

THE GUIDANCE ON COMPETITION COMPLIANCE

Increasing Private Sector Capacity for Competition Compliance



Competition Commission of Pakistan
Creating a level playing field



THE GUIDANCE ON COMPETITION COMPLIANCE

DISCLAIMER

This Guidance is not a substitute for the Act and the rules and regulations made thereunder. Therefore, it has no legal effect. The examples are for illustration purposes only. The Guidance does not limit the enforcement powers of the Commission.



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COMMISSION'S MANDATE

The Competition Commission of Pakistan (the 'Commission') implements the Competition Act 2010 (the 'Act'), so that businesses can operate on a level playing field. The competition regime provides for free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behaviour. This Guidance is aimed to assist businesses to understand competition law of Pakistan and achieve growth not only in Pakistan's market but also in the global arena.



FUNCTIONS AND POWERS

There are four pillars underlying the Commission's general approach:

- 1)** encourage business growth, without which Pakistan would not be competitive in a global world;
- 2)** facilitate and assist in resolving problems in relation to compliance with the competition law – a business friendly stance;
- 3)** be transparent while maintaining the confidentiality of business-sensitive information; and
- 4)** be efficient in reducing both enforcement as well as compliance costs for businesses.

The Act empowers the Commission to undertake competition enforcement, carry out studies to promote competition, and to engage in advocacy through various means to create an awareness of competition issues and to promote a culture of competition.





PURPOSE OF GUIDANCE

Success of the programme will be achieved when the necessary behaviour required, becomes an integral part of the organisation's culture.

1. The purpose of the Guidance is fourfold.

- ◆ First, to explain the basic provisions of Pakistan's competition law and help businesses recognise that, whatever their size, they face certain degree of risk if they do not comply with the law.
- ◆ Second, to encourage businesses to adopt the Guidance on Competition Compliance that clearly explains the standards that all employees must meet when doing their jobs.
- ◆ Third, getting senior management to show a personal and active support for competition law compliant business practices.
- ◆ And fourth, helping businesses realise that anti-competitive practices can lead to imposition of financial and non-financial penalties under the Act.



TARGET AUDIENCE

2. This Guidance provides a basic overview of the law and identifies behaviours that are anti-competitive. It is aimed to help managers and employees of businesses understand the salient features of the competition law and how these could affect their behaviour in the market and their business decision making.

3. Apart from managers and employees, ensuring compliance-oriented behaviour is also the responsibility of board members (where applicable). The Guidance explains the importance of competition law compliance to them to identify, mitigate, and report actual or potential violations.





Part

A

COMPETITION LAW



1

KEY CONCEPTS

4. In competitive markets, businesses compete not only on prices and quantities, but also to innovate and gain more customers. Competition law provides the rules by which market players work to provide a wider variety of higher quality goods and services to consumers at reasonable prices. The development of an economy led by competition and market forces depends on the widespread acceptance and implementation of competition rules. Thus, all market players and consumers would benefit from competition and enhance overall economic efficiency.

5. To preserve competitive markets and prevent and correct anti-competitive behaviour, the Commission is mandated to monitor:

Section

3

ABUSE OF DOMINANCE

by any business with significant market power that affects how competitors work in the market.

Section

10

DECEPTIVE MARKETING PRACTICES

that could mislead consumers and other businesses.

Section

4

AGREEMENTS

between businesses that restrict, prevent, or distort competition.

Section

11

MERGERS, ACQUISITIONS, OR JOINT VENTURES

to assess their impact on competition.



6. There are some basic concepts that need to be understood prior to any discussion on compliance. An **undertaking** (or simply put, a business) is any entity in the market that is engaged in providing goods and/or services to consumers or businesses. This definition is based on participation in commercial or economic activity and is not dependent on the legal form of the business. The Act is applicable to private and public businesses and institutions. The term ‘undertaking’ includes ‘**association of undertakings**’ such as chambers of commerce and industry, trade associations, self-regulatory and professional bodies (e.g., accounting, management), etc.

7. Businesses operate in relevant markets comprising of two components: the product and its geographic reach. The **product market** describes the goods or services that is bought and sold; the **geographic market** describes the geographical area in which the producers or sellers of the goods or service may operate. It could be the whole of Pakistan or any part of it.



§2(1)(q) of the Competition Act, 2010, says an “undertaking means any natural or legal person, governmental body including 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.”



2

ABUSE OF DOMINANT POSITION

2.1

DOMINANT POSITION

8. §3 of the Act prohibits the abuse of dominant position by one or more undertakings.

9. Dominant position or significant market power of an undertaking in a relevant market is deemed to exist if undertaking(s) (individually or collectively) can behave to an appreciable extent independently of their competitors, customers, consumers, or suppliers and when competitive constraints imposed by other firms are relatively ineffective.

10. Moreover, any business is presumed to be dominant if its share in the relevant market exceeds 40%. Although market share is an important consideration, this does not on its own determine whether a business is dominant. The law does not rule out dominance at lower levels of market share.

11. A dominant position is not prohibited under the Act as certain businesses can become market leaders because of their products and services, innovation, and astute business management.

**40%+**

Market share presumed to be

**DOMINANT**



ABUSE OF DOMINANCE

12. One or more businesses with a dominant position will have abused their dominance (individually or collectively) if they engage in practices that prevent, restrict, reduce, or distort competition in the relevant market. Abusive practices may be categorised primarily into exploitative, exclusionary, or discriminatory abuses.

13. **Exploitative abuses** are often concerned with consumer harm as they encompass practices by dominant undertaking(s), that result in direct loss of consumer welfare. Such abuses include, among other things, charging excessive prices, tie-ins and bundling of goods and/or services, making the sale of goods or provisions of service conditional on the purchase of other goods or services, and degrading the quality of goods or services.

14. **Exclusionary abuses** refer to practices by dominant undertakings that harm competition by impairing their competitors' ability to compete effectively in the market and cover behaviours impairing the market structure, which ultimately harms consumers. Refusal to deal or supply, predatory pricing (setting prices below cost to drive competitors out of the market), and preventing new entry in the market are common examples of exclusionary abuses.

15. **Discriminatory practices** include charging different prices for the same goods or services and applying dissimilar conditions to equivalent transactions with other parties placing them at a competitive disadvantage.



360

Example: X holds a dominant position in the oil refining market and provides its refined petroleum products to various oil market companies (OMCs). X refuses to supply its products to Y (an OMC) without any objective justification or makes it conditional on Y to purchase other products, which Y does not need, or X gives preferential treatment to Y's competitors in various forms such as prices or quantities supplied. X's conduct can constitute an abuse of dominant position in the relevant market.

1



2

**3**

PROHIBITED AGREEMENTS

16. §4 of the Act prohibits agreements between and among undertakings and decisions by an association of undertakings that have the object or effect of preventing, restricting or reducing competition within the relevant market. This section provides a non-exhaustive list of agreements that may be categorised as horizontal, vertical, or other agreements containing restrictive trading conditions.

3.1

AGREEMENTS

17. Under the Act, agreement means both written or verbal agreements, arrangements, practices, or decisions between two or more businesses or by an association of undertakings, regardless of their legal form.

