

Crossing the Cross-roads: Making Competition Law Effective in Pakistan

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Crossing the Cross-roads: Making Competition Law Effective in Pakistan

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This article is written as a sequel to my earlier article titled “*At the Crossroads: Making Competition Law Effective in Pakistan*”² published in the *Northwestern Journal of International Law and Business* in Spring 2006. That Article discussed the competition regime in Pakistan as established by the Monopolies and Restrictive Trade Practices Ordinance of 1970³ (MRTPO); the organizational structure of the Monopoly Control Authority (MCA), which enforced the MRTPO; factors impeding effective enforcement of MRTPO; and determinants of an effective competition agency.⁴ Since 2006, the Competition regime in Pakistan has come a long way. In 2007, a new competition law was enacted; a new organization, the Competition Commission of Pakistan (CCP or Commission) was established; the Commission has rigorously enforced the law, busted a number of cartels, punished dominant players for abusing their dominant position, cleared over 200 mergers, and held a number of sessions to create awareness about the new competition regime.

The process for reforming the competition regime in Pakistan, which moved at a snail's pace, started sometime in the late 1990s, and picked up pace in late 2005, when the Government of Pakistan requested the World Bank for technical assistance to help design a new competition law and policy framework for Pakistan.⁵ 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 Competition Ordinance, 2007,⁶ and eventually

¹ Member, Competition Commission of Pakistan; and also serves on the International Advisory Board of the Loyola University Chicago's Institute for Consumer Antitrust Studies, USA. The views expressed here are the author's alone and are not necessarily the views of the Competition Commission of Pakistan or any of its members. The author wishes to thank Mr. Abdul Ghaffar for his comments and for sharing his insights being associated with the reform process, which preceded the introduction of new competition regime in Pakistan.

² J. Wilson, *At the Crossroads: Making Competition Law in Pakistan*, 26 NW. J. INT'L L. & BUS 565 (2006). [Hereinafter “At the Crossroads”]

³ Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 (Pakistan) (Published in the Gazette of Pakistan, Extraordinary, Feb. 26, 1970) [hereinafter MRTPO].

⁴ 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. At the Crossroads, *supra* note 2, pp. 591 – 594.

⁵ The World Bank, *A Framework for a New Competition Policy and Law: Pakistan*, page iii, (2007).

⁶ The Competition Ordinance, 2007 (LII of 2007) (Published in the Gazette of Pakistan, Extraordinary, Oct. 2, 2007) [“CO 2007”].

appeared in its permanent form as the Competition Act of 2010⁷ [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 sets out a commentary on the substantive provisions, and the tools provided to enforce such provisions of the Act. Part III is a commentary on the institutional architecture; appointment mechanism for the members; and adjudicative process within 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 Competition Act, 2010

A. *Competition Ordinance 2007*

The new competition regime in Pakistan was introduced through an Ordinance (Competition Ordinance of 2007 (CO 2007)), promulgated by the President of Pakistan on 2 October 2007.⁸ A federal ordinance is a temporary piece of legislation, valid only for 120 days, which the President of Pakistan can promulgate under Article 89 of the Constitution of Pakistan, if (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.

The CO 2007 repealed the MRTPO, dissolved the MCA, and provided for the establishment of the Competition Commission of Pakistan.⁹ The Commission was established on 12 November 2007 through a notification of the Federal Government appointing five members, including the Chairman of the Commission.¹⁰ The newly formed Commission assumed some of the existing staff, liabilities, and assets of the MCA.

In November 2007, the then President declared emergency rule and issued the Provisional Constitutional Order of 2007 (PCO), which under Clause 5(1) & (2), gave exemption to all the ordinances in force at the time of Proclamation of Emergency, which

⁷ The Competition Act, 2010, Act No. XIX of 2010 (Published in the Gazette of Pakistan, Extraordinary, Oct. 13, 2010) ["The Act"].

⁸ CO 2007, *supra* note 6.

⁹ *Id.* § 12.

