



VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY:

PAKISTAN

Overview





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NOTE

Voluntary peer reviews of competition law and policies carried out by UNCTAD fall within the framework of the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices, known as the United Nations Set of Principles and Rules on Competition, adopted by the General Assembly in 1980. The Set seeks, among other things, to assist developing countries in adopting and enforcing effective competition law and policy suited to their development needs and economic situation.

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(OVERVIEW)

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I. PAKISTAN COMPETITION POLICY AND LEGISLATION

1. In 2007 Pakistan undertook a fundamental redesign of its competition policy system. For several reasons, this initiative is one of the most important modern developments in competition policy. First, the new system holds considerable promise for improving the economic performance of Pakistan. Despite difficult initial conditions, the Competition Commission of Pakistan (CCP or the Commission) has established a substantial foothold for competition law as an element of national economic policy.

2. Second, the implementation of the new regime offers important lessons for other jurisdictions that are considering adopting new competition laws or are in the early stages of making new systems operational. The Pakistani experience underscores the importance of strong leadership in formulating a programme for implementation, attracting skilled professional staff and mobilizing popular support for the competition agency.

3. Third, the competition policy system of Pakistan is today confronting the difficult challenges that new competition agencies have encountered in their first decade after a successful launch. The important law enforcement and advocacy initiatives that have put the Pakistani system on the map also tend to arouse strong opposition within the courts and the political process. Early success also creates attractive opportunities for skilled CCP staff to move to other (and often better paying) positions with private entities. Future progress also demands a continuing commitment by elected officials to appoint top-quality leadership to CCP.

4. In the coming years, CCP will face difficult choices in deciding how best to facilitate a basic transformation of the economy in Pakistan. The economy is a mix of an older regime of industries owing their stature to political choices and a newer, private sector regime shaped by competitive forces. The role of CCP is to encourage the development of the latter – to support the emergence of a private sector free from old political and economic oligarchies. CCP seeks to do this by applying competition law in a professional, autonomous manner without regard to the origin and control of the enterprises subject to its authority.

5. No major monopolies remain in Pakistan, apart from public sector utilities, despite the pre-1970s dominance of cartels and monopolies controlled by 20 powerful family groups. These groups collectively held two thirds of the industrial assets, 80 per cent of the banking sector and 70 per cent of the insurance sector in Pakistan.¹ However, a World Bank report completed in January 2007 stressed that proven or suspected cartels have existed and may still exist in several industries.

¹ UI Haq, M (1976). *The Poverty Curtain: Choices for the Third World*. Columbia University Press. New York.

A. Evolution and structure of the competition legislation

6. The first competition legislation in Pakistan was the monopolies and restrictive trade practices ordinance of 1970, with the Monopolies Control Authority acting under its authority. The scope of the ordinance was severely constrained by the initiation of the economic reform order of 1972, a broad nationalization process enacted directly after the promulgation of the ordinance. The old Monopolies Control Authority was considered incapable of effectively enforcing legislation due to the incompleteness of its legal framework and a lack of staff expertise.

7. The ordinance was revamped 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 the Competition Act in October, 2010 (the Act). The dynamics of the law have changed substantively from a prescriptive to a reasoned approach. In contrast to the ordinance, the Act does not seek to curb dominant positions; it prohibits the abuse of dominance, provides a market share threshold of 40 per cent for presuming dominance and incorporates the concept of collective dominance of multiple undertakings.

8. Unlike the ordinance, which prohibited only restrictive trade practices, resulting in unreasonable lessening of competition, the Act prohibits any agreement that prevents, reduces or restricts competition within relevant markets. Individual and block exemptions of the agreements exist under the Act on efficiency or economic merit grounds. The Act stipulates ex ante merger control procedures, i.e. mandatory procedures for review and prior clearance of mergers and acquisitions meeting thresholds specified by CCP in the competition (merger control) regulations, 2007.

9. The Act introduces provisions regarding deceptive marketing, which aim to protect consumer interests and enhance consumer welfare alongside protecting business interests from false and misleading information or advertising.

10. The Act considerably strengthens the investigative capacity of CCP through provisions for search and inspection, forcible entry and leniency powers. To ensure independence, a degree of protection from arbitrary removal and security of tenure is provided to members of the Commission. For effective implementation, penalties under the Act are much higher than those provided in the ordinance. Advocacy is part of the statutory mandate under the Act, with powers to issue advisory/policy notes and the establishment of an independent Competition Appellate Tribunal is introduced for redress of appeals.

II. INSTITUTIONAL FRAMEWORK AND ORGANIZATION OF THE COMPETITION COMMISSION OF PAKISTAN

A. The Competition Commission of Pakistan

11. The Commission is an autonomous federal agency and mandated to ensure free competition in all spheres of commercial and economic activity, enhance economic efficiency and protect consumers from anticompetitive behaviour across Pakistan.

12. It is a collegiate body, established as a quasi-judicial, quasi-regulatory law enforcement agency. The Commission currently comprises six members, including the Chair, although the law allows a full composition of seven members.² The backgrounds of the current commissioners vary: they include tax law, corporate and regulatory law, banking, finance and private entrepreneurship.