18. §4 focuses on agreements between competing businesses in terms of the competition concerns they cause. In this context, an agreement refers to implicit or explicit understanding of intent and/or behaviour between businesses to derive mutual benefits based on restricting competition between themselves as their object and/or effect. Thus, the term 'agreement' is not limited to a formal contract. It also includes co-operation through informal agreements, understandings, concerted practices, or decision by businesses or their associations. Exchanging information of a strategic nature, *e.g.*, prices, markets, commercially sensitive information disseminated through circulars, minutes of meetings, telephone calls, and emails, etc., may infringe §4 of the Act. Agreements may be of two types: horizontal agreements and vertical agreements.



HORIZONTAL AGREEMENTS

Businesses should set the prices of their goods or services themselves without sharing any commercially sensitive information with their competitors.

19. **Horizontal agreements** are between and among competitors engaged in commercial or economic activity at the **same level of the supply chain** – production, distribution, or supply of goods or services. Generally, hard-core cartels are the results of horizontal agreements with the object or effect of preventing, restricting, or reducing competition. Examples of such agreements include:

a: Fixing Prices. Businesses should set the prices of their goods or services themselves without sharing any commercially sensitive information or co-ordinating with their competitors. Agreements between and among competitors that raise, lower, or set prices at a certain level to reduce or circumvent competition are strictly prohibited under the Act.

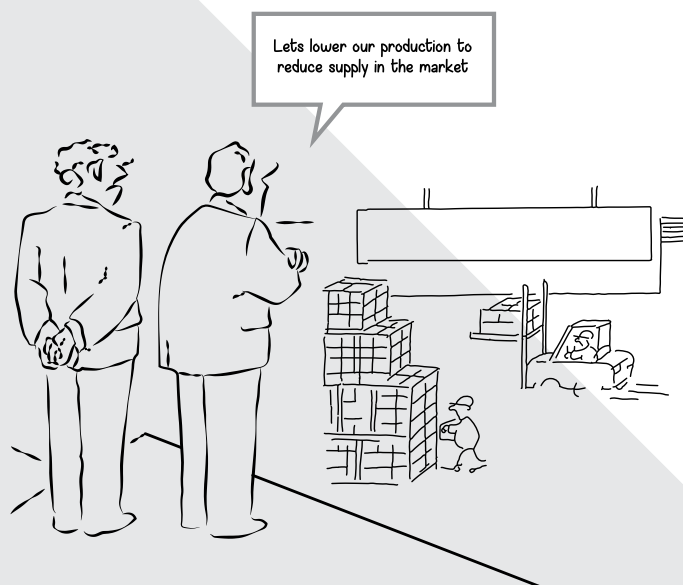
Example: X, Y, and Z are three largest suppliers of dairy products in Pakistan. The three competitors agree to raise the price of their products to a certain level. The agreement amounts to cartelisation. Similarly, where an association of undertakings of dairy industry decides, recommends or suggests to its members to increase, decrease, or sustain their prices at a certain level, the decision amounts to an anti-competitive practice under §4 of the Act.





b: Limiting Output, Innovation and Investment.

Any agreement between businesses or any decision of an association that restricts the production of the goods or limits the provision of services is prohibited. By reducing output or limiting service provision, competitors could create an artificial shortage that could lead to an increase in prices and higher margins for themselves to the detriment of consumers. Similarly, agreements or decisions to affect technological development by not investing into research and development or agreements or decisions to limit investment in the relevant market are anti-competitive.



Example: X, Y, and Z are three major producers of fertilisers in the country. They agree to produce less than what they actually can (their installed capacity), which results in an artificial shortage of fertilisers and consequently an increase in prices. This agreement is a violation of the Act.





c: Allocating Customers, Markets, or

Territories. Businesses should not agree to sell or distribute or provide their goods or services to only a certain class of customers, or allocate markets or geographic area and then agree not to compete in those markets or geographic areas.

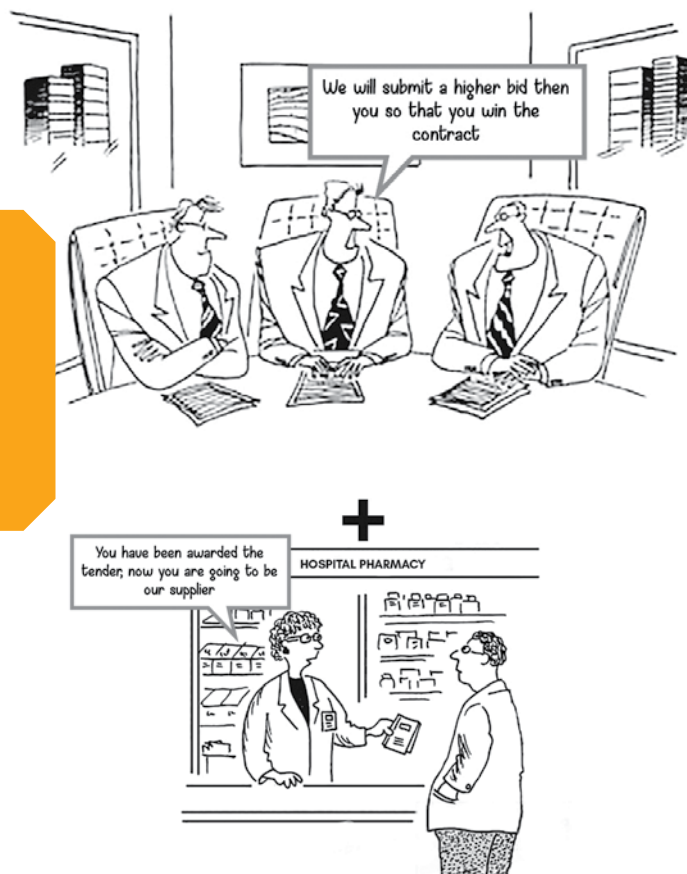
Example: X, Y, and Z are the importers and distributors of home appliances. The competitors agree to sell their products in certain cities only, and hence not to compete in those cities. Each competitor's conduct amounts to cartelisation and a violation of §4 of the Act.





d: Collusive Tendering or Bid Rigging. This occurs when competitors have an arrangement so that one of the competitors could win a contract at a pre-determined price and as a pre-determined outcome. Bid rigging can take many forms. Other competitors may withdraw their bids, price them higher, or submit bids with unacceptable terms and conditions.

Example: X, Y, and Z are the largest suppliers of pharmaceutical products to public hospitals. The three competitors agree that X and Y will submit a higher bid than Z so that Z could win the contract. Such schemes are considered hard-core cartels and are prohibited under §4 of the Act.



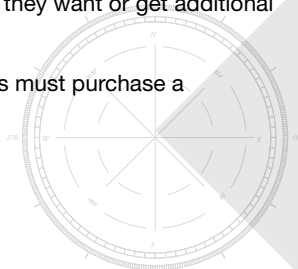


VERTICAL AGREEMENTS

20. Vertical agreements are between businesses operating at different levels of the supply chain, e.g., when a manufacturer and distributors or retailers agree to promote and sell goods or services. Distribution and supply agreements, franchise agreements, licensing of intellectual property rights such as trademarks, copyrights and patents are common examples of vertical agreements. Vertical agreements can be restrictive of competition when their object or effect is to prevent, restrict, or reduce competition in the relevant market. Such agreements are void under §4 of the Act unless they are granted exemption by the Commission under §5-9 of the Act.

