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## Crossing the Crossroads: Making Competition Law Effective In Pakistan

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# CROSSING THE CROSSROADS: MAKING COMPETITION LAW EFFECTIVE IN PAKISTAN

Joseph Wilson<sup>†</sup>

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## Introduction

This article is written as a follow up to my earlier piece titled “*At the Crossroads: Making Competition Law Effective in Pakistan*”<sup>1</sup> published in the North-western Journal of International Law and Business in the Spring of 2006. That article discussed the competition regime in Pakistan as established by the Monopolies and Restrictive Trade Practices Ordinance of 1970<sup>2</sup> (MRTPO); the organizational structure of the Monopoly Control Authority (MCA), the enforcing body of the MRTPO; factors impeding effective enforcement of MRTPO, and

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<sup>1</sup> Joseph Wilson, *At the Crossroads: Making Competition Law in Pakistan*, 26 NW. J. INT’L L. & BUS 565 (2006).

<sup>2</sup> Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 (Pak.) (Published in THE GAZETTE OF PAKISTAN EXTRAORDINARY, Feb. 26, 1970) [hereinafter MRTPO].

determinants of an effective competition agency.<sup>3</sup> Since the publication of my last piece, the competition regime in Pakistan has gone through monumental changes. In 2007, an entirely new competition law was enacted, and a new enforcement organization, the Competition Commission of Pakistan (the Commission) was established. The Commission has rigorously enforced the law, broken up a number of cartels, punished dominant players for abusing their market positions, cleared over 200 mergers, and worked to create awareness of the new competition regime.

The process for reforming the competition regime in Pakistan initially moved at a snail's pace. It started in the late 1990s, but gained momentum in 2005, when the Government of Pakistan asked the World Bank for technical assistance in designing a new competition law and policy framework for Pakistan.<sup>4</sup> I was approached by the Bank to assist in drafting parts of the competition law. The new competition law was initially promulgated in the form of the Competition Ordinance of 2007,<sup>5</sup> and eventually appeared in its permanent form as the Competition Act of 2010<sup>6</sup> ("the Act")—an act of the Parliament as opposed to temporary legislation by the President.

Part I documents the legislative history of the Competition Act. Part II provides commentary on the substantive provisions, and the tools provided by the Act to enforce its substantive provisions. Part III is a commentary on the institutional architecture, member appointment mechanisms, and adjudicative process of the Commission. Part IV places the enforcement record of the Commission in proper perspective, and Part V sets out the conclusion that periodic examination of the institutional arrangements of the Commission is necessary for effective enforcement of the law.

## I. The Run-up to the Competition Act of 2010

### A. The Competition Ordinance of 2007

The new competition regime in Pakistan was introduced through the Competition Ordinance of 2007 (CO 2007), promulgated by the President of Pakistan on October 2, 2007.<sup>7</sup> A federal ordinance is a temporary piece of legislation, valid for only 120 days, which the President of Pakistan has authority to issue under Article 89 of the Constitution of Pakistan, provided that (1) the Senate or National Assembly is not in session; and (2) the President is satisfied that circumstances exist which render it necessary for him to take immediate action.

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<sup>3</sup> The determinants identified to make a competition agency effective were: i) Qualified Leadership; ii) Independence; iii) Transparency; iv) Maintenance of Databases; v) Annual Review of Functioning of Agency; vi) Human Resource Audit; vii) Comparative Study; and viii) Competition Advocacy. Wilson, *At the Crossroads*, *supra* note 1, 591-594.

<sup>4</sup> THE WORLD BANK, COMPETITION POLICY AND LAW: PAKISTAN I (2007).

<sup>5</sup> The Competition Ordinance, 2007 (Published in THE GAZETTE OF PAKISTAN EXTRAORDINARY, Oct. 2, 2007) [hereinafter "CO 2007"].

<sup>6</sup> The Competition Act, 2010, Act No. XIX of 2010 (Published in THE GAZETTE OF PAKISTAN EXTRAORDINARY, Oct. 13, 2010) [hereinafter "The Act"].

<sup>7</sup> CO 2007, *supra* note 5.

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The CO 2007 repealed the Monopolies and Restrictive Trade Practices Ordinance of 1970 (“MRTPO”), dissolved the Monopoly Control Authority (“MCA”), and provided for the establishment of the Competition Commission of Pakistan.<sup>8</sup> The Commission was established on November 12, 2007 through a notification of the Federal Government appointing five members, including the Chairman of the Commission.<sup>9</sup> The newly formed Commission assumed some of the existing staff, liabilities, and assets of the MCA.

In November 2007, then-President Musharraf declared emergency rule and issued the Provisional Constitutional Order of 2007 (“PCO”), which under Clauses 5(1) & (2), gave exemption to all the ordinances in force at the time of Proclamation of Emergency, which included the Competition Ordinance, from being “subject to any limitations as to duration prescribed in the Constitution.”<sup>10</sup> The Competition Ordinance of 2007 was one such law exempt from previous constitutional restraints.

On February 15, 2008, in *Tikka Iqbal Muhammad Khan and others v. General Pervez Musharraf*,<sup>11</sup> a seven member bench of the Supreme Court of Pakistan upheld the PCO. The Court stated:

Ordinances promulgated and legislative measures taken by the President, or as the case may be, by the Governor, which were in force at the time of, or during the period for which the Proclamation of Emergency, dated 3-11-2007 held the field, would continue to be in force by virtue of the Provisional Constitution Order, 2007 read with Art. 270AAA(3) of the Constitution, until altered, repealed or amended by the appropriate Legislature and there would be no question of expiry of these Ordinances in terms of Art.89(2), or as the case may be, under Art.128(2) of the Constitution.<sup>12</sup>

However, on July 31, 2009, a fourteen member bench of the Supreme Court in *Sindh High Court Bar Association v Federation of Pakistan*,<sup>13</sup> declared the PCO unconstitutional and, *inter alia*, directed that all ordinances protected by the PCO be placed before the Parliament and the respective provincial assemblies for their proper validation in accordance with Articles 89 and 128 of the Constitution. A

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<sup>8</sup> *Id.* § 12.

<sup>9</sup> S.R.O (1)/2007; No. F. 3(8)INV.III/2007; *see also* COMPETITION COMMISSION OF PAKISTAN: ANNUAL REPORT 2008, *available at* [http://www.cc.gov.pk/images/Downloads/annual\\_report\\_2008.pdf](http://www.cc.gov.pk/images/Downloads/annual_report_2008.pdf). The Members appointed were:

1. Mr. Khalid Aziz Mirza (Chairman)
2. Mr. Abdul Ghaffar
3. Ms. Rahat Kaunain Hassan
4. Dr. Joseph Wilson
5. Ms. Maleeha Mimi Bangash

<sup>10</sup> Provisional Constitution Order No. 1 of 2007, *issued on* November 3, 2007, *amended on* November 15, 2007 (Pak.), *available at* [http://www.pakistani.org/pakistan/constitution/post\\_03nov07/pco\\_1\\_2007.html](http://www.pakistani.org/pakistan/constitution/post_03nov07/pco_1_2007.html).

<sup>11</sup> P.L.D. 2008 SC 178.

<sup>12</sup> *Id.*

<sup>13</sup> PLD 2009 SC 879.

