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**Faculty of Shariah & Law**

Thesis Title:

***'The Need For A New Competition Law In Pakistan: A Study Of The  
Present Policy Law And Practices'***

Humbly submitted by:

**Naseer Uddin**

**LL.M [ International Trade Law ]**

**Reg. No: 64-FSL/LLMITL/F05**

## **The Competition Law**

Thesis Committee:

- **Mr. Ahmad Khan, Formerly Member MCA**
  - **[Thesis Supervisor]**
- **Mr. Muhammad Mushtaq Ahmad, Asstt. Professor, IIU**
  - **[Internal Examiner]**
- **Hafiz Abdul Basit, Law Officer, OGRA**
  - **[External Examiner]**



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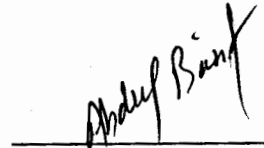
1. Competition law - pakistan

We have the pleasures to submit this letter of recommendation for favorable consideration of the Thesis titled "The Need for a New Competition Law in Pakistan: A Study of the Present Policy Law and Practices" by Mr. Naseer Uddin, a student of LL.M (International Trade Law) Registration No.64-FSL/LLMNITL/F05 in partial fulfillment of his LLM degree.

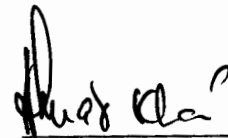
We have also satisfied with his endeavors put in this study and the product quality.



(Muhammad Mushtaq Ahmad)  
Asstt. Professor, IIU,  
Internal Examiner



(Hafiz Abdul Basit)  
Law Officer, OGRA  
External Examiner



(Ahmad Khan)  
Formerly Member, Monopoly  
Control Authority  
Thesis Supervisor

**Abstract:**

The reason for writing on this issue is that the prevailing law Monopolies and Restrictive Trade Practices Ordinance (MRTPO), was promulgated in 1970 and it is now outdated and failed to fulfill the requirements of present economic development and consumer welfare. The law spells out the situations which shall be deemed to constitute undue concentration of economic power, unreasonable monopoly power and unreasonably restrictive trade practices. The law clearly prohibits these defined situations and collects information about them, through the process of registration.

The experience by working with the law showed the desirability of modifications: firstly, the need to review the law to bring it more in line with the current economic realities and international norms; secondly; strengthening of human and other resources of the MCA for effective enforcement. Further, a very weak implementation mechanism was provided. Penalties for non-compliance of MCA's orders were extremely low and applicable only for non-compliance of MCA orders. Looking at the history of implementation of MRTPO, we may observe that the MCA has mostly been handicapped by legal, capacity and present economic constraints.

The present global best practices required a new organization that would assist healthy competition among service providers. It is, therefore, considered desirable to enact a new competition law to replace the MRTPO and carry out necessary institutional strengthening and capacity building of a new "Competition Commission" to replace the MCA.

Competition Ordinance, 2007 is part of the broader competition policy framework of the Government of Pakistan through which it endeavours to engender free competition in all spheres of commercial and economic activity.

The crucial objective is to enhance economic efficiency and to protect consumers from anti-competitive behavior.

The law prohibits situations which tend to lessen, distort or eliminate competition such as actions constituting an abuse of market dominance, competition restricting agreements and deceptive market practices. Although essentially an enabling law, it briefly sets out procedures relating to review of mergers and acquisitions, enquiries, imposition of penalties, grant of leniency and other essential aspects of law enforcement.

Concluding the whole discussion I would like to evaluate MRTPO and Competition Ordinance 2007. Critical analysis the whole discussion, it shall be assessed whether a newly introduced Competition law fulfills the prime objectives of a competition law; i.e. consumer welfare and overall economic efficiency of a country.

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## ABBREVIATION AND ACRONYMS

CO, 07	- Competition Ordinance, 2007
CCP	- Competition Commission of Pakistan
CEO	- Chief Executive Officer
CPC	- Civil Procedure Code
DFID	- Department of International Development, United Kingdom
DG	- Directors General
EU	- European Union
FDI	- Foreign Direct Investment
GDP	- Gross Domestic Products
HEC	- Heavy Electrical Complex
ICN	- International Competition Network
MCA	- Monopoly Control Authority
MOF	- Ministry of Finance
MRTPO	- Monopolies and Restrictive Trade Practices Ordinance 1970
NEPRA	- National Electric Power Regulatory Authority
NIT	- National Investment Trust
OGRA	- Oil & Gas Regulatory Authority
PBA	- Pakistan Banking Association
PEMRA	- Pakistan Electronic Media Regulatory Authority
PBA	- Pakistan Banking Association
PPC	- Pakistan Penal Code
PTA	- Pakistan Telecommunication Authority
PTCL	- Pakistan Telecommunications Company Limited
RPM	- Resale Price Maintenance
SECP	- Securities and Exchange Commission of Pakistan
SME	- Small and Mediums Enterprises
SBP	- State Bank of Pakistan
TNA	- Training Needs Assessment
USA	- United State of America
WAPDA	- Water and Power Development Authority

### **Case Law:**

1. Bahria University (File No. 05/Sec-3/CCP/2008) Date of final order: 3<sup>rd</sup> December, 2009 before the Competition Commission of Pakistan. Case referred on page 63.
2. M/s. Pakistan Mobile Communications Ltd & others (File No.1/(I.O.)-R&I/Inv/Telecom/MCA/07) Date of final order: 28-08-2007 before the Competition Commission of Pakistan.
3. The Institute of Chartered Accountants of Pakistan (File No. 03/Sec-4/CCP/08) Date of hearing: 28th November 2008 before the Competition Commission of Pakistan. Case referred on page 70.
4. Pakistan Bank's Association (File No 2/sec-4/CCP/07) Dates of Hearings February 12, 13, 14, 20, 21, 2008 and March 07, 2008 before the Competition Commission of Pakistan. Case referred on page 68.
5. Murree Brewery Company Limited vs. Siza Foods (Private) Limited (File No. 03 /Sec-3/CCP/08) Date of hearing: 22nd December 2008.
6. Iljin Electric Company Limited, Korea against Siemens (Pakistan) Engineering Company Limited Case hearing on 12-09-2008 before the Competition Commission of Pakistan. Case referred on page 65.
7. Acquisition of the Polka Group of Companies by Lever Brothers Pakistan Limited before the Monopoly Control Authority. Case referred on page 26.
8. Merger of Lipton Pakistan Ltd and Brooke Bond Pakistan Ltd tea marketing companies before the Monopoly Control Authority. Case referred on page 25.
9. Merger of Premier Tobacco and Lakson Tobacco in cigarette industry before the Monopoly Control Authority. Case referred on page 26.
10. Indus bank Ltd case before the Monopoly Control Authority. Case referred on page 17.
11. Pencil manufacturers' case before the Monopoly Control Authority. Case referred on page 18.



## CHAPTER I

### Prevalent Competition Policy / Law In Pakistan:

#### Competition Policy

**Introduction:** firstly, I intend to have a briefly discussion about the subject of competition policy and law, describe what the principles of competition policy and law are. The broad objectives of the Monopolies and Restrictive Trade Practices Ordinance, 1970 is to provide for measures against undue concentration of economic power, unreasonable monopoly power and unreasonably restrictive trade practices. The law spells out the situations which shall be deemed to constitute undue concentration of economic power, unreasonable monopoly power and unreasonably restrictive trade practices. The core scheme of the law is to prohibit these clearly defined situations and to collect information through the process of registration about these and other circumstances which are likely to lead to such situations.<sup>1</sup>

In this chapter, the policy considerations for introduction of MRTPO, 1970 in Pakistan, an overview and analysis of the substantive provisions of the MRTPO, 1970, and some procedural aspects shall be examined.

**Competition Policy:** Competition policy comprises a set of guidelines, procedures and tool used by Governments that find out the circumstances of competition that control on their markets. Its mechanisms contain competition /anti-trust law, guidelines relating to deregulation, privatization, product/producers connected discriminations.

Competition policy aim market actions by undertakings (i.e. market power and its exploitation) that disagree with the goals of take full advantage of

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<sup>1</sup> The Monopolies & Restrictive Trade Practices Ordinance, 1970. [www.mca.gov.pk](http://www.mca.gov.pk) dated 02-07-2007

consumer's welfare and in general economic competency. It, therefore efforts to:

- lessen barriers to market entrance and way out;
- improvement anti-competitive rules; and
- give for a complete regulatory improvement agenda.<sup>2</sup>

**Principle of Competition Policy:** In generally speaking competition policy is likely to attain the following principles:

1. In most part of the world, stress of competition law is to forbid price fixing contracts and abuse of dominant market situation.
2. Preventing irrational restraints on competition, limiting the powers of companies to use undue power over market and its use to exploit that market for their personal gain.
3. Continuation of the competitive development of free competition, and / or safeguard and support of efficient competition.
4. Improving market entrance through privatization, deregulation, and tariff reduction, exclusion of licenses, quotas, and market board schemes.
5. Independence of trade, independence of choice, freedom of individual action, access to market, and securing economic freedom.
6. Prevention of abuse of economic power, protection of consumer's and producers;
7. Achievement of economic competency to take full advantage of consumer welfare.
8. Shield of small businesses, maintaining fairness, preserving free enterprise system and honesty in business dealings.

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<sup>2</sup> Competition Policy & Law: a presentation by Mr. Ahmad Khan, formally Member, Monopoly Control Authority, Government of Pakistan at International Islamic University, Islamabad – 2007.

9. Modern stresses also on lessening unfavorable effects of government interference in the market place.

10. Diffusion of financial power throughout the economy.<sup>3</sup>

**Competition Law:** Opposite to the competition policy, competition law is a set of laws and regulations linking to preventing and controlling intra-firm contracts that limit competition or misuse of dominant position:

- for well organized resource shares and
- ensure that competition procedure is not harmful to public welfare.<sup>4</sup>

Competition in market-based financial systems refers to circumstances in which undertakings or sellers alone struggle for consumers patronage to attain particular goals e.g. sales or market share, profit. Competition rivalry might take place in terms of service, quantity, price, or mixture of these and other issues that consumers may worth.<sup>5</sup>

It is established reality that competition leads to better financial effectiveness i.e. manufacture, distribution etc and consumer's option of goods and services at competitive costs.

In a competitive market financial system, costs and income signs tend to be free of distortions and make encouragements for firms to redeploy resources from lesser to superior – valued uses and decentralized decision making by firms supports well-organized portion of limited resources, boosts consumer's welfare, and promote innovation, industrial change and development in the financial system as a whole.

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<sup>3</sup> Competition Policy & Law: a presentation by Mr. Ahmad Khan, formally Member, Monopoly Control Authority, Government of Pakistan at International Islamic University, Islamabad – 2007.

<sup>4</sup> Ibid

<sup>5</sup> Ibid

Firms have encouragements to have market control by limiting competition by erecting barrier to business, collusive arrangements to limit outputs, prices and engaging in other anti-competitive trade practices. Anti-competitive measures of firms lead to market failures, results in incompetent distribution of incomes and negatively have an effect on manufacturing performance and economic welfare and allow vendors to lessen output and extract higher prices at consumer's cost.

## **The Economic Scenario Leading to the Promulgation of MRTPO, 1970.**

The finance, trade and investment are the three pillars of economy of any State. Michael Gorbachauve; formerly President of USSR, is reported to have once said "*A private cow milks more than a public cow*". This one sentence may speak volumes about the significance of private enterprise and the cardinal role it plays in the economic development of any State; but historical experiences also evidence that an absolutely unregulated private enterprise system tends to result in concentration of wealth and resultant anticompetitive practices.

In developing countries like Pakistan, monopolies emerge as a result of transplantation of modern technology and large scale production techniques to the limited domestic markets characterized by inadequate purchasing power.<sup>6</sup>

In Pakistan, the need for anti-monopoly law was felt in the late sixties when government was pursuing policies of free market economy through encouragement of private sector. Consequently, an absolutely unregulated private sector with concentration of wealth and formation of monopolies emerged. This situation could not last for a long time as it affected both the consumers and the entrepreneurs. It was, therefore, necessary to take appropriate steps to remedy this situation<sup>7</sup>.