21. Some examples of vertical agreements are:

- a. **Resale price maintenance** agreements in which the retail price is fixed by the producers or price floors or ceilings are imposed.
- b. **Exclusive distribution** agreements in which distributors are given exclusivity over certain territorial area, or over particular clients, or over specific products and services.
- c. **Exclusive dealing** agreements in which downstream firms are not allowed to deal with competing producers or distributors.
- d. **Tie-in** (and **bundling**) agreements in which downstream firms must purchase additional products along with the one they want or get additional products as part of the sale; and
- e. **Quantity** agreements in which downstream firms must purchase a minimum quantity of a product.






3.2

EXEMPTIONS

22. Any agreement that restricts competition may be granted an exemption by the Commission if it meets the criteria given in §9 of the Act. To qualify for an exemption, the parties must prove that the agreement (i) substantially contributes to improving production or distribution, (ii) promotes technological or economic progress, while allowing consumers a fair share of the resulting benefit; or (iii) clearly outweighs the adverse effect or lessening of competition. An exemption may be granted with or without conditions. In the case of non-compliance with the conditions imposed when an exemption is given, the Commission may withdraw the exemption.



Deceptive marketing practices can result in harm to competitors and consumers.



4

DECEPTIVE MARKETING PRACTICES

Example: A real estate company claims that a golf course will be developed in the area within a year as a major selling point for properties being sold. The company continues to make these claims despite knowing there are no plans to develop a golf course. The company is misleading potential purchasers by suggesting there are such plans when the company has no reasonable grounds to do so.

23. Businesses may use false or misleading information to advertise products to consumers. Such practices could constitute deceptive marketing, an infringement of §10 of the Act. Deceptive marketing practices can result in harm to competitors as well as consumers.

- ◆ **Competitor and/or Consumer harm** results from the distribution of false or misleading information or comparisons with other products or services.
- ◆ A competitor can be harmed if its trademark and branding efforts are also used by others.
- ◆ The distribution of false or misleading information to the consumer, 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 may amount to deceptive marketing practices, actionable under §10 of the Act.

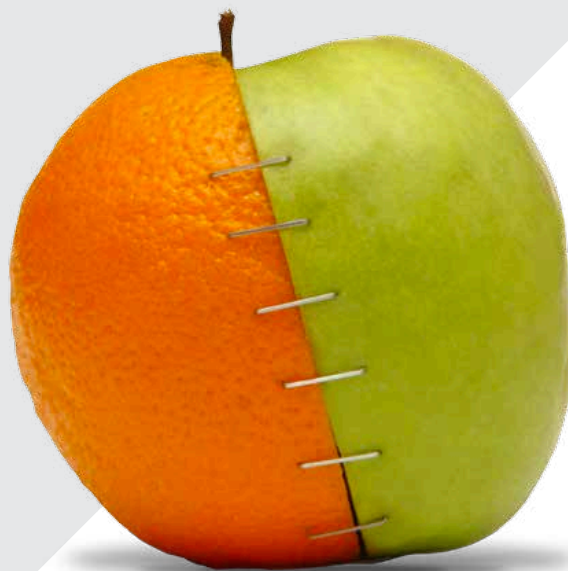




5

MERGERS, ACQUISITIONS & JOINT VENTURES

*All transactions that
meet certain thresholds
must be notified to the
Commission prior to
being finalised.*





5.1

MERGER NOTIFICATION THRESHOLDS

24. A **merger**, in its general definition, means the joining of two or more businesses into a new or existing business. Mergers leading to an entirely new business also results in all the parties to the merger losing their unique legal personalities.

25. An **acquisition** refers to one business acquiring assets or shares to gain control of whole or a part of another business. In contrast to mergers, in acquisitions, businesses do not necessarily lose their legal personalities.

26. **Joint ventures** are collaborative arrangements by which two or more businesses devote their resources to pursue a common objective that involves joint control, shared ownership, functioning as an autonomous entity, and for a lasting basis may also be assessed under the scope of mergers/acquisitions and their impact on competition.

27. Pakistan has a mandatory pre-merger clearance regime. All transactions that meet certain thresholds must be notified to the Commission prior to being finalised.

28. A pre-merger application to the Commission is necessary when the following thresholds are met:

- a. One party has assets of PKR 300 million or the parties have a **cumulative asset** base of PKR 1 billion, **or**
- b. One party has an annual revenue of PKR 500 million or the parties have a **cumulative revenue** of PKR 1 billion

AND

- c. The **transaction value** is PKR 100 million or more, **or**
- d. One party acquires 10% or more **voting rights** in another party through the acquisition of shares.

29. In the case of failure to seek the Commission's clearance as stipulated above, the Commission may pass one or more orders under §31 of the Act which empowers the Commission to undo or prohibit a merger and/or impose penalties under §38 of the Act.



6

THE COMMISSION'S PROCEEDINGS

30. Pursuant to §37 of the Act the Commission is empowered to initiate enquiries either:

- ◆ on its own; or
- ◆ upon a reference made to it by the Federal Government; or
- ◆ upon receipt of a complaint by an undertaking.

31. The process of filing a complaint by any

business or individual are given in Regulations 16-19 of the Commission's **General Enforcement Regulations**.

32. Where an enquiry finds a *prima facie* violation, the Commission may issue a show cause notice to the concerned undertaking(s) to provide an opportunity for hearing before adjudicating upon the issue and passing an order.

7

SANCTIONS

33. §38 of the Act empowers the Commission to impose a financial penalty of up to **PKR 75 million** or an amount not exceeding **10%** of the annual turnover of the undertaking(s) found to be in violation of the Act. For non-compliance, including wilful abuse, interference, or obstruction of the Commission's orders, notices, or requisitions, the Commission can impose a fine of up to **PKR 1 million**.

34. In the case of continued violation of an order of the Commission, the Commission can impose an additional fine of an amount of up to **PKR 1 million** per day till such time the violation end. A failure to comply with the Commission's order or directions constitutes a criminal offense punishable with imprisonment for up to **1 year** or with a fine of up to **PKR 25 million**, or both.



8

SEARCH AND INSPECTIONS

35. §34 grants the Commission the power to **enter and search premises** to gather information or evidence about anti-competitive activities. In the case of refusal or resistance during search and inspection, §35 empowers the Commission to do a **forcible entry** to collect necessary evidence.

ENSURING COMPLIANCE DURING SEARCH AND INSPECTION

36. A search and inspection is possibly the first moment that a business realises that it is being investigated for a possible violation in the form of a prohibited agreement. The officials of businesses are under an obligation to assist the officers of the Commission conducting the inspection. In case of non-compliance, the Commission is empowered to make a forcible entry of the premises. Co-operation with the search-and-inspection team can mitigate many of the possible repercussions on the business' reputation.





37. Businesses should ensure that their employees:

- a. Act calmly and facilitate the inspection after ensuring its validity, which will be given in writing by the Commission.
- b. Allow the team to access any documents and electronic devices on which official material is available.
- c. Refrain from deleting, destroying, or removing any information (whether in electronic or physical form) from the premises.
- d. Stop sending any emails after the inspection commences or speak with anyone not expressly authorised by the business' senior management. A temporary ban on electronic communication during the period of the inspection should be expected.
- e. Do not impede the inspection on account of obtaining legal advice from businesses' counsels.