¹⁰ S.R.O (1)/2007; No. F. 3(8)INV.III/2007. 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

included the Competition Ordinance, from being “subject to any limitations as to duration prescribed in the Constitution.”¹¹

On 15 February 2008, in *Tikka Iqbal Muhammad Khan and others v. General Pervez Musharaf*,¹² a seven member bench of the Supreme Court of Pakistan validated the PCO. The Court held:

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.¹³

However, on 31 July 2009, a fourteen member bench of the Supreme Court in *Sindh High Court Bar Association v Federation of Pakistan*¹⁴, declared the PCO as 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 and granted a period of four months from 31 July 2009 for federal ordinances and three months for provincial ordinances. Thus a federal ordinance was to be ratified by the Parliament by or before 28 November 2009; otherwise, it would stand repealed. The Competition Ordinance, 2007 was tabled in the National Assembly as the Competition Bill in October 2009. However, the National Assembly was prorogued on 16 November 2009, before it could deliberate on the Bill.

B. Competition Ordinance 2009

To avoid lacunae that were to be created through the lapse of CO 2007, the President of Pakistan promulgated the Competition Ordinance, 2009¹⁵ on 26 November 2009, giving effect to the Competition Ordinance of 2007 from 2 October 2007 thereby giving validity to all actions taken, and decisions made, by the Commission under the Competition Ordinance, 2007.¹⁶ On 27 January 2010, the National Assembly passed the Competition Bill, 2009, which was then tabled in the Senate on 24 February 2010, from

¹¹ Provisional Constitution Order No. 1 of 2007, issued on November 3, 2007, amended on November 15, 2007.

¹² P.L.D. 2008 SC 178.

¹³ *Id.*

¹⁴ PLD 2009 SC 879.

¹⁵ Ordinance No. XLVI of 2009

¹⁶ 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.

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 2009, and as a consequence, the Competition Ordinance, 2009 lapsed on 26 March 2010, leaving the Commission without any legal status until 18 April 2010, *i.e.*, for 22 days, when the President promulgated Competition Ordinance, 2010¹⁷ [CO 2010].

C. Competition Ordinance 2010

The modern competition regime of Pakistan got reincarnated the third time as CO 2010.¹⁸ 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 5 May 2010, the Senate's Standing Committee on Finance unanimously approved the draft of the Competition Bill, 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,¹⁹ should be de-linked from the Commission Fund and be deposited in the national exchequer (consolidated fund account no. 1 of the Federal Government). Second, the Committee recommended to the government to set up a special appellate tribunal - the Competition Appellate Tribunal - for taking up appeals against the decisions of the Competition Commission of Pakistan, instead of provincial high courts.²⁰ 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.²¹

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

D. Competition Act 2010

After another hiatus of 57 days, the Parliament finally passed the Competition Act 2010²² on 6 October 2010, which received the assent of the President on 13 October 2010.

¹⁷ Ordinance No. VI of 2010; see also
<http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/the-newspaper/front-page/competition-law-repromulgated-on-18th-official-340>

¹⁸ *Id.*

¹⁹ The Act, *supra* note 7, § 20(2)(b): Charges, fees and penalties levied by the Commission.

²⁰ <http://www.brecorder.com/index.php?id=1052915&currPageNo=1&query=&search=&term=&supDate=>

²¹ http://www.dailytimes.com.pk/default.asp?page=2010/05/06/story_6-5-2010_pg5_12

²² The Act, *supra* note 7.

II. Competition Act, 2010: Objective & Tools

The Competition Act is the fourth incarnation of the modern competition regime in Pakistan.²³ The major provisions remain the same in all its four forms, with the exception of change in 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 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 objectives to: (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.²⁴ 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.²⁵

B. Substantive Provisions: Competition and Consumer Protection

The Act applies to all undertakings²⁶ (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 dominant position;²⁷ (ii) entering into agreements which have the object or

²³ The other three being CO 2007, CO 2009, CO 2010.

²⁴ The Act, *supra* note 7, Preamble.

²⁵ See, Wilson, At the Crossroads, *supra* note 2, 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))
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 distribution 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).