Government of Pakistan circulated a draft Anti-monopoly and Restrictive Trade Practices Law for public opinion with the budget for 1969-70. The draft Law was widely commented upon by the press, the Chambers of Commerce

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<sup>6</sup> An Explanatory Memorandum on the Law on Regulation and Prevention of Monopolies and Cartels: Ministry of Finance, Government of Pakistan. p. 1. [www.mof.gov.pk](http://www.mof.gov.pk) dated 03-08-2007.

<sup>7</sup> Article 38 of the Constitution of Islamic Republic of Pakistan makes it incumbent upon the State, i.e. The Federation, to inter alia, secure the well-being of the people 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; Clause 2 of Article 151 (clause 1 of which provides for freedom of trade) stipulates that Parliament may impose such restrictions on the freedom of trade, commerce or intercourse between one province and another or within any part of Pakistan as may be required in the public interest.

and Industry and the public and consequently many useful suggestions were received. Taking these suggestions into account, the President promulgated the Monopolies and Restrictive Trade Practices (Control & Prevention) Ordinance, in February 26, 1970 (MRTPO 1970).<sup>8</sup>

The MRTPO was made effective by the Central Government on August 17, 1971. MCA was also constituted on August 17, 1971. MCA is a quasi-judicial and autonomous organization to control and prevent undue concentration of economic power, unreasonable monopoly power; and unreasonably restrictive trade practices. When MCA started enforcement of the law in 1971, the policy decision leading to widespread nationalization of major private industries in 1972, curbed the scope of MRTPO 1970, and therefore, during the 1970s and 1980s, MCA's emphasis was on diversification of capital resources of undertakings. In 1990s however, the need to shift from assets based investigation to market based investigation was felt in view of the changing economic scenario. The elaborate privatization plans of government required a comprehensive monitoring of any possible tendencies of unreasonable monopoly power and unreasonably restrictive trade practices.<sup>9</sup>

MCA faced several difficulties - both on policy and operational aspects in the enforcement of the law. The foremost issue is the lack of general awareness about the law. Consumer's societies are almost non-existent or have a low profile. Therefore, MCA does not have the sources within the general public to come forward with evidence about the violation of the Law. Consequently, in almost all the cases, it had to move sou-moto and collect the evidence from the information supplied by the accused party. Presently, MRTPO, 1970 only applies to private monopolies; State monopolies are not covered thereby.

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<sup>8</sup> An Explanatory Memorandum on the Law on Regulation and Prevention of Monopolies and Cartels: Ministry of Finance, Government of Pakistan. p. 1. [www.mof.gov.pk](http://www.mof.gov.pk) dated 03-08-2007.

<sup>9</sup> Pakistan Experience in the Enforcement of Monopolies Law And Capacity Building Requirement: Saleem Asghar Mian, Chairman MCA, Pakistan: UNCTAD; Trade & Development Board: Geneva, 3-5 July, 2002

Single firm monopolies are also not covered in the substantive provisions of the law. It has also been realized that the penalties which MCA can impose in case of non-compliance with its orders are very low i.e., a one time penalty of upto Rs. 100,000 (About US \$ 1,335) and Rs. 10,000 (About US \$ 135) per day in case of continuous default, with the result that business find it easier to pay the low penalties and to continue with their abusive practices.

Before explaining the purposes of provisions on anticompetitive practices, it may be desirable to illustrate what, in fact, anticompetitive practices are. Anti-competitive practices are business or government practices that prevent and / or reduce competition in a market.<sup>10</sup>

An undertaking with a monopoly over certain products or services may be guilty of anticompetitive practices, if it has abused its dominant position or market power.<sup>11</sup> The types of activity / practices which may generally be prohibited on account of the same being anticompetitive include: barrier to entry, dumping, exclusive dealing, price fixing, limit pricing, tying, Walker Process fraud<sup>12</sup>, resale price maintenance, absorption of a competitor or competing technology, bid-rigging, vendor lock-in, geographic allocation, etc.<sup>13</sup>

Whereas, on the other hand, Competition is the act of striving against others for the purpose of achieving dominance or attaining a goal, it is a term that is commonly used in numerous fields, including business, ecology, economics, music, politics, and sports. Competition may be between two or more forces, organisms, systems, individuals, or groups, depending on the context in which the term is used. Competition may yield various results to the participants, including both intrinsic and extrinsic rewards. Some results, such as resources or territory, may be biologically motivated because they

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<sup>10</sup> Oliver Black. Conceptual Foundations of Antitrust (2005)

<sup>11</sup><http://www.comcom.govt.nz/BusinessCompetition/AnticompetitivePractices/GuidetoAnticompetitivePractices/anti-competitivepractice.aspx> dated 07-01-2008.

<sup>12</sup> The term comes from the Supreme Court case Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965)

<sup>13</sup> The Business Community's Suicidal Impulse by Milton Friedman: A criticism of antitrust laws and cases by the Nobel economist.

provide survival advantages. Others, such as competition in business and politics, are learned aspects of human culture. Additionally, extrinsic symbols such as trophies, plaques, ribbons, prizes, or laudations may be given to the winner. Such symbolic rewards are commonly used in human sporting and academic competitions.<sup>14</sup>

Now focusing on the core point under reference, when one is required to signify purposes of the provisions on anticompetitive practices; one must analyze various factors; and after going through motley competition regimes, including those of US, EU, UK, Canada, Germany, Ireland, Taiwan, Korea, Australia and Pakistan as well as reviewing UNCTAD & WB-OECD Model Laws, it is quite apparent that the purposes of the provisions on anticompetitive practices include:

- Maintenance of the competitive process of free competition, and / or protection and promotion of effective competition;
- Striking down or preventing unreasonable restraints on competition, limiting the powers of corporations to wield undue influence over market and its use to exploit that market for their own gain;
- Freedom of trade, freedom of choice, access to market; freedom of individual action ( Germany ); securing economic freedom ( France );
- Improving market access through deregulation, privatization, tariff reduction, removal of quotas and licenses, and market board schemes;
- Prevention of abuse of economic power, protection of consumers and producers;
- Achievement of economic efficiency to maximize consumer welfare;
- Diffusion of economic power throughout the economy (USA); and

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<sup>14</sup> Competition Policy & Law: a presentation by Mr. Ahmad Khan, formally Member, Monopoly Control Authority, Government of Pakistan at International Islamic University, Islamabad – 2007.



- Protection of small businesses; preserving free enterprise system; maintaining fairness and honesty in business transactions.<sup>15</sup>

In addition to the above described specific purposes, competition policy and law cater for the consumer welfare; public interest, producer welfare, overall aggregate welfare etc. which generally form the basic orientation of and the objects and purposes of the incorporation of provisions on anticompetitive practices in a country's competition legislation. Nevertheless, some countries may give consumer welfare precedence over economic efficiency and overall welfare.

If one gets more specific in terms of looking for the purposes of provisions on anticompetitive practices, one needs to carefully look at both WB-OECD & UNCTAD Models. The former envisages that the primary objective of the competition policy and law is the maintenance / enhancement of competition to enhance consumer welfare; whereas the latter focuses on control or elimination of restrictive agreements or arrangements among enterprises, or the control of acquisitions and / or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic and international trade or economic development therein.

#### **Scope & Cardinal Provisions of MRTPO, 1970:**

The MRTPO 1970, has three substantive provisions [section # 4 / undue concentration of economic power, section # 5 / creation of unreasonable monopoly power and section # 6 / unreasonably restrictive trade practices], through which it controls and prevents anti-competitive practices. Apart from

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<sup>15</sup> Competition Policy & Law: a presentation by Mr. Ahmad Khan, formally Member, Monopoly Control Authority, Government of Pakistan at International Islamic University, Islamabad – 2007.

these three provisions, section # / 7 is also significant enough to be dealt with.<sup>16</sup>

Theoretically speaking, all actions of competition agency lead towards economic development. However, it may be noted at the outset that though the MRTPO 1970 was enacted in 1970 but this was followed by the nationalization of businesses in early seventies which reduced the role of the Monopoly Control Authority (MCA). It was only in 1994 that the MCA was granted an autonomous status to enforce the Law.

The following briefly describes the individual provisions of MRTPO, 1970.

MRTPO 1970 extends to the whole of Pakistan. The laws enforced as from 17 August 1971 vide SRO 316 (1) /71 dated 17 August 1971. MCA established from the same date.<sup>17</sup>

Section 2 defines various terms. These are explained as under:-

**Agreement:** Any understanding or arrangement, whether printed or otherwise, and whether, intentional to be lawfully enforceable or not. This can be explicit or implicit agreement between firms generally in competition for their common benefit; an explicit agreement may not be overt agreement i.e. one which can be openly observed by those not party to agreement. Indeed most agreements that give rise to anti-competitive practices tend to be covert arrangements i.e. not easily detected by competition authorities. The agreements may be arrived at in an extensive proper manner, and their terms and conditions explicitly written down by involved parties or they may be implicit but their boundaries understood and observed by convention.

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<sup>16</sup> The Monopolies & Restrictive Trade Practices Ordinance, 1970. [www.mca.gov.pk](http://www.mca.gov.pk) dated 03-09-2007.

<sup>17</sup> *ibid.*

Not all agreements are damaging to competition or agreed by competition laws. 'Mutual arrangements' that make possible active change and / or efficiency are really encouraged. These comprise, for instance, agreements for standardized, improved use of manufactured goods and transmission of technology, Research and Development, exchange of information /statistics, joint ventures to divide risks or pool capital in large manufacturing projects.

**Associated Undertakings:** Where a person is partner / owner of one undertaking or holds / controls thirty percent or more of voting shares in that undertaking is also owner / partner of the additional undertaking or control / holds thirty percent or more of voting shares of the other undertaking, amount to 'associated undertakings'.

Likewise, if undertakings are under common control or management or they are in a parent-subsidiary relation, they amount to 'associated undertakings'. This basically addresses the inter-locking problems, common control or management, officers, directors, common partners, owners. The prohibition of such inter-locks under section five of MRTPO 1970 is aimed at breaking up circumstances where a family group controls two or more companies in the same market having a joint share more than the approved threshold. The law also prohibits new interlocks and directs offering such shares to general public. There is a conflict in the definition of 'associated undertakings' given in MRTPO 1970 and Companies Ordinance 1984. Two cases regarding associated undertaking dealt by the MCA are referred as under: -

**Indus Bank Case:** The undertaking, Indus Bank made loans to its associated companies on easy terms i.e., less than the prevailing market rate of interest, than those made available to other undertakings in the comparable situation. Prima facie the circumstances attracted the law; a *suo-moto* action was taken by the MCA. In response to the show cause notice, the undertaking raised the issue relating to common directorship and that the

dealings were as per regulations set by the State Bank of Pakistan. The status of undertakings being "associated" could not be established and the case was cleared by the MCA.<sup>18</sup>

**Pencils case:** Crescent Pencils Ltd and Indus Pencils Ltd both had market share more than the threshold limit. Prima facie it was alleged that associated undertakings had more than threshold market share. Upon deep investigate; the undertakings were able to establish that the legal requirements for dominance were not met. MCA decided in its Order that the Directors of the two undertakings though were associated to each other but were not the same 'persons' as required in the definition of the associated undertakings in the MRTP Ordinance, 1970. The case was thus cleared.<sup>19</sup>

**Undertakings:** An undertaking denotes any concern, establishment, institution or enterprise engaged in the manufacture, production, distribution of goods, supply or in provisions of control any service.

**Control:** Control means power to exercise controlling influence over the policies or management of the undertaking, in relation to shares, it means controlling influence over voting power attached to such shares.

**Market:** In a general sense, it is a place where buyers and sellers carry out business for trade of goods / services and where their prices are likely towards fairness. In relation to goods and services means the 'geographical region' in which the competition in the production or sale of such goods / services takes place.