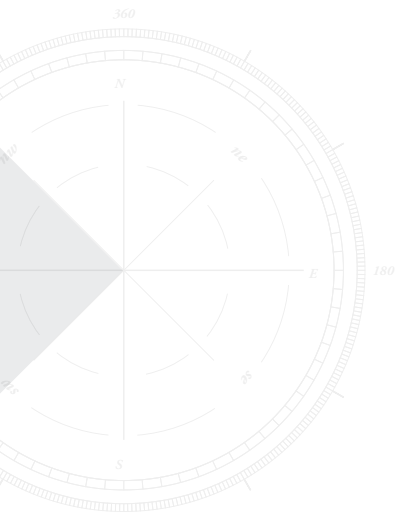
38. The inspection team has the right to make copies of documents or even take the original as and if necessary. Impounded documents will be returned after due examination. A list of documents and items being retained by the inspection team will be provided to the representatives of the business. The team can also impound or make forensic image of hard disks (computers, storage devices, etc.) and save a copy of data on any device (iPads, mobiles, tablets, etc.).

A list of documents and items being retained by the inspection team will be provided to the representatives of the business.



9

LENIENCY AND REWARD PAYMENT TO INFORMANTS



39. Apart from search and inspection, the Commission has two basic tools to unearth cartels and other anti-competitive practices. The first is the **leniency** provision and the second is the **reward payment to informants** scheme.

LENIENCY

40. Under §39 of the Act, the Commission shall, if it is satisfied that any business that is a party to an agreement prohibited under §4 of the Act, has made a full and true disclosure of the alleged violation, grant full immunity or reduction in the amount of financial penalties that can be imposed. ‘Leniency’ is considered as one of the important tools in detecting and prosecuting cartels. The details of the leniency scheme are found in the **Competition Leniency Regulations**.

REWARD PAYMENT TO INFORMANTS SCHEME

41. In case an individual has adequate information about a cartel or anti-competitive practice, he or she may report such activities to the Commission. The Commission rewards informants an amount ranging from a minimum of PKR 200,000 to PKR 2,000,000. The reward shall be paid if the information provided by the informant is accurate, verifiable, and useful in the Commission’s anti-cartel enforcement. The Commission keeps the identity of the informant confidential.





Part

B

SETTING UP AND MANAGING A COMPETITION COMPLIANCE PROGRAMME

42. In general, a competition compliance programme requires:

- i. Preparing a **corporate guide** explaining principles and procedures of the competition law compliance programme;
- ii. **Training** employees periodically;
- iii. Regular **assessment** and monitoring of the compliance programme; and
- iv. Consistent **discipline** and **encouragement** practices.

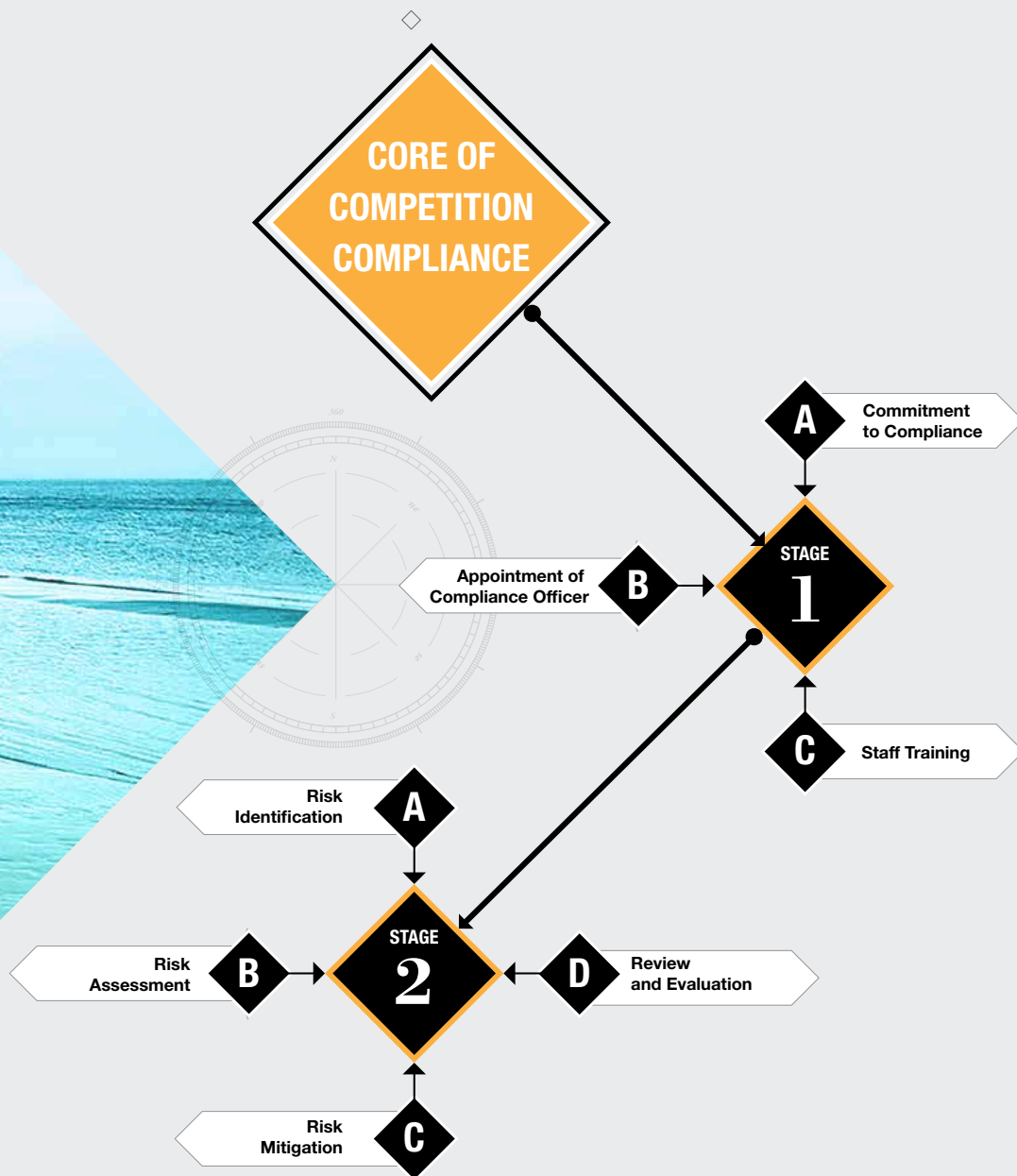
43. There are two stages associated with a compliance programme. The **first stage** focuses on setting up a compliance programme, highlighting

three key areas:

- a. Commitment to Compliance
- b. Appointment of Compliance Officer
- c. Staff Training

44. The **second stage** is focused on the implementation of the compliance programme and looks at four key areas:

- a. Risk Identification
- b. Risk Assessment
- c. Risk Mitigation
- d. Review and Evaluation





DEVELOPING AND MANAGING A COMPETITION COMPLIANCE PROGRAMME

45. This section of the Guidance provides a general programme that businesses are encouraged to implement as the ‘core’ of their overall regulatory and corporate compliance agenda. The programme may be tailored to meet the needs of individual businesses.

46. Keeping the key provisions of the Act and implementing rules and regulations (highlighted in Part-A) in mind, businesses need to develop and manage an effective competition compliance programme. Two factors are very important for any business to help achieve compliance:

- a. First, an unequivocal commitment to compliance from top to bottom along with an effective competition compliance programme as a ‘core’ of the overall corporate and regulatory compliance agenda.
- b. Second, adequate internal training and necessary incentives for employees to avoid any breaches of competition law and/or to report any potential infringement to senior management and the Commission.