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period of four months was granted from July 31, 2009 for federal ordinances to be validated, while a three month window was created for provincial ordinances. Thus a federal ordinance could be ratified by the Parliament as late as November 28, 2009; otherwise, it would stand repealed. The Competition Ordinance of 2007 was tabled in the National Assembly as the Competition Bill in October 2009. However, the National Assembly was prorogued on November 16, 2009, before it had the opportunity to deliberate on the Bill.

### B. The Competition Ordinance of 2009

To avoid the gap that would be created through the lapse of CO 2007, the President of Pakistan promulgated the Competition Ordinance of 2009 (“CO 2009”)<sup>14</sup> on November 26, 2009. CO 2009 was made effective from October 2, 2007 thereby giving validity to all actions taken, and decisions made by the Commission under the Competition Ordinance of 2007.<sup>15</sup> On January 27, 2010, the National Assembly passed the Competition Bill, 2009, which was then tabled in the Senate on February 24, 2010, from where it was referred to the Senate’s Standing Committee on Finance and Revenue for review. The Parliament failed to pass the Bill within 120 days of promulgation of Competition Ordinance of 2009, and as a consequence, the Competition Ordinance of 2009 lapsed on March 26, 2010, leaving the Commission without any legal status until April 18, 2010 (22 days), when the President promulgated the Competition Ordinance of 2010<sup>16</sup> (“CO 2010”).

### C. Competition Ordinance of 2010

The modern competition regime of Pakistan was reincarnated a third time as CO 2010.<sup>17</sup> Yet again, the Commission and the businesses were presented with an ephemeral competition regime—casting doubts on the authority and future of the Commission.

On May 5, 2010, the Senate’s Standing Committee on Finance unanimously approved the draft of the Competition Bill of 2010 with two major amendments. First, the Committee recommended that the penalties, which are imposed and recovered by the Commission to become part of the Commission Fund,<sup>18</sup> should be de-linked from the Commission Fund and deposited in the national exchequer (consolidated fund account no. 1 of the Federal Government). Second, the Committee recommended that the government to set up a special appellate tribunal—the Competition Appellate Tribunal—for taking up appeals against the decisions

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<sup>14</sup> Ordinance No. XLVI of 2009 (Pak.).

<sup>15</sup> This act of the president to re-promulgate the Competition ordinance has been challenged in a number of petitions before the High Courts and it is sub judice yet.

<sup>16</sup> Ordinance No. XVI of 2010 (Pak.); *see also* Kamal Afridi, *Looking into CCP Claims*, DAWN (Dec. 5, 2009), <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/the-newspaper/front-page/competition-law-repromulgated-on-18th-official-340>.

<sup>17</sup> *Id.*

<sup>18</sup> The Act, *supra* note 6, § 20(2)(b) (the “CCP Fund” shall include “Charges, fees and penalties levied by the Commission”).

of the Competition Commission of Pakistan, instead of provincial high courts.<sup>19</sup> The Committee suggested that the Competition Tribunal should be formed within 30 days after the enactment of the Competition Act, 2010 and be located in Islamabad. Appeals against the decisions of the proposed three-member Competition Tribunal will be heard by the Supreme Court of Pakistan.<sup>20</sup>

The Competition Bill, however, was again not passed within the 120 day life of CO 2010, which ended on August 17, 2010, leaving the fate of the Commission in limbo yet again.

#### D. Competition Act 2010

After another hiatus of 57 days, the Parliament finally passed the Competition Act of 2010<sup>21</sup> on October 6, 2010, which received the assent of the President on October 13, 2010.

## II. Competition Act of 2010: Objective & Tools

The Competition Act of 2010 is the fourth incarnation of the modern competition regime in Pakistan.<sup>22</sup> The major provisions remain the same in all four forms, with the exception of new provisions relating to appeals and fines appearing in the Competition Act. While the law was originally introduced through the CO 2007, discussion below refers to the Competition Act of 2010 for the sake of convenience, and also because it is the permanent and present legal instrument documenting competition law of Pakistan.

#### A. Objective: A Paradigm Shift

The Competition Act was enacted with the following objectives in mind: (i) to ensure free competition in all spheres of commercial and economic activity; (ii) to enhance economic efficiency; and (iii) to protect consumers from anticompetitive behavior.<sup>23</sup> The foregoing triad captures the various facets of the notion “consumer welfare,” which is globally recognized as the *raison d’être* for having a competition regime. The object reflects a marked shift from the objective of the MRTPO, which was enacted with a view to prevent undue concentration of economic power in the hands of a few.<sup>24</sup>

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<sup>19</sup> Sohail Sarfraz, *Senate Body Passes Competition Ordinance With Amendments*, BUS. RECORDER, May 6, 2010.

<sup>20</sup> Sajid Chaudhry, *Further improvement: Senate body approves Competition Bill 2010*, DAILY TIMES (May 6, 2010), [http://www.dailytimes.com.pk/default.asp?page=2010/05/06/story\\_6-5-2010\\_pg5\\_12](http://www.dailytimes.com.pk/default.asp?page=2010/05/06/story_6-5-2010_pg5_12).

<sup>21</sup> The Act, *supra* note 6.

<sup>22</sup> The other three being CO 2007, CO 2009, and CO 2010.

<sup>23</sup> The Act, *supra* note 6, pmbl.

<sup>24</sup> See Wilson, *At the Crossroads*, *supra* note 1, at 568 (while it was enacted some three years prior to the present day Constitution of Pakistan, constitutional ground for such legislation was laid in Article 38(a)). Under Article 38(a), the State shall:

[S]ecure the well-being of the people, irrespective of sex, caste, creed or race, by raising their standard of living, by preventing the concentration of wealth and means of production and distri-

B. Substantive Provisions: Competition and Consumer Protection

The Act applies to all undertakings<sup>25</sup> (firms), whether governmental or private, and to all actions or matters which may have the effect of distorting competition within Pakistan. The definition of the term “undertaking” also includes a governmental regulatory body. The substantive provisions of the Act include prohibitions against (i) abuse of a dominant position;<sup>26</sup> (ii) entering into agreements which have the object or effect of preventing or reducing competition within the relevant market;<sup>27</sup> and (iii) deceptive marketing practices.<sup>28</sup> It also introduced a

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tribution in the hands of a few to the detriment of general interest and by ensuring equitable adjustment of rights between employers and employees, and landlords and tenants;

PAK. CONST. (1973), art. 38(a).

<sup>25</sup> “Undertaking” means any natural or legal person, governmental body including a regulatory authority, body corporate, partnership, association, trust or other entity in any way engaged, directly or indirectly, in the production, supply, distribution of goods or provision or control of services and shall include an association of undertakings. The Act, *supra* note 6, § 2(q).

<sup>26</sup> *Id.* § 3. Abuse of dominant position:

(1) No person shall abuse dominant position.

(2) An abuse of dominant position shall be deemed to have been brought about, maintained or continued if it consists of practices which prevent, restrict, reduce or distort competition in the relevant market.