13. The Commission is organized into the following departments:

(a) Secretariat of the Commission. It oversees the conduct of Commission business under approved procedures. Its responsibilities include: representation of the Commission, issuing Commission notices and minutes, certifying decisions or documents and liaising with various organizations, ministries and governmental bodies;

(b) Cartels and Trade Abuses Department. This is the principle department responsible for enforcement, conducting enquiries and investigations for possible contraventions of sections 3 (abuse of dominance) and 4 (prohibited agreements) of the Act. The department comprises professionals with backgrounds in law, economics, finance and accounts;

(c) Legal Department. The Legal Department is fundamental to the good functioning of the Commission, carrying out enforcement activities, providing legal advice and services to all departments and assisting with conducting inquiries and the performance of searches and inspections. The Office of the Registrar is responsible for drafting pleadings and representation before the courts, issuing “show cause” notices, organizing hearings and assisting the CCP Original and Appellate Benches by providing administrative and legal support;

(d) Corporate Affairs Department. Given budgetary constraints, the department has an essential role in the efficient and effective functioning of CCP, handling matters pertaining to internal operations, including

² Section 14 of the Competition Act.

administration, accounts and human resources. Aside from enforcement, a major emphasis is placed upon improvements to facilities, organization, policies and procedures. Prominent improvements have been made in areas of policy formulation, introducing standard operating procedures, staffing and computerized information sharing. Although CCP remains under significant financial constraints, it has been operationally active and judiciously deploys its limited resources;³

(e) Mergers, Acquisitions and International Affairs Department. The functions and responsibilities of the Mergers and Acquisitions Department include the detection of mergers and acquisitions cases from newspaper reports, stock exchange websites and directly from the Securities and Exchange Commission of Pakistan. It also conducts reviews of mergers and acquisitions of shares or assets, including joint ventures, pursuant to section 11 of the Act. Generally, a single member, assisted by technical departments, makes final decisions regarding these reviews. If a merger or acquisition is not to be approved, then current CCP practice is that a bench of at least two members has the final word on such decisions. The department was established as the focal coordinating point to liaise with the United Nations Conference on Trade and Development (UNCTAD), the Organisation for Economic Co-operation and Development (OECD) and the International Competition Network (ICN) and is the communications focal point for all international activities. In addition, it explores bilateral relations concerning technical assistance with other competition agencies and with donor organizations. The Office is currently involved in two ICN working groups and contributes to the work of OECD and UNCTAD.

(f) Competition Policy and Research Department. Under sections 28 and 29 of the Act, CCP is required to conduct research and review policies. It is also empowered to issue policy notes. Promoting public policies that support competition is a key activity of any agency and CCP has been working actively towards this objective. The research and study programmes of the department assist the Enforcement Department in identifying anti-competitive factors and practices;

(g) Advocacy and Information Technology Department. The Advocacy Department works towards the sensitization of stakeholders. Awareness of competition law amongst the Pakistani business community is considered fairly high by multinationals and workable in relation to national or local companies. Media exposure has been crucial for the independence and efficiency of CCP. The Information and Technology (IT) team manages and

³ CCP annual report, 2011.

supplies all IT-related services to support the CCP mission of increasing employee productivity and efficiency. The recent focus of the department has been on the automation of legal/court cases, employee attendance records, inventory assets and tracking, human resource profiles and website upgrading. A forensic lab has also been set up to provide assistance to search and inspection teams;

(h) Office of Fair Trade and Budgetary Affairs. Establishing the Office of Fair Trade was intended to enhance the link between the Commission and consumers, establishing a focal point for identifying and providing solutions to issues resulting from deceptive marketing that (potentially) pose problems for consumers.⁴ The Office comprises a small committed team dedicated to the goal of building consumer confidence, facilitating informed consumer decision-making and giving consumers recourse over corporate deception. Given the scarcity of funds available for CCP, the Budgetary Affairs Department was created to pursue and arrange funds for its budgetary requirements, within the statutory provisions of section 20 of the Act. CCP has not yet benefited from the contributory 3 per cent of fees and charges of the five other regulatory agencies, which is meant to ensure its financial autonomy under the Act. Consequently, budget receipts chiefly comprise Government allocations. The contribution of CCP to the fund through merger and exemption fees is one fourth of the Government grants received.⁵

B. Personnel incentives

14. CCP personnel incentives are codified under its service regulations of 2007 and are supplemented through standard operating procedures. Incentives include:

(a) Monetary incentives:⁶ (i) advance increments for exceptional (and relevant) qualifications and experience; (ii) merit increments for outstanding performance; (iii) honorariums and cash awards for exceptional performance, including research work and publications, in order to encourage employees to improve their qualifications; and (iv) overtime allowance.

(b) Training and career planning:⁷ (i) to further continue the professional development of its personnel, the Commission, at its own expense, routinely requires employees to undergo training courses within or outside Pakistan; (ii) the service regulations allow the Commission to provide for employee career planning, subject to its requirements. In this regard, the Commission,

⁴ CCP annual report, 2011, page 19.

⁵ On average, PRs 200 million is received every year from the Government.

⁶ CCP (service) regulations, chapter 3, sections 4, 5, 7 and 9.

⁷ Ibid., chapter 5, sections 1 and 2.

through standard operating procedures, provides financial assistance for the improvement of the academic or professional qualifications of employees.

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

III. OVERVIEW OF THE COMPETITION LAW

15. Divided into six chapters and 62 sections, the Competition Act is a contemporary, full content and international standard competition law that gives CCP all powers and legal and investigative instruments to enforce it.