FIRST-STAGE: SETTING UP A PROGRAMME

A. COMMITMENT TO COMPLIANCE

47. While the Commission cannot be prescriptive, businesses should devote sufficient resources – appropriate to their size and risk profile – to ensure the presence of a credible competition compliance programme.

48. Creating awareness of competition law and a commitment to compliance is a key responsibility of **senior management** (and boards, where applicable). Without a competition compliance programme and a clear-cut commitment by management, a business is unlikely to have an effective compliance with competition law

programme. Lack of management's commitment to compliance could result in a violation of competition law at various levels within a business. Thus, active involvement and support of senior management is crucial. This commitment should be conveyed in an unambiguous manner because it is ultimately senior management that is likely to be held accountable in case of any competition law violation.

49. A **written guide** informing the employees about the compliance programme and how activities will be conducted within the programme will be helpful. The guide should cover the consequences of competition law infringement for the business *i.e.*, an investigation by the



B. APPOINTMENT OF COMPLIANCE OFFICER OR UNIT

Commission, penalties, and other administrative measures being imposed.

50. In this context, the guide should clearly explain the sanctions and discipline provisions to be imposed on employees engaged in competition law infringements. The guide should include a simple, understandable and practical list of “do’s and don’ts” to counsel the employees. This list should be prepared to take the workflow of the business into account.

51. Associations of undertakings also have important roles in implementing compliance programmes. Associations should prevent any practices from happening that violate competition rules and ensure that their members should have knowledge and awareness of competition law.

The compliance officer or unit will ensure that the compliance programme is appropriately designed, implemented, and updated as necessary.

52. Procedures on how to make internal monitoring about whether the activities and decisions of the business comply with Act and rule and regulation made thereunder must be put in place. To that end, entrusting an official or a unit to carry out the principles and procedures of a compliance programme will help.

53. The compliance officer or unit will ensure that the compliance programme is appropriately designed, implemented, and updated as necessary. Ideally, a compliance officer with senior ranking is expected





to have greater knowledge and experience in compliance matters than the other staff engaged in general business operations and matters, among other things.

54. The compliance officer will be the key point of contact to address the queries raised by the senior management or employees vis-à-vis compliance matters or report any compliance-questionable conduct in a timely manner.



C. STAFF TRAINING

55. The basic objective of compliance training should be to raise awareness and highlight responsibilities relating to competition law in simple language that is easily understandable. There is no one size fits all approach to meeting each employee's training requirements and there is no standard form and method that is recommended. However, the Commission's four-step compliance process described in the second-stage below is a basic starting point.

56. Training can be given by the employees of the business or by an external professional or a firm. Small and medium enterprises can use practical methods such as asking advice from professionals, participating in courses or training programmes, or using the website of the Commission. Such training can be provided in face-to-face sessions or using web-based electronic platforms. Training activities can be carried out by various methods such as seminars and video presentation, etc and reviewed periodically.

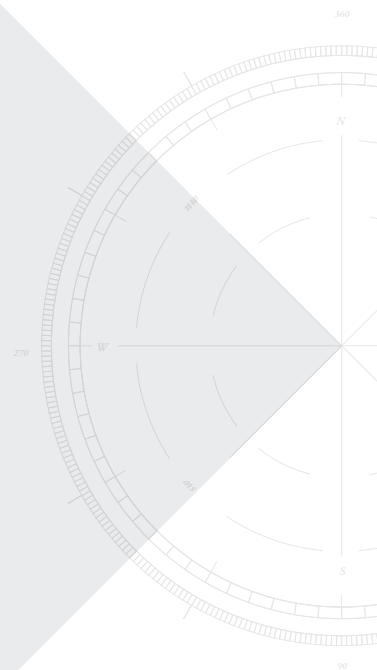
57. Well-trained and informed management and employees can deliver tangible value to the business. Employees' training is an on-going process



that should be conducted on a regular basis. Trained employees are able to identify anti-competitive practices within or outside their organisation and can take the necessary steps to report and mitigate actual or potential violations of competition law. This may reduce the likelihood of the Commission imposing penalties on the concerned business.

58. Employees involved in marketing and sales activities or those who frequently meet customers, suppliers, competitors, or who attend trade fairs or meetings at trade associations during their employment must have:

- adequate familiarity with the principles of competition law and associated rules and regulations as are outlined in Part-A of the Guidance;
- the ability to identify risks where competition law related issues may arise such as price-fixing, unfair trading conditions, sale and distribution channels management, allocating or sharing markets, customer, territories, fixing or setting the quantity of production, distribution or sale of any goods or provisions of services, bid rigging, among other things;
- full knowledge of the consequences of non-compliance with competition law; and
- a personal and professional commitment to achieve compliance with the competition law.





SECOND-STAGE RUNNING A COMPLIANCE PROGRAMME

59. The elements of the **second stage** of competition compliance are:

A. RISK IDENTIFICATION

60. The first element of an effective competition compliance policy is to identify the actual or potential risks specific to the nature and size of business. In some markets, competition infringements could be more frequent because of the reasons such as product characteristics, entry conditions, the scale of operations, and the existence of mechanisms that facilitate communication between competitors.

61. Key risks for some businesses could be their involvement in a prohibited agreement, while for others, it could be issues arising due to their abuse of dominant position in the market and their links in the downstream market. These include potentially anti-competitive agreements such as those granting exclusivity, setting terms and conditions at which customers must sell or purchase.

62. Some questions to help identify risk are:

- ◆ Is the business at risk because employees lack awareness and knowledge about competition law, the behaviours it covers, and its consequences?
- ◆ Do employees have contact with competitors' employees at industry events or otherwise, trade association or social events where representatives of competitors are also present?
- ◆ Do employees change jobs often between competing businesses and are there people who have recently joined from competing businesses?
- ◆ Do employees seem to have information about competitors' prices or business plans?
- ◆ Does the business have a large share of any of the markets in which it operates?
- ◆ Do businesses share the same supplier(s)?
- ◆ Are the business's customers also its competitors?
- ◆ Does the business work in partnership with its competitors?
- ◆ Are there any exclusive contracts for long periods?
- ◆ Does the business have any agreements containing joint selling and purchasing provisions with its competitors?
- ◆ Do these agreements contain requirements to share commercially sensitive confidential information with competitors?



B: RISK ASSESSMENT

63. The risk identified must be assessed in terms of how serious it is considering competition law provisions.

64. Risk assessment is a process in which businesses shall review their operations and activities to understand the areas of actual and potential risks that their business might face. It includes identification of compliance gaps in the business existing procedures for managing such risks. Risk identified might be categorised and assessed as high, medium, and low. One way of making such an assessment is the degree of directors, managers or staff's exposure to the risk of competition law violations. High risk is usually associated with directors and managers, who are assigned with the key tasks such as making sale and purchase/ procurement decisions, concluding agreements, and those dealing with the competitors on regular basis, attending meetings at trade associations or trade fairs as noted above, in addition to the new employees who have been engaged from a competing business organisations.



C: RISK MITIGATION

65. After an assessment of actual and/or potential risk, businesses need to develop risk mitigation strategies – in short, policies, procedures, and training to reduce the likelihood of any risk identified from occurring. For example, meetings with competitors at trade events or association meetings would necessitate training on what can and cannot be shared at such events.