(3) The expression “practices” referred in sub-section (2) shall include, but not limited to-

(a) limiting production, sales and unreasonable increases in price or other unfair trading conditions;

(b) Price discrimination by charging different prices for the same goods or services from different customers in the absence of objective justifications that may justify different prices;

(c) Tie-ins, where the sale of goods or services is made conditional on the purchase of other goods or services;

(d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage, have no connection with the subject of the contracts;

(e) Applying dissimilar conditions to equivalent transactions on other parties placing them at a competitive disadvantage;

(f) Predatory pricing driving competitors out of a market, prevent new entry and monopolize the market;

(g) Boycotting or excluding any other undertaking from the production, distribution or sale of any goods or the provisions of any service; or

(h) refusing to deal.

<sup>27</sup> *Id.* § 4.

4. Prohibited agreements:

(1) No undertaking or association of undertakings shall enter into any agreement or, in the case of an association of undertakings, shall make a decision in respect of the production, supply, distribution, acquisition or control of goods or the provision of services which have the object or effect of preventing, restricting or reducing competition within the relevant market unless exempted under section 5 of this Ordinance.

(2) Such agreements include, but are not limited to-

(a) fixing the purchase or selling price or imposing any other restrictive trading conditions with regard to the sale or distribution or any goods or the provision of any service;

(b) dividing or sharing of markets for goods or services, whether by territories, by volume of sales or purchases, by type of goods or services sold or by any other means;

(c) fixing or setting the quantity of production, distribution or sale with regard to any goods or the manner or means of providing any services; limiting technical development or investment with regard to the production, distribution or sale of any goods or the provision of any service; or

(d) collusive tendering or bidding for sale, purchase or procurement of any goods or service;

(e) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a disadvantage; and

(f) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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sophisticated pre-merger clearance regime.<sup>29</sup> The substantive test for merger clearance is the substantial lessening of competition by creating or strengthening a dominant position in the relevant market.<sup>30</sup>

The substantive provisions are modeled after the competition law of the European Union. While there “is a particular competition between the United States and the European Union to expand geographic scope of their law,”<sup>31</sup> one reason Pakistan has its competition law modeled after that of the E.U. was that the World Bank, which was providing technical assistance, engaged the law firm of Jones Day in Brussels. It was simply more convenient for the firm to draft the proposed law using the framework with which it was most familiar.

The substantive provisions have integrated competition policy and consumer protection policy. Section 10 prohibits deceptive marketing. Choice and availability of perfect information are, among others, integral determinants of a competitive market.<sup>32</sup> Choices made on flawed information distort competition. Prevention of deception (fraud) not only helps consumers “by deterring dishonest sellers,”<sup>33</sup> but also “by making it easier for honest sellers to make credible product claims.”<sup>34</sup>

Both consumer and competition policy serve to improve consumer welfare, and they naturally complement each other. Competition theory that excludes consumer policy is not only shortsighted but, given the growing importance of consumer issues, can ultimately be self-defeating. Consumer policy that ignores its impact on competition can result in cures worse than the disease. An agency’s contribution to the economy can be

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(3) Any agreement entered into in contravention of the provision sub-section (1) shall be void.

<sup>28</sup> *Id.* § 10.

10. Deceptive marketing practices:

(1) No undertaking shall enter into deceptive marketing practices.

(2) The deceptive marketing practices shall be deemed to have been resorted to or continued to or continued if an Undertaking resorts to-

(a) the distribution of false or misleading information that is capable of harming the business interests of another undertaking;

(b) the distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, suitability for use, or quality of goods;

(c) false or misleading comparison of goods in the process of advertising or packing;

(d) fraudulent use of another’s trademark, firm name, or product labeling or packing.

<sup>29</sup> *Id.* § 11. The MCA started requiring premerger clearance in June 2007 under section 24 of the MRTPO. See The Monopoly Control Authority (Acquisition of Shares and Merger Notice) Rules, 2007, S.R. & O. 642 (1)/2007.

<sup>30</sup> The Act, *supra* note 6, §11(1).

<sup>31</sup> Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781, 1799 (2000).

<sup>32</sup> The determinants of a competitive market are: (i) absence of a dominant player; (ii) availability of choices; (iii) perfect information as to market conditions; (iv) easy entry; and (v) easy exit. See EINER ELHAUGE AND DAMIEN GERADIN, *GLOBAL COMPETITION LAW AND ECONOMICS 1* (Hart 2007); RICHARD WHISH, *COMPETITION LAW 7* (Oxford Univ. Press 6th ed., 2008).

<sup>33</sup> Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. CHI. L. REV. 165, 174 (2005).

<sup>34</sup> *Id.*



measured by its progress in increasing consumer welfare overall. Thus, well-conceived competition and consumer policies should take complementary paths to the same goal.<sup>35</sup>

To enforce the substantive provisions, the Act has given the Commission essential tools of forcible entry<sup>36</sup> and leniency.<sup>37</sup> Forcible entry becomes necessary when an undertaking refuses to let properly authorized officers of the Commission to enter and search premises with a view to gather material that may be relevant for proving and enforcing the provision of the Act. In order to protect that the provision of forcible entry is not abused, the Act provides that an order authorizing an officer(s) to forcibly enter and search premises has to be signed by two members of the Commission, and the officer so authorized shall not use his power with “vexatious, excessive or with *mala fide* intent.”<sup>38</sup>

Section 39 provides for leniency for an undertaking, which is a party to a prohibited agreement, and is the first to make the full and true disclosure of the agreement. Leniency promotes compliance with the competition law by offering incentives to disclose prohibited arrangements, entered into with the intent to reduce, restrict or prevent competition. Leniency creates a prisoner’s dilemma for cartelists, a situation that instills mistrust, which helps in breaking the cartels.

### C. Remedial and Sanctioning Powers

The Commission derives its remedial<sup>39</sup> and sanctioning powers from sections 31 and 38 of the Act, respectively. The Commission can impose penalties either on a fixed amount basis not exceeding PRK 75 million (USD 0.88 million) or on turnover basis not exceeding ten percent of turnover of the undertaking found guilty of a violation.<sup>40</sup>

In the case of a contravention of section 3, i.e., abuse of dominance, section 31(a) states that the Commission may pass an “order as may be necessary to restore competition.” This broad framework “allows the Commission to devise behavioural and structural remedies and to order retribution/damages to the victims of abuse—both exploitative and exclusionary.”<sup>41</sup> For section 4 violations, i.e., prohibited agreements, section 31(b) lays a narrow framework to make primarily cease and desist orders. The Commission can either annul the complete agreement or strike down provisions which are repugnant to section 4 of the Act.

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<sup>35</sup> *Id.*

<sup>36</sup> The Act, *supra* note 6, § 35.

<sup>37</sup> *Id.* § 39.

<sup>38</sup> *Id.* § 35(3).

<sup>39</sup> *Id.* § 31.

(a) an abuse of dominant position, require the undertaking concerned to take such actions specified in the order as may be necessary to restore competition and not to repeat the prohibition . . .

(b) prohibited agreements, annul the agreement or require the undertaking concerned to amend the agreement or related practice and not to repeat the prohibitions . . . .

<sup>40</sup> *Id.* § 38.

<sup>41</sup> Joseph Wilson, *Antitrust Remedies in Pakistan: Composition and Challenges*, 6 COMPETITION L. INT’L 62, 64 (2010).