16. The Act applies to all undertakings,⁸ whether governmental or private, and to all actions or matters that may prevent, restrict or reduce competition within Pakistan.

A. Definition of the relevant market

17. The definition of relevant market,⁹ which is exactly the same as the European Commission notice,¹⁰ deals only with demand-side substitutability. Additionally, Pakistan merger regulations and guidelines do not refer to supply-side substitution. However, the European Commission notice includes a section concerning supply substitution, as the effects are often equivalent to those of demand substitution.

B. Abuse of dominance

18. Under Pakistan law, dominance is not stated in terms of percentage alone but also deemed to exist if undertakings have the ability to behave independently of competitors, customers, consumers and suppliers. Presumptions of dominance under the Act remain at 40 per cent of relevant market share, although globally this varies between 20 per cent and 70 per cent.

19. Under the regulations¹¹ CCP, in assessing the competitive effects of abuse of dominant position in a relevant market, may consider the following factors of dominance including, but not limited to, commonly used measures such as market share, concentration measures and structural factors.

⁸ Section 2(1)(q) of the Act.

⁹ Section 2(k) of the Act.

¹⁰ European Commission notice on the definition of relevant market, paragraph 7.

¹¹ CCP general enforcement regulations, 2007, section 29.

C. Prohibited agreements and exemptions

20. In line with best international practices, the Act prohibits all agreements that have the effect of preventing, restricting or reducing competition. While exemption is available, it has narrow scope and places the onus of proof on the parties to the agreement. Time-specific individual or block exemptions can be granted with respect to prohibited agreements if, in terms of section 9 of the Act:

- (a) They contribute to the efficiency of production;
- (b) The same benefit could not be obtained without restricting competition;
- (c) The benefit clearly outweighs the adverse effects of lessening competition.

21. In the case of block exemptions, for purposes of transparency and alerting potentially affected parties, CCP is required to publish the proposed order.

22. So far, CCP has granted over 400 individual exemptions, some conditional, in an array of cases, including template distribution or dealership, licensing and franchise agreements.

D. Mergers and acquisitions

23. Pakistan has a mandatory regime for merger notification. Under section 11 of the Act, mergers that would substantially lessen competition by creating or strengthening a dominant position in relevant markets are prohibited. If CCP determines this to be the case, it can prevent mergers or acquisitions; it may still approve with or without conditions or require divestitures.¹² The law makes no distinction between horizontal and vertical mergers.

24. CCP enforces section 11 of the Act, read with regulation 4 of the competition (merger control) regulations, which provides for a mandatory pre-merger notification for those transactions above thresholds relating to transaction and size of parties. The time periods for processing mergers for review are 30 days and 90 days, for phases I and II respectively.

25. Merger guidelines exhaustively clarify the factors that the merger regulation refers to under the headings of market share, possible (coordinated and non-coordinated) effects of mergers, buyer power, likelihood of entry, efficiencies and failing firms.

¹² If it is shown that (a) it contributes substantially to business efficiency, (b) such efficiency could not be reasonably achieved by less restrictive means of competition, (c) these efficiency benefits clearly outweigh the adverse effect of diminished competition, or (d) it is the least anticompetitive option for the assets of the failing undertaking, in cases of actual or imminent financial failure.

E. Preventing deceptive marketing and consumer protection

26. The Competition Act stipulates prohibition of “deceptive marketing practices”, aiming to protect consumers. Section 10 of the Act refers to practices such as the distribution of false/misleading information, fraudulent use of trademarks, firm names or product labelling or packaging.

27. In this regard, the Office of Fair Trade was created to oversee consumer protection issues. It has dealt with a substantial number of cases and meaningfully contributed to building jurisprudence, while ensuring 100 per cent compliance, whether after final decisions or soon after cognizance has been taken by CCP.

F. Remedies

28. When deciding on appropriate remedies, CCP should consider the effectiveness of different remedies and associated costs, whilst heeding the principle of proportionality.

29. CCP is allowed to formulate behavioural and structural remedies.¹³ The latter involve dissolution, divorcement and divestiture, as well as requiring access to essential facilities and mandatory licensing. Sections 31 and 38 of the Act empower CCP to impose penalties for violations under the Act.

30. Section 31 states that in cases of abuses of dominant positions, CCP may require undertakings to take actions to restore competition. In cases of prohibited agreements, CCP may annul or require amendment. In relation to deceptive marketing practices, CCP may require undertakings to take actions to restore previous market conditions, or confiscate or destroy any harmful goods.

31. Regarding mergers, CCP, pursuant to section 31, may (a) authorize a merger, possibly setting forth conditions;¹⁴ (b) open a second phase review; or (c) undo or prohibit the merger. CCP has the power to issue interim orders, which may be reviewed, modified or cancelled by CCP.

32. CCP, in addition to imposing penalties, is empowered under the Act¹⁵ to formulate cease and desist orders, to take necessary actions to restore the previous market conditions and to confiscate and destroy goods used as, or in, deceptive marketing practices.

¹³ CCP general enforcement regulations, 2007, regulation 28 and Competition Act, section 31.

¹⁴ Competition Act, section 11(c).

¹⁵ *Ibid.*, sections 31(c) and 38(2).