Market meaning usually include potential and actual sellers as they have the ability to dampen the ability of (existing) firms to increase prices beyond competitive level.

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<sup>18</sup> Indus bank Ltd case before the Monopoly Control Authority. [www.mca.gov.pk](http://www.mca.gov.pk) dated 03-10-2007.

<sup>19</sup> Pencil manufacturer's case before the Monopoly Control Authority. [www.mca.gov.pk](http://www.mca.gov.pk) dated 03-10-2007.

Location of sellers and buyers determines whether geographic market is local, regional or international, too narrow definition will exclude significant competition from analysis; broad definition would overstate degree of competition.

Starting point for any competition analysis is the definition of 'relevant market'. Fundamental dimensions of definition of 'market' are: Product market i.e. which products may be grouped together; Geographic market i.e. which geographic areas to be grouped.

Definitions of market take into account equally demand and supply reflections:

*Demand side:* manufactured goods must be substitutable from buyer's point of view.

*Supply side:* Those which manufacture or could easily switch manufacturing to relevant products or close substitutes.<sup>20</sup>

**Monopoly Power:** It is the market power to maintain prices above that normally would exist under competition. It leads to reduced output and loss of economic welfare. Market power refers to all situations in which firms face downward sloping demand curves and can profitably raise price above the competitive level. It may exist not only where there is monopoly, but also when there is oligopoly, monopolistic competition, or dominant firm.

Ability to maintain non-competitive prices, restrict output without losing a substantial share of market or exclude others from any part of the market. The ability to maintain exceeds the prescribed price threshold, without attracting the entry of new firms or production of substitute products. (as determined by detailed examination of quantitative, qualitative market structure and firm behavior factors ).

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<sup>20</sup> Competition Policy & Law: a presentation by Mr. Ahmad Khan, formally Member, Monopoly Control Authority, Government of Pakistan at International Islamic University, Islamabad – 2007.

Measurement of monopoly power (in economic terms) is not straight forward. It may be measured either through the extent of to which price exceeds marginal cost or average variable cost, or through the measurement of the price of elasticity of demand facing an individual firm. The actual or potential exercise of market power is used to determine whether or not substantial lessening of competition exists or likely to exist. Barriers to entry are factors which prevent or deter the entry of new firms into an industry even when incumbent firms are earning excess profits. These may be structural (arising from industry characteristics like technology, costs and demand) or strategic (arising from behavior of incumbent firms e.g. pre-emption of facilities by which an incumbent over-invests in capacity in order to threaten price war, or creates artificial new brands and products to limit the possibility of imitation). They are also referred to as economic and behavioral barriers to entry.

**Unreasonable restrictive trade practice:** Restrictive trade practices resorted through cartels / collusions and other vertical and horizontal restraints. A trade practice, which has or may have the effect of unreasonably preventing, restraining or otherwise lessening competition in any manner. These are intra-firm agreements / arrangements.

**Horizontal:** Horizontal restraints refer to all agreements or actions between competing enterprises acting on the same level of production or distribution (say between producers or between wholesalers or between retailers dealing in similar kind of goods or services) lessening or even stopping competition. These include actions such as fixing prices or industry outputs, installing quota or territorial cartels, collusive tendering.<sup>21</sup>

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<sup>21</sup> Competition Policy & Law: a presentation by Mr. Ahmad Khan, formally Member, Monopoly Control Authority, Government of Pakistan at International Islamic University, Islamabad – 2007.

**Vertical:** Vertical restraints refer to certain practices by manufacturers or suppliers relating to resale of their products e.g. resale price maintenance, exclusive dealings, exclusive territory or market restrictions.

There are several expressions which have not been specifically defined in the MRTPO, 1970. The Law provides that the words and expressions not defined in the Ordinance and defined in Companies Act/Ordinance have the same meanings as are given in the Companies Ordinance, 1984.<sup>22</sup>

The MRTPO 1970, has three substantive provisions [section # 4/ undue concentration of economic power, section # 5/ creation of unreasonable monopoly power and section # 6/ unreasonably restrictive trade practices], through which it controls and prevent anticompetitive practices. Apart from these three provisions, section # 7 is also significant enough to be dealt with.

Theoretically speaking, all the actions of competition agency lead towards economic development. However, it may be noted at the outset that though the MRTPO was enacted in 1970 but this was followed by the nationalization of businesses in early seventies which reduced the role of the MCA. It was only in 1994 that the MCA was granted an autonomous status to enforce the Law.

Pursuant to section # 3 of MRTPO, 1970, the concentration of economic power, unreasonable monopoly power or unreasonably restrictive trade practices as envisaged in the law amount to be anticompetitive practices; hence declared to be prohibited.

Before embarking upon review of anticompetitive practices under MRTPO, 1970, I may deem it proper to solicit herein below following provisions of MRTPO, 1970 for ready reference:

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<sup>22</sup> Competition Policy & Law: a presentation by Mr. Ahmad Khan, formally Member, Monopoly Control Authority, Government of Pakistan at International Islamic University, Islamabad – 2007.

According to Section 4 undue concentration of economic power shall be deemed to have been brought about, maintained or continued if -

- a) there is established, run or continued an undertaking the total value of whose assets is not less than four billion rupees or such other amount as the Authority may by rule prescribe, and which is -
  - i. not owned by a public company, or
  - ii. is owned by a public company in which any individual holds or controls shares carrying not less than fifty per cent, or such other percentage as the Authority may by rule prescribe, of the voting power in the undertaking;
- b) there are any dealings between associated undertakings which have or are likely to have the effect of unfairly benefiting the owners or shareholders of one such undertaking to the prejudice of the owners or share-holders of any other of its associated undertakings.<sup>23</sup>

Speaking in terms of critical review / examination of the above provisions of law; section # 4 exposes the circumstances which may constitute undue concentration of economic power. However, conversely we see that the entrepreneur has the primary right to decide on the corporate structure of its business. If for any reason (e.g. for increasing the capital base, taking advantage of the tax rate differential, etc.) the entrepreneur decides to establish a 'private company' (The Companies Ordinance 1984 allows establishing one director company that is no different from sole proprietorship except for certain legal safeguards). Further, GOP Investment Policy allows holding of 100 percent capital by foreign investors and conduct businesses in Pakistan through incorporating a domestic company or a branch of the foreign company or its representative office. The provision concerning divesting where a person shareholding exceeds 50 percent of public company shares appears to be contrary to Government's investment policy and a disincentive for foreign investors. The second aspect of section #

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<sup>23</sup> Section 4 The Monopolies & Restrictive Trade Practices Ordinance, 1970. [www.mca.gov.pk](http://www.mca.gov.pk) dated 13-08-2007.



borrower or any of its associated undertakings will make any loan to a person or undertaking associated with the lender.<sup>25</sup>

2) No such relationship, acquisition, merger or loan as is referred to in subsection shall be deemed to have the effect of bringing about, maintaining or continuing unreasonable monopoly power if it is shown:-

(a) that it contributes substantially to the efficiency of the production or distribution of goods or of the provision of services or to the promotion of technical progress or export of goods;

(b) that such efficiency or promotion could not reasonably have been achieved by means less restrictive of competition; and

(c) that the benefits of such efficiency or promotion clearly outweigh the adverse effect of the absence or lessening of competition.<sup>26</sup>

Section # 5 of MRTPO, 1970 deals with unreasonable monopoly powers. It deals with the associated firms, acquisitions and mergers. The underlying intention is to deny the enterprises the potential to abuse their 'market power' unless they establish that they qualify under the 'gateway' provisions of the law. The prescribed threshold for the Authority to take cognizance of the proposed action for acquisitions or mergers is 1/3<sup>rd</sup> market share. There is no provision for 'pre-merger control' by the enterprise concerned; hence the Authority mostly relies on third party information. Moreover, the determination of market share is a tedious task unless clear rules are made there for. Critically enough, several competition laws provide indicative rather than rigid threshold bases / criteria. These may be market share, turnover, and / or aggregate assets. Combination or otherwise of similar indicative thresholds or, for that matter, number of competitors left in the

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<sup>25</sup> The Monopolies & Restrictive Trade Practices Ordinance, 1970. [www.mca.gov.pk](http://www.mca.gov.pk) dated 13-08-2007

<sup>26</sup> Ibid.

market place in the post-merger situation deserves consideration. Further, the incorporation of the provision for pre-acquisition and pre-merger control and preparation of 'Pre-Merger Guidelines' for the Authority and the entrepreneurs concerning market share determination, product lines and differentiation deserves serious consideration. While the law takes cognizance of acquisitions and mergers resulting in market dominance, there is no concept of 'single monopoly firm' in law. Consider intervention in such situations in cases where market size exceeds a given threshold and there is likelihood for abuse of 'public interest'. Behavioral abuse could be regulated through several or one of the following regulatory measures:

- Price controls by the relevant agency,
- Imposition of fines by the Authority,
- De-linking in cases of tight selling,
- Competition advocacy.<sup>27</sup>

Here I want to refer some cases dealt by the MCA of mergers:<sup>28</sup>

**Lipton Pakistan Ltd and Brooke Bond Pakistan Ltd case:**

Unilever, United Kingdom based company had majority shares in Lipton Pakistan Limited and forty percent shares in the equity of Brooke Bond Pakistan Limited. The merger was to make a dominant undertaking with more than eighty percent of the market share. Issue of computation of market share was raised; Due to unorganized sector, smuggled tea and other substitutes of tea, etc. MCA allowed the merger subject to some conditions: the undertaking will develop tea cultivation at six hundred hectares by the year 2004 in areas identified in District Mansehra of NWFP province, as a first step towards tea production. MCA monitored the implementation of its

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<sup>27</sup> Competition Policy & Law: a presentation by Mr. Ahmad Khan, formally Member, Monopoly Control Authority, Government of Pakistan at International Islamic University, Islamabad – 2007.

<sup>28</sup> Mergers and market dominance: cases and country experiences regional conference on 'competition policy, competitiveness and investment in a global economy: the asian experience' Colombo, Sri Lanka, may 19-21, 2004 by Abdul Ghaffar, Member, Monopoly Control Authority Pakistan. [www.mca.gov.pk](http://www.mca.gov.pk) dated 28-09-2007

Order during the fixed time period; company is facing certain difficulties in achieving the targets of tea production; after some time the undertaking approached the MCA with a revised plan of developing tea production and required extension in timeframe till 2006 stating that due to unforeseen floods / draught over last few years, the targets envisaged originally could not be achieved. MCA felt it difficult to permit the extension as it would amount to revision of its own order, as under the Law, MCA has no powers to review its own Order.<sup>29</sup>

**Acquisition of the Polka Ice-cream by Lever Brothers Pakistan Ltd:**

After the acquisition of Polka Ice-cream by the Lever Brothers Pakistan Ltd, the market share of the undertaking increased to sixty five percent in the organised sector producing ice-cream. The company argued the case under gateways on the efficiency grounds, usage of international standards, prospective decrease in price, availability of technical expertise, etc. MCA allowed merger on fulfillment of certain conditions and efficiency grounds, etc.