²⁶ “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; Section 2(q), the Act, *supra* note __ .

²⁷ The Act, *supra* note 7, § 3.

Abuse of dominant position.-(1) No person shall abuse dominant position.

effect of preventing or reducing competition within the relevant market;²⁸ and (iii) deceptive marketing practices.²⁹ It also introduced a sophisticated pre-merger clearance

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- (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.

²⁸ *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.

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

²⁹ *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;

regime.³⁰ The substantive test for merger clearance is the substantial lessening of competition by creating or strengthening a dominant position in the relevant market.³¹

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,”³² the 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 but convenient for the firm to draft the law in line with the law with which it was more familiar with.

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.³³ Choices made on flawed information distort competition. Prevention of deception (fraud) not only help consumers “by deterring dishonest sellers”³⁴, but also “by making it easier for honest sellers to make credible product claims.”³⁵

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 measured by its progress in increasing consumer welfare overall. Thus, well-conceived competition and consumer policies should take complementary paths to the same goal.³⁶

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- (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.

³⁰ *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 (I)/2007.

³¹ The Act, *supra* note 7, §n11(1).

³² Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, And Sideways*, 75 N.Y.U. L. REV. 1781 at 1799 (2000).

³³ 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*, (Hart, 2007) at p. 1; Richard Whish, *COMPETITION LAW*, (Oxford Uni. Press, 6th ed., 2008) at p.7.

³⁴ Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. CHI. L. REV. 165 at 174 (2005).

³⁵ *Id.*

³⁶ *Id.*

To enforce the substantive provisions, the Act has given the Commission essential tools of forcible entry³⁷ and leniency.³⁸ 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.”³⁹

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 remedial⁴⁰ 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.⁴¹

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.”⁴² 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. 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.”⁴³ In cases

³⁷ The Act, *supra* note 7, § 35.

³⁸ *Id.* § 39.

³⁹ *Id.* §35(3).

⁴⁰ *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 . . .

⁴¹ *Id.* §. 38.

⁴² J. Wilson, *Antitrust Remedies in Pakistan: Composition and Challenges*, 6 No. 2 COMPETITION L. INT'L 62 at 64 (2010).

⁴³ *Id.* at 66-67.

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.”⁴⁴ 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.”⁴⁵ The substantive test is a combination of the tests deployed in the United States⁴⁶ and in Europe.⁴⁷ 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.*⁴⁸ 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.”⁴⁹ 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.”⁵⁰

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

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.

⁴⁴ *Id.* at 69

⁴⁵ The Act, *supra* note 7, §11(1).

⁴⁶ Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version at 15 USC §§ 12-44) § 7, , (substantially to lessen competition, or to tend to create a monopoly.)

⁴⁷ Art. 2(2) Merger Regulation (creation or strengthening of a dominant position).

⁴⁸ File No.373/Merger/CCP/2011, decision available at http://www.cc.gov.pk/images/Downloads/vimpel_wind_telecom_merger.pdf

⁴⁹ *Id.* ¶ 9.

⁵⁰ The Act, *supra* note 7, § 2(e).

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, 2007⁵¹ (the “CMCR”) must seek clearance from the Commission. Regulation 4 of the CMCR sets out the notification thresholds, which are based, *inter alia*, on (i) the size of the parties; (ii) size of the transaction; and (iii) percentage of the 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. Being involved with the drafting of this particular provision, the original wording reads: “Notwithstanding the provisions contained in the Companies Ordinance, 1984⁵² . . .”. The rationale for such non-obstante clause was that there are provisions⁵³ 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, “find and replace” command was used to replace the word Ordinance with the word Act.⁵⁴ 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.⁵⁵

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. The time for Phase-I review starts ticking from the date when a “complete application” is submitted.⁵⁶ 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.⁵⁷

⁵¹ Competition (Merger Control) Regulations, 2007, available at:

http://www.cc.gov.pk/images/Downloads/merger_control_regulations.pdf [hereinafter “CMCR”]

⁵² XLVII of 1984

⁵³ Sections 284 to 288 of the Companies Ordinance 1984 (XLVII of 1984).