G. Penalties

33. CCP, for violations committed under the Act, may impose penalties up to PRs 75 million¹⁶ or an amount not exceeding 10 per cent¹⁷ of the annual turnover of the undertaking. Settlements are not possible under the competition legislation of Pakistan. However, while building sanctions, CCP still adopts a “lenient approach” towards cooperative parties who are not leniency applicants.

34. Failure to comply with a CCP order constitutes a criminal offence, punishable with imprisonment for a maximum one-year term or with a maximum fine of PRs 25 million.

35. CCP guidelines on the imposition of financial penalties¹⁸ provide parameters for determining the size of the penalty, stipulating factors to take into consideration while calculating the sanctions.¹⁹

H. Functions and powers of the Commission

36. Section 28 of the Competition Act lists the functions and powers of the Commission, which include initiating proceedings under the Act, conducting studies for promoting competition, conducting enquiries to give advice, engaging in competition advocacy and taking all other necessary actions to carry out the purposes of the Act. After receiving a substantiated complaint or referral by the Government, or by acting independently, CCP may conduct an inquiry. Upon positive conclusion, it shall initiate proceedings subject to due process stipulated under section 30 of the Act.

I. Enforcement tools

1) Leniency

37. The Act confers power to grant leniency under section 39,²⁰ but only for the first undertaking making a full disclosure. Factors that govern the reduction in penalty aspect include: the stage at which the undertaking comes forward; the evidence already in the possession of CCP; and the quality of the information

¹⁶ From October 13, 2010. Previously the maximum figure was PRs 55 million.

¹⁷ From October 13, 2010. Previously it was 15 per cent.

¹⁸ CCP guidelines on imposition of financial penalties (fining guidelines). Accessible at http://www.cc.gov.pk/images/Downloads/guidlines/imposition_of_financial_panelties.pdf. Accessed on January 30, 2013.

¹⁹ These are: (a) seriousness of the infringement; (b) duration of the infringement; (c) aggravating or mitigating factors; and (d) other relevant factors, e.g. deterrent value. The guidelines are non-binding on the Commission.

²⁰ Section 39 allows CCP to impose lesser penalties if an undertaking has made a full, truthful disclosure in respect of the alleged violation. Subsection 2 extends to full exemptions. However, CCP may revoke leniency in cases of false evidence or failure to comply with leniency conditions.

provided by the undertaking.

38. All financial penalty reductions are discretionary under the regulations and CCP may revoke leniency if the undertaking is found to have given false evidence.

39. Leniency regulations also promote private competition enforcement, as they make clear that the exemption/immunity granted by CCP cannot exclude third-party claims relating to losses suffered as a result of activities in respect of which immunity is granted.

2) Reward payment scheme

40. Pakistan is the third country, after the United Kingdom of Great Britain and Northern Ireland and the Republic of Korea, to introduce a reward payment scheme.²¹ This primarily relates to the usefulness of information provided vis-à-vis cartel formation. It does not apply to those involved in cartel activity, as they can seek benefit under the leniency regulations. Financial rewards are granted to informants based on the veracity and usefulness of the information provided. CCP has the discretion to reject information.

3) Search/inspection and forcible entry

41. Powers to search/inspect and force entry without warrant have remained in the Act, with an inbuilt mechanism that caters for the exercise of such power. The officer to enter and search premises must be authorized by CCP. If the undertaking refuses without “reasonable cause” to allow CCP to exercise its power, a deliberation process is provided and an investigating officer is required to obtain a written order signed by two members of CCP before making a forcible entry. Despite initial resistance, professional handling of this power has led to increasing acceptance from the business community.

4) Powers of civil courts in enquiry and proceedings

42. Section 33 of the Act provides that CCP shall, for the purposes of a proceeding or enquiry, have the same powers as civil courts.²²

5) Forums of appeal

43. Under section 41 of the Act, a decision by a single member can be appealed to two or more CCP members by aggrieved parties. For decisions adopted by multiple members, the appeal is filed before the newly functional Competition

²¹ CCP revised guidelines on “Reward payment to informants scheme”.

²² In respect of: (a) summoning and enforcing witness attendance, (b) discovery and production of documents as evidence, (c) accepting evidence on affidavits, (d) requisitioning public records from any court or office and (e) issuing a commission for the examination of any witness or document.

Appellate Tribunal.²³ Appeals against a decision of the Tribunal lay before the Supreme Court of Pakistan.

IV. COMPETITION POLICY INSTITUTIONS

44. Although the most directly influential, CCP is not the only organization that influences the competition environment in Pakistan.

45. Concerning consultation, CCP considers comments from relevant regulatory bodies, businesses and consumers. Apart from Government, judicial institutions and non-governmental organizations (NGOs), among the public bodies that have direct or indirect influence on the state of competition in Pakistan are:

- Securities and Exchange Commission of Pakistan
- State Bank of Pakistan
- Pakistan Telecommunication Authority
- Pakistan Electronic Media Regulatory Authority
- National Electric Power Regulatory Authority
- Oil and Gas Regulatory Authority
- Public Procurement Regulatory Authority
- Federal Board of Revenue.

46. Both CCP and the Public Procurement Regulatory Authority are currently working on a memorandum of understanding, accepting that public procurement is a key economic activity with a broad impact on competition. Many of the most significant cases dealt with by CCP so far have involved collusive conduct in public tenders.