**Merger Premier Tobacco and Lakson Tobacco:**

Premier Tobacco Industries Limited was merged into Lakson Tobacco Limited and post-merger share exceeded the threshold. During the merger, Lakson Tobacco Limited raised the following points that the market was previously dominated by the Pakistan Tobacco Company Ltd. As a result of the merger, the Lakson Tobacco Limited is better capable to compete with big giant i.e. the Pakistan Tobacco Limited. The competition conditions have, therefore, improved moreover in cigarette industry, the consumer is brand captive and does not hassle as to who is the producer, the brands compete with each other even produced by the same maker and market of each brand is split one and should not be added together to compute the market

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<sup>29</sup> Mergers and market dominance: cases and country experiences regional conference on 'competition policy, competitiveness and investment in a global economy: the asian experience' Colombo, Sri Lanka, may 19-21, 2004 by Abdul Ghaffar Member, Monopoly Control Authority Pakistan. [www.mca.gov.pk](http://www.mca.gov.pk) dated 28-09-2007.

dominance of an undertaking producing a number of brands and the issue of counterfeits, smuggled cigarettes, and cigarettes produced by unorganized sector was raised. After careful assessment of the facts, the case was cleared by the MCA, while approving with the mentioned arguments of the company.<sup>30</sup>

According to Section 6 of the ordinance unreasonably restrictive trade practices shall be deemed to have been resorted to or continued if there is any agreement - <sup>31</sup>

(a) between actual or potential competitors for the purpose or having the effect of –

(i) fixing the purchase or selling prices or imposing any other restrictive trading conditions with regard to the sale or distribution of any goods or the provision of any services;

(ii) dividing or sharing of markets for any goods or services;

(iii) limiting the quantity or the means of production, distribution or sale with regard to any goods or the manner or means of providing any service;

(iv) limiting technical development or investment with regard to the production, distribution or sale of any goods or the provision of services;

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<sup>30</sup> Mergers and market dominance: cases and country experiences regional conference on 'competition policy, competitiveness and investment in a global economy: the asian experience' Colombo, Sri Lanka, may 19-21, 2004 by Abdul Ghaffar Member, Monopoly Control Authority Pakistan. [www.mca.gov.pk](http://www.mca.gov.pk) dated 28-09-2007.

<sup>31</sup> Section 6, The Monopolies & Restrictive Trade Practices Ordinance, 1970. [www.mca.gov.pk](http://www.mca.gov.pk) dated 13-09-2007.

(v) excluding by means of boycott any other person or undertaking from the production, distribution or sale of any goods or the provision of any services;

b) between a supplier and a dealer of goods fixing minimum resale prices including--

(i) an agreement with a condition for the sale of goods by a supplier to a dealer which purports to establish or provide for the minimum prices to be charged on the resale of the goods in Pakistan; or

(ii) an agreement which requires as a condition of supplying goods to a dealer the making of any such agreement;

c) Which subjects the making of any agreement to the acceptance by suppliers or buyers of additional goods or services which are not, by their nature or by the custom of the trade, related to the subject matter of such agreement.<sup>32</sup>

2) No such agreement as is referred to in sub-section (1) shall be deemed to constitute an unreasonably restrictive trade practice if it is shown--

(a) that it contributes substantially to the efficiency of the production or distribution of goods or of the provision of services or to the promotion of technical progress or export of goods;

(b) that such efficiency or promotion could not reasonably have been achieved by means less restrictive of competition; and

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<sup>32</sup> Section 6, The Monopolies & Restrictive Trade Practices Ordinance, 1970. [www.mca.gov.pk](http://www.mca.gov.pk) dated 16-09-2007.

(c) that the benefits from such efficiency or promotion clearly outweigh the adverse effect of the absence or lessening of competition.<sup>33</sup>

Section # 6 is all about unreasonably restrictive trade practices. This provision caters both for situations of horizontal and vertical constraints. While it is easy to investigate and decide in cases of hard core cartels (i.e. where written agreements exist between firms in collusive arrangements), it is not as such easy to investigate / decide on soft core cartels (i.e. where only an understanding or arrangement exists). It may be pertinent to observe that MRTPO 1970 does not treat 'unfair trade practices' as constituting monopoly. This is, however covered under the model Consumer Protection Law.

As per section 7 of the ordinance-

(1) Without prejudice to the provisions of sections 4, 5 and 6, the Authority may by General Order prescribe the circumstances in which and the conditions under which undue concentration of economic power or unreasonable monopoly power shall be deemed to exist and the practices which shall be deemed to be unreasonably restrictive trade practices.

(2) Where the Authority is of opinion that the making of a General Order under sub section (1) may be in the public interest, it shall conduct an inquiry affording the persons or undertakings likely to be affected by such Order such opportunity of being heard and of placing before it relevant facts and material as it may be deem fit.

(3) Before making any General Order under sub-section (1), the Authority shall:--

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<sup>33</sup> Section 6, The Monopolies & Restrictive Trade Practices Ordinance, 1970. [www.mca.gov.pk](http://www.mca.gov.pk) dated 13-09-2007.

- a. publish in the official Gazette and in such other manner as in its opinion will bring it to the notice of all persons and undertakings likely to be affected thereby a draft of the proposed General Order together with a notice inviting suggestions or objections to be submitted before a date specified therein;
- b. consider any objection or suggestion which may be received by it from any person or undertaking with respect to the draft; and
- c. Where it deems appropriate, afford an opportunity to any such person or undertaking of being heard and of placing before it facts and material in support of the objection or suggestion. <sup>34</sup>

Section # 7 postulates certain other circumstances which MCA may treat as anticompetitive; but lamentably it does not provide for any clear set of rules / parameters to determine circumstances other than those provided in section # 3 as constituting cognizable under MRTPO 1970. <sup>35</sup>

However, despite undesirable circumstances, MCA has decided various cases involving following companies/entrepreneurs/undertakings, including: Pakistan Oxygen Limited, Bata Shoe Company Ltd. M/s. Muller & Phipps Pakistan Ltd., Exxon Chemical (Pakistan) Ltd, Searle Pakistan Ltd., M/s. Siemens Pakistan Engineering Co. Ltd. Whereas, most pleasantly speaking, M/s. Schuckertwerke Aktiengesellschaft Berlin and Erlangen, M/s. Warner Lamberet (Pak) Ltd., Chloride (Pakistan) Ltd., Lever Brothers (Pak) Ltd., Pakistan Burma Shell, Sterling Products (Pak) Ltd, Rafhan Maize Products Ltd, SmithKline & French (Pak) Ltd., Burshane (Pak) Ltd, Shell (Pak) Ltd. & Cyanamid (Pak) Ltd. are among those who were directed to delete or modify trade restrictive clauses in their agreements.

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<sup>34</sup> Section 7, The Monopolies & Restrictive Trade Practices Ordinance, 1970. [www.mca.gov.pk](http://www.mca.gov.pk) dated 29-09-2007.

<sup>35</sup> Competition Policy & Law: a presentation by Mr. Ahmad Khan, formally Member, Monopoly Control Authority, Government of Pakistan at International Islamic University, Islamabad – 2007.

This provision concerns 'Composition of Authority' and provides that it shall consist of not less than three members one of whom shall be appointed as Chairman, according to section 8 of the ordinance. Persons having any such financial or other interest as is likely to affect prejudicially their functions as members of the Authority shall be appointed as its members. Persons appointed as members are required to make declarations affirming secrecy and fidelity in prescribed form. A Member shall have tenure of five years unless he earlier resigns, or otherwise ceases to hold office or retires from service. Authority's act/proceedings shall not be invalid by reason of absence of a Member or existence of a vacancy among its Members or any defect in its constitution. Authority may delegate all or any of its powers and functions to any two of its Members.<sup>36</sup>

- a. Academic qualifications and work experience requirements for selection of the Chairman and Members are not prescribed which has adversely affected its quality of decisions.
- b. Selection of civil servants more or less on a regular basis as Members has compromised independence of the Authority.
- c. Five years' tenure has been compromised by adding provisions of retirement of members on attaining the age of superannuation.

Authority has the powers to appoint its officers and staff as per section 9, prescribe qualifications for various positions, and promote them to next grade against existing vacancies.<sup>37</sup>

As per section 10:

- Register undertakings, individuals and agreements.

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<sup>36</sup> Section 8, The Monopolies & Restrictive Trade Practices Ordinance, 1970. [www.mca.gov.pk](http://www.mca.gov.pk) dated 30-09-2007.

<sup>37</sup> Ibid.



- Conduct enquiries into general economic conditions ( including sector analyses ) with particular reference to the monopolies, market dominance and restrictive practices
- Advance rulings to undertakings/persons on matters subject of the Ordinance and rules made there under.
- Recommend to the Govt. suitable actions to prevent or eliminate monopolies, market dominance of undertakings or restrictive trade practices.
- Make orders and take all such actions as are necessary for carrying out the purposes of the Ordinance.<sup>38</sup>

Proceedings, in case of contravention of section 3 is covered under section 11:

- Authority may make appropriate order under section 12 where it is satisfied that there has been or is likely to be contravention of the provisions of section 3 and action is necessary in public interest.
- Prior to making order under section 12, it is necessary for the Authority to issue a show cause notice stating the reasons for such action, and provide an opportunity of being heard and of placing before it facts and material in support of the contention of the undertaking.
- Orders under section 12 are valid notwithstanding any other law in force or any contract/memorandum/article of association.<sup>39</sup>

The law provides that it is condition precedent that the Authority is satisfied, on the basis of its enquiries, that the contravention of the provisions of section 3 is contrary to public interest.

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<sup>38</sup> Section 10, The Monopolies & Restrictive Trade Practices Ordinance, 1970. [www.mca.gov.pk](http://www.mca.gov.pk) dated 3-10-2007.

<sup>39</sup> Section 12, Ibid

This provision concerns the issue of show cause notice in cases where the Authority is satisfied that there exists a monopoly situation in the meanings of Sec. 3 of MRTPO, 1970 (i.e. the aggregate value of assets of a private limited company has exceeded the prescribed threshold, firm's market share exceeds the prescribed threshold as a consequence of the proposed acquisition or merger, or firms enter into collusive arrangements – written or otherwise) and that it is contrary to or likely to be contrary to public interest.

Review the type of enquiries to be conducted to reach the level of satisfaction underlying Section 11. Is it envisaged to conduct the formal enquiry to be signed by the Authority or the noting on the relevant file adequately constitutes the 'enquiry' in the legal sense? Should the enquiry be conducted by the technical team with full participation of the Authority or end at the person heading the 'Investigation Wing' who is available for cross examination by the Authority / Firm during adjudication of cases. These are some of the important questions because their answers will define the organization of MCA.

Section 12 deals Orders of the Authority:

- Section 12 empowers the Authority to make appropriate orders in respect of cases where it is satisfied that there has been contravention of the provisions of section 3 and it was contrary to public interest.
- Where any party to a restrictive trade practice does not carry business in Pakistan, Authority's order is valid with respect to that part of such practice as is carried in Pakistan.
- Divesture of stocks is not to be below the face value of shares or at below the aggregate value of such shares and 50 percent of difference below such value and net worth of stocks.

- Where stocks offered for divesture are not subscribed no fresh order to be issued within 3 years.<sup>40</sup>

Orders in case of undue concentration of economic power:

- Order conversion of firms or undertaking other than public companies to public limited companies within prescribed timeframe and manner.
- Order controlling shareholders of public limited companies to divest their shares in prescribed timeframe and manner to general public or NIT.
- Prescribe circumstances / conditions for dealings between associated undertakings.

Orders in case of unreasonable monopoly power:

- Orders persons/undertakings to divest of stocks or shares or other beneficial interest within the specified time and conditions.
- Order person concerned to divest himself of the position held as officer, director or partner in an undertaking within specified time and conditions.
- Order the concerned person to divest of management or control of the undertaking within specified time and conditions.
- Prohibit the person or undertaking concerned from acquiring stocks / assets of another undertaking, or from merger with another undertaking.
- Limit total amount of loan made by a bank/insurance company to an individual or undertaking associated with it.
- Limit investments of any undertaking engaged in banking, investment or insurance business
- Require person or undertaking concerned to take appropriate actions to restore competitive prices and eliminate restrictions on output or remove barriers for entry of new firms.<sup>41</sup>

In the case of unreasonably restrictive practices:

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<sup>40</sup> Section 12, The Monopolies & Restrictive Trade Practices Ordinance, 1970. [www.mca.gov.pk](http://www.mca.gov.pk) dated 05-10-2007.

<sup>41</sup> Ibid.

