microorganisms.

III. Institutional aspects: enforcement structures and practices

A. Competition policy institutions

Other Government and judicial institutions, as well as NGOs, may influence the objectives of the competition policy in a country. Although CCP is the public agency that is most directly engaged in competition law enforcement and policy implementation, it is not the only organization that influences the competition environment in Pakistan. The repercussions for competition of actions and decisions by other public bodies, which regulate particular sectors or are responsible for the development of specific policies, may affect, both negatively and positively, the competition authority's ability to promote competition principles.

The Commission, as part of the advocacy initiative, does take into account the comments and proposals, as and when required, of stakeholders, including the regulatory bodies, the business community and consumers.

As far as the ministries are concerned, it is not only the Ministry of Commerce and Industries whose views are taken into account, the Commission under the provisions of section 37 of the Competition Act may take cognizance of any reference forwarded to it by the Federal Government.

The Commission also takes action on any competition concern raised before it by any body or institution. As far as consultation is concerned, the Commission does take into account the comments of all the regulatory bodies, the business community and consumers.

Among executive and judicial bodies and NGOs having substantial influence on the state of competition in the country, are:

- Securities and Exchange Commission of Pakistan
- State Bank of Pakistan
- Pakistan Telecommunications Authority
- Pakistan Electronic Media Regulatory Authority
- National Electric Power Regulatory Authority
- Oil and Gas Regulatory Authority
- Public Procurement Regulatory Authority
- Ministry of Commerce
- Federal Bureau of Revenue
- Pakistan high courts
- Supreme Court of Pakistan
- Transparency International Pakistan
- Associations of consumers (Helpline Trust and Consumer Forum).

During the fact-finding mission to Pakistan, the UNCTAD team had the opportunity to meet and/or interview by phone representatives of the Public Procurement Regulatory Authority,

associations of consumers (Helpline Trust and Consumer Forum) and the Ministry of Commerce.

The information and impressions gained from the first two are in the specific sections of this report (public procurement and the Office of Fair Trade). In relation to the Ministry of Commerce, comments follow below.

There is no formal relationship between CCP and the Ministry of Commerce of Pakistan. As the Ministry of Commerce focuses on internal rather than international trade, this relationship becomes even more important.

The Ministry of Commerce (MoC) is not responsible for industry affairs as this falls under the jurisdiction of the Ministry of Industry. MoC is a member of the Government Committee on Rationalization of Tariff Policy and CCP has been invited to participate in those meetings. The Ministry has requested policy advice from the Competition Commission on automobile sector issues for the last three years.

MoC believes that CCP could have a greater role in advising on international trade issues, especially on regional integration as it could play a crucial role for future deeper economic integration in the region, especially in relation to India.

In MoC's view, CCP should seek membership of different Government committees, such as the Tariff Committee. A very noticeable fact, for example, is that there is no representation of consumer affairs institutions in Government committees.

MoC also believes that CCP has done a good job on competition advocacy in Pakistan and should now focus on further implementing such policy, as a way to gain consistency in this area. CCP has called the country's attention to competition concerns in some sectors, now it should propose and help implement the ways and means of tackling those problems.

B. Organization and performance of the Competition Commission of Pakistan

1. Institutional framework and organization of the Competition Commission

The Competition Commission as an institution is very well respected in Pakistan, even though it is relatively young. Its contribution to the creation of an institutional framework in the country is to be acknowledged.

Representatives of the Pakistani business community comment that surprisingly the Pakistani Government truly respects the independence of CCP, perhaps in part due to international pressure. It was also emphasized that investments will only flow into Pakistan if legal certainty, through independent institutions like CCP, is achieved.

The Commission's solid reputation is based on technical competence and integrity. There is a common perception among Pakistani business and legal communities that the law gives CCP adequate power and discretion, as well as, along with CCP initiatives and performance, making the Commission known and respected in the country.

It is also considered that there are adequate checks and balances in the competition law and in the Pakistani legal system, particularly in regards to the judiciary.

The mindset of CCP, which is recognized among society, is that it is (i) important to enforce the law and not only to punish; and (ii) not against profit-making but in favor of regulating the market.

It is also generally accepted that the Commission is transparent and that its judgments are fairly clear.

Section 12, (3) of the Competition Act prescribes that the Commission shall be administratively and functionally independent, and the Federal Government shall use its best efforts to promote, enhance and maintain the independence of the Commission.

Section 14 stipulates that the Commission shall consist of not less than five and not more than seven members who must serve full-time for a renewable three-year term of office until they attain the age of 65 years⁵⁹ and not more than two members shall be employees of the Federal Government. Such provisions aim to ensure that the Commission is largely composed of technocrats, rather than bureaucrats.⁶⁰

Commentators have pointed out that the shorter duration of the term of the members of CCP, as compared to that of the five-year terms of the parliament of Pakistan, when seen in light of the possibility of getting reappointment for as many terms until one attains the age of sixty-five years may compromise the authority's independence. This may be due to the fact that the Prime Minister, who is the appointing authority,⁶¹ gets to appoint two full commissions during his tenure.⁶² Any member of the Commission who aspires to get reappointed for a second term, which falls within the tenure of the Prime Minister who originally appointed him, is more prone to yield to political pressure.⁶³

The law also demands that members must be recognized for their integrity, expertise, eminence and experience for not less than 10 years in any relevant field including industry, commerce, economics, finance, law, accountancy or public administration. A one-year quarantine period is also applicable to former members.

Terms of office may be revoked by order of the Federal Government if it is found that a member has been disqualified for having been convicted by a competent court of an offence involving moral turpitude, has been judged insolvent, is considered physically or mentally incapable, is absent for three consecutive meetings of CCP without authorization, fails to report any conflict of interest, or discloses unauthorized information.

The Commission shall meet whenever the Chair considers necessary and the minimum quorum is three members. All questions arising at any meeting shall be determined by a majority of votes of the members present and voting. The Chair shall have a casting vote in case of a tie.

⁵⁹ In other words, members of CCP are appointed for a three-year term of office and are eligible for re-appointments until they reach the age of 65.

⁶⁰ Wilson, Joseph. *Crossing the crossroads: making competition law effective in Pakistan*. Loyola University *Chicago International Law Review*, vol. 8, issue 2. Chicago, 2011.

⁶¹ Normally a list of candidates is submitted to the Ministry of Finance by the chairperson of CCP, which then recommends a shorter list to the Prime Minister for appointment.

⁶² Under the current Pakistani competition regime, there is no participation of the legislature in the process of appointing members of the Commission.

⁶³ Wilson, Joseph. *Op. Cit.*, p. 121.

The Board of the Commission is a collegiate body and its main role is to make policy decisions and to oversee the working of the Commission.

The Board is currently comprised of five members and the Chair.⁶⁴ As seen above, the law allows a full composition of six members, plus the chair. The credentials and backgrounds of the current commissioners vary, including tax law, regulatory law, banking, investment and project finance and private entrepreneurship.

One interviewee has stated that CCP has managed to create a good case law, with good reasoning, and that the Commission has frequently referred to and used international precedents and best practices in its analysis and decisions as well.

Besides the Board, the Commission is organized into the following departments:

- (a) Commission secretariat
- (b) Cartels and Trade Abuses
- (c) Legal
- (d) Corporate Affairs
- (e) Mergers, Acquisitions and International Affairs
- (f) Competition Policy and Research
- (g) Advocacy and Information Technology
- (h) Office of Fair Trading and Budgetary Affairs.

(a) Commission secretariat

The Commission secretariat oversees the conduct of business of the Commission under the approved procedures. Among the powers and duties of the secretariat to the Commission are, *inter alia*, to represent the Commission at any forum as authorized by the Commission, to issue notices and minutes of the meetings of the Commission and certifying the decisions or documents used in hearings by the Commission. The Chair may assign other powers and duties to the secretariat based on organizational necessities.

(b) Cartels and Trade Abuses Department

This department is the result of the merging of two previous departments: the Monopolies and Trading Abuses Department and the Cartels and Investigation Department. Currently, the Department conducts enquiries and investigations for possible contraventions of sections 3 and 4 of the Competition Act, including, *inter alia*:

1. Abusive practices of dominant undertakings, such as limiting production or sales, making unreasonable increases in price, imposing other unfair trading conditions, engaging in unfair price discrimination, predatory pricing, tying the sale of certain goods to the sale of unrelated goods, boycotting suppliers and refusals to deal;

⁶⁴ Section 14 of the Competition Act reads: “The Commission shall consist of not less than five and not more than seven members. Provided that the Federal Government may increase or decrease the number of Members from time to time, as it may consider appropriate.”

2. Entering into prohibited agreements, including cartelization and collusive behaviour relating to the production, supply, distribution, acquisition or control of goods or the provision of services that may have the object or effect of preventing, restricting, reducing or distorting competition.

The Department performed seven searches and inspections in 2011 compared to four in the preceding three years. In total there have been fifteen searches and inspections in the past five years. Thirty-five enquiries were also carried out in the past four years and 20 are currently underway.

Search and inspection planning, risk analysis and performance is done with the help of the Legal Department and potentially other departments of CCP. There is much inter-departmental cooperation within CCP and departments can participate in the investigations of other departments.

The department also participates in the investigation work for policy notes. Thirteen policy notes have been issued by CCP in the last five years.

Several CCP professionals interviewed by the peer review team emphasized that there is an “open door” policy within the Commission, encouraging staff to discuss issues directly with the Chair and members.

The Cartel and Abuses Department counts seven professional staff plus two support staff. In some specific cases the department receives assistance from sector experts who are hired by the Commission.

The Competition Act and subsequent regulations make it mandatory for all government bodies and agencies, either federal or provincial, to aid CCP when necessary.