A. Challenges and performance of the Commission

1) Constitutional challenges

47. In order to fully appreciate the performance of the agency, it is important to consider the circumstances and challenges CCP has faced and continues to face. From its inception, CCP has struggled for survival and for recognition. The competition ordinance of 2007 encountered many constitutional challenges. On 31 July 2009, the Supreme Court passed a judgment withdrawing protection against lapses to 37 ordinances, including the competition ordinance of 2007. This ordinance was twice re-promulgated and despite the smooth succession of the current Chair in July, 2010 (indicative of Government support for the sustainability

²³ Sections 42 and 43.

of the institution), the law remained suspended for 45 days, prior to its enactment on 13 October 2010.

2) Budgetary and financial constraints

48. Continuous fiscal constraints and struggles for financial autonomy are challenges that CCP has faced since its inception. For complete autonomy, the Competition Act envisages independent funding through tied sources i.e. 3 per cent of fees and charges levied by the other regulatory bodies. In the last two years there has been considerable progress in terms of the Ministries of Law and Finance formally endorsing the position of CCP and assurances at the highest level of Government that it will focus attention on providing the Commission with a secured source of funding to carry on its important work.²⁴ However, the recovery of receipts is yet to materialize. The budget allocation from the Government has remained fixed at PRs 200 million for the last five years, without adjusting for inflation, which is calculated to be on average 15.3 per cent per annum over this period.

3) Capacity and human resource constraints

49. The CCP enforcement team comprises 50 professionals, including its six Commission members, excluding the Chair and the potential seventh member of the Commission. Of the enforcement staff, 40 per cent are female, representing a healthy gender participation ratio. The average age of non-administrative staff is 35, in a context where about 70 per cent of the population of Pakistan are under the age of 25. The total strength of the CCP team is 135, including administrative staff. The professional team comprises 10 lawyers, 11 economists (including the senior economic advisor with a PhD in economics) and 28 other employees holding degrees in business administration, finance, mass communication, IT and other subjects. This small professional team is entrusted with the huge task of implementing the mandate of CCP under the Act.

4) Backlog of cases before the courts

50. The huge backlog of around 200 pending court cases is another significant challenge. However, it is noteworthy that, notwithstanding the legal battles that await it in the courts, CCP has been very conscious of preserving its image by continuing to enforce the law without fear. The overburdened courts, unpredictability, inordinate delays, emphasis on procedure over substance and a lack of understanding of the subject are the hallmarks of the judicial system in many Asian countries, hence Pakistan is not unique. Courts normally do not change CCP decisions, but rather issue restraining orders until the final judgment. Most CCP decisions have been

²⁴ Address of the Prime Minister to the international conference on “Competition enforcement: challenges and consumer welfare in developing countries”, December 2011

appealed and are pending before different high courts and the Supreme Court; not a single case has been decided so far on merit.

5) Challenging political and economic times

51. Aside from the security and law and order situation, with increasing friction amongst State institutions, weak social sector reforms, unrelenting and crippling energy shortages and the inability of the Government to balance the budget, the existing economic scenario in Pakistan seems beset by weaknesses resulting in high inflation and low economic growth. Nonetheless, there are some positive aspects: the consumer price index, while high, is showing signs of becoming range-bound; foreign remittances continue to rise; the banking system remains insulated from the western banking meltdown; and while the rest of the world is ageing, the population of Pakistan is getting younger. Most importantly, democracy is steadfast and national resilience remains intact.²⁵

52. In the current social, economic and political milieu, the emergence of strong independent and performing institutions would go far towards building a sustainable economy.

6) Performance of the Commission

53. Against this backdrop, an overview of the performance of CCP can broadly be stated as set out below.

6.1) *Transition from ordinance into an act*

54. While the enactment of law demonstrates the political will of the democratic Government and is reflective of its support for CCP as an institution, the enforcement and persuasive advocacy of CCP has had a major role to play in the successful transition of the law from a temporary to a permanent phase. Achieving this critical milestone was a sine qua non for the foundation of competition law enforcement. Notwithstanding constitutional challenges and intimidating uncertainties, CCP has remained resolute in its commitment to enforce the law and pursue its mandate. This effective handling ensured that proposed amendments to the Competition Act under deliberation by the Parliament were reduced from 14 to 3.²⁶

6.2) *Efficient management of resources*

55. Besides financial and budgetary constraints, there has been efficient management of resources, as the total percentage of budget allocation spent on

²⁵ See The Nation newspaper at <http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/business/25-Nov-2012/economic-challenges-for-pakistan-going-into-2013> and State Bank of Pakistan, second quarter report, 2012.

²⁶ New provisions included those relating to the Competition Appellate Tribunal (section 43), penalties no longer to form part of the CCP fund and to be deposited in the Government consolidated fund (section 40(8)), penalties revised from 15 per cent to 10 per cent of turnover and fixed penalties enhanced from PRs 75 million under section 38(2)(a).

employee salaries/benefits in the last three years has increased from 59 per cent to 72 per cent. To increase visibility and public accessibility, CCP offices have been relocated and expanded and now have a corporate set-up offering an excellent work environment for its employees, which is quite uncommon in public sector organizations. However, this efficiency may eventually reach saturation point and have an impact on the sustainability of the institution if financial constraints are not adequately addressed.