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In section 4 violations, the Commission, however, does not have power to order retribution or damages as “the amount to be retributed and damages to be paid by individual members of a cartel is difficult to assess.”<sup>42</sup> In cases involving deceptive marketing, Section 31(c) empowers the Commission to issue cease and desist orders, as well as give directions “as may be necessary to restore the previous market conditions.” The Commission can confiscate, or “destroy goods used as or in deceptive marketing practice.”<sup>43</sup> The Commission does not have powers to impose criminal sanctions.

### D. Merger Provisions

Section 11 of the Act lays down an elaborate scheme for pre-merger clearance. The substantive test for merger review is enumerated in section 11(1), which reads: “[n]o undertaking shall enter into a merger which substantially lessens competition by creating or strengthening a dominant position in the relevant market.”<sup>44</sup> The substantive test is a combination of the tests deployed in the United States<sup>45</sup> and in Europe.<sup>46</sup> The term dominant position is defined in Section 2(e) of the Act to mean:

“dominant position” of one undertaking or several undertakings in a relevant market shall be deemed to exist if such undertaking or undertakings have the ability to behave to an appreciable extent independently of competitors, customers, consumers and suppliers and the position of an undertaking shall be presumed to be dominant if its share of the relevant market exceeds forty percent.

The Commission in its recent decision in the matter of *Acquisition of Wind Telecom S.P.A by Vimpelcom Ltd.*<sup>47</sup> made it clear that the term dominant position includes joint or collective dominance, *i.e.*, “a situation where two or more undertakings jointly or collectively hold a dominant position.”<sup>48</sup> The Act assumes dominant position if an entity holds more than forty percent of market share. However, the presumption is a rebuttable one and the entity may rebut the presumption of dominance by proving that a mere share of more than forty percent does not lend it “the ability to behave to an appreciable extent independently of competitors, customers, consumers and suppliers.”<sup>49</sup>

Section 11(2) makes the merger clearance regime mandatory. It reads:

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<sup>42</sup> *Id.* at 66-67.

<sup>43</sup> *Id.* at 69.

<sup>44</sup> The Act, *supra* note 6, §11(1).

<sup>45</sup> Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version at 15 USC §§ 12-44) (substantially to lessen competition, or to tend to create a monopoly.).

<sup>46</sup> Merger Regulation Act Art. 2(2) (creation or strengthening of a dominant position).

<sup>47</sup> File No. 373/Merger/CCP/2011, available at [http://www.cc.gov.pk/images/Downloads/vimpel\\_wind\\_telecom\\_merger.pdf](http://www.cc.gov.pk/images/Downloads/vimpel_wind_telecom_merger.pdf).

<sup>48</sup> *Id.* ¶ 9.

<sup>49</sup> The Act, *supra* note 6, § 2(e).

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Notwithstanding the provisions contained in the Act where an undertaking, intends to acquire the shares or assets of another undertaking, or two or more undertakings intend to merge the whole or part of their businesses, and meet the pre-merger notification thresholds stipulated in regulations prescribed by the Commission, such undertaking or undertakings shall apply for clearance from the Commission of the intended merger.

The section requires that any acquisitions of assets and stocks, which meets the pre-merger notification thresholds as stipulated in the Competition (Merger Control) Regulations, 2007<sup>50</sup> (the “CMCR”) must seek clearance from the Commission. Regulation 4 of the CMCR sets out the notification thresholds, which are based primarily on (i) the size of the parties; (ii) the size of the transaction; and (iii) percentage of voting rights tests. Regulation 4A exempts certain transactions, such as those between a holding company and its subsidiaries, or acquisition of shares through inheritance, or acquisition of voting shares pursuant to a rights issue.

It is interesting to note that section 11(2) starts with a non-obstante clause, notwithstanding the provisions contained in the Act, which appears to be a result of a typographical error as there is nothing repugnant to section 11 in the Act. The original wording reads: “Notwithstanding the provisions contained in the Companies Ordinance, 1984. . . .”<sup>51</sup> The rationale for such non-obstante clause was that there are provisions<sup>52</sup> in the Companies Ordinance that require a scheme of amalgamation to be approved by the provincial High Court with a view to secure the interest of minority shareholders. However, when the law was promulgated as CO 2007, the term Companies Ordinance, 1984 was put in the definitions section at 2(j) under the definition of the word “Ordinance.” When the Competition Act was drafted, the “find and replace” command was used to replace the word Ordinance with the word Act.<sup>53</sup> The Act still has entry of Companies Ordinance in the definitions clause at section 2(j), but there is no reference to the Companies Ordinance in the Act at all.<sup>54</sup>

Section 11 provides a two-phased merger review scheme. The first phase review has to be completed within thirty days. There is no compulsory wait period.

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<sup>50</sup> Competition (Merger Control) Regulations, 2007, available at [http://www.cc.gov.pk/images/Downloads/merger\\_control\\_regulations.pdf](http://www.cc.gov.pk/images/Downloads/merger_control_regulations.pdf) [hereinafter “CMCR”].

<sup>51</sup> The Companies Ordinance, 1984 (XLVII of 1984) (Pak.).

<sup>52</sup> *Id.* § 284-288.

<sup>53</sup> Other instances highlighting the inconsistency created by the “find and replace” command are section 52 and 61. These state:

52. Permitted disclosure: Nothing in section 49 shall preclude a person from:

(a) producing a document to a court in the course of criminal proceedings or in the course of any proceedings under this Act, the Act or any other law for the time being in force;

61. Repeals and savings. —On the commencement of this Act—

(a) the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 (V of 1970), hereinafter referred to as the repealed Act shall stand repealed;

(b) the Monopoly Control Authority established under the repealed Act shall stand dissolved . . . .  
The Act, *supra* note 6, § 52, 61.

<sup>54</sup> Section 2(i) defines the term “Minister,” which again is not used in the Act at all. Section 2(i) is also a redundant entry.

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The time for Phase-I review starts ticking from the date when a “complete application” is submitted.<sup>55</sup> If after the initial review, the Commission concludes that there is a likelihood of creation or strengthening of a dominant position, it may initiate a second phase review.<sup>56</sup>

During the second phase review, parties can raise efficiencies and/or failing firm defenses.<sup>57</sup> These defenses are expressly recognized in section 11(10) reproduced below:

- (a) [the proposed merger] contributes substantially to the efficiency of the production or distribution of goods or to the provision of services;
- (b) such efficiency could not reasonably have been achieved by a less restrictive means of competition;
- (c) the benefits of such efficiency clearly outweigh the adverse effect of the absence or lessening of competition;
- or (d) it is the least anti-competitive option for the failing undertaking’s assets, when one of the undertakings is faced with actual or imminent financial failure.

Sub-section 11 of section 11, and section 31(d) provide broad guidelines for devising remedies for mergers. The Commission can block or approve a proposed merger with or without any conditions. Where a merger is consummated without seeking prior clearance from the Commission, the Commission can require the merged parties to undo the merger.<sup>58</sup>

### E. Competition Advocacy: Combating Public Restraint

Protecting competition by focusing solely on private restraints is like trying to stop the water flow at a fork in a stream by blocking only one channel. A system that sends private price fixers to jail, but makes government regulation to fix prices legal, has not completely addressed the competitive problem. It has simply dictated the form that the problem will take.<sup>59</sup>

The Act did envisage that combating private restraint in the market is not sufficient, and it is equally important to review the effects of government regulation and actions. Therefore, in Section 29<sup>60</sup>, the Act mandates the Commission

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<sup>55</sup> CMCR, *supra* note 50, Reg. 9(5).