66. To remedy any breach, an effective competition compliance programme shall ensure that the employees and compliance officers can report any breach to senior management and Board of Directors on an urgent basis to prepare for risk management and mitigation.

67. Risk mitigation measures include:

- ◆ **Training** employees about competition law and regular refresher trainings.
- ◆ Seeking **written undertakings** from their employees to ensure they perform their duties within the compliance programme, failing which disciplinary action could be taken against them. In all situations, the senior management as well as the employees should have easy access to their compliance officer to seek advice in case they suspect an infringement of competition law and/or if they are uncertain whether a business practice complies with the law.

- ◆ Putting in place an employee **code of conduct** and implementing a business-wide ethics policy that highlights risk avoidance and management. For example, encouraging employees to inform the business if they are participating in an event where representatives of competitors will be present and developing a checklist to help with decision-making especially when issues of risk are visible.

- ◆ Having a **confidential system** that helps employees report any concerns that they may have without fear of reprisal.

68. Employees awareness about regulatory compliance increases with a mix of both disciplinary and encouragement measures.

D: REVIEW AND EVALUATION

69. Businesses need to arrange periodic compliance evaluations, including investigations to verify compliance. It will be necessary to test the knowledge of employees about the competition law, business policies, and procedures related to the compliance programme, and perhaps to even monitor employees as they perform their duties for actual or potential infringements. Moreover, the businesses and compliance officers need to stay abreast with developments in competition law while simultaneously updating and amending their compliance programme accordingly.



NEXT STEPS

70. Businesses should conduct a review and evaluation of Stages A-C to ascertain the effectiveness of the compliance programme in place. There is no standard review period. It could be annual or biannual. The evaluation can be done by the Compliance Officer or unit with the assistance, if necessary, of external experts dealing in competition compliance and associated regulatory affairs.

71. While conducting the evaluation, businesses shall use their best efforts to ensure that each review is conducted providing the necessary access to employees and all relevant information in the business's possession or control.

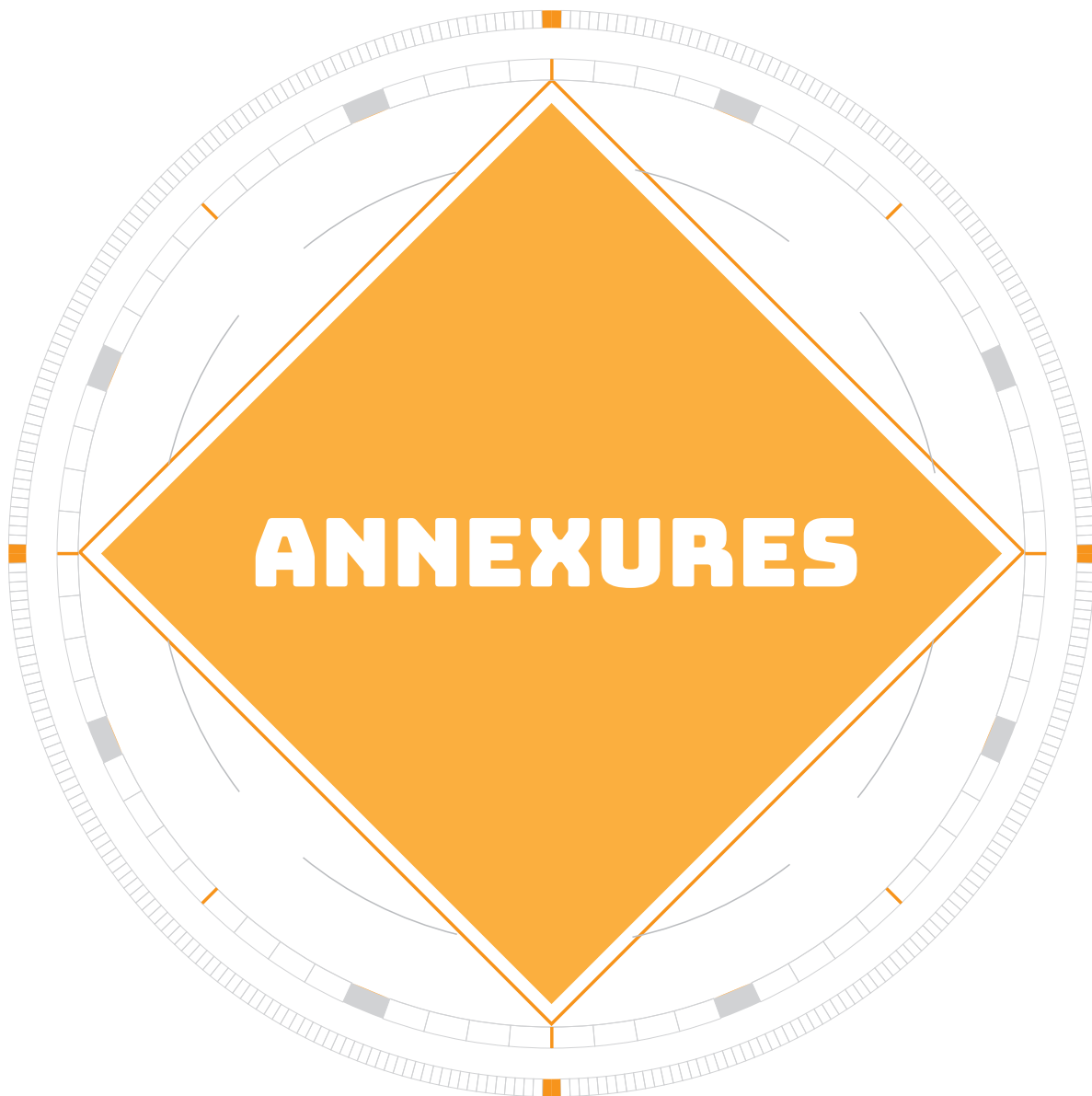
72. An evaluation report detailing the findings should be prepared and shared by the Compliance Officer with senior management, and with the Board (where applicable), of the business. If the report identifies any actual or potential infringement of competition law, the senior management and/or the board shall take urgent actions to address them and intimate the Commission.

73. The best way to ensure compliance with the competition law is to inculcate a culture of compliance and implement a compliance programme.

74. Businesses and individuals that come forward to report their own involvement in a prohibited activity defined in Part-A of the Guidance may receive lenient treatment from the Commission. Leniency could be a reduction in or avoidance of the penalty altogether if they fulfil the necessary criteria. In addition, the Commission can pay a financial reward for information about any prohibited activity, cartelisation in particular. Any business or any individual suspecting a colleague, competitor, supplier, distributor, or any other business partners of infringing competition law can talk to the Commission in confidence.

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MAKING COMPLIANCE EASIER





75. Businesses should review and assess their current compliance with competition law situation and a checklist for this purpose for businesses and associations of undertakings is below. The checklist does not cover all situations but includes basic guide question to help develop clarity. Responses to the questions will determine what kind of practice and approach may be necessary for the success of a compliance programme.

A. INFORMATION ABOUT THE COMPETITION LAW AND THE COMPETITION COMMISSION OF PAKISTAN

76. Information about the competition law and the Competition Commission of Pakistan is vital to foresee many problems that can be avoided altogether and would be very difficult to correct otherwise. The extent of knowledge and of managers and employees who have decision-making power about what is legally permissible and which kind of decisions and actions are prohibited serves as a basis for success or failure of the business and the management in this area.