Among abuse of dominance cases we may cite, for instance, *Tetra Pak Pakistan Limited*,⁶⁵ where CCP initiated an enquiry into the complaint of the Consumer Awareness and Welfare Association wherein it was alleged that Tetra Pack Pakistan Ltd. (TPPL) was abusing its dominant position. The enquiry team reviewed the material and found that TPPL had dominance in the relevant market by virtue of its market share, as well as by the absence of substitutes in the market. It had used this dominance to tie its sales and leasing of equipment with the exclusive right to provide maintenance and repair services. Based on the findings of the enquiry report, a show cause notice for violation of section 3 of the Act was issued to TPPL. TPPL presented its defence and agreed to reword or amend all of the clauses that appeared to be in violation of the Act. The Bench disposed of the show cause notice subject to timely compliance by TPPL with CCP conditions within six weeks from the date of the final hearing.

In *Murree Brewery Company Ltd v Siza Foods (Pvt) Ltd.*,⁶⁶ the complainant, Murree Brewery (MB), sent several letters to SIZA foods, a franchisee of McDonald's, requesting that its non-alcoholic beverages be considered for sale in McDonald's fast-food outlets in Pakistan. McDonald's ignored the requests of MB. Consequently, MB complained to the Commission

⁶⁵ Show cause notice No. 20 of/2010. Issued to M/S TETRA PAK PAKISTAN LIMITED (FILE No. 02/DIR(INV)/TETRA PAK/CCP/08). Accessible at: http://www.cc.gov.pk/images/Downloads/tetra_pak_final_order.pdf.

⁶⁶ Available at: www.cc.gov.pk/images/Downloads/Final%20Order-Siza%20Foods.pdf (April 2009).

for refusal to deal by McDonald's amounting to abuse of dominant position. The Commission conducted an enquiry, which revealed that McDonald's had an exclusive dealing arrangement with Coca-Cola and that McDonald's enjoyed a dominant position in the relevant market of international fast-food restaurants. CCP noted that even though exclusive dealing agreements are vertical restraints, the competition concerns are nonetheless predominantly "horizontal" in that the exclusive dealing arrangement has an impact on the rivals of the manufacturer, who are foreclosed from having access to the buyer. Further, where the buyer happens to be the dominant player, it inevitably (by virtue of its exclusive dealing arrangement with the manufacturer) engages in refusals to deal with the rivals of manufacturer, and thus attracts the provisions of section 3. McDonald's understood the concerns of the Commission, and volunteered the following undertaking, which was accepted by the bench:

"SIZA hereby undertakes that SIZA will, in addition to the products of the Coca-Cola Company sell such other beverages which, after review, are shown to conform to the global quality standards prescribed by McDonald's to its licensees/franchisees from time to time and which are available in the quantities required and on reasonable commercial terms, and in conformity with the requirements of the relevant franchise agreement, and that the other beverages will be placed in a chiller/beverage cooler within its restaurants and at kiosks (space permitting) at a place visible to customers, but without having to make any structural changes in any of its restaurants or kiosks in order to accommodate such additional beverages."

As it was a consent decree, no appeal was submitted. CCP did not impose any penalty, keeping in view the cooperative behaviour of the party and its legal counsel.⁶⁷

Concerning the leniency policy, to date CCP has received one leniency application. In *Leniency Application filed by M/S. Siemens (Pakistan) Engineering Company Ltd.*,⁶⁸ the Commission had initiated a formal enquiry under section 37(2)⁶⁹ of the Act on information received from an informant against the prima facie collusive bidding by electric power equipment manufacturers and their association in procurement tenders of different electric power distribution companies (DISCOs) for switchgear and transformers.

The Commission inspected the premises of the manufacturers association (PEMA) and two companies, seizing various documents including valuable information that enabled CCP to identify and record the methods used by the various electric equipment manufacturers to collude amongst themselves to fix prices and divide the quantities of goods being procured.

The leniency applicant, M/s Siemens (Pakistan) Engineering Co. Limited, approached the Commission to seek leniency when the proceedings under section 30 had already been initiated. Subsequently, the applicant submitted the leniency application along with documents⁷⁰ as evidence of prohibited activity mentioned in the show cause notice, while fully cooperating and providing the Commission with the requested information. The applicant admitted unconditionally the infringement of the offence as alleged and committed that it had abandoned its participation in the prohibited activity.

⁶⁷ Wilson, Joseph. Antitrust remedies in Pakistan: composition and challenges. *Competition Law International*, V. 6, N.2, September 2010, London, pp. 62-72.

⁶⁸ (File No. 1(2)/Reg/S.39/CCP/2011).

⁶⁹ On the conduct of enquiries.

⁷⁰ 233 documents.

The Commission granted immunity to the applicant from a penalty with respect to price fixing in the switchgear market and a 100 per cent reduction in the penalty with respect to the contravention alleged in the show cause notice No. 27 in the relevant markets of switchgear and transformers, stating that it would serve as an incentive to all participants of a cartel to come forward. The Commission also made clear that such reductions could also heighten the uncertainty amongst the participant undertakings in other cartels, spurring them to compete for leniency.

In regard to the alternative “Reward payment to the informants scheme”, a good initiative by CPP, which was used once in *Cartelization in the Cellular Mobile Telecommunication Services Market*, where the Commission, based on a news report from “The Daily Times”, entitled “Cellular operators start charging 10 paisas on balance inquiry”, took notice of an apparently simultaneous imposition of the same amount charged for balance enquiry services by four major mobile telecom operators.

CCP sent letters seeking clarification and comments to the four companies concerned. The companies in their replies denied any suspected violation of section 4⁷¹ of the law and provided detailed information and arguments in their support. Meetings were held by the undersigned with the representatives of all the four companies to gather further information.

In the meantime, an informant under the Commission’s reward payment scheme contacted the Commission offices and provided documents that consisted of printouts and PST1 files of e-mails exchanged between the CEOs and high-level officials of all the major cellular mobile telephone operators. Upon receiving the e-mails, the Commission decided to initiate a formal enquiry under section 37 of the law.

The analysis of all e-mails and other material provided to CCP indicated that the cellular mobile telephone operators had been discussing their pricing strategies with their competitors and, therefore, that they had entered into an agreement to revise the selling price of SIM cards and missed call charges, which prima facie amounted to violation of section 4 (1) in terms of section 4 (2) (a) of the Competition Act.

Based on the above findings, a recommendation was made in the enquiry report to initiate proceedings against the cellular mobile telecom operators under section 30⁷² of the Act. The Commission, after taking into account the findings and recommendations of the enquiry report, initiated proceedings under section 30 of the Competition Act by issuing show cause notices.

The cellular mobile telecom operators have challenged the powers of the Competition Act, the jurisdiction of the Commission and the show cause notices before the Lahore High Court and the cases are still pending adjudication.

A brief analysis of additional substantive work of the department, including selected cases, can be found in the section on CCP functions and investigatory powers below.

⁷¹ Prohibited agreements.

⁷² Proceedings in cases of contravention.

(c) Legal Department

The Legal Department is key to the good functioning of the Commission, as it carries out enforcement activities and court representation. Its roles include providing legal advice and services to all other departments of CCP and assisting the Commission in conducting enquiries and in the performance of searches and inspections.

It is equally responsible for managing the legal affairs of CCP, researching and following competition law developments in mature jurisdictions, providing legal advice and assistance to operational departments and undertakings on matters pertaining to the Competition Act. This department, under the mandate of the Commission's leadership, also serves as a liaison with the Federal Government, its ministries and other regulatory authorities.

In addition, the Legal Department is assigned the responsibility of drafting and proposing secondary legislation, such as rules and regulations, and scrutinizing it to ensure its compliance with the law.

It also houses the Office of the Registrar, which issues show cause notices, arranges hearings and assists the Original and Appellate Benches of CCP by providing administrative and legal support. The Registrar also represents the Commission in litigation matters before the various courts of Pakistan, preparing pleadings to be filed in all litigation-related matters.

In order to defend itself and its decisions against legal and court challenges, the Commission has been represented by external counsel. Currently both the Chair and the Registrar work closely with private practitioners in developing litigation strategies.

Further, the Legal Department is responsible for the initial processing of exemptions applied for by undertakings under section 5 of the Competition Act. The department initially processes these exemption applications, following which the responsible Board member makes the final decision regarding the grant of exemptions.

The department staff participate and help other departments on many issues. For instance, they assist the Cartel Department in planning and performing dawn raids as well as working with the Merger Department on exemptions authorizations.

Additionally, the department is in charge of the follow-up of compliance with CCP decisions, keeping a comprehensive in-house legal database.

(d) Corporate Affairs Department

The Corporate Affairs Department has a supportive role in CCP functioning. It handles matters pertaining to the internal operations of the CCP, namely, administration, accounts, information technology and human resources. Improvements have been made in staffing and computerized information systems in recent years.

The department's administration wing provides administrative and logistical support to the Commission and its employees. Its mandate includes general office management, transport management, assets management and security and safety.

The accounts wing is responsible for accounts and internal controls. There is an increasing emphasis on cost control within the Commission, in part due to the chronic scarcity of funds available.

The human resources wing is involved with the planning and assessment of the number of employees and the skills mix that is needed. It is also accountable for the review, design and drafting of job descriptions for current and prospective vacancies, as well as for the recruitment of talent. Once an employee is recruited, the department reviews their performance on a regular basis through performance appraisals. In order to improve the efficiency levels of CCP officers and staff, each employee is required to undertake relevant training sessions and development programmes.⁷³

(e) Mergers, Acquisitions and International Affairs Department

The detection of merger and acquisition cases from newspaper reports, stock exchange websites and directly from the Securities and Exchange Commission of Pakistan and the review of mergers and acquisitions of shares or assets, including joint ventures, pursuant to section 11 of the Competition Act are among the functions and responsibilities of the Mergers and Acquisitions Department.

To assist undertakings contemplating a merger or acquisition that desire to get an informal and non-binding view of the Commission, the department operates the Acquisitions and Mergers Facilitation Office (AMFO). The procedure adopted by the department for examining the application and issuance of a “No objection certificate (NOC)” is transparent and expeditious. In spite of an accelerated time frame of 30 days for the first phase review, cases are typically finalized and an NOC is issued within a few days, except in cases where additional information is required.