6.3) *Enforcement demonstrating autonomy*

56. Irrespective of the increasing backlog of cases, CCP with its small, committed team of professionals has been able to build and preserve its image and is expanding enforcement undeterred. CCP has taken significant enforcement actions and fined cartels, which is expected to have far-reaching economic effects. Industries that have been addressed and penalized include banks (PRs 975 million),²⁷ cement (PRs 6.3 billion), sugar (proposed maximum penalty), liquefied petroleum gas (PRs 318 million), poultry (PRs 50 million), edible oil (PRs 50 million), jute mills (PRs 23 million), dredging (PRs 200 million), etc. CCP has initiated and taken decisive actions against undertakings in the power sector, shipping industry, stock exchanges, professional bodies, State-owned entities and even media organizations, thus relatively quickly establishing its independence and demonstrating an even-handed approach. In the short span of five years, CCP has passed 61 orders, concluded 35 enquiry reports, issued 416 “show cause” notices, carried out 18 searches and inspections, processed 405 exemptions, carried out 13 sectoral research projects/studies, issued 14 policy notes and 330 merger no objection certificates. Total mergers and acquisitions transactions reviewed by CCP between November 2007 and December 2011 accounted for 59 mergers, 254 acquisitions and 8 joint ventures; 318 transactions were approved without conditions, 3 were subject to conditions and none was disapproved. So far, CCP has imposed penalties totalling PRs 8.577 billion on various undertakings and associations.²⁸ While only a nominal penalty has so far been deposited and decisions are regularly challenged in the courts, CCP has demonstrated its independence through its decisions, whilst also contributing towards building competition and economic jurisprudence.

6.4) *Issuance of policy notes*

57. Between 2009 and 2012, CCP issued 12 policy notes and two opinions. The policy notes were intended to influence public policies in various sectors, particularly regulated markets. They have also helped CCP to be perceived as an autonomous institution rather than a governmental agency. It has strongly resisted

²⁷ See http://www.cc.gov.pk/images/Downloads/order/application_filed_by_1_link.pdf and http://www.cc.gov.pk/images/Downloads/Order_of_Banks.pdf.

²⁸ As at 8 February 2013.

policies that are in violation of competition principles envisaged under the Act, e.g. the policy note issued to the Federal Board of Revenue for the rationalization of duty structure on PET resin.²⁹

6.5) *The Commission as agent of change - promoting a competition culture*

While decisions passed by CCP may not be flawless, the legal community is impressed with its achievements over a short learning curve.³⁰ CCP is fully cognizant that the sooner these pending cases are concluded, the better it will be for businesses and consumers and that it will help CCP to emerge as an even more robust administrator of the law.³¹ It is believed that these decisions will go far towards building a competition culture and changing the existing mindset.

58. Furthermore, the landmark leniency decision in which a multinational company approached CCP, invoked the leniency provision and filed 233 documents in support of findings made by the CCP investigative team deserves applause. This, apart from establishing the writ of CCP, reflects the confidence that businesses are willing to invest in the agency, which will eventually result in savings of billions of rupees in public procurement.³² Thus, the leniency decision is a high-profile success, rightly termed as a “phenomenal achievement” and a “regulatory breakthrough”.³³

59. Furthermore, increased referrals from ministries, a softening of the resistance towards CCP by sector-specific regulators, more companies seeking advice, filing exemption and merger applications and 100 per cent compliance in deceptive marketing orders are indicative of the effectiveness of CPP in promoting a competition culture and changing business outlooks.

6.6) *Third party independent evaluation and international recognition*

60. CCP has, over the last few years, received particular international recognition, being the only regulatory agency in Pakistan that has submitted itself for voluntary third party independent evaluation to an international body, Global Competition Review, and earned a fair rating. It is the youngest agency to achieve this milestone. In 2010, Global Competition Review applauded the inclusion of CCP in the rating as testament to the fact that “the Commission has established itself as a truly effective enforcer” and in 2011, its evaluation stated that CCP continued to progress impressively. It is testament to the hard work of CCP that it became the first South Asian regulatory authority shortlisted by Global Competition Review

²⁹ http://www.cc.gov.pk/images/Downloads/policy_notes/policy_note_28_dec.pdf.

³⁰ Global Competition Review, *Rating Enforcement 2011*.

³¹ Speech of the Chair at the international conference on “Competition enforcement: challenges and consumer welfare in developing countries”, December, 2011.

³² Public procurement comprises 25 per cent of the GDP of Pakistan.

³³ <http://www.brecorder.com/br-research/44:miscellaneous/2411:ccps-regulatory-breakthrough/?date=2012-04-05>.

for the enforcement award in the category of agency of the year for Asia and the Pacific, Middle East and Africa for 2012, a shortlist of 5 from 42 competition agencies in these regions.

6.7) *International cooperation*

61. CCP is involved in drafting a chapter on international cooperation and information sharing for the ICN anti-cartel enforcement manual in collaboration with Canada, the European Union and the Russian Federation.

62. CCP also participates in OECD Competition Committee projects and initiatives of the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy.

63. Furthermore, CCP was involved in the creation of the competition network of the South Asian Association for Regional Cooperation, which aims to achieve three main objectives: (a) to provide a platform to foster capacity-building; (b) to hold annual regional conferences for knowledge sharing, learning and networking; and (c) to effectively implement cooperation activities on enforcement between member countries.