- Order to discontinue or not to repeat restrictive trade practice and terminate/modify agreement relating thereto in the specified manner.
- Order to restore competition in production, distribution, or sale of goods / services, i.e. no quota restrictions on production, no price fixing or tied sales, discontinue bid rigging, refrain from entering technology development agreements at the expense of others.<sup>42</sup>

Section - 13: Power to issue interim orders:

- Pending the proceedings for issuance of final order the Authority may, in public interest, issue an interim order after giving the undertakings an opportunity of being heard.
- The interim order may direct the parties concerned to or refrain from doing or continuing to do any act specified in the order.
- The interim order remains in force unless modified or cancelled for the specified period but not beyond the date of issue of final order.<sup>43</sup>

*Comments:*

- The interim order is essentially to safeguard 'public interest' rather than safeguard 'undertakings interest'.
- In cases of acquisitions and mergers, the interim order may provide temporary injunction.
- In case of restrictive practices, the interim order may, for example, restore the prices to the previous level, not to implement agreements ( say between suppliers and distributors ), do not disburse loans granted to the associated undertakings or independent parties serving as a conduit between the bank / insurance company and the associated undertaking.

Section 14 deals Special enquiry:

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<sup>42</sup> The Monopolies & Restrictive Trade Practices Ordinance, 1970. [www.mca.gov.pk](http://www.mca.gov.pk) dated 30-10-2007.

<sup>43</sup> Section 13, Ibid.

7A. 7982.

- The Authority, on its own or on reference by the Govt., may conduct enquiries on competition related matters.
- The Authority may, on receipt of complaint from not less than 25 persons, conduct enquiries on complaint related matters.
- If the findings of the enquiries require in public interest to initiate proceedings under section 11, Authority shall initiate necessary proceedings.<sup>44</sup>

Powers of the Authority in relation to proceedings or enquiry Section - 15:

- Authority has the same powers as vested in a civil court under Code of Civil Procedure, 1908 in respect of summoning and enforcing attendance of witnesses and examining under oath; discovery and production of documents, etc. producible as evidence; reception of evidence or affidavits; requisitioning of any public record from any court or office; issuance of commissions for examination of witnesses and documents
- Any proceedings before the Authority deemed as judicial proceedings within the meanings of section 193 and 228 of PPC and the Authority as civil court for purposes of section 195 and Chapter XXXV of CCP.
- The Authority may order any person to produce for examination / retention any books, accounts or other documents relating to matters under examination, and to furnish such information in his possession necessary for the purposes of the Ordinance.<sup>45</sup>

Section - 16 to 18 deals registration, etc.

- Under section 16, the specified undertakings, individuals and agreements require registration with the Authority.

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<sup>44</sup> Section 14, The Monopolies & Restrictive Trade Practices Ordinance, 1970. [www.mca.gov.pk](http://www.mca.gov.pk) dated 30-10-2007.

<sup>45</sup> Section 15, Ibid.

- Applications for registration to be made in prescribed form giving information on the value of assets, volume of individual goods/services sold, etc ( for undertakings ), statement of management and control over an undertaking or its shares (in case of an individual), and copy of the agreement and names/addresses of parties there to ( in case of agreements ).
- Applications to be signed by the concerned executive of the undertaking, or the individual concerned, or one of the parties to the agreement.
- Subsequent variations to the relevant facts given along with the application to be intimated to the Authority within 30 days of the variation.
- Under section 17, separate registers for registration of undertakings, individuals and agreements to be kept.
- Where registration requirements are no more valid, registration to be cancelled.<sup>46</sup>

#### 1. Information Obtained at the Time of Registration of Undertakings:

- Name, Registered Office / Head Office, Registration Number, Type of Organization ( i.e. proprietorship, partnership, company );
- If proprietorship / partnership:
  - Names / address of proprietor / partners,
  - Voting power of proprietors/partners in any associated undertaking, or any other undertaking,
  - Inter-connection between the undertakings.
- If private / public company
  - Names / address of directors including Managing Director / Manager
  - Voting power of directors/manager in the undertaking, associated undertaking or any other undertaking

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<sup>46</sup> Section 17, The Monopolies & Restrictive Trade Practices Ordinance, 1970. [www.mca.gov.pk](http://www.mca.gov.pk) dated 12-11-2007.

– Inter-connection between the undertakings.

- Value of assets of undertaking and associated undertakings, if any [Section 2(1)(o)].
- Volume of goods and services produced, distributed or sold/supplied during the next preceding year [Section 16(1)(a)].
- Percentage of total production and supply of goods (itself or together with the associated undertaking) during the next calendar year [Section 16(1)].
- Whether the undertaking has established minimum resale price of goods produced or distributed for retailers or wholesalers [Section 16(1)(e)].
- Whether itself or with associated undertaking sole distributor or supplier for more than one undertaking of any goods or services [Section 16(1)(f)].
- In case of associated undertakings engaged in same line of business: % age of total production or supply of goods or services they produced, distributed, sold or supplied during the next preceding year [Section 16(1)(b)].<sup>47</sup>
- In case of acquisitions or mergers, the effect in terms of % age of market share of total goods produced, supplied or distributed, or services provided in the market.
- In case of mergers, full particulars of common management or control or the subsidiary nature of the other undertaking.
- In case of banks or insurance companies, loans granted to associated undertakings I amounts and terms.
- Loans and advances to subsidiary, associated companies and other undertakings – amounts and terms.<sup>48</sup>

## 2. Information Obtained at the Time of Registration of Individuals.

- Name, address and occupation of the individual.
- Name of the undertaking in relation to which application is made.
- Share capital of the public company owning the undertaking.

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<sup>47</sup> The Monopolies & Restrictive Trade Practices Ordinance, 1970. [www.mca.gov.pk](http://www.mca.gov.pk) dated 12-11-2007.

<sup>48</sup> Ibid.

- Number of shares / % age of voting power held by the individual in the public company.
- Number of shares / % age of voting power not held by the individual in the public company, and particulars thereof.
- Number of shares / % age of voting power not held or owned but controlled by the individual in the public company, and particulars thereof.
- Name of other undertakings in which individual owns shares, and number and value thereof.

### 3. Information Obtained at the Time of Registration of Agreements and Licenses of Patents or Technology:

- Names and address of parties to agreement.
- Terms of agreement.
- Details of license i.e. minimum resale price for retailers or wholesalers with regard to goods produced or distributed.<sup>49</sup>

#### *Comments:*

- This provision concerns registration of certain firms and agreements. The underlying purpose for registration appears to develop a data base and a system of periodically examining the information appearing in annual accounts such firms are required to file with the Authority.
- This purpose apparently has not been achieved as it is only a small number of firms, individuals and agreements that have registered over the last thirty five years. Authority's limited resources do not justify an extensive exercise of registration of all firms required to register under the law. Further, the expected backlash from influent businesses is not worth the effort.
- Section 16 (3) requires that the undertakings must report the changes, if any, in the information given in the application for registration. This is seldom done. The Authority, in practice, has also not pursued this in the past. The

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<sup>49</sup> The Monopolies & Restrictive Trade Practices Ordinance, 1970. [www.mca.gov.pk](http://www.mca.gov.pk) dated 12-11-2007.



information provided by the undertakings/individuals is therefore mostly as old as the date of registration. The only source of updating is the annual audited accounts or specific requisition through the Supply of Information Rules. There is an element of the originally supplied information becoming obsolete at any given point of time after the registration.

- Government may consider deleting this provision and develop various alternatives to achieve the purpose of creating an integrated large data base on firms' profiles.

Penalties deals under section 19:

- In case of non-compliance of these orders, the Authority may impose fine under Sec. 19. Similarly, fines may be imposed where information under Sec. 21 Supply of Information Rules is denied by the undertakings or the undertakings/individuals required to register do not register with the Authority under section 16.
- An initial penalty up to Rs. 100, 000/- and, for continuous default/non-compliance daily penalty up to Rs. 10, 000/-. Penalty is to be levied only after giving the person concerned an opportunity of being heard.<sup>50</sup>

*Comments:*

- The law does not provide any penalty for resorting to a restrictive practice even where it is established. Similarly, clear provisions on penalties for not obtaining Authority's approval for acquisitions/mergers cognizable under the law is required do not exist. It is only for non-compliance of Authority's orders that penalties are attracted. Similarly, the non-compliance of the rules on supply of information *per se* is not being punished. It is only in the event of

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<sup>50</sup> The Monopolies & Restrictive Trade Practices Ordinance, 1970. [www.mca.gov.pk](http://www.mca.gov.pk) dated 12-11-2007.

no response to Authority's specific directions for supply of such information (otherwise not voluntarily provided) that attracts penalties.

- Govt. may consider levy of penalties at two steps – first penalty at the time contravention is established, and the second penalty for non-compliance of order under sec. 12. Rules on supply of information may accordingly provide for provision of information at prescribed intervals – non-compliance triggering automatic penalties (without any orders under sec. 19).
- Penalties and fines prescribed in this section are very low. Each time Authority decides to levy penalty, it must issue a notice for hearing and make an order imposing penalty/fine. Consider increasing the amount of fine, providing for prosecution/imprisonment in appropriate cases, and automatic imposition of fines (without issuing a notice and hearings by the Authority except for the original penalty for non-compliance of Authority's order).

Appeal before the High Court:

- The law provides for appeal against the orders of the Authority before the High Court, on matters of law or procedures, within 60 days of the order.<sup>51</sup>

*Comments:*

- There is no mention of appeal/reference against the order of the High Court before the Supreme Court in the Ordinance.
- There have been several proposals to consider appeal on matters of facts.

Section - 21: Power to call for information relating to undertakings:

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<sup>51</sup> The Monopolies & Restrictive Trade Practices Ordinance, 1970. [www.mca.gov.pk](http://www.mca.gov.pk) dated 12-11-2007.

- Authority is empowered to issue general or special orders requiring the undertakings and individuals to periodically, or as and when required, provide information concerning their business activities considered useful for the purposes of the Ordinance.
- The Authority has prescribed various forms for providing the required information.<sup>52</sup>

Section - 22: Compensation not payable:

- No person is entitled to any compensation or damages for any loss or damages arising from termination of any agreement or employment or divestment of any shares or assets in pursuance of Authority's orders.<sup>53</sup>

Section - 23: Indemnity:

- Authority and its officers are indemnified against any suit, prosecution or any other legal proceedings for actions under the Ordinance.<sup>54</sup>

Section - 24: Power to make rules:

- Authority empowered to make rules regarding procedures, fees and other matters for carrying purposes of Ordinance.<sup>55</sup>

Section - 25 and 25A: Exemptions:

- Undertakings owned by federal and provincial governments
- Undertakings owned by body corporate established by Govt. or whose CEO is appointed by or with the approval of federal or provincial govt.
- Actions taken by a person in pursuance of Govt. directives.

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<sup>52</sup> Section 21, The Monopolies & Restrictive Trade Practices Ordinance, 1970. [www.mca.gov.pk](http://www.mca.gov.pk) dated 12-11-2007.

<sup>53</sup> Section 22, Ibid.

<sup>54</sup> Section 23, Ibid.

<sup>55</sup> Section 24, Ibid.

- Actions taken by a trade union or its members for carrying out its purposes.
- Privatized public sector enterprises whose functions are regulated by NEPRA, OGRA, PTC and PEMRA.<sup>56</sup>

## CONCLUSION:

Pursuant to above discussion in relation to anticompetitive practices and kindred legal provisions available in MRTPO, 1970; one may conclude that competition laws prohibit agreements in restraint of trade, monopolization and attempted monopolization, anticompetitive mergers and tie-in schemes, and, in some circumstances, price discrimination in the sale of commodities. Anticompetitive agreements among competitors, such as price fixing and customer and market allocation agreements are typical types of restraints of trade proscribed by the competition laws. These types of conspiracies are considered pernicious to competition and are generally proscribed outright by the competition laws. Resale price maintenance by manufacturers is another form of agreement in restraint of trade. Other agreements that may have an impact on competition are generally evaluated using a balancing test, under which legality depends on the overall effect of the agreement. It is important the technical assistance programs should be continued side by side with the negotiations to help develop understanding of competition policy and the effective implementation on the part of developing countries.

What's more, it is pertinent to observe that there is no universal role model as such to be followed in the area of competition law. Nevertheless, it is imperative to benefit from the experience of the developed countries having

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<sup>56</sup> Section 25a, The Monopolies & Restrictive Trade Practices Ordinance, 1970. [www.mca.gov.pk](http://www.mca.gov.pk) dated 12-11-2007.

established norms in this field other than UNCTAD Model Law. This approach has several advantages, for instance, ready-made case law, learning externalities, etc.