During 2010, for instance, more than 35 undertakings, law firms and consultants were facilitated on different issues relating to merger application filing and substantive issues by AMFO.

In phase 1 no notice to the public on the operation is given, as this only occurs in phase 2. Any acquisition of a 10 per cent share is considered relevant by CCP in terms of notification and revision of the transaction, because it means the possibility of appointing at least one director, even if it is a non-commercial position.

CCP has only imposed behavioural remedies in M&A cases to date. The understanding is that in these early stages of the competition law and policy in the country, it is more acceptable for undertakings. For monitoring compliance with the behavioural remedies, CCP receives compliance reports from the parties and may appoint a trustee, e.g., an audit firm.

A single member, with the help of the technical departments, makes final decisions regarding the review of mergers and acquisitions.

⁷³ See the section on agency resources, caseload and personnel incentives below for more information on personnel development programmes.

If a merger or an acquisition is to be disapproved, then the current practice at CCP is that a bench of at least two members, not the full Commission, must have the final word and make such decisions.

Since its inception, CCP has cleared 59 mergers, 254 acquisitions and 8 joint ventures, totaling 321 transactions.⁷⁴ Of the total number of merger applications processed by the Commission, three have been approved with conditions and none has been rejected or disapproved.⁷⁵ The CCP issues an NOC for first phase cases that deserve approval from the Commission. Hence, the approach of the CCP in merger transactions can only be analysed within those three conditional decisions.

One important issue concerning conditional decisions that was underlined by the counsel on behalf of Fauji Fertilizer Company Limited (FFC)⁷⁶ is of Article 11(5)(b) of the Merger Regulation that gives the power to CCP to authorize an intended merger with conditions, although the transaction under review does not lessen competition by creating or strengthening a dominant position under section 11(1) of the Act.

FFC applied to CCP for the acquisition of Ms. Agritech Limited and the Commission decided to carry out a second phase review as the merger was considered to have, prima facie, the likelihood of substantially lessening competition by strengthening a dominant position in the relevant market. The fertilizer industry has a duopolistic character in Pakistan as the two leading firms, namely FFC and Engro, have more than 80 per cent of the market. The pre-market shares of FFC in both the urea and dap markets were almost 50 per cent.

The Commission, after its second-phase analysis, declared that the proposed transaction would not substantially lessen competition since the increase of FFC's market share was not substantial (6 per cent and 7.4 per cent for urea and dap, respectively) with respect to the already established dominance of FFC. In order to deter possible collusion in the market, the Commission decided to clear the merger subject to behavioural conditions.

Nonetheless, the Pakistani Supreme Court set aside the order of the Commission to the extent of imposing the conditions and remanded the case to CCP to dispose of the matter in relation to the imposition of the conditions, after hearing the parties. Thereafter, the Commission should issue a certificate holding as to whether the conditions were finally to be imposed or not.

The counsel appearing on behalf of FFC stressed that imposing conditions was illegal since CCP had declared that the merger did not lessen competition. The Commission then disagreed with the private counsel and referred to the Merger Regulation Article 11(5)(b) and section 31(d) of the Act. That section of the Act declares that in addition to the provisions contained in section 11, the Commission may authorize the merger, however it may set conditions.

The legal dispute is due to the interpretation of subsections 10 and 11 of section 11 of the Competition Act that appear to give CCP the authority to approve a transaction subject to

⁷⁴ Data include time period between 2 October 2007 (establishment of the CCP) and 15 December 2012.

⁷⁵ See the paragraphs on caseload in the section on agency resources, caseload and personnel incentives below for more detailed information.

⁷⁶ File No.324 /MERGER-CCP/2010. Acquisition of 79% shares of M/s. Agritech Limited by M/s. Fauji Fertilizer Company Limited. (Conditional NOC given). File No. 24 in "Orders" list on CCP's website.

conditions if it “creates or strengthens a dominant position”. In such context, the legal basis of Article 11(5)(b) of Merger Regulation became questionable in the view of the parties to the transaction.

In another conditional decision (*Nestle S.A./Pfizer Nutrition*),⁷⁷ the acquiring party’s written commitment to import the products of the target company for three years, ensuring that Pfizer (Wyeth) products would continue to be available in Pakistan was considered sufficient to assuage concerns raised by CCP. In the acquisition of Wind Telecom S.p.A., Pakistan’s largest mobile telecom operator, Vimpelcom Ltd., (with a market share of 32.5 per cent) had the chance to have joint control of the second biggest mobile telecom operator, which itself enjoyed a 23.9 per cent market share. In this case, the Commission concluded that the market was oligopolistic, whereby the potential for coordinated effects was high and accepted the parties’ commitments prohibiting any representatives of one group from serving on the governing body of the other group and barring the sharing of commercially sensitive information.

In both cases referred to, the behavioural remedies imposed seem to have been necessary to placate the Commission’s competition concerns; however, they might not have been sufficient alone to achieve that.

Office of International Affairs

The Office of International Affairs was established as the focal coordinating point to liaise with UNCTAD, OECD and the International Competition Network (ICN). In addition, the Office is responsible for exploring bilateral relations with competition agencies and with donor agencies for possible technical assistance. In essence, the Office is the communications focal point for all international activities.

The Office is currently involved in two ICN working groups, specifically in the working groups on cartels and mergers. It also contributes to the workings of OECD and UNCTAD.

The Office also handles the liaison and cooperation relationships with other competition agencies in the world, be it on a bilateral or regional basis. Cooperation activities are described in more detail in the section on international cooperation below.

(f) Competition Policy and Research Department

Due to the growing importance of research in the area of competition policy and law, this department was created in 2011. Prior to this, the research function was a part of the Policy Planning, Research, Exemptions and International Affairs Department. The Competition Act requires CCP to conduct research and review policies as per the following sections of the law:

- Section 28(b) (functions and powers of the Commission) requires the Commission to conduct studies for promoting competition in all sectors of commercial and economic activity;

⁷⁷ File No.493/MERGER-CCP/2012. Acquisition of the nutrition business of Pfizer Inc. by Nestlé S.A. (conditional NOC). File No. 1 in orders list on the website of CCP.

- Section 29(b) (competition advocacy) mandates the Commission to promote competition through reviewing policy frameworks for fostering competition and making suitable recommendations.

The department's research and market studies programme helps identify anti-competitive factors and market practices, and propose appropriate remedies for those sectors of the economy which are subject to an anti-competitive environment.

The department has just hired a staff member with a PhD in economics to become a senior economist of CCP, a position similar to chief economist. The team is composed of five professionals, including the senior economist, a master in economics, a B.A. in economics, a B.A. in business and a telecom specialist.

Parties do bring economic information and data into cases (either conduct or merger cases). However, parties have not to date brought economic opinions from economists, or econometric studies into cases.

Information resource centre

The department also manages the Commission's Information Resource Centre (IRC). At the time of the establishment of the Commission, the library resources of the Monopoly Control Authority were passed on to serve as the beginning inventory for the Commission's library. After processing and preparing proper records, all the library volumes were managed by adopting the standardized library parameters. The library was renamed as the Information Resource Centre (IRC) in 2010, and given a broader mandate to transition from a static library to an interactive and dynamic resource and reference centre.

(g) Advocacy and Information Technology Department

The work of CCP towards increasing the awareness of stakeholders, including the public and private sectors, the legal community, academia, media, and the Government, is being carried out through an advocacy strategy developed by the Advocacy Department.

Section 29 of the Competition Act, requires the Commission to engage in advocacy through various means in order to create an awareness of competition issues and to promote a culture of competition in the country. Advocacy efforts include national and international conferences, seminars, training workshops, round tables, media appearances, sessions of the Competition Consultative Group and bilateral meetings with sector regulators.

The Commission understands the reason for and importance of advocating competition, especially in a developing country where the awareness of the business community may be suboptimal.

As a result, awareness of competition law amongst the Pakistani business community is considered to be fairly high by foreign multinationals. Within national/local Pakistani companies it is increasing due to good coverage of CCP decisions and activities by the media and other advocacy initiatives. Media exposure has been crucial for CCP independence and efficiency. In reality, the media have embraced the Commission as a driven and effective enforcer in a country where the population feels big business and vested interests often trump ordinary people's needs.

Policy notes

Influencing and eventually modifying public policies which have the potential to impair competition is a very relevant and key activity of any competition agency. CCP has been working consistently towards that approach and objective. In 2010, for instance, eight different public policies were reviewed by CCP. As a result, the Commission issued one policy note to the Securities and Exchange Commission of Pakistan.

During the interviews undertaken by the UNCTAD fact-finding mission, some practitioners complimented the policy notes system, stressing that clients now seek policy notes from CCP on matters of interest, recognizing them as a good reference.

However, as acknowledged by some members of CCP, its advocacy activities have, so far, been directed mainly and with priority to businesses. In the future, it is expected that CCP should also direct advocacy to the Government, especially to those sectors in Government that are less open to competition, in addition to the issuing of policy notes.

Information technology

The IT team manages and supplies all IT-related services to support the Commission's technology mission of increasing employee productivity and efficiency.

The area is organized into three programme fields: enterprise application services, enterprise operational services and enterprise design/multimedia services.

The Commission is working on an increased digitalized process management system. The IT Department is also focusing on the establishment of a forensics laboratory. The basic equipment is already in place and the department is able to perform some forensic work but needs further funds for more detailed activity. The IT Department is also responsible for the maintenance and update of the CCP website.

(h) Office of Fair Trading and Budgetary Affairs Department

The Office of Fair Trading (OFT) enables the Commission to engage in direct consumer protection from misleading and deceptive marketing practices.

The OFT was recently formally established as a separate department and continues to share resources with the Legal Department. Prior to its independent status, it was a part of the Legal Department. The purpose of establishing the office was to enhance the link between the Commission and the consumer and establish a focal point for identifying and providing solutions to issues that pose or may potentially pose problems for consumers.⁷⁸

Essentially, the Commission, through the OFT, aims to redress deceptive marketing practices, one of the salient features of the Competition Act, with which the public needs to be acquainted.