⁵⁴ Other instances highlighting the inconsistency created by the “find and replace” command are section 52 and 61.

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 ____

⁵⁵ 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.

⁵⁶ CMCR, *supra* note 51 Reg. 9(5),

⁵⁷ The Act, *supra* note 7, § 11(6).

During the second phase review, parties can raise efficiencies and/or failing firm defenses.⁵⁸ These defenses are expressly recognized in section 11(10) reproduced below:

- (a) [the proposed merger would] 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.⁵⁹

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.⁶⁰

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 29⁶¹, the Act mandates the Commission to review “policy

⁵⁸ 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 AT 1415 (2007) (efficiency issues are not expressly recognized in statutes covering merger review in either the United State or the European Union).

⁵⁹ See J. Wilson, *Antitrust Remedies in Pakistan: Composition and Challenges*, 6 No. 2 COMPETITION L. INT'L 62 at 69 (2010).

⁶⁰ Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. CHI. L. REV. 165 AT 170 (2005).

⁶¹ 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 or a competition culture;

frameworks for fostering competition and *making suitable recommendations for amendments to this Act and any other laws that affect competition in Pakistan.*⁶² (emphasis supplied). What is interesting to note is 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 affect on competition. The Commission has issued a number of policy notes to the government recommending the government to amend laws affecting competition.⁶³

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.”⁶⁴ 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.”⁶⁵ The Commission is composed of not less than five and more than seven member; however, the Federal Government has the authority to increase or decrease the number of members as it deems appropriate.⁶⁶ 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.”⁶⁷ 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 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

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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;

⁶² The Act, *supra* note 7, § 29.

⁶³ See Commission's website at cc.gov.pk.

⁶⁴ The Act, *supra* note 7, § 12(2).

⁶⁵ *Id.* §12(3).

⁶⁶ *Id.* § 14(1).

⁶⁷ The American Heritage Dictionary, 3rd Edition, page 311, under the meaning corporation.

affairs of the Commission.” The responsibility for the administration of the affairs of the Commission is, therefore, not solely on the chairman, but on all members.

The Act chose 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, U.S. Department of Justice (Antitrust Division), to name a few. 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.”⁶⁸ “The underlying theory is that the consultation and exchange of views is an integral part of the functioning of the board.”⁶⁹ And to enhance the value of consultation and exchange of views, the Act lays down broad categories of disciplines, *i.e.*, “industry, commerce, economics, finance, law, accountancy or public administration” expertise wherein 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,”⁷⁰ 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.”⁷¹ 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.”⁷² 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.”⁷³

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”⁷⁴ or to oblige some political affiliates. As this paper goes to print, the Commission is composed

⁶⁸ Stephen M. Bainbridge, *Why A Board? Group Decisionmaking In Corporate Governance*, 55 VAND. L. REV. 1 at 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)

⁶⁹ Bainbridge, *id.* Citing MODEL BUS. CORP. ACT ANN. § 8.01 cmt. (1998).

⁷⁰ Bainbridge, *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. (Too many cooks spoil the soup.) (footnotes omitted). *Id.* at p. 11; *see also* William E. Kovacic . *The Quality of Appointments and the Capability of The Federal Trade Commission*, 49 ADMIN. L. REV. 915 at 948 (Eliminating the five-member format would also increase accountability and discourage members from shirking responsibility for their policy choices.).

⁷¹ Bainbridge, *id.*

⁷² Kovacic, *The Quality of Appointments*, *supra* note 70 at 949.

⁷³ *Id.*

⁷⁴ *Id.* at 950

of six members, and it is probable that the Federal Government will appoint the seventh member as well. The fluid and increasing number of commission members affects its functioning through uncertainty and perhaps induction of weak candidates.⁷⁵ It is, therefore, recommended 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.”⁷⁶ 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.⁷⁷ The members and chairman serve on a full-time basis.⁷⁸ (emphasis supplied)

The Act envisages appointment of technocrats, as opposed to political appointees.⁷⁹ 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.”⁸⁰ 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.