<sup>56</sup> The Act, *supra* note 6, § 11(6).

<sup>57</sup> For a commentary on efficiency considerations, see Robert Pitofsky, *Efficiency Consideration and Merger Enforcement: Comparison of U.S. and EU Approaches*, 30 *FORDHAM INT’L L.J.* 1413, 1415 (2007) (efficiency issues are not expressly recognized in statutes covering merger review in either the United State or the European Union).

<sup>58</sup> See Wilson, *Antitrust Remedies in Pakistan*, *supra* note 41, at 69.

<sup>59</sup> Muris, *supra* note 33, at 170.

<sup>60</sup> Section 29 states:

29. Competition advocacy. — The Commission shall promote competition through advocacy which, among others, shall include:-

(a) creating awareness and imparting training about competition issues and taking such other actions as may be necessary for the promotion of a competition culture;

to review “policy frameworks for fostering competition and *making suitable recommendations for amendments to this Act and any other laws that affect competition* in Pakistan.”<sup>61</sup> It is interesting to note that the Act not only recommends reviewing “other laws that affect competition,” but also the Act itself if its design or interpretation results in having a negative effect on competition. The Commission has issued a number of policy notes recommending ways the government can improve laws affecting competition.<sup>62</sup>

### III. The Commission

Section 12 of the Act provides for the establishment of the Commission, which “shall be a body corporate with perpetual succession and a common seal.”<sup>63</sup> Section 12(3) provides that “the Commission shall be administratively and functionally independent, and the Federal Government shall use its best efforts to promote, enhance and maintain the independence of the Commission.”<sup>64</sup> The Commission is composed of between five to seven members; however, the Federal Government has the authority to increase or decrease the number of members as it deems appropriate.<sup>65</sup> To ensure that the Commission is largely composed of technocrats, and not bureaucrats, section 14(4) provides that not more than two members shall be employees of the Federal Government. This condition was incorporated based on the experience of MCA, which was composed of bureaucrats alone.

The Commission is body corporate, a juridical device to lend “a separate legal entity having its own rights, privileges, and liabilities distinct from those of its members.”<sup>66</sup> The members forming the Commission are to act as a “college.” All members are *pari passu* (on equal footing) and the Chairman is *primus inter pares* (first among peers). This principle is reflected in section 14(2), which reads, “[t]he Members shall be appointed by the Federal Government and from amongst the Members of the Commission, the Federal Government *shall appoint* the Chairman.” The Chairman is first appointed as a member, and then appointed as the Chairman. If a chairman were to have any higher authority, section 14(2) would have used the word “elevate” rather than “appoint” in the latter half. To stress this point further, section 15, which defines the role of the Chairman, reads: “[t]he Chairman shall be the chief executive of the Commission and shall, *together with the other Members*, be responsible for the administration of the affairs of the Commission.” The responsibility for the administration of the af-

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(b) reviewing policy frameworks for fostering competition and making suitable recommendations for amendments to this Ordinance and any other laws that affect competition in Pakistan to the Federal Government and Provincial Governments; . . .  
The Act, *supra* note 6, § 29.

<sup>61</sup> *Id.* (emphasis added).

<sup>62</sup> See COMPETITION COMMISSION OF PAKISTAN, POLICY NOTES AND OPINIONS, [http://cc.gov.pk/index.php?option=com\\_content&view=article&id=21&Itemid=42](http://cc.gov.pk/index.php?option=com_content&view=article&id=21&Itemid=42) (last visited April 16, 2011).

<sup>63</sup> The Act, *supra* note 6, § 12(2).

<sup>64</sup> *Id.* § 12(3).

<sup>65</sup> *Id.* § 14(1).

<sup>66</sup> AMERICAN HERITAGE DICTIONARY 311 (3d ed., 1996) (defining “corporation”).

## Crossing the Crossroads

fairs of the Commission is, therefore not solely on the chairman, but on all members.

The Act established a board as opposed to a single individual to head the agency. There are a number of countries which have chosen the latter model for its competition agency, such as, Canada, Norway, Sweden, and the United States.<sup>67</sup> The choice of having a board as an institution is grounded in the “belief that the effective oversight of an organization exceeds the capabilities of any individual and that collective knowledge and deliberation are better suited to this task.”<sup>68</sup> “The underlying theory is that the consultation and exchange of views is an integral part of the functioning of the board.”<sup>69</sup> To enhance the value of consultation and exchange of views, the Act lays down broad categories of disciplines, wherein expertise will make an individual eligible for appointment as Member of the Commission. However, the utility of “collective knowledge” diminishes as the size of the board increases. Members are more likely to engage in “social loafing,”<sup>70</sup> a phenomenon where members of a group do not work at their optimal productivity level as “identification and/or measurement of individual productivity are difficult.”<sup>71</sup> A board with a large number of members is also attendant with the problem that the authority which appoints members starts “endorsing candidates with weak qualifications.”<sup>72</sup> The appointing authority may argue “that at least some commissioners are qualified and can be relied upon to guide the agency on matters of substance.”<sup>73</sup>

The Act stipulates that the Commission shall be composed of no less than five and not more than seven members; and the number the Federal Government may increase or decrease as it deems appropriate. The provision allows the government to create opening and dispense member positions “purely as rewards for faithful political service”<sup>74</sup> or to oblige some political affiliates. The fluid and increasing number of commission members affects its functioning through uncer-

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<sup>67</sup> There are two antitrust agencies in the United States: (i) the Department of Justice, Antitrust Division, which is headed by an individual, (assistant Attorney General for Antitrust); and (ii) the Federal Trade Commission, which is headed by a board consisting of five members.

<sup>68</sup> Stephen M. Bainbridge, *Why A Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1, 12 (2002) (citing Daniel P. Forbes & Frances J. Milliken, *Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups*, 24 ACAD. MGMT. REV. 489, 500-01 (1999)).

<sup>69</sup> *Id.* (citing MODEL BUS. CORP. ACT ANN. § 8.01(b) (1998)).

<sup>70</sup> *Id.* In a famous 1913 study which measured how hard subjects pulled a rope, members of two-person teams pulled to only ninety-three percent of their individual capacity, members of trios pulled to only eighty-five percent, and members of groups of eight pulled to only forty-nine percent. This phenomenon is partially attributable to the difficulty of coordinating group effort as size increases. In other words, too many cooks spoil the soup. *Id.* at 11; see also William E. Kovacic, *The Quality of Appointments and the Capability of the Federal Trade Commission*, 49 ADMIN. L. REV. 915, 948 (1997) (eliminating the five-member format would also increase accountability and discourage members from shirking responsibility for their policy choices).

<sup>71</sup> Bainbridge, *supra* note 68, at 11.

<sup>72</sup> Kovacic, *The Quality of Appointments*, *supra* note 70, at 949.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 950.

tainty and perhaps induction of weak candidates.<sup>75</sup> It is therefore suggested that the number of commission members be fixed at five and the ability of the Federal Government to increase or decrease the number at will be constrained.