⁷⁸ Competition Commission of Pakistan Annual Report 2011, page 19. Available at: http://www.cc.gov.pk/images/Downloads/annual_report_2011.pdf.

The OFT comprises a small team dedicated to the goal of building consumer confidence, facilitating informed consumer decision-making and giving aggrieved consumers recourse to corporate deception.

The recent establishment of this department shows that CCP is seriously addressing consumer protection issues involving misleading and deceptive marketing practices.

The Commission has held 22 deceptive marketing practice cases so far⁷⁹ and issued orders in 8 of them. This represents a significant number considering the lack of funds and the need to cover the whole country on fair trade issues.

In Pakistan, the Federal Government has delegated consumer protection legislation initiatives to the provinces. This means that the Federal Government cannot enact a nationwide consumer protection law.

Only one province, Punjab, has enacted a consumer protection law but no institution has been created to enforce it.

In such a context, the CCP initiative of creating the Office of Fair Trade and tackling deceptive marketing practices has the potential to start building a consumer protection conscience in Pakistan.

Amid the considerable number of cases on consumer protection handled by OFT, one may mention, for instance, *China Mobile Pakistan Ltd and Pakistan Telecom Mobile Ltd.*,⁸⁰ where China Mobile advertised a call rate but did not mention that the rate was not based on per minute calls, which is the norm, but rather based on calls of 30 seconds. In addition, Pakistan Telecom claimed to offer the world's cheapest call without any supporting evidence. The undertaking involved stopped the misleading advertisement before the case was concluded by CCP. No penalty was therefore imposed in the case.

In *M/S ACE Group of Industries (RK) on complaint of BMW and Harley Davidson*,⁸¹ BMW and Harley Davidson filed complaints against AGI, alleging that AGI was fraudulently using its registered trademark on its products and advertising the same on its website in contravention of the provisions of section 10 of the Act.

The CCP enquiry report recommended issuance of a show cause notice to AGI regarding unauthorized and fraudulent use of the complainant's mark on its own products, and advertising the mark on its website (albeit purportedly committed innocently), which constituted a deceptive marketing practice as it was capable of harming the complainant's business interests. This violated the provisions of section 10(1) of the Act, read with 10 (2) (a) & (d). The Commission issued a groundbreaking order with a view to setting an example for other undertakings involved in the fraudulent use of a registered trademark. CCP imposed a token penalty of PKR 250,000, by taking a lenient view, as the deceptive practice was immediately discontinued, and owing to the cooperative approach of AGI. The company removed all the trademark images of BMW and Harley Davidson from the website domain

⁷⁹ By the end of 2012.

⁸⁰ Available at: www.cc.gov.pk/images/Downloads/ZONG%20-%20Order%20-%202029-09-09%20.pdf. (September 2009) (Zong/Ufone).

⁸¹ Show cause notices No. 18 and 19 of 2010.

immediately after receipt of a letter from CCP. However, AGI was informed that in future CCP would not take a lenient view of any non-compliance with the provisions of the Act.

Budgetary Affairs

The financial resources of the Commission comprise “receipts” of the budget and are consolidated under the CCP Fund established under the Act. The receipts which constitute the Fund mainly include: (i) allocations by the Government; (ii) charges and fees levied by the Commission; (iii) contributions from local and foreign donors and (iv) a percentage of fees and charges levied by other regulatory agencies in Pakistan, as prescribed by the Competition Act.⁸²

To ensure the financial autonomy of the Commission, section 20 of the Act provides that the CCP fund shall consist, beyond allocations by the Government and charges levied by the Commission, of “a percentage of the fees and charges levied by other regulatory agencies in Pakistan”. A portion (3 per cent) of the fee and charges levied by other regulatory agencies was supposed to be the main source of funding for the Commission. However, the other regulators have challenged this provision and have not contributed to the fund with their share, even after three years of Commission’s existence. It was learned that the Government is trying to resolve this issue.

As a result, the Commission has not, so far, benefited from the 3 per cent of the fees and charges of other regulatory agencies as prescribed and consequently the budget receipts chiefly comprise the allocations of the Government. In view of the scarcity of funds, a separate department named Budgetary Affairs has been created within the Commission and is working under the supervision of one of the members of the Commission. Its main role is to arrange funds for the budgetary requirements of the Commission, within the statutory provisions of the Act.

2. Agency resources, caseload and personnel incentives

Personnel

There is a common perception among the Pakistani business and legal communities that CCP is composed of professionals rather than bureaucrats. The total number of employees, including members working at CCP is 135.⁸³ The composition of the non-administrative staff of each department is as follows:

Serial No.	Department/description	Total number
1.	Chair/members/secretary	6
2.	Legal	7
3.	Cartels and Trade Abuses	7
4.	Mergers and International Affairs	5
5.	Advocacy	5
6.	Corporate Policy and Research	5
7.	Office of Fair Trading	3
8.	Information Technology	8

⁸² Section 20(f) of the Competition Act.

⁸³ This includes the five members and the Chair, as they are full-time working members of the team.

9.	Senior economic adviser	1
10.	Consultants	1

In addition to the departments mentioned above, there is also the Corporate Affairs Department, members of which assist the other departments in enforcement actions.

The breakdown of the total number of employees by lawyers, economists and others is as follows:

Serial No.	Description	To date	Up to 2011	Up to 2010
1.	Lawyers	10	11	8
2.	Economists	11 (this includes the Senior Economic Adviser who holds a PhD in economics)	10	3
3.	Others ⁸⁴	28	22	25

Personnel incentives

CCP personnel incentives are codified under its service regulations of 2007 and are also supplemented through standard operating procedures (SOPs). Following are some of the incentives schemes offered by the Commission for career development and encouragement of its employees for outstanding work and dedication towards the job:

(a) Monetary incentives. The monetary incentives under the service regulations and the SOPs include:

- Granting of advance increments for exceptional qualifications and experience relevant to the job;⁸⁵
- Grant of merit increments to employees for outstanding performance (service regulations provision);⁸⁶
- Honorarium and cash awards for exceptional performance, including research works and publications, in order to encourage employees to improve their qualifications;⁸⁷
- Allowances for overtime (service regulations and SOPs provisions).

(b) Training and career planning:

⁸⁴ The remaining employees are holders of degrees in business administration, finance, mass communication, IT and statistics.

⁸⁵ Chapter 3, section 4 of the Competition Commission of Pakistan (service) regulations 2007.

⁸⁶ Chapter 3, section 7, *ibid.*

⁸⁷ Chapter 3, section 9, *ibid.*

- The Commission takes a keen interest in the continuing professional development of its employees. To this end, the Commission, at its own expense, routinely requires employees to undergo training courses within or outside Pakistan.⁸⁸
- The service regulations also allow the Commission to make provisions for the career planning of employees, subject to its requirements.⁸⁹ In this regard, SOPs have been developed through which the Commission provides financial assistance to its employees in improving their academic/professional qualification.

(c) Study leave. Employees of the Commission may also avail themselves of study leave⁹⁰ with full pay for competition law and policy courses of durations of up to a year. This is in line with the Commission’s objectives of increasing the personal efficiency and rewarding the professional growth of its employees, as this ultimately benefits the entire organization.

Resources

The total budget allocated by the Federal Government to CCP for the 2012–2013 fiscal year was 200 million rupees.⁹¹ That has been the average allocation for the three preceding fiscal years as shown in the box below:

Serial No.	Year	Amount in Pakistan rupees (millions)
1.	July 2012 –June 2013 ⁹²	200
2.	July 2011 –June 2012	200
3.	July 2010 – June 2011	190
4.	July 2009 – June 2010	200
5.	July 2008 – June 2009	82.13
6.	October 2007- June 2008	59.57

Employees’ salaries and benefits account for an average of 63 per cent of the total budget since 2007 and specific percentages are as follows.

⁸⁸ Chapter 5, section 1, *ibid.*

⁸⁹ Chapter 5, section 2, *ibid.*

⁹⁰ Section 10(10) of the Competition Commission (service) regulations, 2007 provides that: “10. Study leave. (1) An employee may be granted study leave with full pay by the competent authority for a maximum period of one year during the entire service of the employee; provided that the employee has been in the service of the Commission for a continuous period of three years. (2) Such leave may be granted for study within or outside Pakistan: Provided that such a study may increase the efficiency of the employee and may be in the benefit of the Commission. (3) The study leave may be allowed for Competition Law and Policy courses only. (4) Study leave may be granted to a limited number of employees every year, as may be decided by the Commission. (5) The employee shall have to provide sufficient evidence of his admission in a recognized institution, at the time of applying for leave. (6) The employee shall also have to furnish a bond in prescribed form, for an amount of double the amount of salary paid during the leave, to the effect to the Commission if the employee violates any terms and conditions of the bond. (7) The competent authority shall have the right to pend, approve or reject study leave to an employee”.

⁹¹ Exchange rate as at 21 December 2012 was 1 dollar = 97.50 rupees

⁹² Allocated budget.

Serial No.	Year	Percentage
1.	July 2011 – June 2012	71.91
2.	July 2010 – June 2011	64.24
3.	July 2009 – June 2010	58.85
4.	July 2008 – June 2009	77.69
5.	October 2007- June 2008	41.85

As required by any competition framework and practice, charges collected by the competition authority through the enforcement activity must not be part of its budget. However, the total amount of those charges gives the interpreter a good reference for the expected or ideal budget allocation, as well as a view of the relationship between the results achieved by the enforcers and the financial resources put at their disposal.

Total fees and charges collected by CCP in the last six fiscal years were as follows.