6.8) *Effective advocacy*

The Competition Act provides that CCP shall promote competition through advocacy and shall include, among others: (a) creating awareness and imparting training; (b) reviewing policy frameworks and making recommendations to the Federal Government and provincial governments; (c) holding open hearings on any matter affecting competition and expressing publicly an opinion; and (d) posting all its decisions, inquiries and guidelines on its website.³⁴ Apart from enforcement being the best advocacy for CCP, other distinctive initiatives are listed below

64. **Holding of conferences.** CPP held an international conference in December 2011 that hosted representatives from over 50 countries, as well as from various local stakeholders, including Government, at the highest level. It played a major role in getting assurances from the Government for the secured funding and establishment of the Competition Appellate Tribunal. Indeed, it was the effective advocacy of CPP that yielded a positive outcome and the long-awaited Tribunal has recently been constituted and operationalized. This is expected to reduce the caseload in the courts and also enable faster resolutions of appellate proceedings.

65. **Establishment of the Competition Appellate Tribunal.** The constitution of the Tribunal is a very positive, although not yet effective, aspect of Pakistani competition law and policy. Competition law provides that any person affected by an order of the Commission comprising two or more members of the Commission

³⁴ Section 29 of the Act.

or of the Appellate Bench of the Commission may, within 60 days, appeal to the Tribunal.³⁵ The Competition Act also prescribes that the Tribunal shall decide an appeal within six months and its decisions may be taken to the Supreme Court within 60 days for review. Some interviewees have emphasized that the Pakistani legal community understands that the Tribunal should be completely independent from the Commission, both in its set-up and workings, as it is currently.

66. **Meetings of the Competition Consultative Group.** The Competition Consultative Group holds quarterly meetings, on an invitational basis, mainly comprised of representatives of regulatory bodies, business and academia, either in Islamabad, Karachi or Lahore. The quarterly meetings have been a useful tool where the work of CCP is shared with group members to solicit feedback. Initiatives such as introducing competition law as an elective subject in academic institutions, building strategic collaborations with consumer protection associations and the standing committees of the Federation of Pakistan Chambers of Commerce and Industry are some significant measures contributing to CCP outreach.

67. **Interaction with media and strategic partnership with civil society and academia.** The Advocacy Department works closely with more than 40 industry and trade chambers in the main business cities across Pakistan and holds regular meetings with the main business journalists, updating them on CCP and competition developments. The Department is also trying to promote competition law and policy as a discipline in the universities.

68. CCP considers the media an important partner in disseminating information and creating awareness of competition law. In this regard, actions taken include issuing regular press releases on enforcement actions, appearances on TV business talk shows, press conferences, briefing journalists etc. The media has embraced the Commission as an effective enforcer where the population feels that big business and vested interests often trump the needs of ordinary people.³⁶

V. FINDINGS AND RECOMMENDATIONS

A. Findings

69. CCP is a very well respected institution in Pakistan, even though relatively young. Its contribution to the creation of an institutional framework in the country is to be acknowledged and its solid reputation is based on technical competence and integrity. There is a common perception among Pakistani business and legal communities that the law provides CCP with adequate power and discretion, as well as making CCP known and respected in the country, along with its initiatives

³⁵ Ibid., section 42.

³⁶ Global Competition Review, *Rating Enforcement*, 2011.

and performance. As mentioned in the Global Competition Review evaluation, “Observers see CCP as proof that developmental and political problems need not hamper the creation of a dynamic competition agency in developing countries, as long as they are able to secure autonomy and they are staffed by driven, independent people.”

70. The achievements of CCP since its recent inception are internationally recognized not only among the world competition community, but also among local business, the media, Government and society. It is performing a crucial leadership role in taking the Pakistani economy forward to a greater level of confidence in competition-based and consumer welfare-oriented market systems. As an institution, CCP has an excellent countrywide reputation based on integrity, technical competence and governance.

71. Naturally, CCP struggles against the 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 organs and incomplete support from other parts of the Government, mainly translated into the lack of adequate financial autonomy.

B. Recommendations

1) Financial autonomy and sustainability

72. Autonomy in decision-making and finance is sine qua non for the effective performance of any regulatory body. While independence in decision-making is manifest in the various decisions and actions of CCP, ensuring financial autonomy for its sustainability is critical.

73. It is strongly recommended that the provision in the Act stipulating that 3 per cent of the revenue of the regulatory agencies of Pakistan form part of the CCP Fund be finally implemented. Those resources would permit the Commission to focus on implementing advocacy policy more effectively by expanding its outreach and establishing its regional offices. CCP has called the attention of the country to competition problems in some sectors and it must now become capable of proposing and employing ways and means to tackle those concerns, whilst retaining professional expertise and further enhancing capacity.

2) Institutional arrangements

2.1) Board of the Commission

74. As regards the board of the Commission:

- (a) It is expected that economists should also be chosen as members, in addition to CCP staff, especially those with knowledge and experience in industrial organization or related fields;
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- (b) The Pakistani Federal Government should stipulate a pre-established and open method for the appointment of members of the Commission under the Act;
- (c) 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 proviso that they would be eligible for reappointment after a minimum gap of one term.
- (d) To build capacity, the staff of all departments 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.

2.2) *Harmonizing government policies with competition law*

75. Keeping in view various policy notes to government bodies or authorities, it appears that despite the enactment of the Competition Act, various policies continue, or are introduced, that are in conflict with the competition principles envisaged under the Act. Policies should move in tandem with the law, therefore it is important that competition assessment is undertaken at the policy development stage.