- ◆ Do you have sufficient knowledge about competition legislation?
- ◆ Have senior managers or employees received training about competition legislation and related practices?



B. UNDERTAKINGS WITH SIGNIFICANT MARKET POWER

- ◆ Is there a special department or an official to deal with competition legislation and related practices in your business?
- ◆ Do you have rules, a booklet or a procedure prepared to ensure compliance with competition law, showing the required practices and ways of informing all employees (or the relevant ones) about these?
- ◆ Do you use external legal or other consultancy services about competition legislation and practices?
- ◆ Do you have information about the regulations, activities, and decisions of the Competition Commission of Pakistan?
- ◆ Do you regularly follow the website of the Competition Commission of Pakistan?

In certain markets, it is possible that one or more businesses may have power to determine, independently from their competitors and consumers.

77. In certain markets, it is possible that one or more businesses may have the power to determine, independently from their competitors and consumers, economic parameters such as price, supply, and distribution volume. Such decisions could lead to an infringement of the law.

- ◆ Is your pricing below or much above the costs?
- ◆ Is your pricing policy complicating your competitors' activities?
- ◆ Do you apply different price and sales conditions to consumers who are at equivalent positions?
- ◆ Do you impose any obligations on your consumers to buy another good or service with the good or service being sold?
- ◆ Do you make restrictions on supplying goods to your customers or competitors without reasonable grounds?
- ◆ Do you use your financial or technological superiority in a market to create complications for your competitors' activities in other markets?



C. RELATIONS WITH COMPETITORS

78. The main obstacle to a fair and competitive environment are anti-competitive (prohibited) agreements between businesses that could result in a cartel. Such agreements are strictly prohibited globally as they affect consumer welfare and could result in heavy penalties being imposed.

- ◆ Do you exchange views with your competitors about your cost and prices that result in the market price?
- ◆ Do you discuss and determine cost and prices that result in your price and sales conditions for different consumers with your competitors?
- ◆ Do you make a geographical or a consumer-based market allocation with your competitors?
- ◆ Do you have any understanding with your competitors on matters of restricting supply and other inputs?
- ◆ Do you have a written or oral agreement with your competitors on refraining from competing amongst yourselves?
- ◆ Do you act in concert with competitors to push certain competitors and/or consumers out of the market?
- ◆ Do you discuss with your competitors issues such as price, cost elements, supply *etc.* that might affect competition before or during tenders? Do you act jointly on these issues?



D. RELATIONS WITH CUSTOMERS AND DEALERS

79. Businesses distributing or selling goods and services through mostly vertical agreements should avoid practices that may constitute a competition infringement.

- ◆ Do you determine the resale price for your dealers or for different consumers?
- ◆ Do you impose restrictions on sales to some consumers in agreements with your dealers?
- ◆ Do you set sales conditions such as discount rates or quantities for your dealers or different consumers?
- ◆ Do you impose any prohibitions on sales by your authorised dealers in different regions into each other's region?



E. ASSOCIATIONS OF UNDERTAKINGS

80. Generally, businesses operating in a sector come together in organisations created under various titles such as chamber, association, union or others, for several reasons. It is natural that these organisations, with or without legal recognition, work for the success of their members. However, such associations of undertakings in certain situations could knowingly or ignorantly take anti-competitive decisions and result in anti-competitive practices happening.

- ◆ Are there any provisions in the charter of the association of undertakings restricting competition?
- ◆ Does the association of undertakings take decisions about sales prices and other sales conditions of its members?
- ◆ Are members encouraged to talk about issues such as prices, sales conditions, market/customer allocation, etc.?
- ◆ Do the powers of the association of undertakings over its members affect competition between them?
- ◆ Does the association of undertakings take decisions restricting its members' sphere of activity?
- ◆ Do technical standards aiming to regulate the members' activities restrict their commercial activities?

F. PARTICIPATING IN PROCUREMENT

81. Another area where competition infringements tend to happen are when businesses participate in public tenders. It is considered a severe competition infringement if those participating in the bidding process communicate closely with each other before or during a tender.

- ◆ Does your business communicate with competitors about the tender or tender elements before or during tenders?
- ◆ Is your business in an agreement with its competitors about price, amount, etc. related to the tender?
- ◆ Does your business allocate tenders with competitors, especially when there is more than one tender?
- ◆ Does your business agree with your competitors and withdraw from the tender in favour of one or more competitors?
- ◆ Has your business submitted a tender that was very different in terms of price, amount, etc., from what you would actually do if you won the bid?



G. DECEPTIVE MARKETING

- ◆ Is your business's marketing material accurate?
- ◆ Is information regarding your business's product often added to the marketing material without conducting research to substantiate the information?
- ◆ Has your business ever adopted a marketing strategy containing misleading information which results in harm to another business or competitor?
- ◆ Does your business provide false or misleading information to the consumer in terms of origin, properties, suitability for use, or quality of goods etc. through any marketing medium?
- ◆ Does your business intentionally omit material information regarding your product from the marketing material to induce sales?
- ◆ Does your business ever falsely or misleadingly compare its own product with a competitor's product?
- ◆ Is your business involved in the fraudulent use of intellectual property of another business such as its trademark, firm name, product labeling or packaging etc.?

It is advisable that undertakings and associations of undertakings at this position implement a compliance programme

UNDERSTANDING THE RESPONSES

82. Many “No” responses in Section A could indicate that decisions and practices of the business or association of undertakings have a higher potential to violate the competition legislation. It is advisable that undertakings and associations of undertakings at this position implement a compliance programme or at least receive consultancy/training services with respect to competition law. For Sections B-G, a “Yes” response to any question indicates that the undertaking or association of undertakings in question might be involved in a competition infringement and they should reassess its practice or action concerned in terms of competition legislation and should terminate any such action.



ANNEX

2

THE COMPETITION ACT, 2010: SECTIONS RELEVANT TO BUSINESSES

OVERVIEW

83. The COMPETITION ACT, 2010 is a modern comprehensive law, which gives the Commission legal and investigative instruments and powers to engender free competition in all spheres of commercial and economic activity, enhance economic efficiency, and to protect consumers from anti-competitive behaviour.

84. The Act applies to all undertakings in Pakistan regardless of their public or private ownership and to all actions or matters that can affect competition in Pakistan. Although essentially an enabling law, it briefly sets out procedures relating to review of mergers and acquisitions, enquiries, the imposition of penalties, grant of leniency and other essential aspects of law enforcement.



KEY SECTIONS

85. Briefly, the law prohibits situations that tend to lessen, distort, or eliminate competition such as actions constituting an abuse of market dominance, competition-restricting agreements, and deceptive marketing practices.

- ◆ **Abuse of Dominant Position.** §3 of the Act 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, reducing 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.
- ◆ **Prohibited Agreements.** §4 of the Act prohibits undertakings or associations from any agreement or any decision in matters of **production, supply, distribution, acquisition** or control of goods or the provision of services, which have the object

or effect of preventing, restricting, reducing, or distorting competition within the relevant market. 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. The Commission is authorised, however, to issue either individual or block exemptions under §5-9 of the Act.