## CHAPTER II

### **Efficacy of the Provisions of MRTPO 1970 in Present Economic Milieu / Environment and Suggested Recommendation for Change(s)\*:<sup>57</sup>**

**Introduction:** MRTPO, 1970 was made applicable to private enterprises only. Public sector enterprises as well as several services including communication, construction, real estate, money changing, storage, processing, indenting, medical, legal, education, accounting, etc were excluded from the scope of monopoly law. Restrictive and unfair trade practices in a single firm monopoly situation also fell out of the scope of MRTPO, 1970. Similarly, situations such as refusal to deal, vertical restraints and tying of supplies and services with purchase agreements were also not covered under MRTPO, 1970. Further, a very weak implementation mechanism was provided. Penalties for non-compliance of MCA's orders were extremely low and applicable only for non-compliance of MCA orders. Looking at the history of implementation of MRTPO, 1970, we may observe that the MCA has mostly been handicapped by legal, capacity and present economic constraints.

### **Efficacy of the Provisions of MRTPO, 1970 in Present Economic Milieu/Environment**

As to the efficacy of the provisions of MRTPO, 1970 in present day economic milieu; it is important to note that the present MRTPO 1970 is substantively the same that was enacted in 1970. Since then, the economic conditions have substantially changed and the government set-up various committees / commissions from time to time to review corporate laws. The amendments proposed by these committees and commissions were basically some deletion/improvement in the existing text of the Ordinance. Therefore, a

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<sup>57</sup> This topic was selected at the time prior to the promulgation of the Competition Ordinance 2007. Hence, our review of the MRTPO 1970 may be considered in that perspective.

complete review of the Ordinance was required to give it the shape of a competition law, since globalization and liberalization was adding newer and complex aspects to the definition of market structure, concentration, etc. Awareness was growing at the international level to develop rules for controlling anti-competitive conduct of firms and measures by government that could adversely affect competition. Consequently, elements of competition policy were introduced in the multilateral and bilateral trade negotiations.

On higher level of interpretation, speaking in terms of efficacy of provisions of MRTPO, 1970, it is observed that the approach of MRTPO 1970 was quantitative, i.e. threshold based like WB-OECD Model, whereas Companies Ordinance, 1984 allows otherwise. If for any reason (e.g. for increasing the capital base, taking advantage of the tax rate differential, etc.) the entrepreneur decides to establish a "private company"

The Companies Ordinance 1984 allows establishing one director company that is no different from sole proprietorship except for certain legal safeguards).<sup>58</sup> Further, Government of Pakistan Investment Policy allows holding of 100 percent capital by foreign investors and conduct businesses in Pakistan through incorporating a domestic company or a branch of the foreign company or its representative office. The provision concerning divesting where a person shareholding exceeds 50 percent of public company shares appears to be contrary to Government's Investment policy and a disincentive for private foreign investors. Likewise, the provisions on assets based monopolies are truly in conflict with contemporary Privatization policy.

The Law envisages too much regulation, though in theory, yet the same may

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<sup>58</sup> Companies Ordinance 1984. [www.secp.gov.pk](http://www.secp.gov.pk) dated 15-12-2007.

prove out to be detrimental to business. The Law was applicable to private sector monopolies and only on few services. Further, the Regulator's domain over privatized undertakings has also diluted MCA domain; and competition-sector regulation interface is nowhere in the law. Furthermore, exclusion of single firm monopoly also distorts competition process. MRTPO 1970 was all together silent at the qualification of the Chairman and members of MCA. The qualification of the Chairman and Members of MCA should be clearly defined in the law. The persons involved in adjudication have no legal background; hence the quality of decision was hampered.

Furthermore, MRTPO 1970 envisages overlapping of functions; investigations and adjudications, for instance, by the same officials, which may be deprecated being against internationally established norms of justice. It may be pertinent to observe that MRTPO 1970 does not treat 'unfair trade practices' as constituting monopoly. This is, however covered under the model Consumer Protection Law. MRTPO 1970 was also silent in relation to price and limited supply cartel areas. The MRTPO, 1970 does not envisage any penalty for contravention of provisions of the very law. However, it only envisages mere fiscal penalty against non compliance of orders of MCA or furnishing of false information thereto. Even otherwise, the fiscal punishment it contains is absolutely nothing in terms of wrongful gains of those who are guilty of anticompetitive practices. The concept of physical punishment, which may serve as a real deterrent, finds no room in MRTPO 1970. Even otherwise, the penalty enforcement provisions are not adequate. No compensation for consumer is also an area which has hampered efficacy of the law.

Theoretically speaking, all the actions of competition agency lead towards economic development. However, in the paragraphs to follow the developmental impact will be discussed with reference to above three



provisions for creation of competitive markets. It may be noted at the outset that though the MRTPO was enacted in 1970 but this was followed by the nationalization of businesses in early seventies which reduced the role of the Monopoly Control Authority. It was only in 1994 that the MCA was granted an autonomous status to enforce the Law.

### **Suggested Recommendation for Change(s) in MRTPO 1970:**

Competition law generally aimed at preventing restrictive business practices that significantly lessen competition, reduce consumer welfare, and result inefficient use of resources.<sup>59</sup> Trade Policy has important implications for the development of competitive markets. Domestic markets are relatively small in most transition and developing economies and often characterized by dominant firms. Economic, social, and political pressures pose obstacles to opening up such markets by breaking up dominant domestic firms. Imports, on the other hand, can bring about new competition relatively quickly. Thus liberalized trade policies such as reducing tariffs, investment controls, import restrictions and quotas, domestic production or content requirements, and the like are among the most significant measures that can be advocated by the competition agency.<sup>60</sup>

The experience of working with the law showed the desirability of modifications: firstly, the need to review the law to bring it more in line with the current economic realities and international norms; and secondly; strengthening of human and other resources of the MCA for effective enforcement. These are briefly covered in paragraphs to follow:

- The investigation and adjudication staff should be independent of each other; and one official should not do both the jobs; hence overlapping functions

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<sup>59</sup> A framework for the Design and Implementation of Competition Law and Policy: OECD-World Bank. p. 93.

<sup>60</sup> p. 94, Ibid.

thereby should be aborted. The officials involved in investigations should be provided with investigative guidelines. Moreover, the officials involved in adjudication should be well versed in law; for only then one can expect of quality decisions from the MCA.

- Special provisions was required relating to price and limited supply cartel must be incorporated in the law.
- There must be pre-merger control mechanism in the law. The incorporation of the provisions for pre-acquisition and pre-merger control and preparation of 'pre-merger guidelines' for the Authority and the entrepreneur concerning market share determination, product lines and differentiation deserves serious consideration is need of the hour.
- Technical assistance from international organizations should also be required to given to the MCA as the required expertise to run with the pace of time with reference to overall economic situation of Pakistan and, of course, the international dimension, was not available to the MCA internally.
- Another area was where MCA should benefit from technical assistance was to improve the skills of MCA officers. MCA was a limited staff strength that makes it even more important to upgrade the qualification/understanding of its staff. This may take the form of providing refresher courses to the officers especially in the field of investigative techniques and methods to analyze cases relating to unreasonable monopoly power, merger evaluation and unreasonably restrictive trade practices, accounting and law. A visit from a resource person(s) of some international organization(s) may also prove beneficial in imparting customized training to MCA officers.
- MRTPO, 1970 is all together was silent at the qualification of the Chairman and members of MCA. The qualification of the Chairman and Members of

Monopoly Control Authority should be clearly defined in the law. The persons having legal background should be employed in the Authority. As MRTPO, 1970 is performing quasi-judicial functions; its officials involved in adjudication must be familiar with legal procedure for the disposal of cases before them. The Chairman of the Authority should be a person who has been or is qualified to be a judge of the High Court.

- Information management possesses a central position in the efficient working of an organization like MCA. These are basically to replace obsolete equipment (PCs with a speed of 90 MHz only) and to make data accessible to the officers through local area networking.<sup>61</sup>
- The single firm monopoly power situations should be declared per se illegal. It may also create anti-competitive environment in a particular market, that is, to restrict competition in the market.
- Appeals against the orders of the MCA in the High Court should also be allowed to be preferred on the matters of facts also and not on the matters of law only.
- Competition enforcement will be more effective when there is a community whose members understand and support the concept of competition policy. Therefore, community awareness programs should be resorted to frequently.<sup>62</sup>
- Competition advocacy can play an important role in the legislative process in transition and developing economies. The competition agency should strive to ensure that competition rules are properly and consistently inserted into new

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<sup>61</sup> Pakistan Experience in the Enforcement of Monopolies Law And Capacity Building Requirement: Saleem Asghar Mian, Chairman MCA, Pakistan: UNCTAD; Trade & Development Board: Geneva, 3-5 July, 2002

<sup>62</sup> A framework for the Design and Implementation of Competition Law and Policy: OECD-World Bank. p. 99

legislation and regulations, where appropriate.<sup>63</sup> Experience has shown that several factors lead to successful competition advocacy:

- The MCA must develop relationships with government ministries, regulatory agencies, and other bodies that formulate, enact, administer policies affecting demand and supply conditions in various markets.
- The MCA must have specific expertise in the areas in which it seeks to intervene.
- Competition advocacy should be conducted in an open, transparent manner in order to safeguard the integrity and credibility of the competition agency.
- MCA must be independent and insulated from political and bureaucratic influence.
- An informed business press is invaluable for furthering the objectives of competition policy.<sup>64</sup>
- In enforcing this rubric of the law, the competition agency/office could end up spending an inordinate amount of time arbitrating what are really private disputes having little influence on the competitive process. To reduce that risk, the law should provide for enforcement through private actions. Every effort should also be made to ensure that the unfair competition provisions area as clear as possible. The Countries could address this issue in their general consumer protection laws instead of in their competition statute.<sup>65</sup>
- The deterrent effect of penalties is enhanced considerably if the anticompetitive acts are characterized as criminal and if individuals as well

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<sup>63</sup> A framework for the Design and Implementation of Competition Law and Policy: OECD-World Bank. p. 95

<sup>64</sup> P. 100 Ibid.

<sup>65</sup> P. 147 Ibid

as enterprises are liable.

- MCA must ensure confidentiality and data privacy of the information of the business sector that it acquires in the course of an investigation or proceedings.<sup>66</sup>
- The registration of undertakings/individuals/agreements as envisaged in the MRTPO, 1970 should be discarded with; and alternative effective sources of up-to-date information gathering should be resorted to.
- MCA should be given full administrative and financial autonomy in truly effective fashion. It should also be provided with adequate and expert work force.
- When one speaks of Rules, he may observe only MCA Rules, 1971. Rules of investigation of Cartels especially 'Soft Core Cartels' are not available, which truly need to be promulgated. Likewise Rules for the purpose of section # 7 of MRTPO 1970 also call for drafting. On the same way, determination of market share is a tedious task under present provisions of law; unless clear Rules are made there for.
- The MRTPO, 1970 does not envisage any penalty for contravention of provisions of the very law. However, it only envisaged mere fiscal penalty against non compliance of orders of MCA or furnishing of false information thereto. Even otherwise, the fiscal punishment it contains is absolutely nothing in terms of wrongful gains of those who are guilty of anticompetitive practices. The contravention of provisions of MRTPO 1970 should be treated as criminal violation; hence physical and fiscal penalty on contravention of provisions of MRTPO 1970 should be provided with. Physical punishment

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<sup>66</sup> A framework for the Design and Implementation of Competition Law and Policy: OECD-World Bank. p. 150

which may extend to at least 3 years imprisonment should be incorporated in the MRTPO 1970. Simultaneously, the quantum of fiscal penalty is insufficient. Penalty enhancement provision must be taken into consideration in revision/improvement of the law. The penalty for failing to comply with the orders of the Authority should not be less than ten million rupees; and in case of continuing default a further penalty of one hundred thousand rupees per day after the first default should be envisaged. However, the penalties how rigorous they may be are nothing unless they are implemented in its true sense and spirits. Therefore, the penalty enforcement provisions must be made adequate and effective. Competition law enforcement is both the foundation and the tool for fostering sustainable competitive markets that result in healthy inter firm rivalry, opportunities for new entry, entrepreneurship, increased economic efficiency, and consumer welfare.<sup>67</sup>

- Provisions on the Asset based monopolies are in conflict with Investment Policies Government; hence crystal synchronization between Government Investment and Privatizations Policies and corresponding provisions of MRTPO 1970 is greatly warranted.