76. Competition assessment at the design stage is desirable and recommended to achieve regulatory objectives with less harm to competition. In this regard, it is important to:

- Identify existing policies that are likely to adversely impact competition.
- Prioritize policies which should be reviewed first - such priorities have to be decided by a body representative of Government.
- Ensure that reviews are undertaken by sector-specific regulators in conjunction with CCP.

2.3) *Research*

77. 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 the work of CCP.

78. The relationships of CCP with universities need to be developed. The creation of initiatives towards competition-related academic work would spread the competition culture in Pakistan, as well as bringing new minds into professional and academic competition communities.

3) Widening the scope of competition legislation and policies

79. Section 1.3. 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. 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 in Pakistan.

4) Enforcement

4.1) *Anti-competitive conduct*

80. 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.

81. Similarly, regulations could further specify conditions, prerequisites and timings for interested parties to participate in cases or address the Commission.

82. The conception of specific regulations concerning the acceptance of specialized and corroborated opinions and studies of parties would contribute to avoiding unnecessary, yet natural, disputes on procedural timings and excessively discretionary decisions.

83. Based on the experience of other countries, CCP could make use of other forms of recording for use in cartel proceedings. In order to have appropriate recourse to those techniques, it is imperative that the Commission establishes a properly equipped audio laboratory.

4.2) *Leniency*

84. Under the revised CCP regulations, an undertaking is allowed to invoke leniency provisions even after the decision and findings of the Commission have been made. Such policy could be fruitful if further strengthened under strict parameters within the Act.

4.3) *Mergers*

85. The creation of the Acquisitions and Mergers Facilitation Office was a valuable initiative for a country with a new competition law and competition institutions: a positive idea for avoiding time loss and bureaucracy. The Office may be an adequate response to the dissatisfaction of undertakings in relation to the alleged tendencies of the Commission to order case notifications while replying to a mergers and acquisitions consultation.

86. Decisions on approving mergers and acquisitions cases, or decisions

to restrict or disapprove such cases, should be made by at least two or more members of the Commission. The participation of more members in the decision-making process would bring more transparency, accountability and support to the decisions and more overall knowledge of the principles and techniques of antitrust analysis.

87. It would be helpful to introduce guidelines for the filing of exemption applications, in order to make them more comprehensible to the undertakings which are applying, particularly regarding factors that are taken into account when granting exemptions.

88. Pakistan merger regulations and guidelines should include a reference to supply-side substitution analysis in the determination of the relevant market, since its effects may be equivalent to those of demand substitution.

89. Like many young agencies in developing countries, CCP has demonstrated a preference towards behavioural rather than structural remedies in merger cases. Although behavioural remedies are legitimate and in some very specific cases the best answer to an identified concern, they are difficult to police, especially for understructured and underresourced agencies.

5) International cooperation

90. Given its active involvement in key working groups of ICN, OECD and UNCTAD, it is recommended that CCP becomes directly involved with those aspects of their work which relate to the substantive areas of CCP. This would allow it to better interact with and contribute to the activities of those international organizations and initiatives, bringing benefits to the internal work of CCP and its departments.

6) Competition advocacy

91. In view of key initiatives, a future challenge to the Commission is to enhance the knowledge of competition law and practice amongst the academic community. This would bring more acquaintance with and culture and awareness of competition across the country; attract new ideas and readings of competition law, policy and practice; enhance antitrust familiarity; and prepare more professionals to work with competition issues, either inside or outside the Commission.

92. The productivity of the meetings of the Competition Consultative Group would increase if their planning, schedules and organization were shared in advance, as the number of participants, their contributions and their involvement could grow.

93. Another path of action towards regulated sectors is to negotiate

memorandums of understanding or cooperation agreements with all regulatory agencies in Pakistan in order to identify potential regulatory overlap, common concerns and goals and joint competition policies and initiatives.³⁷

94. Subject to enhancement of resource capacity, CCP should seek membership in different government committees, such as the Tariff Committee, as an approach to boosting advocacy within the public sector.

95. The Commission should urgently upgrade the equipment and investigative resources of its forensics laboratory, a key activity for conducting investigation and prosecution.

96. There is a current endeavor in CCP to digitalize the process management system. It is advisable that a “from now on” digital process system is prioritized over the time-consuming task of digitalizing old cases.

7) Capacity-building of the Commission

97. Subject to resource/funding availability, CCP could create internal incentives and plans to motivate staff to apply for internships or exchange programmes in foreign competition agencies, as many traditional and developing competition jurisdictions offer attractive programmes.

8) Public procurement

98. CCP should take better advantage of its memorandum of understanding with the Pakistan Public Procurement Regulatory Authority to brief that authority on competition techniques, identify possible collusion in procurement proceedings and encourage the authorities to disseminate those techniques nationwide, especially in relation to provincial procurement counterparts.

9) Consumer affairs

99. The Office of Fair Trade should further develop relations with private consumer protection associations and NGOs throughout Pakistan, creating networks for disseminating best practices and awareness.

10) Judicial review

100. It is important for the Government and the judiciary to recognize the need to prioritize matters of economic importance that impact on the public. This would benefit enforcement by all economic regulators and contribute towards effective enforcement by regulatory bodies. Bearing in mind that there is a huge backlog of competition cases, constitution of a special bench may enable expeditious disposal, serving public and consumer interests.

³⁷ Section 35 of the general enforcement regulations of the Competition Commission, 2007.