#### A. Appointments

Section 14(2) of the Act provides that the “*Members shall be appointed by the Federal Government and from amongst the Members of the Commission, the Federal Government shall appoint the Chairman.*” Section 14(5) stipulates that “[n]o person shall be recommended for appointment as a Member unless that person is known for his integrity, expertise, eminence and experience for not less than ten years in any relevant field including industry, commerce, economics, finance, law, accountancy or public administration.”<sup>76</sup> The chairman and members are appointed for a term of three years and are eligible for re-appointments until they attain the age of sixty-five years.<sup>77</sup> The members and chairman serve on a full-time basis.<sup>78</sup>

The Act envisages appointment of technocrats, as opposed to political appointees.<sup>79</sup> Section 14(5) talks about “recommended for appointment” but stops short of giving guidance as to who has the responsibility to recommend. However, the proviso to Section 14(5) states “that the Federal Government may prescribe qualifications and experience and mode of appointment of such Members in such manner as it may prescribe.” In the United States, Commissioners of the Federal Trade Commission are appointed “with the advice and consent of the Senate.”<sup>80</sup> In India, section 9 of the original Competition Act 2002 provided that “members shall be selected in the manner as may be prescribed.” In 2007, section 9 was amended to read: “[t]he Chairperson and other Members of the Commission shall be appointed by the Central Government from a panel of names recommended by a Selection Committee.” The Selection Committee is composed of (i) the Chief Justice of India or his nominee; (ii) Secretary, Ministry of Corporate Affairs; (iii) Secretary, Ministry of Law and Justice; and two experts of repute of international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs, or competition law and policy.

In Pakistan, no such mode or manner has been prescribed by the Federal Government so far, despite the fact that the Government has appointed two sets of members to the Commission, one in November 2007, which completed its three-

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<sup>75</sup> In India, Section 8 of the Competition Act of 2002 originally stipulated that “the Commission shall consist of a Chairperson and not less than two and not more than ten other members.” The Competition (Amendment) Act, 2002, No. 12, Act of the Competition Commission of India, New Delhi, 2003 (India). This Competition Act was amended by the Competition Act of 2007, which reduced the upper limit of ten other members to six other members.

<sup>76</sup> The Act, *supra* note 6, § 14(5).

<sup>77</sup> *Id.* § 17.

<sup>78</sup> *Id.* § 15(3).

<sup>79</sup> *See, e.g.*, 15 U.S.C. § 41 (not more than three of the Commissioners shall be members of the same political party).

<sup>80</sup> *Id.*

year term by November 2010, and another set of members in January 2011.<sup>81</sup> The first set of members were appointed on the recommendations of the last chairman of the MCA, Mr. Khalid Mirza, who was also the chairman-designate of the yet to be established Competition Commission. Mr. Mirza sent a list of eight names to the Ministry of Finance, which picked the first four in the order of preference of Mr. Mirza, and then put forward a summary for approval to the then Prime Minister. In December 2009, one Member resigned, and the vacancy was again filled on the recommendation of the then-Chairman of the Commission. The new appointment was made for a full three year term. In July 2010, Chairman Mirza retired upon reaching the age of sixty five, but before his departure made a recommendation for his successor, which was accepted. The new chairperson then sent recommendations for appointment of members, which included the reappointment of the existing members, whose term ended in November 2010.

In essence there have been three offices responsible for the appointment of members of the Competition Commission: the Chairman of the Commission, the Minister for Finance, and the Prime Minister. Vacancies on the Commission are not advertised, unlike with other regulatory bodies.<sup>82</sup> In order to attract a larger pool of candidates, it is recommended that the Federal Government prescribe a mode and manner for the appointment of Members, wherein vacancies are advertised, and the entire selection process is transparent, competitive and rigorous.

## B. The Model

Section 28 stipulates the functions and powers of the Commission. Of primary importance are the powers to initiate proceedings and to make orders in cases of contravention of the Act. The Commission thus fits into what has been called an “integrated agency model,” wherein “a single specialized agency undertakes investigative, enforcement, and adjudicative functions.”<sup>83</sup> The other two models they have identified are (i) bifurcated judicial model; and (ii) bifurcated agency model.

Under the bifurcated judicial model, specialized investigative and enforcement agencies must bring formal complaints before and seek remedial relief from the courts, subject to normal rights of appeal to appellate courts. Under the bifurcated agency model, specialized investigative and

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<sup>81</sup> S.R. & O (1)/2011; No. F. 3(8) INV.III/2007-Vol-II. The Members appointed were:

1. Ms. Rahat Kaunain Hassan (Chairperson)
2. Mr. Abdul Ghaffar
3. Dr. Joseph Wilson
4. Mr. Mueen Batlay

<sup>82</sup> See, e.g., CAREER MIDWAY, MEMBER (OIL) – ISLAMABAD, PAKISTAN, <http://www.careermidway.com/jobs/Islamabad/Member-Oil/15307> (last visited April 16, 2011) (“Cabinet Division invites applications for the post of Member (Oil), Oil and Gas Regulatory Authority (OGRA).”).

<sup>83</sup> Michael J. Trebilcock & Edward M. Iacobucci, *Designing Competition Law Institutions: Values, Structure, and Mandate*, 41 LOY. U. CHI. L.J. 455, 459 (2010).



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enforcement agencies must bring formal complaints before separate, specialized adjudicative agencies.<sup>84</sup>

While the law was being drafted, the structure of the U.S. Federal Trade Commission (FTC), which represents the integrated agency model, was followed. At the FTC:

The Bureau [of Competition] undertakes investigations of alleged violations of antitrust laws, and where appropriate recommends that the Commission take formal enforcement action against the alleged violator. If the Commission agrees to take an action, the Bureau will prepare the case for litigation before an administrative law judge (ALJ). The ALJ is an official to whom the Commission “delegates the initial performance of statutory fact-finding functions and initial rulings on conclusions of law.” The administrative law judge follows a procedure similar to the one observed by US district courts and issues a so-called initial decision. Decisions by the ALJ may be appealed to the full Commission on both findings of fact and conclusions of law by either the FTC staff or the [defendant or] merging parties.<sup>85</sup>

Of the three models, Trebilcock and Iacobucci recommended the integrated agency model for the new agencies for the following reasons:

the dangers associated with a lack of expertise are acute for new antitrust regimes. For this reason, we tend to favor the integrated model, where investigators and adjudicators are drawn from the same talent pool. We recognize the concerns about independence that follow from this model, but view it as the preferable alternative. In the early years of an antitrust regime, human capital in the sector will be thin. Adopting an integrated model allows enforcers and adjudicators to move more quickly up the learning curve than the other models, in which adjudicators will have only sporadic contact with antitrust policy. It is better to have potentially biased experts than to have independent, but uninformed, adjudicators.<sup>86</sup>

Since the Act does not envisage private actions where parties challenging competition law violations before general civil courts—a feature peculiar to the U.S. antitrust laws where private actions accounts “for more than ninety percent of all enforcement actions”<sup>87</sup>—the judiciary gets limited opportunity to decide on competition issues, an integrated agency model is well suited. Given that there is a lack of expertise of competition law experts, it is recommended that the Bar

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<sup>84</sup> *Id.*

<sup>85</sup> JOSEPH WILSON, *GLOBALIZATION AND THE LIMITS OF NATIONAL MERGER CONTROL LAW* 78 (Kluwer Law Int'l 2003) (footnotes omitted).

<sup>86</sup> Trebilcock & Iacobucci, *supra* note 83, at 470.