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

⁷⁶ The Act, *supra* note 7, § 14(5)..

⁷⁷ *Id.* § 17.

⁷⁸ *Id.* § 15(3).

⁷⁹ *See e.g.*, § 1, FTC Act (Not more than three of the Commissioners shall be members of the same political party).

⁸⁰ *Id.*

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 set of members to the Commission, one in November 2007, which completed its three-year term by November 2010, and another set of members were appointed in January 2011.⁸¹ 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 full three year term. In July 2010, Chairman Mirza retired on attaining the age of sixty five, but before his departure, he 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 are, so far, three key people who play the role in the appointment of members of the Competition Commission, *i.e.*, the Chairman of the Commission, the Minister for Finance, and the Prime Minister. The vacancies are not advertised, as is done in making appointments in other regulatory bodies.⁸² The post of member should be advertised to attract a larger pool of candidates. It is therefore recommended that the Federal Government should prescribe a mode and manner for the appointment of Members, wherein the vacancies are advertised, and the selection process be made transparent, competitive and rigorous.

B. The Model

Section 28 stipulates the functions and powers of the Commission. On top of the list is the power to initiate proceedings and to make orders in cases of contravention of the provision of the Act. The Commission, thus, fits into what Trebilcock and Iacobucci call an “integrated agency model”, *i.e.*, where “a single specialized agency undertakes investigative, enforcement, and adjudicative functions.”⁸³ 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

⁸¹ 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

⁸² See, *e.g.*, Cabinet Division invites applications for the post of Member (Oil), Oil and Gas Regulatory Authority (OGRA), <http://www.careermidway.com/jobs/Islamabad/Member-Oil/15307>

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

appellate courts. Under the bifurcated agency model, specialized investigative and enforcement agencies must bring formal complaints before separate, specialized adjudicative agencies.⁸⁴

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.⁸⁵

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.⁸⁶

Since the Act does not envisage private actions, *i.e.*, 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”⁸⁷ -- the judiciary gets limited opportunity to decide on competition

⁸⁴ *Id.*

⁸⁵ JOSEPH WILSON, GLOBALIZATION AND THE LIMITS OF NATIONAL MERGER CONTROL LAW, at 78 (2003) (footnotes omitted).

⁸⁶ Trebilcock & Iacobucci, *supra* note 83, at 470.

⁸⁷ *Id.* at 460. See Wolfgang Wurmnest, *Foreign Private Plaintiffs, Global Conspiracies, and The Extraterritorial Application Of U.S. Antitrust Law*, 28 HASTINGS INT'L & COMP. L. REV. 205 (2005) (Outside the United States, private antitrust enforcement is either virtually non-existent or still in the

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 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.”⁸⁸ 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,⁸⁹ unless declared disqualified under sub-section 6 of section 14.⁹⁰ The shorter duration of the term of the members and the Chairman than that of the parliament of Pakistan, which is five years, 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

fledging stages).

⁸⁸ The Act, *supra* note 7, § 20(2)(f).

⁸⁹ *Id.* § 17.

⁹⁰ *Id.* § 19, *id.* Subsection 6 of section 14 reads as follows:

(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.

independence of the Commission as a college. Au contraire, the President of the United States gets to appoint half of the FTC members during his tenure – as the Presidential term is for four years, while the commissioners at the FTC are appointed for a term of seven years. In India, the term of the members of the Competition Commission and that of the parliament is 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 may 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. Inquiry officer (or an inquiry committee) prepares inquiry report, and depending on the recommendations in the inquiry report, 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 Act⁹¹ 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,⁹² 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 circumstance of a case.”⁹³ The order of the appellate bench can be appealed against before an Appellate Tribunal, yet to be created, and finally before the Supreme Court of Pakistan.⁹⁴

Originally, in the Competition Ordinance 2007, the appeal from the decision of the appellate bench was maintainable before the Supreme Court of Pakistan, affording a complainant/defendant a two-tier appellate process, one before the appellate bench of the Commission and second before the Supreme Court. In the Competition Ordinance of 2010⁹⁵ another tier of appeal was added by stipulating that the appeal from the Commission's decision will lie first to the provincial high court before being

⁹¹ The term Act includes all Competition Ordinances that preceded it.