Serial No.	Year	Amount in Pakistan rupees (millions)
1.	July 2012 – June 2013 ⁹³	25.14
2.	July 2011 – June 2012	60.72
3.	July 2010 – June 2011	51.76
4.	July 2009 – June 2010	46.47
5.	July 2008 – June 2009	42.88
6.	October 2007- June 2008	41.80

Caseload

Orders

CCP has passed a total of 475 orders from October 2007 to date.⁹⁴ The distribution according to the pertinent violations is as follows:

Serial No.	Relevant provision	Total number
1.	Section 3 - Abuse of dominance	12
2.	Section 4 - Prohibited agreements	18
3.	Section 10 - Deceptive marketing practices	22
4.	Section 11 - Phase II mergers	4
5.	Section 39 - Leniency	1
6.	Section 5 - Exemptions	404
7.	Regulation 21 of the general enforcement regulations - withdrawal of complaint	1
8.	Section 41 - Appellate Bench	5
9.	Section 32 - Interim orders	3
10.	Section 61 - Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970	3

⁹³ Up to 12-12-2012.

⁹⁴ Idem.

	Orders	
11.	Section 38 – Non-compliance orders	2

Mergers

Since its inception, CCP has processed a total number of 321 merger applications to date. The figures are as follows.

Serial No.	Year	Total number
1.	July 2012 – June 2013 ⁹⁵	25
2.	July 2011 – June 2012	51
3.	July 2010 – June 2011	85
4.	July 2009 – June 2010	60
5.	July 2008 – June 2009	61
6.	October 2007- June 2008	39

Out of the total merger applications processed by the Commission, four (4) have gone through second phase review. Out of those, three (3) have been approved with conditions.

Total merger transactions (mergers/acquisitions/JVs) reviewed by the Commission from November 2007 to December 2012:

From November 2007 to 15 December 2012:

Mergers	59
Acquisitions	254
Joint ventures	08
Total	321

The numbers of transactions approved without conditions, subject to conditions and not approved are as follows:

From November 2007 to 15 December 2012:

Transactions permitted without conditions:	318
Transactions subject to conditions:	03
Transactions disapproved	00

As seen, there have been only four merger notifications that were taken to the second phase review as of December 2012. Details are appended below:

Second phase review: 4 cases

⁹⁵ Up to 12-12-2012

	Second phase cases	
1	Acquisition of 79 per cent of the shares of M/s. Agritech Limited by M/s. Fauji Fertilizer Company Limited. (Conditional NOC given) (File No. 22 in orders list on website of CCP)	26-01-2011
2	Acquisition of Wind Telecom S.p.A (formerly Weather Investments S.p.A), an Italian private company by VimpelCom Limited, a Bermudan company. (Conditional NOC) (File No. 20 in Orders list on website of CCP)	17-03-2011
3	Acquisition of 100 per cent of the shares of Coastal Refinery Limited by Universal Terminal Limited. (No conditions) In this second phase review, the Commission observed that the licences in question held by the merger parties, referred to one single project. The bifurcation was done to procure bank loans and now their amalgamation will not have any impact on competition. NOC granted on 15 April 2011	15-04-2011
4	Acquisition of the Nutrition Business of Pfizer Inc. by Nestlé S.A. (Conditional NOC). (File No. 1 in Orders list on website of CCP)	09-10-2012

Exemptions

The Competition Act recognizes that certain practices or agreements that would otherwise be prohibited may provide an overall benefit to consumers, such as improving production or distribution, and making technological developments that would outweigh the adverse effects of decreased competition in the market. Thus, the Act makes provision for undertakings to apply for exemptions, should the pro-competitive effects of a prohibited practice or agreement be deemed advantageous. These exemption applications are initially processed by the Legal Department, followed by the final decision on the granting of such exemptions from one of the members of the Commission.

Since CCP became fully functional it has granted a total number of 404 exemptions to date. The annual breakdown of these exemptions is as follows.

Serial No.	Year	Total number
1.	July 2012 –June 2013 ⁹⁶	15
2.	July 2011 –June 2012	121
3.	July 2010 – June 2011	56
4.	July 2009 – June 2010	37
5.	July 2008 – June 2009	93
6.	October 2007- June 2008	82

CCP may grant an individual or block exemption to a prohibited agreement under section 5 of the Act, if it contributes to:

⁹⁶ Up to 12-12-2012.

- (a) Improving production or distribution;
- (b) Promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; or
- (c) The benefits of that clearly outweigh the adverse effect of absence or lessening of competition.

However, the Commission hasn't made a block exemption order to date. During 2011, CCP granted 66 exemption certificates. A significant percentage of them (37 per cent) dealt with distribution agreements. As the Commission may grant block exemptions on its own,⁹⁷ a block exemption on vertical restraints may also be applicable.

An important decision concerning individual exemptions was the *1-Link Guarantee Ltd and Member Banks* order. The case concerned the fixing of interchange fees of ATM cash withdrawal services; utility bill payment services and interbank funds transfer (IBFT) services. Also, 1-Link applied for an exemption under section 5 of the Competition Act for the agreements on ATM cash withdrawal and IBFT services. After comprehensively analysing the three criteria set out in section 9, CCP declared that the ATM cash withdrawal and IBFT agreements met the exemption criteria. Nonetheless, conditional exemption was granted for the utility bill payment services.

In its decision for the exemption of a joint venture agreement between *M/S Metro Cash & Carry International Holding B.V. and Thal Limited*, the Commission granted an exemption to the agreement, including a non-compete obligation, stating that those restrictions to competition ensured efficiency and were essential for a joint venture. CCP declared that the exemption was granted with the condition that the non-compete obligation would continue only during the existence of the joint venture.

Additional/other information

Serial No.	Description	Total Number
1.	Hearings conducted	116
2.	Show cause notices issued	416
3.	Searches and inspections	19
4.	Enquiry reports	35
5.	Leniency application	1

The number of CCP decisions since its creation in 2007, including merger and conduct analysis, exemptions and orders, compared to the number of decisions of the old Anti-Monopoly Service shows how active CCP has been.

3. CCP functions and investigatory powers

Section 28 of the Competition Act states that the functions and powers of the Commission shall be to: (a) initiate proceedings and make orders; (b) conduct studies for promoting competition; (c) conduct enquiries; (d) give advice to any undertaking which has asked for it in relation to the consistency of its proposed actions in relation to the law; (e) engage in competition advocacy; and (f) take all other actions necessary.

⁹⁷ Article 4A of Competition Commission (general enforcement) regulations, 2007.

Section 30 of the law establishes rules for proceedings in case of contravention, stipulating that before making an order the Commission shall: (a) give notice of its intention stating reasons; and (b) give the undertaking(s) involved an opportunity to be heard and to bring before the Commission facts and material in support of its (their) contention.

Where the Commission receives a substantiated complaint in writing of facts that appear to constitute a contravention, it shall conduct an enquiry. Upon conclusion of an enquiry with sufficient findings, the Commission shall initiate proceedings under section 30.

Section 31 states that in the case of an abuse of a dominant position the Commission may require the undertaking concerned to take action to restore competition and not repeat or engage in any other such practice. In the case of prohibited agreements, the Commission may annul the agreement or require the undertaking to amend the agreement or not to repeat the prohibitions or enter into any agreement or engage in any other such practice.

In relation to deceptive marketing practices, the Commission may require the undertaking(s) concerned to take actions to restore previous market conditions, or confiscate or destroy any goods with harmful effect.

Concerning mergers, the Commission, pursuant to section 31, may (i) authorize a merger, possibly setting forth conditions;⁹⁸ (ii) open a second phase review; or (iii) undo or prohibit the merger.

The Commission has the power to issue interim orders as well if the final decision will take time and the situation, actual or imminent, may cause serious and irreparable damage. In any case, the Commission must give the undertakings concerned an opportunity to be heard. Such interim orders may be reviewed, modified or cancelled any time by the Commission.

As outlined above, section 33 of the Competition Act establishes that the Commission shall, for the purpose of a proceeding or enquiry, have the same powers as are vested in a civil court, while trying a suit, in respect of the following matters: (a) summoning and enforcing the attendance of any witness, (b) discovery and production of any document as evidence, (c) accepting evidence on affidavits, (d) requisitioning of any public record from any court or office, and (e) issuing of a commission for the examination of any witness or document.

Any proceeding before the Commission shall be deemed to be a judicial proceeding in relation to intentional insult or interruption to public servants sitting in judicial proceedings and false evidence; and the Commission shall be deemed to be a civil court for the purposes of offences relating to documents given in evidence.

CCP may also require any undertaking to: (a) produce and allow examination of any books, accounts or other documents; and (b) furnish any information in its possession.

In addition the law lays down the possibility of the Commission, based on reasonable grounds to be recorded in writing, to enter and search any premises for the purpose of enforcing any provision of the Competition Act. In order to fulfil this power, section 34

⁹⁸ Conditions may include that undertakings enter into legally enforceable agreements specified by the Commission. Section 11(11) (c) of the Competition Act.

specifies that the Commission: (a) shall have full and free access to any premises, accounts, documents or computers; (b) may stamp, make an extract or copy of any accounts, documents or computer-stored information; (c) may seize any accounts or documents and retain them for as long as may be necessary; (d) may impound and retain any computer for as long as is necessary to copy the information required; and (e) may make an inventory of any article. The Commission may also authorize any valuer to enter any premises.

As seen above, the Competition Act gives CCP extensive powers in relation to entering and searching premises without the authorization of a judge. Such powers are even greater as section 35 of the law allows the Commission to enact forcible entry by its own decision, a previous court order not being necessary. That is the case when an undertaking refuses without reasonable cause to allow the Commission to exercise its search powers. In this situation, the investigating officer of the Commission may, by written order signed by at least two members, enter any place or building by force, if necessary. If the search activity is considered vexatious, excessive or with mala fide, the responsible investigating officer may be dismissed and fined a maximum of 500,000 rupees and/or imprisoned for up to one year.

Evidence gathered by recordings and wiretaps are not allowable in a court of law in Pakistan, even with the prior authorization of a judge. They can however be used to start an investigation. Hence, the Competition Act appears to give CCP enough power to investigate and enforce it, although the Pakistani competition authorities lack adequate personnel, resources and equipment to effectively perform such activities.