Pursuant to above discussion in relation to anticompetitive practices and kindred legal provisions available in MRTPO, 1970; one may conclude that competition laws prohibit agreements in restraint of trade, monopolization and attempted monopolization, anticompetitive mergers and tie-in schemes, and, in some circumstances, price discrimination in the sale of commodities. Anti-competitive agreements among competitors, such as price fixing and customer and market allocation agreements are typical types of restraints of trade proscribed by the competition laws. These types of conspiracies are considered pernicious to competition and are generally proscribed outright by the competition laws. Resale price maintenance by manufacturers is another

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<sup>67</sup> A framework for the Design and Implementation of Competition Law and Policy: OECD-World Bank. p. 100

form of agreement in restraint of trade. Other agreements that may have an impact on competition are generally evaluated using a balancing test, under which legality depends on the overall effect of the agreement. It is important the technical assistance programs should be continued side by side with the negotiations to help develop understanding of competition policy and the effective implementation on the part of developing countries.

What's more, it is pertinent to observe that there is no universal role model as such to be followed in the area of competition law. Nevertheless, it is imperative to benefit from the experience of the developed countries having established norms in this field. This approach has several advantages, for instance, ready-made case law, learning externalities, etc.

To crown the above, in addition to suggestions for improvement solicited hereinabove under the caption "Recommendations for change"; it is solicited here that privatization process in Pakistan has hampered in the presence of stringent Monopoly law. Likewise, existing competition law has potential adverse effects on investment and especially private foreign investment. MRTPO 1970 applies only to a few services. Regulators' domain over privatized undertaking have diluted MCA's domain. MRTPO 1970 does not postulate any compensation for the consumer in cases of contraventions which really encourage undertakings to resort to anticompetitive practices. Therefore, these issues must be addressed dynamically so that the prime objectives of any competition law; i.e. consumer welfare and overall economic efficiency of a country may duly be satisfied. I would like to end up on the statement; we should seed the true plant to harvest a desirable reap.

#### **CONCLUSION:**

This topic was selected at the time prior to the promulgation of the Competition Ordinance 2007. Hence, our review of the MRTPO 1970 may be considered in that perspective.

When one analyses efficacy of the provisions of MRTPO, 1970 in present day economic milieu; one is bound to observe that the present MRTPO is substantively the same that was enacted in 1970. Since then, the economic environment has substantially changed. Overtime, Pakistan Government set-up various committees / commissions to review corporate laws which, mostly, proposed deletion / improvement in the existing text of the MRTPO. Therefore, a complete review of the Ordinance is required to give it the shape of a competition law, since, globalization and liberalization is adding newer and complex aspects to the definition of market structure, concentration, etc. To crown the above, in addition to suggestions for improvement solicited above under the caption "Recommendations for change"; it is solicited that privatization process in Pakistan has hampered in the presence of stringent Monopoly law. Likewise, existing competition law has potential adverse effects on investment and especially private foreign investment. MRTPO applies only to a few services. Regulators' domain over privatized undertaking have diluted MCA's domain. MRTPO does not postulate any compensation for the consumer in cases of contraventions which really encourage undertakings to resort to anticompetitive practices. Therefore, these issues must be addressed dynamically so that the prime objectives of any competition law; i.e. consumer welfare and overall economic efficiency of a country may duly be satisfied. I would like to end up on the statement; we should seed the true plant to harvest a desirable reap.



## CHAPTER III

### Newly Introduced Competition Ordinance – 2007

**Introduction:** Present global best practices now required a new organization that would assist healthy competition among service providers. It is, therefore, considered desirable to enact a new competition law to replace the MRTPO 1970 and carry out necessary institutional strengthening and capacity building of a new "Competition Commission" to replace the MCA.

The Competition Ordinance 2007 has been promulgated by the President of Pakistan on 2nd October 2007.

In its preamble, the purpose of the Ordinance has been described as: -

"an Ordinance to provide for free competition in all spheres of commercial and economic activity, to enhance economic efficiency and to protect consumers from anti-competitive behaviour".<sup>68</sup>

The objective of the Ordinance is that an undertaking does not abuse its dominant position in a "relevant market". It states that, a dominant position shall be deemed to have been created or is existed if it consists of practices which prevent, restrict, reduce or distort competition in a "relevant market".<sup>69</sup>

In this chapter, the policy considerations for introduction of Competition Ordinance, 2007 in Pakistan, an overview and analysis of the substantive provisions of the Competition Ordinance, 2007 and some procedural aspects shall be examined.

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<sup>68</sup> Competition Ordinance, 2007. [www.cc.gov.pk](http://www.cc.gov.pk) dated 12-03-2008.

<sup>69</sup> Ibid.

The Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance was set up in 1970, as an instrument of market regulator to manage and control monopolies, cartels and unfair trade practices. The basic reason / purpose of this law was to regulate economic activities of private enterprises to make sure that they do not achieve undue concentration of economic power or unreasonable monopoly power or resort to unreasonably restrictive trade practices.

Presently international best practices, however, required a new modern organization that would assist strong competition among service providers. It was, therefore, considered desirable to enact a new competition law to replace the MRTPO 1970. The Competition Commission of Pakistan is envisaged to carry out practically all functions which were within the jurisdiction of Monopoly Control Authority.

The Competition Ordinance 2007 has been promulgated by the President of Pakistan on 2nd October 2007. In its preamble, the purpose of the Ordinance has been described as: -

"an Ordinance to provide for free competition in all spheres of commercial and economic activity, to enhance economic efficiency and to protect consumers from anti-competitive behavior".<sup>70</sup>

The objective of the Ordinance is that an undertaking does not abuse its dominant position in a "relevant market". It states that, a dominant position shall be deemed to have been created or is existed if it consists of practices which prevent, restrict, reduce or distort competition in a "relevant market".

Dominant position has been further defined under section 2 of the Chapter-1 as, "...if such undertaking or undertakings have the ability to behave to an appreciable extent independently or competitive, customers, consumers and

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<sup>70</sup> Competition Ordinance, 2007

suppliers and the position of the undertaking shall be presumed to be dominant if its share of the relevant market exceeds forty percent."

The whole competition law revolves around the following three most important and basic concepts;

- Firstly, it must be an "undertaking" having a "dominant position" in a "relevant market".
- Secondly, a "relevant market" must be defined for the purposes of establishing a dominant position and
- Thirdly, there are no prohibited agreements between the different undertakings. If there are such agreements, then these agreements must have either an individual exemption or falls under a block exemption to escape from the jurisdiction of the Competition Commission.<sup>71</sup>

### **Scope & Cardinal Provisions of Competition Ordinance, 2007:**

Now I would like to discuss briefly scope and cardinal provisions of newly introduced Competition Ordinance, 2007.

According to section 1 of the Ordinance, It shall apply to all undertakings and all actions or matters that take place in Pakistan and distort competition within Pakistan.

According to Section 2 of the Ordinance; Definitions: (1) in this Ordinance, unless there is anything repugnant in the subject or context,-

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<sup>71</sup> Competition Ordinance, 2007.

(a) “acquisition” Under the Competition Ordinance means any change of control of an undertaking by way of acquisition of shares, assets or any other means;<sup>72</sup>

Acquisition refers to obtaining ownership and control by one firm, in whole or in part, of another firm or business. It does not necessarily entail amalgamation or consolidation of the firms. An acquisition, even when there is a complete change in control, may lead the firms involved to continue operate as separate entities. However joint control is a potential concern to anti-trust authorities as there could be an effort to maximize profits through joint decisions because of inter-locking directorates. Acquisitions or takeovers are usually instituted by purchasing shares at ‘premium’ over existing prices.

(b) “agreement” According to Competition Ordinance 2007; includes any arrangement, understanding or practice, whether or not it is in writing or intended to be legally enforceable;

(c) “Chairman” means the Chairman of the Competition Commission of Pakistan and includes the Acting Chairman;<sup>73</sup>

(d) “Commission” means the Competition Commission of Pakistan established under section 12 of Competition Ordinance 2007.<sup>74</sup>

(e) “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;

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<sup>72</sup> Section 2 (a), Competition Ordinance, 2007

<sup>73</sup> Section 2 (c) Ibid

<sup>74</sup> Section 2 (d) Ibid.

(f) "goods" According to Competition Ordinance, 2007 includes any item, raw material, product or by-product which is sold-for consideration;

(g) "Member" means a member of the Competition Commission of Pakistan;

(h) "merger" means the merger, acquisition, amalgamation, combination or joining of two or more undertakings or part thereof into an existing undertaking to form a new undertaking; and expression "merge" means to merge, acquire, amalgamate, combine or join, as the context may require;

(i) "Minister" means the Federal Minister for Finance and, in his absence, the Adviser to the Prime Minister on Finance;

(j) "Ordinance" means the Companies Ordinance, 1984.

(k) "relevant market" means the market which shall be determined by the Commission with reference to a product market and a geographic market and a product market comprises all those products or services which are regarded as interchangeable or substitutable by the consumer' by reason of the 'products' characteristics, prices' and intended uses. A geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring geographic areas because, in particular, the conditions of competition are appreciably different in those' areas;

(l) "retailer", in relation to the sale of any goods, means a person who sells the goods to any other person other than for re-sale;<sup>75</sup>

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<sup>75</sup> Section 2 (l) Competition Ordinance, 2007

(m) "regulations" means the regulations made by the Commission under this Ordinance;<sup>76</sup>

(n) "rules" ,means the rules made by the Federal Government under this Ordinance;

(o) "service" means a service of any description whether industrial, trade, professional or otherwise;

(p) "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;

(q) "wholesaler", in relation to the sale of any goods, means a person who purchases goods and sells them to any other person for re-sale; and

(2) The words and expressions used but not defined in this Ordinance shall have the same meanings respectively assigned to them in the Ordinance.<sup>77</sup>

According to Competition Ordinance, 2007; sub-section (1) of section 3: No Person shall abuse dominant position.

In the sub section (2) describes the conditions of Dominant Position explained according to that;

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

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<sup>76</sup> Section 2 (m) Competition Ordinance, 2007.

<sup>77</sup> Section 2 (2) Ibid.

In the sub-section (3) explains that the term "practices" referred to in sub-section (2) include, but are not restricted 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 service 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 provision of any service; or
- h. refusing to deal.<sup>78</sup>

The new law does not reduce or curb a dominant position. It speaks to the abuse of dominance. While the new law point out a definite lowest market share beyond which there will be an assumption of dominance - forty per cent - this is by no means final; nor does an assumption of dominance recommend in any way that the dominance is being abused. The new law does not ruling out either dominance or abuse at lesser levels of market share.

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<sup>78</sup> Section 3, Competition Ordinance, 2007

As the MRTPO 1970 prohibited only “restrictive” trade practices to “unreasonably” lessened competition, the new law forbids any agreement that reduces competition within the relevant market, whether or not it is “unreasonably restrictive”. The new law prohibits unfair trading practices and stipulates a detailed method for review and permission of mergers and acquisitions that meet the thresholds and that would be notified under the new law rule.

Now I want to refer some cases dealt by the Competition Commission of Pakistan with reference to above mentioned section.