<sup>87</sup> *Id.* at 460; see also Wolfgang Wurmnest, *Foreign Private Plaintiffs, Global Conspiracies, and the Extraterritorial Application Of U.S. Antitrust Law*, 28 *HASTINGS INT'L & COMP. L. REV.* 205, 205 (2005) (“Outside the United States, private antitrust enforcement is either virtually non-existent or still in the fledging stages.”).

Councils in Pakistan should make competition law as a compulsory offering in the bachelor of laws (LL.B.) programs.

### C. Independence

Section 12 (3) stipulates that “the Commission shall be administratively and functionally independent, and the Federal Government shall use its best efforts to promote, enhance and maintain the independence of the Commission.” To ensure the financial autonomy of the Commission, section 20 of the Act provides that there shall be a fund, which consists of allocations or grants by the government, charges and fees levied by the Commission, as well as “a percentage of the fee and charges levied by other regulatory agencies in Pakistan.”<sup>88</sup> A portion (3%) of the fee and charges levied by other regulatory agencies was supposed to be the main source of funding for the Commission; however, the other regulators have challenged this provision, and have not paid a single penny of their share, even after three years of Commission’s existence. The Government is however trying to resolve this issue.

To ensure the independence of the Commission, the Act has provided for a secure term of three years for the Chairman and the members,<sup>89</sup> unless they are declared disqualified under sub-section 6 of section 14.<sup>90</sup> The shorter duration of the term of the members and the Chairman, as compared to that of the five-year terms of the parliament of Pakistan, when seen in light of the possibility of getting reappointed for as many terms until one attains the age of sixty-five years compromises this independence. This means that the Prime Minister, who is the appointing authority, gets to appoint two full commissions during his tenure. Any Chairman or member of the Commission, who aspires to get reappointed for a second term, which falls within the tenure of the Prime Minister who originally appointed him, is more prone to yield to any political pressure. The independence of the Commission is linked to that of the independence of its members. Any factor that stifles the functioning of a member be it external or internal, would compromise the independence of the Commission as a college. Compare this to the President of the United States’ ability to appoint only half of the FTC members during his tenure (the Presidential term is for four years, while the commissioners at the FTC are appointed for a term of seven years.) In India, members’

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<sup>88</sup> The Act, *supra* note 6, § 20(2)(f).

<sup>89</sup> *Id.* § 17.

<sup>90</sup> *Id.* § 19. Subsection 6 of section 14 states:

(6) No person shall be appointed or continued as a Member if he—

- (a) has been convicted of an offence involving moral turpitude;
- (b) has been or is adjudged insolvent;
- (c) is incapable of discharging his duties by reason of physical, psychological or mental unfitness and has been so declared by a registered medical practitioner appointed by the Federal Government;
- (d) absents himself from three consecutive meetings of the Commission, without obtaining leave of the Commission;
- (e) fails to disclose any conflict of interest at or within the time provided for such disclosure under this Act or contravenes any of the provisions of this Act pertaining to unauthorized disclosure of information; or
- (f) deemed incapable of carrying out his responsibilities for any other reason.

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terms for both the Competition Commission and Parliament are five years, so the central government can appoint one commission during its tenure. In order to improve the independence of the Commission, it is suggested that the term of the member and the Chairman be increased to that of five years, and that the members and the Chairman may not serve for more than two terms.

### D. Adjudicative process

The Commission has the powers to investigate and adjudicate. Section 30 of the Act lays down the procedure that the Commission should follow in cases of a contravention. The Commission initiates investigation on either receiving a complaint from a private party, a reference from the Federal Government, or on its own motion. An inquiry officer (or inquiry committee) prepares an inquiry report, and depending on the recommendations therein, the Commission issues show cause notices to concerned undertakings, who are given an opportunity of being heard at which charges alleged in the show cause are addressed. The hearing (or a set of hearings) culminates by issuance of a speaking order which lays down the rationale for the decision taken by the officiating officer or member(s) of the Commission.

Most of matters under the Act<sup>91</sup> are decided in the first instance by a single member of the Commission. Appeal against the order of a single member, or authorized officer, may be preferred before an appellate bench comprising of no less than two members of the Commission, not including the one who originally heard the case. The Appellate Bench, constituted by the Commission,<sup>92</sup> has the power to “confirm, remand, set aside or cancel the impugned order or enhance or reduce the penalty or make such other order as it may deem just and equitable in the circumstances of a case.”<sup>93</sup> The order of the appellate bench can be appealed against before a yet to be created Appellate Tribunal, and finally before the Supreme Court of Pakistan.<sup>94</sup>

Originally, in the Competition Ordinance of 2007, the appeal from the decision of the appellate bench was maintainable before the Supreme Court of Pakistan, affording the parties a two-tier appellate process, one before the appellate bench of the Commission and a second before the Supreme Court. In the Competition Ordinance of 2010,<sup>95</sup> another tier of appeals was added by stipulating that the appeal from the Commission’s decision will lie first to the provincial high court before being maintainable at the Supreme Court of Pakistan. Pursuing cases before different provincial high courts pose practical and financial challenges for the Commission, as the Commission does not have financial or human capital to litigate cases in four different cities. Finally, the Competition Act replaced provincial high courts with a specialized Competition Appellate Tribunal

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<sup>91</sup> The term “Act” includes all Competition Ordinances that preceded it.

<sup>92</sup> The Act, *supra* note 6, § 41(2).

<sup>93</sup> The Competition Commission (Appeal) Rule 22 (2007), S.R. & O. 399(I)/2008 (Pak.).

<sup>94</sup> The Act, *supra* note 6, § 41.

<sup>95</sup> The Competition Ordinance of 2010, No. 6 of 2010, THE GAZETTE OF PAKISTAN EXTRAORDINARY, Oct. 13, 2010.

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(CAT), composed of a chairperson who “has been a judge of Supreme Court or retired Chief Justice of High Court and two technical members.”<sup>96</sup> CAT was to be constituted within thirty days of the Competition Act’s entry into force, but remains uncreated after six months.

The original and prevalent scheme of having an intra-Commission appeal is flawed and defies the very notion of constituting a board as the head of an agency. The underlying theory for choosing a board as opposed to an individual as a head of the agency “is that the consultation and exchange of views is an integral part of the functioning of the board.” The participation of board members is essential in the decision-making process, of which a judicial determination whether an undertaking has contravened the provisions of the Act or not, is the most important of all decisions. The model of intra-commission appeal in a sequential fashion rather than sitting as a panel is a novel and unprecedented scheme. At the FTC, an appeal lies from the decision of an Administrative Law Judge to the full Commission. The college does not break its ranks. The Indian Competition Act of 2002 had the concept of Benches of the Commission<sup>97</sup>, which it abolished through the Competition (Amendment) Act of 2007. Even there, there was no concept of intra-Commission appeal, from one bench to the appellate bench of the Commission. The supporters of the intra-commission appellate process (among commission members) draw a somewhat misconceived analogy to the functioning of the provincial high courts, where there are intra-court appeals, *i.e.*, an appeal from a decision of a single bench to that of the division bench—composed of two judges. The analogy is flawed in the following respects: (i) a high court is not a collegiate body, where all judges need to be a part of the decision-making process; (ii) all judges in the high court are trained in law, and have experience of adjudication and order writing; (iii) all members of the Commission are not supposed to have training in law, nor experience of adjudication and order writing.