Notwithstanding, the Commission may call upon any undertaking to furnish periodically, or as and when required, any information relating to its organization, accounts, business, trade practices, management and connections with other undertakings. The Commission may also conduct enquiries into any relevant matter.

An example of behavioural remedy applied by CCP in a conduct case is found in the case of the *Pakistan International Airlines' Price Discrimination in Ticket Rescheduling*.⁹⁹ PIA had a policy to charge a fee for rescheduling domestic reservations, based on a percentage of the air fare. CCP considered that the fee amounted to price discrimination among passengers holding reservations in a particular flight and cabin. CCP then ordered PIA to stop discrimination by introducing a flat fee for rescheduling.

Another anti-competitive practice case that demanded a structural solution is found in *Islamabad Stock Exchange (ISE) and Karachi Stock Exchange (KSE)*.¹⁰⁰ ISE complained that KSE's refusal to share its trading platform, even for a reasonable fee, amounted to abuse of its dominant position. CCP held the trading platform as an essential facility and directed KSE to establish a unified trading system within six months, in order to ensure availability and access to the best price of commonly listed securities to all investors.

⁹⁹ See PIA Rescheduling case at: www.cc.gov.pk/images/Downloads/PIA%20Rescheduling-Cancellation%20Order%20%5B8%20Dec%202009%5D.pdf (December 2009).

¹⁰⁰ See KSE essential facility case at: www.cc.gov.pk/images/Downloads/Latest%20KSE-Order%2029-5-09.pdf (May, 2009).

4. Competition and public procurement

Pakistan spends around 30 per cent of its GDP on public procurement. Transparency International Pakistan¹⁰¹ estimates that the Government could save \$4 billion per annum by curbing anti-competitive and corrupt practices in the area. The Pakistan Public Procurement Regulatory Authority, however, believes that figure should be \$8 billion per year.

The relation between CCP and the Pakistan Public Procurement Regulatory Authority is considered informal and even though a relationship has been established, there are no regular or scheduled meetings between them.

Both authorities are currently working on a memorandum of understanding, having regard to the fact that public procurement is a key economic activity with a wide impact on competition. Many of the most significant cases dealt with by the Commission so far involved bid rigging and other collusive conducts in public tenders.

5. International cooperation

As mentioned above, the Office of International Affairs is involved in two ICN working groups, specifically in the working groups on cartels and mergers.

There is growing cooperation as regards the principles that are to be applied in the pursuit of hard core cartels. CCP is actively involved in drafting a chapter of the ICN cartel manual on international cooperation and information sharing in collaboration with Canada, the European Union and the Russian Federation.

The CCP Chair and one of its members participated in the ICN cartel workshop in Cairo in October 2009 along with 200 other delegates. The Chair was a panelist at a session that discussed cartelization by professionals and the member was a moderator at the session focusing on agency cooperation to fight multinational/regional cartels.

The office also participates in the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy (IGE) for consultations on competition issues of common concern to member States and informal exchanges of experiences and best practices.

CCP had ad hoc observer status for the year 2009-2010 at the OECD Competition Committee and regularly contributes by responding to questionnaires sent by the Committee. It has also contributed to the OECD Global Forum on Competition by providing resource persons in the form of speakers and/or moderators for the last five years.

Concerning international cooperation activities, the office is responsible for implementing, managing and monitoring the relationship with other competition agencies in the world.

Naturally, there has been an increase in the Commission's bilateral activities in the last few years. Members of the Commission have participated in international conferences organized by other competition agencies. For instance, a CCP member participated as a resource person/speaker at the Pros and Cons Conference 2009, organized by the Swedish Competition Agency. The theme was "Pros and cons of competition in/by the public sector".

¹⁰¹ TI-Pakistan is a national chapter of Transparency International, a civil society organization dedicated to curbing both international and national corruption.

The same member attended the 7th Annual Trade Practices Workshop organized by the Centre for Economic Research at the University of South Australia. In addition, CCP provided information to the Asian Development Bank for their technical assistance programme on “Accelerating economic transformation in Pakistan”.

Furthermore, CCP was involved in the creation of the South Asian Association for Regional Co-operation (SAARC) Competition Network (SCN).¹⁰² SCN aims to achieve three main objectives: (i) to provide a platform to foster capacity-building of those countries where competition law and policy is at a nascent stage and to encourage countries to adopt competition law and policy where it is non-existent; (ii) to hold an annual regional conference for knowledge sharing, learning and networking; and (iii) to effectively implement enforcement cooperation activities between member countries where transnational activities are involved. Regarding the latter, SCN will increase the chances that the investigation, be it a merger review or that of an anti-competitive conduct case, is successfully concluded and avoid conflicting decisions.

Notwithstanding the SCN, a meeting of Asian countries was held on the sidelines of the twelfth session of the UNCTAD IGE, in Geneva on 10 July 2012. Representatives of seven Asian countries, Japan, China, India, Pakistan, Lao People’s Democratic Republic, Bhutan and Cambodia, discussed a proposal from India to establish a network of competition jurisdictions in Asia aimed at exchanging information and expertise on a regional basis, fostering consultation among agencies and developing a capacity-building agenda.

C. The Competition Commission and the courts

A very positive, although not yet effective, aspect of the Pakistani competition law and policy is the constitution of a Competition Appellate Tribunal. Section 42 of the Competition Act provides that any person affected by an order of the Commission comprising two or more members or of the Appellate Bench of the Commission may, within 60 days, appeal to the Competition Appellate Tribunal.

The Competition Appellate Tribunal shall consist of a Chair, who has been a judge of the Supreme Court or a Chief Justice of a High Court,¹⁰³ as well as two other technical members who shall have at least 10 years’ knowledge and experience of international trade, economics, law, finance or accountancy.

Terms of office of the Competition Appellate Tribunal members will be three years and may be extended for a similar period. The Tribunal is entitled to make its own internal rules with respect to proceedings, in consultation with the Federal Government.

The Competition Act also prescribes that the Appellate Tribunal shall decide an appeal within 6 months and its decisions may be taken to the Supreme Court within 60 days for review.

Section 43 of the Competition Act establishes that “as soon as may be within thirty days of the commencement of this Act, the Federal Government shall constitute the Competition

¹⁰² SAARC is an organization of South Asian nations, founded in 1985 and dedicated to economic, technological, social and cultural development, emphasizing collective self-reliance. Its seven founding members are Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. Afghanistan joined SAARC in 2007.

¹⁰³ Currently, the Chair of the Competition Appellate Tribunal is a retired Supreme Court judge.

Appellate Tribunal”. However, it took more than two years from the promulgation of the Competition Act before the Appellate Tribunal was fully constituted.

Notwithstanding, under the Competition Act the decisions of the Commission are subject to judicial review before the Competition Appellate Tribunal. Where the parties wish to raise constitutional challenges, they approach the provincial high courts by invoking its writ jurisdiction. High Courts normally do not change CCP decisions, but rather issue stay orders until final judgment is achieved.

Most of the decisions of CCP have been appealed against and are pending before different high courts and the Supreme Court. At the time of finalizing this report, the courts have not yet decided a single case on merit.

Competition Appellate Tribunal

Until recently, CCP decisions were appealed to the high courts before the Competition Appellate Tribunal was established. Once the tribunal becomes fully functional, appeals of CCP decisions will then be directed only to it and then onto the Supreme Court.

Most CCP decisions that impose any kind of sanction or restriction are appealed to the judiciary. Only in one conduct case did parties not appeal to the courts (the Jute case).

According to members and lawyers from the Commission, as well as private practitioners, the establishment of the Appellate Tribunal is very helpful, as the high courts take too long to judge cases and, under the Pakistani legal system, do not decide on evidence and other substantial issues, but only on legal matters.

Some interviewees have emphasized that the Pakistani legal community understands that the Competition Appellate Tribunal should be completely independent from CCP.

IV. Competition advocacy and research

Competition advocacy and legislation

Section 29 of the Competition Act provides that CCP shall promote competition through advocacy and that this shall include, among others: (a) creating awareness and imparting training; (b) reviewing policy frameworks and making recommendations to the federal and provincial governments; (c) holding open hearings on any matter affecting competition and expressing publicly an opinion; and (d) posting all its decisions, enquiries and guidelines.

Since the establishment of the Commission, the federal Government has not exempted any sector or class of undertakings from the operation of the law, as would be possible based on section 54 of the Competition Act.

The State Bank of Pakistan (SBP) had initially urged the Government to consider it “in the interest of banking and the general public” so as to exempt it from the application of competition law. SBP resisted actions (such as issued notices) against banks and refused to acknowledge their context. However, CCP defended its position and eventually prevailed.

It maintained that granting the banking sector exemptions from the application of competition law would not be in synchronicity with recognized practices and may well be regarded as counterproductive. The Commission asserted that such an exemption would defeat the very object of the law - “to provide for free competition in all spheres of commercial and economic activity”, with “the banking sector being the jugular vein of all commercial and economic activity”.¹⁰⁴

Advocacy activities

The Advocacy Department works closely with more than 40 industry and trade chambers in the main business cities across Pakistan. The department also keeps regular meetings with main business journalists to update them on CCP activities and on the development of ongoing competition issues. The department is also trying to promote competition as a discipline in universities across the country.

The Commission established the Competition Consultative Group, mainly comprising of representatives of regulatory bodies, business and academia, which holds quarterly meetings on an invitation basis either in Islamabad, Karachi or Lahore.

CCP has held one national competition conference and one international conference with over 250 participants from 20 different countries.

The Commission’s specialized department has met with different business associations to encourage them to adopt compliance programmes. The Commission has prepared a voluntary competition compliance code for businesses to adopt. Four companies in Pakistan have already adopted an internal compliance programme and 45 are in contact with CCP for this matter. The voluntary compliance programme is expected to reach 100 companies by the end of 2013.

Other advocacy endeavours include industry-specific meetings, media briefings and a helpful and friendly website.