- ◆ **Deceptive Marketing.** The Act prohibits deceptive marketing practices, in other words, any advertising or promotional material that misrepresents the nature, characteristics, qualities, or geographic origin of goods, services or commercial activities. An OFFICE OF FAIR TRADE (OFT) has been created within CCP specifically to oversee consumer protection issues under §10 of the Act.
- ◆ **Approval of Mergers.** The law prohibits mergers that would substantially lessen competition by creating or strengthening a dominant position in



the relevant market. The Act requires prior notice of proposed mergers or acquisitions that meet the notification thresholds stipulated in §4 of the Competition (Merger Control) Regulations, 2007. If the Commission determines this to be the case, it can prevent mergers or acquisitions, set conditions or require divestitures. The Act does not distinguish between horizontal and vertical mergers. The term merger in §11 also covers joint ventures, which are subject to the Commission's approval if they meet the notification thresholds.

86. §28 of the Act states that the **functions** and **powers** of the Commission are 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 for implementing the Act.

87. §30 establishes rules for **proceedings** in case of contravention, stipulating that before making an order the Commission shall: (a) give

The Act requires prior notice of proposed mergers or acquisitions that meet the notification thresholds stipulated in §4



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.

88. §31 deals with the Commission's **orders** in cases pertaining to abuse of dominant position, prohibited agreements, deceptive marketing practices, and mergers. The Commission has the power to issue interim orders if the final decision will take time and the actual or imminent situation can cause harm.

89. §33 establishes that the Commission shall, for any proceeding or enquiry, have the **same powers as a civil court** for: (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 and the Commission shall be deemed to be a civil court for the purposes of offences relating to documents given in evidence.

90. §34 empowers the Commission, to **enter and search premises** and should any undertaking



refuse without any reasonable grounds, §35 grants the power of **forcible entry** to collect necessary evidence.

91. §36 permits the Commission to ask for any necessary information from any undertaking pertaining to its work. §37 allows the Commission to conduct market studies and research into anything pertinent to the Act.

92. §37 permits the Commission to conduct enquiries for matters relevant to the Act. The Commission may do these enquiries on its own or upon receipt of a reference by the Federal Government.

93. §38 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.

§37 allows the Commission to conduct market studies and research into anything pertinent to the Act.

94. §39 permits the Commission to be lenient and impose a lesser penalty on an undertaking that is alleged to have violated the law if it has made a full and true disclosure in respect of the alleged violation. There is also a possibility of a full exemption. Leniency is possible only for the first undertaking that makes a full disclosure. The Commission, though, may revoke leniency in the case of failure to comply with the leniency conditions or false evidence.

95. §41-43 define the process of appeals against any Order of the Commission and §44 permits any undertaking to seek judicial review from the Supreme Court of Pakistan.



ANNEX

3

HOW TO FILE A COMPLAINT

CHECKLIST





THE RELEVANT PROCEDURE FOR FILING A COMPLAINT

Regulations 16-19 of the General Enforcement Regulations relating to filing a complaint are given hereunder:

16. Inquiry.

(1) Without prejudice to the generality of the powers conferred under section 37 and subject to sub-regulation hereof, the Commission may commence an inquiry:

- a. suo moto; or
- b. upon a reference made to it by the Federal Government under regulation 17; or
- c. on receipt of a complaint from an undertaking or a registered association of consumers under regulation 17.

(2) The Commission may commence an inquiry upon receipt of a complaint if the facts before it, appear to constitute a contravention of the following provisions:

prohibition in section 3;
prohibition in section 4;
prohibition in section 10;
prohibition in section 11; or

any act, omission or facts otherwise available appear to constitute a contravention of the provisions of Chapter II of the Ordinance [Act].

17. Reference and Complaints.

(1) The Commission shall upon a reference made to it by the Federal Government, conduct enquiries into any matter relevant to the purposes of the Ordinance [Act].

(2) Without prejudice to the foregoing where the Commission receives from an undertaking or a registered association of consumers a complaint in writing, it may, unless it is of opinion that the application is frivolous or vexatious or based on insufficient facts, or is not substantiated by prima facie evidence, conduct an inquiry into the matter to which the complaint relates.

18. Contents of complaint and reference. (1) A complaint/ reference/application under these regulations shall state –



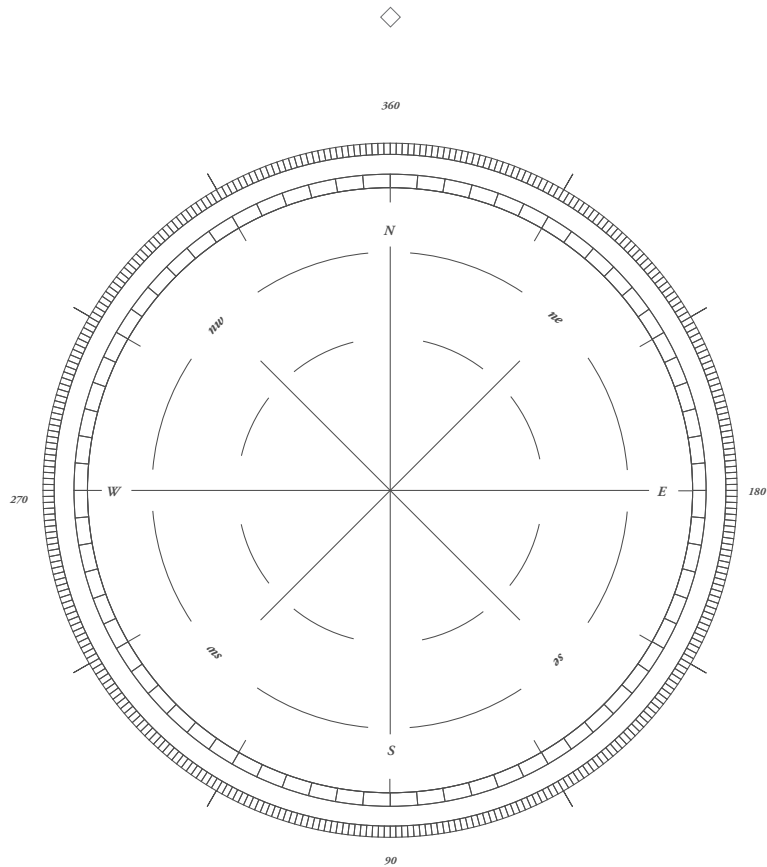
- a. Name of the person making the complaint/ reference/application;
- b. address in Pakistan for delivery of notice/ document;
- c. telephone number, fax number and electronic mail address, if available;
- d. mode of service of notice/documents to be used;
- e. name and address(es) of respondent(s); and
- f. name and address of authorized representative, if any;

(2) The complaint/ reference/ application shall contain

—

- a. a brief statement of facts;
- b. a summary of the alleged contravention of the Ordinance [Act];
- c. a succinct presentation in support of each contravention;
- d. such other particulars as may be specified by the Commission;
- e. a schedule listing all documents/affidavits/ evidence in support of each of the presentations; and (f) relief(s) sought.

19. Fee for filing Complaint. Except for the reference filed by the Federal Government, each complaint received under these regulations shall be accompanied by an evidence having paid the fee of Rs. 50,000; (2) Fee can be paid either by tendering demand draft or pay order payable in favour of the Commission or challan form evidencing the payment of fee in the account of the Commission.



Compass helps in navigation and has been used in this book as a symbol of guidance towards voluntary compliance.



W W W . C C . G O V . P K



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