⁹² The Act, *supra* note 7, § 41(2).

⁹³ Rule 22, Decision of appeal, The Competition Commission (Appeal) Rules, 2007, S.R.O. 399(I)/2008.

⁹⁴ The Act, *supra* note 7, § 41.

⁹⁵ Ordinance No. VI of 2010

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 and human capital to defend/press cases in four different cities. Finally, the Competition Act replaced provincial high courts with a specialized Competition Appellate Tribunal (CAT), composed of a chairperson who “has been a judge of Supreme Court or retired Chief Justice of High Court and two technical members.”⁹⁶ CAT was to be constituted within thirty days of the day Competition Act came in force, but it has yet to be created even 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 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. In 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 Commission⁹⁷, 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) draws, somewhat misconceived, analogy with 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 argument/analogy is flawed in 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 members⁹⁸, 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

⁹⁶ The Act, *supra* note 7, § 41.

⁹⁷ Section 22 of the Competition Act, 2002.No. 12 of 2003.

⁹⁸ *See, e.g., In re Fauji Fertilizer Company Limited and Fauji Fertilizer Bin Qasim Limited* (29 April 2008); *In re Polyester Staple Fibre Companies* (10 June 2008); *In re Pakistan Steel Mills* (15 May 2009); *In re Karachi Stock Exchange* (29 May 2009); *In re All Pakistan Cement Manufacturer Association et al* (27 August 2009); *JJVL v. LPGAP* (14 December 2009); *In re Trading Corporation of Pakistan* (12 February 2010); *In re Engro Chemicals Pakistan Ltd. et al* (23 July 2010); *In re China Harbour Engineering Company Ltd. et al.* (23 July 2010); *In re Tetra Pak* (13 August 2010); *In re Pakistan Poultry Association* (16 August 2010); *In re Wateen Telecom & Defence Housing Authority* (22 March 2011); *In re Cinepax* (28 March 2011). All orders are available at cc.gov.pk.

matters at first instance by a bench comprising of all members.⁹⁹ 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.¹⁰⁰

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 sections 3, 4, & 10 violations.¹⁰¹ With the exception of a few, majority 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 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, judiciary has been referred to as “a major stumbling block in the path of effective competition enforcement.”

The all-but unanimous view expressed is that the judiciary is a major stumbling block in the path of effective competition enforcement--the 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.¹⁰²

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 be appointed as members, is remain to be seen.

⁹⁹ There are a number of occasions when the Commission has heard cases at first instance by a bench composed of two or more members.

¹⁰⁰ See, e.g., *In re Takaful*, available at cc.gov.pk, wherein the appellate bench over-ruled the single member's decision. Had all members sat together in first instance, the parties would have got final decision from the Commission much earlier.

¹⁰¹ See Commission's website: cc.gov.pk

¹⁰² 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.

V. Concluding Remarks

If one is to gauge the performance of the Commission from the number of cases decided by it, the Commission has been dubbed to run like a hare.¹⁰³ The Commission does not deserve the fate of the hare. The Competition Act has provided sound substantive law, and architecture for a strong institution to implement it. Having moved away from the crossroads, what needs attention at the moment is the institution that provides the engineering for implementing the physics of substantive law. 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.*¹⁰⁴

This paper has identified some areas which can improve the functioning of the institution, *i.e.*, (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 full Commission, and it should dispense 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

¹⁰³ Rosalind Donald, *The Tortoise and the Hare*, Global Competition Review, Vol. 13, Issue 10, Nov. 2010 p. 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).

¹⁰⁴ 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 AT 5-6 (2010) (emphasis supplied).

amend it.¹⁰⁵ The Commission should undertake periodic examining of the institutional arrangements to develop excellent engineering for the elegant physics we have.

¹⁰⁵ The Act, *supra* note 7, § 29(b).