Commission members, especially the Chair, have given 16 television interviews as well as several newspaper and radio talks. The Commission has issued around 105 press releases and offered 3 competition courses for journalists so far.¹⁰⁵

Influencing and eventually modifying public policies which have the potential to impair competition is a very relevant and key activity of any competition agency. CCP has been working consistently toward that approach and objective. In 2010, for instance, eight different public policies were reviewed by CCP. As a result, policy notes were issued by CCP to different regulatory bodies in Pakistan.

During the peer review interviews, some practitioners complimented the policy notes system, stressing that clients now seek policy notes from CCP on matters of interest, recognizing them as a good reference.

¹⁰⁴ Hassan, Rahat Kaunain. Introduction - Competition Commission of Pakistan. Asia Pacific Antitrust Review – Global Competition Review - Law Business Research Ltd., London, 2013.

¹⁰⁵ By December 2012.

So far, CCP has issued 12 policy notes between 2009 and 2012 and 2 opinions. Policy notes were intended to influence public policies in sectors varying from import tariffs, the official ban imposed on the establishment and expansion of existing sugar mills in a certain province, telecommunication tariffs, price determination practices for fresh milk and the dismissal of a requirement to place cost audit reports on companies' websites, to amending the Bilateral Air Service Agreement between Pakistan and Saudi Arabia to allow multiple airlines to be designated by each State to independently operate direct scheduled services and hajj services between the two countries.¹⁰⁶

Research activities

The Commission's Competition and Research Department initiatives include the "Seminar series" involving academia and policymakers in producing applied research, analysis and recommendations on the content, methodologies and application of competition policy. Another noticeable endeavour is the "Competition Research Forum", at which competition agencies of various jurisdictions are invited to present case studies and share new research.

In several cases, investigations have been initiated as a result of research undertaken by the department. In addition, research has been undertaken to assist the investigation effort.

Also, the Competition Policy and Research Department helps the Advocacy Department by providing studies, information and data for business meetings and conferences.

CCP focuses its research and studies on those sectors in the Pakistani economy that have characteristics which encourage and facilitate collusion.

V. Conclusions and recommendations

A. Conclusions

The achievements of the Competition Commission of Pakistan since its inception in November 2007 are internationally recognized by the world competition community, as well as local business, media, the Government and civil society. It has been performing a crucial leadership role in taking the Pakistani economy forward to a greater level of confidence in a competition-based and consumer welfare-oriented market system. As an institution, CCP has gained countrywide recognition of an excellent reputation based on integrity, technical competence and governance. In fact, there is a clear perception that it has been an essential example for institution-building in Pakistan, favouring not only the consistency and stability of the institutions themselves, but also the legal certainty that can attract the inflow of investments.

In previous analyses of the progress of CCP, experienced and respected commentators have called attention to what the agency has done, with outstanding competence in ascending a steep learning curve, concluding that it is to be considered one of the best-performing newly established agencies in the developing world.

¹⁰⁶A complete list of policy notes and opinions from CCP is available at:
http://www.cc.gov.pk/index.php?option=com_content&view=article&id=21&Itemid=42

Naturally, CCP struggles against difficulties that often challenge competition agencies in economies with a long tradition of strong government control, including a deficient public understanding of competition policy, slow judicial review and incomplete support from other parts of the Government, mainly translated into the lack of adequate financial autonomy.

Among the major strengths of CCP that were repeatedly mentioned during the peer review process are a recognized mindset toward the importance of complying with and enforcing the law and not only of punishment; that the Commission is not against profit-making but in favour of regulating the market; that transparency is very accountable with fairly clear decisions; and that it runs a notable and successful advocacy programme, including the very useful policy notes. CCP is also considered to have an excellent sense of responsibility and has managed to create a good leniency policy, making the business community look for legal counsel on competition issues beforehand.

The Commission's staff is composed of high-level and quality professionals, rather than bureaucrats, often prepared to be open to receiving inputs and critics.

The number of decisions of CCP from its creation in 2007 compared to the number of decisions of the old Monopoly Control Authority shows how active CCP has been. It has secured well-timed resolution of merger review proceedings, even though some improvements may be suggested in relation to the decision-making process. For instance, the numbers of conditional and disapproval decisions are considerably low when compared with the total number of decisions.

Some recommendations are made below with a view to facilitating the enforcement of competition law and policy issues in Pakistan in a more efficient manner.

B. Recommendations

1. Institutional arrangements

CCP board

(a) Although the different professional experience and backgrounds of members of the Commission bring the necessary interdisciplinary exchange, it would be expected that more economists would also be chosen to become members, in addition to CCP staff, especially those with knowledge and experience in industrial organization or related fields.

(b) In the current CCP system, in phase 1 a single Member may continue to have the delegated power of issuing NOCs. However, for phase 2 the matter may be decided by the full Commission. Pakistan may consider the alternative of increasingly involve the full collegiate for final decisions.

(c) Another improvement in the process of selecting members of CCP would be that the Pakistani Federal Government stipulate a pre-established and open method for the appointment of members of the Commission under the Act.

(d) Terms of office of members and the Chair of CCP are relatively short, taking into account their challenges in effectively enforcing the competition law in

Pakistan and securing the Commission's independence. It is suggested that terms of office for members and the Chair be increased to five years, without possibility of reappointment. Alternatively, members and the Chair could serve for no more than two subsequent terms, with the provision of eligibility for reappointment after a minimum gap of one term.

Research

(a) Activities of the Research Department in relation to economic review of cases could be expanded as it is expected that solid economic analysis will play a greater role in CCP work.

(b) CCP's relationship with universities and their faculty on competition issues could be also developed. The conception of initiatives towards competition-related academic work by incentivizing the production of undergraduate and graduate studies on issues such as industrial organization, microeconomics, regulatory and corporate law, among others, would help the spread of competition culture in the country, as well as bringing new minds to the professional and academic competition communities.

(c) Staff of the Research Department and other department should be more exposed to experiences from other competition agencies, either by engaging in exchange and trainee programmes offered abroad or by bringing in colleagues and experts for capacity-building programmes.

(d) In view of clause (b) of section 29 of the Act and the Commission's practice it appears that some Government policies may have been in contravention of the Act. In that context, a mechanism to bring such existing and future policies into conformity with the law should to be drawn up without delay, with prior involvement of CCP.

Competition Appellate Tribunal

In the same vein as CCP, it is suggested that the term of office of the members of the Competition Appellate Tribunal may be increased to five years.

2. Improvement of competition legislation and policies

Section 1, subsection 1, paragraph 3 of the Competition Act states that the Act shall apply to all undertakings and all actions or matters that take place in Pakistan and distort competition within Pakistan. Even though CCP has construed properly the sense of the provision by its practice and jurisprudence, legislative change is considered desirable in order to establish that the law should apply not only to all undertakings, actions or matters that take place in Pakistan, but also elsewhere if they have any effect or consequence in Pakistan. Several worldwide cartel cases were sanctioned in different countries under the fact that the members of the cartel had exports into those jurisdictions but no activity within those countries.

3. Enforcement

Anti-competitive conduct and leniency

(a) CCP leniency regulations, despite the essential terms, could be further detailed by including, for instance, criteria, limits and deadlines allowing interested parties to have prior understanding.

(b) Similarly, regulations could further specify conditions, prerequisites and timing for interested parties to participate in cases or come before the Commission.

(c) The designation of different reporting members for each case to review staff enquiries and, naturally, become more involved and familiar with matters, would give all board members more acquaintance and increase participation, allowing an enhanced assessment of the enquiry reports.

(d) Accordingly, the timing between the enquiry report release and the showcase should be extended, allowing the Commission to better scrutinize the enquiry report before turning it into a showcase.

(e) The conception of specific regulations to deal with the acceptance of parties' specialized and corroborated opinions and studies, would contribute to avoiding unnecessary, yet natural, disputes on procedural timing and excessive discretionary decisions. Thus, CCP may consider the creation of guidelines governing the acceptance and treatment of external economic and legal opinions offered by parties.

(f) CCP was able to conceive and implement a successful leniency policy, in a record time. It is an uncontroversial fact that leniency is one of the most effective instruments to deter cartels. Consequently, it is recommended that the Commission continue to pursue an increasingly active policy toward leniency.

(g) With time, Pakistan may consider criminal penalties for managers who are responsible for substantive hard-core competition violations. An enhanced effective leniency programme must not only entail the possibility of the imposition of substantial fines for undertakings and persons, but rather the opportunity of criminal prosecution as a powerful inducement for representatives and managers to cooperate with agency investigations.

It is, nevertheless, understandable that Pakistan's economic and judicial framework may not be ideally equipped to cater for such criminal sanctions as the country's competition law dates from only a few years ago.

However, for successful prosecution of cartels, it is desirable that the State may criminally prosecute perpetrators. The high threshold of evidence¹⁰⁷ in a criminal case, though, should not be appreciated as an impediment to the administrative prosecution of the case and thus a predicament in establishing the effectiveness of the law or strengthening the agency.

¹⁰⁷ 'Beyond shadow of any doubt'.

Therefore, two different prosecution systems or jurisdictions may be established: one administrative or adjudicative and the other criminal. Under the first, the undertakings involved in a violation of the competition law may be penalized in the form of a fine, for example. While in the second, offenders are prosecuted under the criminal legislation and its particular standards of proof, which differ from the specific administrative ones.

With such necessary separation, if an offence cannot be established under the thorough criminal standards, the existing system of imposing administrative fines will not be rendered as ineffective.

(h) Based on the experience of other countries, CCP could make use of other forms of recording to use in cartel proceedings. However, in order to appropriately make recourse to those techniques, it is imperative that the Commission has an equipped audio/video laboratory.

(i) It would be helpful to introduce guidelines for the filing of exemption applications in order to make them more comprehensible to the applicant undertakings as to the factors that are taken into account when granting the exemptions. At present, a senior officer is assigned to elaborate the exemption process (including the factors on the basis of which the exemptions may be granted by the Commission) to the undertakings that are required to file the exemption applications.