Now that the Act has added another tier of appeal to the CAT, and given that the Commission has heard a number of cases at first instance by a bench composed of two or more members<sup>98</sup>, it is recommended that the may Commission dispense with hearing cases in single benches, and should make a final decision in one-go by hearing the matters at first instance by a bench comprising of all

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<sup>96</sup> The Act, *supra* note 6, § 41.

<sup>97</sup> The Competition (Amendment) Act, 2003, No. 12, Act of the Competition Commission of India, New Delhi, 2003 (India) *as amended by* The Competition (Amendment) Act, 2007.

<sup>98</sup> *See, e.g., In re Fauji Fertilizer Company Limited & Fauji Fertilizer Bin Qasim Limited* (April 29, 2008); *In re Polyester Staple Fibre Companies* (June 10, 2008); *In re Pakistan Steel Mills* (May 15, 2009); *In re Karachi Stock Exchange* (May 29, 2009); *In re All Pakistan Cement Manufacturer Association, et al.* (Aug. 27, 2009); *JJVL v. LPGAP* (Dec. 14 2009); *In re Trading Corporation of Pakistan* (Feb12, 2010); *In re Engro Chemicals Pakistan Ltd., et al.* (July 23, 2010); *In re China Harbour Engineering Company Ltd., et al.* (July 23, 2010); *In re Tetra Pak* (Aug. 13, 2010); *In re Pakistan Poultry Association* (Aug. 16, 2010); *In re Wateen Telecom & Defence Housing Authority* (March 22, 2011); *In re Cinepax* (March 28, 2011). See COMPETITION COMMISSION OF PAKISTAN: DECISIONS AND ORDERS, [http://cc.gov.pk/index.php?option=com\\_content&view=article&id=168&Itemid=41](http://cc.gov.pk/index.php?option=com_content&view=article&id=168&Itemid=41) for the Commission’s Decisions and Orders.

members.<sup>99</sup> This will be in spirit with the notion of the board, and will reduce the time in reaching at the final decision of the Commission.<sup>100</sup>

#### IV. Enforcement Record

The Commission has an impressive enforcement record. It has in its over three years existence has issued more than 35 orders, inclusive of single bench, and appellate orders, dealing with section 3, 4, & 10 violations.<sup>101</sup> Most of the decisions have been appealed against, and are pending before different high courts and the Supreme Court. Not a single case has been decided by the courts on merit, so far. Moreover, the Commission has cleared over 170 mergers. Of these 170 cases, two cases were cleared with conditions. Of the two, one is challenged before the court and the matter is still pending.

In a 2003 report of the International Competition Network, which synthesized the survey of competition agencies of developing and transition economies, the judiciary has been referred to as “a major stumbling block in the path of effective competition enforcement.”

Judges do not understand competition law and are content to avoid the necessity to learn through diverting competition issues into a maze of esoteric administrative and procedural side-streets out of which the substantive matters at issue rarely emerge.<sup>102</sup>

In Pakistan, it is hoped, at least in theory, that once the Competition Appellate Tribunal is established, with two experts as its members, the tendency to sidestep adjudication on substantive matters will be minimal. And when the case goes to the Supreme Court, the Court will have the benefit of the opinions and decision of the Commission and the CAT in making its final decisions. Whether the government will constitute CAT, and whether it will find experts to appoint as members, remains to be seen.

#### V. Concluding Remarks

If one is to gauge the performance of the Commission from the number of cases it has decided, the Commission has been sprinting along like the hare in

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<sup>99</sup> The Commission has heard cases at first instance by a bench composed of two or more members on a number of occasions.

<sup>100</sup> See, e.g., *In re Takaful*, available at [http://cc.gov.pk/images/Downloads/taap\\_tpl\\_order\\_app\\_bench.pdf](http://cc.gov.pk/images/Downloads/taap_tpl_order_app_bench.pdf). In this instance, the appellate bench overruled the single member's decision. Had all the members sat together in the first instance, the parties would have gotten the final decision from the Commission much earlier.

<sup>101</sup> See generally COMPETITION COMMISSION OF PAKISTAN: DECISIONS AND ORDERS, [http://cc.gov.pk/index.php?option=com\\_content&view=article&id=168&Itemid=41](http://cc.gov.pk/index.php?option=com_content&view=article&id=168&Itemid=41).

<sup>102</sup> INT'L COMPETITION NETWORK, CAPACITY BUILDING AND TECHNICAL ASSISTANCE: BUILDING CREDIBLE COMPETITION AUTHORITIES IN DEVELOPING AND TRANSITION ECONOMIES 35 (2003), available at [www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org).

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Aesop's fable.<sup>103</sup> But the Commission does not deserve the fate of the hare. The Competition Act has provided sound substantive law, and the necessary architecture for strong institutional implementation. Having moved away from the crossroads, what is needed now is a focus on improving the institution that implements the substantive law. Financial autonomy and supportive judicial machinery are of the utmost importance for the sustainable functioning of the Commission. Then comes periodic self-assessment in improving its functioning. In this respect, Professor William Kovacic's observation is instructive for the Commission:

To have elegant physics without excellent engineering is a formula for policy failure. [A term of three year for the institution head leaves] too few incentives to invest in the engineering of institution building and implementation, which are the agencies' equivalent of durable infrastructure. There is strong incentive to engage in consumption and too little motivation to invest. In regulatory policymaking, consumption consists of engaging in activities that generate *readily observable events for which one can claim credit*. This can imbue policymaking with a highly short-term perspective. By contrast, investments in creating a strong institutional infrastructure generate returns that tend to extend mainly beyond the period of leadership of an individual. . . . Given the choice between consumption and investment, the interior voice that urges incumbent leaders to consume easily can drown out the voice that calls for investment. Where there are long term policy needs and short term appointees, *it is a major challenge to create incentives that press the agency to examine its institutional arrangements regularly and pursue measures to improve them.*<sup>104</sup>

This paper has made a number of recommendations to improve the functioning of the institution: (i) that the number of Commission members be fixed at five, and the ability of the Federal Government to increase or decrease at will be constrained; (ii) the term of the members be increased to five years, and members be eligible to be appointed for two terms only; (iii) judicial decisions be made by the full Commission, and should dispense with hearing cases through a single member bench; (iv) members should be appointed in a transparent, competitive and rigorous manner; and (v) competition law should be compulsorily offered in the LL.B. curriculum. The Act facilitates the Commission by imposing a positive obligation to review the Act and make suitable recommendations to amend it.<sup>105</sup> The Commission should undertake periodic examining of the institutional arrangements to develop excellent engineering for the elegant physics it has.

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<sup>103</sup> Rosalind Donald, *The Tortoise and the Hare*, GLOBAL COMPETITION REV., Nov. 18, 2010, at 9 (like the tortoise and the hare of Aesop's fable, Pakistan's Competition Commission has a reputation for action, while India's authority has yet to issue any decisions at all).

<sup>104</sup> William E. Kovacic, *The Digital Broadband Migration And the Federal Trade Commission: Building the Competition And Consumer Protection Agency of the Future*, 8 J. TELECOMM. & HIGH TECH. L. 1, 5-6 (2010) (emphasis added).

<sup>105</sup> The Act, *supra* note 6, § 29(b).