(j) Under CCP revised regulations, an undertaking is allowed to invoke leniency provisions even after the decision and the findings of the Commission have been made. The new policy is intended to allow undertakings to approach the Commission at subsequent stages of the proceedings.

(k) A recent amendment to the CCP leniency programme made available to an undertaking to invoke leniency provisions even after the decision of the Commission, although prior to initiation of proceedings before a court of law.

(l) A policy of leniency policy, apart from creating deterrence for cartels and anti-competitive practices, brings about corrective behaviour. The authorities, however, must be vigilant not to allow a perception among the business and legal communities that it is rewarding to wait until the Commission has decided the matter to present a leniency proposal, and not before.

(m) An alternative that could be considered is the possibility and acceptability by the Commission of settlements, which would entail clear and rigid requirements such as a financial contribution, the submission of a compliance programme and immediate halt of any negative practice, among others.

(n) Anyhow, it is important to ensure that corrupt practices cases are distinguished from cartels and collusive behaviour. After the leniency decision, the National Accountability Bureau and Transparency International have expressed interest in the case and any such intervention or lack of clarity on this aspect may deter future leniency applicants.

Mergers and acquisitions

(a) The creation of the Acquisitions and Mergers Facilitation Office (AMFO) was a valued initiative for a country with a new competition law and new competition institutions; a positive idea for avoiding time loss and bureaucracy. Such activity is even more affirmative in an increasingly competitive economy such as Pakistan's. AMFO may be an adequate response to a detected dissatisfaction on the part of undertakings in relation to an alleged tendency of the Commission of ordering the notification of a case while replying to an M&A consultation.

(b) It is important to mention that under the Act "acquisition" means any change in control of any undertaking by way of acquisition of shares, assets or any other means. The "change in control" aspect of the definition of an "acquisition" in the Act has created confusion with respect to the separate definition of a merger prescribed under section 2(h) of the Act which includes an acquisition to fall within the meaning of a merger. In numerous acquisition cases, where the shares of an undertaking intended to be acquired meet the threshold test under regulation 4(2)(c) and (d) of the competition (merger control) regulations, the applicant undertakings argue with the change of control aspect of the definition of acquisition in the Act, which creates hindrance in the pre-merger application process. In order to clarify the ambiguity caused by the "change of control" aspect of the definition of an acquisition in the Act, various competition legislations of other jurisdictions around the globe have been gone through that have mostly omitted the definition of an acquisition and have separately mentioned the definition of "change of control".

It is, therefore, proposed that section 2(a) of the Act, i.e. definition of acquisition, may be amended accordingly, linking it to the thresholds prescribed by the Commission under the merger regulations.

(c) As previously mentioned, from the 321 M&A cases analysed by the Commission so far, in three there were conditions imposed on the undertakings. In all of them, only behavioural requirements were enforced; and in two¹⁰⁸ of those three, the Commission laid down moderate conditions¹⁰⁹ to counteract the marked probable anti-competitive effects in the market. It is comprehensible though that in the first years of enforcement of a new competition law in a formerly controlled economy, the authorities act in a more cautious and flexible manner. However, in the long run, that may favor the occurrence of competition setbacks in the very same markets, forcing regulators to intervene more drastically.

(d) Pakistani merger regulations and guidelines should include a reference to the supply-side substitution analysis in the determination of the relevant market, since its effects may be equivalent to those of demand substitution. Even though the Commission did take into consideration supply-side substitutability during the merger

¹⁰⁸ Nestlé/Pfizer and Wind Telecom/Vimpelcom.

¹⁰⁹ (1) Acquiring party's written commitment to continue to import the products of the target company for three years, assuring their availability in Pakistan; and (2) Prohibition of interlocking directorates and exchange of commercially sensitive information.

review of at least one case,¹¹⁰ it is deemed advisable for legal certainty reasons that such a possibility is established in applicable regulations.

(e) Like many young agencies in developing countries, CCP, as its performance has shown, tends to prefer the use of behavioural remedies in merger cases. Although behavioural remedies are legitimate and in some very specific cases, the best answer to an identified competition concern, one must be cautious and attentive, however, as behavioural remedies are difficult and onerous to monitor and police, especially for understructured and underresourced agencies. The role of structural remedies, where appropriate, in resolving merger cases should not be undervalued.

4. International cooperation

Given its active involvement in key working groups of the International Competition Network (ICN), the Organisation for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD), it is recommended that CCP becomes directly involved with the work of relevant substantive areas. This would allow CCP to better interact and contribute to the activities of those international organizations and initiatives, bringing benefits to the internal work of the Commission and its departments.

5. Competition advocacy

(a) The Commission's commitment to enhancing the knowledge of the competition law and practice amongst the academic community, including university professors and students is to be maintained and possibly increased. The involvement of university legal, business and economic communities brings a variety of advantages to the competition acquaintance, culture and awareness in the country. It attracts new ideas and readings of the competition law, policy and practice, as well as creating more familiarity with anti-trust issues and, accordingly, it prepares more professionals to work with competition issues, either inside or outside the Commission.

(b) The Competition Consultative Group has been a very positive and productive initiative, making competition law and regulations, as well as CCP practice and jurisprudence, available to and known by the private sector as well as by NGOs and regulatory bodies. It was learnt from the perception of some past and current participants that the group's meetings could be even more productive if their planning, schedule and organization were shared in advance with participants, among other reasons, due to the fact that the meetings take place in different cities and the number of participants and their contribution and involvement could be increased.

(c) As provided in the Competition Act,¹¹¹ 3 per cent of the revenue of the regulatory agencies of Pakistan should be directed to CCP. Those allowances were intended to help CCP activities toward advocacy. Nevertheless, that legal provision has not yet been enforced, causing a shortfall in the CCP budget and thus compromising its

¹¹⁰ *Iljin Electric Company Limited versus Siemens Pakistan Engineering Company Limited* for the acquisition of 90 per cent of shares of Heavy Electrical Complex, which was reviewed on the basis of a complaint filed by Iljin Electric Company Limited.

¹¹¹ Section 20, f.

advocacy initiatives. It is, therefore, highly recommended that such legal stipulation be finally implemented in Pakistan.

(d) The financial resources outlined above would permit the Commission to focus on implementing an advocacy policy, as a way to gain consistency in this area. CCP has called the country's attention to competition problems in some sectors, yet it now must become capable of proposing and employing ways and means to tackle those concerns.

(e) A suggested way for helping to achieve the above is to set up a strategic plan in order to define directions, set priorities and allocate resources. In order to determine the direction of the organization, it is necessary to understand its current position and the possible paths through which it can pursue a particular course of action. One of the goals in drafting a strategic plan is to develop it in a way that is easily translatable into action plans articulated into day-to-day projects and tasks. By doing so, the Commission will make its vision and mission clear and understood by all stakeholders, be they undertakings, NGOs, consumers and civil society, Government or regulatory agencies.

(f) Another possible way of action toward regulated sectors is to negotiate memorandums of understanding or cooperation agreements¹¹² with all regulatory agencies in Pakistan in order to identify potential overlapping, common regulatory concerns and goals and joint competition policies and initiatives. This would create a better cooperation atmosphere, possibly serving to help speed the solution for the 3 per cent fee due to CCP by regulatory agencies under section 20(2) of the Competition Act.

(g) CCP should seek membership in different Government committees, such as the Tariff Committee, as an approach to boosting advocacy within the public sector. Besides competition concerns, it is very noticeable that there is no representation of consumer affairs institutions in Government committees.

(h) There is a current endeavour in the Commission in relation to the digitalization of the process management system. This a positive project in the direction of bringing more transparency and information to the society. It is, however, advisable that a "from now on" digital process system starts as soon as possible and the agency can later digitalize all old cases, as this will naturally be more time consuming.

6. Competition authority capacity-building

(a) Adequate and continuous training of the competition authority's staff is key to the authority's reputation and results. Staff capacity-building must involve substantive and procedural aspects of law enforcement. Besides academic training, experience sharing can offer improvements in staff performance and for maintaining "institutional memory" within the agency. International exchange and assistance have proven to be very helpful in this sense. Hence, CCP could create an internal incentives plan to motivate staff to apply for internship or exchange programmes in foreign competition agencies, as many traditional and developing competition jurisdictions do offer very attractive programmes. It is of immense importance that all staff, as well as

¹¹² As provided by section 35 of the Competition Commission (general enforcement) regulations, 2007.

the Chair and members, should participate in major international events that not only build capacity but enable sharing and develop the country's image.

(b) The Commission may consider, as soon as possible, upgrading the equipment and other investigative resources of its forensics laboratory, a key activity for conducting investigations and prosecution.

7. Public procurement

CCP should better profit from the memorandum of understanding (yet to be signed) with the Pakistan Public Procurement Regulatory Authority to brief that authority on competition techniques in order to identify possible collusion in procurement proceedings. This may possibly be achieved by publishing a booklet with examples and international cases and also encouraging the relevant authorities to spread those techniques all over the country, especially in relation to provincial procurement counterparts. Internal and external training for CCP staff as well as that of PPPRA and subsequent training for the staff of the procurement agency can be of great value in detecting collusive bids.

8. Consumer affairs

(a) CCP Office of Fair Trade should increase its ties and relations with private consumer protection associations and NGOs throughout the country, creating a network for proliferating best practices, awareness and supervision for preventing deceptive marketing practices.

(b) Profiting from a successful initiative in the competition area, CCP could organize an international conference in Pakistan, aiming to encourage the promotion of consumer protection issues at the federal and provincial levels of government, including the enactment of provincial legislation and the consequent creation of institutions in charge of handling consumer affairs.

9. Judicial review

(a) In view of the significant backlog of cases involving CCP in courts, the constitution of special or specialized benches in courts may be considered for expeditious disposal.

(b) The frequent interaction and discussion of cases among lawyers engaged by the Commission and between these lawyers and the Commission is very important and necessary for the enrichment of CCP court representation and decisions.