***Laptop case (Bahria University)***

The Commission taking notice of news published in the local newspaper alleging that the Baharia College forced the students seeking admission in the College to buy old Laptops, the Commission decided to initiate an inquiry on the matter. The Commission asked the Rector of the Baharia University for their comments on the allegation made in the said report, mainly:-

- I. It is made mandatory by the administration of Bahria College for the new applicants to buy old Laptops imported by the College;
- II. In 2006, 4500 Laptops were purchased and sold to the students as a mandatory for admission in College during 2007-08.
- III. Students seeking admission in Bahria College were unwilling to buy these Laptops due to outdated and most of the students have their own.
- IV. About 1500 Laptops still remain unsold and the College would be provided to the next batch of admission seekers.<sup>79</sup>

In their reply the University administration admitted that:

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<sup>79</sup> Bahria University (File No. 05/Sec-3/CCP/08) Date of hearing: 16th June 2008 before the Competition Commission of Pakistan.



- The University has been selling the Laptops to the students as it was considered the supportive to the students in their education especially in the field of I.T.
- The University also admitted that the scheme only to assist the students and facilitate them to make use of the digital library, E-teaching by faculty and other steps taken by the University to make the campus WiFi.
- The Administration of University also clarified that they bought the Laptops through a loan from The Bank of Punjab and they were passing on all the payments received from the students to the Banks for repayment of their loan and the interest amount.

The Administration of University also admitted that due to lack of knowledge of the Competition Law they were uninformed of the violation and as soon as they received the notice of the Competition Commission, they immediately stopped the mandatory sale of Laptops in the University and also removed the mandatory requirement of purchase of Laptops.

The Administration of University further requested the Commission to take a lenient view in their case as they are a primary institution providing educational services to a number of students and they were unaware of the violation.

After hearing the case The Member, keeping in the view all the facts placed before him observed in his order issued that since the University is providing educational services and now they have dedicated to act in accordance with the Competition Law in future, the Competition Commission is not imposing any penalty on the University. However, the University has to refund the interest amount up to Rupees Ten Million to the students who have purchased the laptops from University on installments and have been paying

the interest cost. Further the University was ordered to stop the practice tying immediately.<sup>80</sup>

***Iljin Electric Company Limited, Korea against Siemens (Pakistan) Engineering Company Limited Case:***

The Competition Commission had received a complaint from Iljin Electric Company, Korea asking for the withdrawal of the NOC issued to Siemens ( Pakistan ) to participate in the bidding for the Heavy Electrical Complex (HEC) in Privatization Commission, on the grounds that:

- a) Siemens had provided false or misleading information; and further:
- b) Siemens successfully acquire Heavy Electrical Complex; it would be in a dominant position in manufacturing 132 KV power transformers and would abuse this dominance to crowd out competitors.

An Enquiry Committee comprising Mr. Khalid A. Mirza, Chairman, and Dr. Joseph Wilson, Member, which held a hearing on 12-09-2008 attended by the representatives of both companies. The Committee required to establish whether there were any justifications in Iljin's argument that the proposed merger between Siemens and HEC would create a dominant position, allowing the merged entity to raise prices above competitive levels without losing sales or if Siemens had indeed provided false or misleading information to secure the NOC.

The Committee decided that there was no evidence of dominance in the power transformer market in Pakistan by any one of the company at present and neither was dominance to be expected as the dynamics of the market showed considerable variability taking into account domestic production and

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<sup>80</sup> Bahria University (File No. 05/Sec-3/CCP/08) Date of hearing: 16th June 2008 before the Competition Commission of Pakistan.

imports. Therefore, no violation of Sections 3 and 11 of the Competition Ordinance, 2007, were foreseen.<sup>81</sup>

As per Section 4 of the newly introduced Competition Ordinance, 2007:

(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 of 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;  
or
- d. limiting technical development or investment with regard to the production, distribution or sale of any goods or the provision of any service; or
- e. collusive tendering or bidding for sale, purchase or procurement of any goods or service;

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<sup>81</sup> Iljin Electric Company Limited, Korea against Siemens (Pakistan) Engineering Company Limited Case hearing on 12-09-2008 before the Competition Commission of Pakistan.

- f. applying dissimilar condition to equivalent transactions with other trading parties, thereby placing them at a disadvantage; and
- g. make the conclusion of contracts object t 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 in subsection (I) shall be void.

Competition Ordinance 2007 is intended to make sure that undertakings do not come into any such agreements, understanding or decisions, in respect of manufacture, distribution, supply, acquisition or control of goods and provision of services which have the aim or result of restricting or preventing, reducing competition within the "relevant market" except exempted under the section 5 of the Ordinance.

Section 5 of the Ordinance provides powers to the Competition Commission to allow exemptions from the condition of section 4 of the Ordinance that lists the conditions and situations where such agreements may create dominant positions.

Not like MRTPO 1970, which interprets "restrictive" trade practices and new competition law forbids any agreement that lessen the competition within the relevant market whether or not it is "unreasonably restrictive". Moreover, Commission has power to grant exemptions on basis of efficiency or economic advantage.

Now I want to refer some cases of Prohibited Agreements dealt by the Competition Commission of Pakistan.

***Pakistan Banking Association Case:*** In another case, Competition Commission on its suo moto notice, in response to the advertisement appeared in newspapers from Pakistan Banking Association (PBA) to introduce the Enhanced Savings Account (ESA) on behalf of its members banks, which indicated collusive or cartel like behavior.

ESA: the interest rate being fixed at four percent. The manner or means of providing services by imposing automatic conversion of PLS account (with average balances up to Rs 20,000), and fixing Rs 50 as deduction charges per month in case the average balance falls below Rs 5,000.

The following seven banks which are fined Rs. twenty five million each are:

- 1) Habib Bank Ltd, Allied Bank Ltd,
- 2) Muslim Commercial Bank Limited.
- 3) United Bank Limited.
- 4) Allied Bank Limited
- 5) Saudi Pak Bank Limited,
- 6) Atlas Bank Limited
- 7) National Bank Limited.

The penalty imposed on PBA is Rs. thirty million.

CCP granted immunity from cartel like behaviour charges to the 35 scheduled banks due to their non-implementation of ESA Scheme. The CCP has announced its decision after an inquiry against 42 Commercial Banks and PBA.

The order issued states that the subject advertisement falls within the purview of the prohibitions prescribed by Section 4 of the ordinance. Section 4 of the ordinance in its relevant parts reads as follows: "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”

The order has further elaborated that a decision of an association of undertakings reflects an understanding between its members and when such a decision is acted upon by a member bank it constitutes an ‘agreement’ between the association and the member, as defined in clause (b) of subsection 1 of Section 2, which reads as follows: “agreement includes any arrangement, understanding or practices, whether or not it is in writing or intended to be legally enforceable”.

PBA and several of the banks asserted that the ESA scheme was introduced in consultation with the State Bank of Pakistan. The issue before the commission was not the introduction of a saving scheme by a bank pursuant to a SBP circular but whether the terms and conditions of the ESA scheme prominently advertised by PBA is tantamount to a breach of Section 4 of the ordinance.

Verdict: The order states that the PBA had acted beyond its mandate as per its own submission and owing to its lead role in the formation of a cartel of the banks which is prohibited under Section 4 of the Ordinance has been imposed a penalty the sum of Rs. 30 million.

PBA has further been directed to discontinue this practice forthwith and not to repeat the prohibition specified in Section 4 of the ordinance. The seven Banks that have been penalised are these, which implemented the ESA Scheme hence establishing their participation in the cartel.

Even though the violation by the above mentioned banks could have attracted maximum penalty, considering that the ordinance is a new law and that due to non-enforcement of any anti-trust law in the past, (such cartel-

like behaviour had apparently become a norm), the order has taken a lenient view and a lower penalty has been imposed.<sup>82</sup>

***Institute of Chartered Accountant Pakistan Case:*** Institute of Chartered Accountant of Pakistan ( ICAP ) had issued ATR 14 that had fixed the minimum remuneration for conducting the audit of companies by the members of ICAP.

The CCP proceeded suo moto against ICAP by issuing a show cause notice for the violation of Section 4(1) of the Competition Ordinance, 2007.

A show cause notice was served and due opportunity of hearing was provided and on 4<sup>th</sup> December, 2008 the single member passed his order in that way declaring ATR 14 void and direct ICAP to withdraw the same from the ICAP Member's Handbook. Furthermore, to publish notice of such withdrawal in two news papers on or before 19<sup>th</sup> December, 2008 failing which ICAP was held liable to pay a penalty of Rupees. 300,000/- per day, for infringement. ICAP appealed before the Appellate Bench of the Commission (Section 41).

The Appellate Bench has held that collusive price fixing is a severe violation that should not be left without punishment unless there are strong reasons to do so. Accordingly, a fine of rupees one million on the Appellant has been imposed. In addition the Appellant will pay a fine of Rupees. 300,000/- per day of infringement commencing from fifteen days from the date of issuance of the Order, in the event of non-compliance with the directives given under the Order.<sup>83</sup>

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<sup>82</sup> Pakistan Bank's Association (File No 2/sec-4/CCP/07) Dates of Hearings February 12, 13, 14, 20, 21, 2008 and March 07, 2008 before the Competition Commission of Pakistan.

<sup>83</sup> The Institute of Chartered Accountants of Pakistan (File No. 03/Sec-4/CCP/08) Date of hearing: 28th November 2008 before the Competition Commission of Pakistan.

As per Section 5 of the Ordinance the Competition Commission may allow an exemption from section 4 with respect to a particular practice or agreement, in that case a request for an exemption has been made to it by an undertaking to the agreement or practice and the agreement is one to which section 9 applies. The exemption may be allowed subject to such circumstances as the Commission considers it suitable and just to enforce and has effect for such phase as the Commission considers suitable. This phase must be precise in the award of the exemption. An individual exemption may also be allowed so as to have effect from a date earlier than that on which it is allowed. On an request through in such a way as may be specified by rules made under section 55, the Commission may expand the phase for which an exemption has effect; but, if the rules so provide, the Commission may do so only in particular situations.

According to Section 6, if the Commission has realistic justification for believe that there has been a substance change of conditions since it allowed an individual exemption, it can by means of notice in writing:-

- a. terminate the exemption;
- b. differ or take away any condition or commitment; or
- c. enforce one or more supplementary conditions or obligations.

If the Commission has realistic doubt that the information on which it based its judgment to allow an individual exemption was imperfect, fake or mislead in a material particular, the Commission may by notice in lettering take any of the steps mentioned above.

Violate of a stipulation has the cause of cancel the exemption and fail to fulfill with a commitment allow the Commission, by notice in lettering to take



any of the steps mentioned above. The Commission may take action under on its Suo moto action or on grievance made by any person.<sup>84</sup>

As per Section 7 of the Ordinance, If agreements which fall within a particular kind of agreements are in the view of the Commission, possible to be agreements to which section 9 apply; the Commission may formulate a block exemption order giving exemption to such agreements. A block exemption order may require some conditions of obligations subject to which a block exemption is to have effect.

A block exemption order may provide:-

- a. that violation of a condition imposed by the order has the effect of canceling the block exemption in respect of an agreement;
- b. that if there is a failure to fulfill with an obligation imposed by the order, the Commission may, by notice in writing, cancel the block exemption in respect of the agreement;
- c. that if the Commission considers that a particular agreement is not one to which section 9 applies; the Commission may cancel the block exemption in respect of that agreement.

A block exemption order may provide that the order is to cease to have effect at the end of a period specified in the block exemption order.<sup>85</sup>

Block exemptions procedure is incorporated in Section 8, according to that, before making a block exemption order, the Commission shall make public facts of its proposed order in such a way as the Commission thinks most appropriate for bringing it to the attention of those likely to be affected and consider any representations about it which are made to the Commission. A

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<sup>84</sup> Section 6, Competition Ordinance, 2007

<sup>85</sup> Section 7, Ibid.

block exemption order may provide for a block exemption to have effect from a date earlier than that on which the order is made.

Section 9 deals with the criteria for individual and block exemption, the Commission may grant individual or block exemption in respect of an agreement, which substantially contributes to:-

- a. improving production or supply;
- b. promote technological or economic growth, while allowing consumers a fair share of the resulting benefit; or
- c. the benefits of that obviously outweigh the bad result of absence or reduction of competition.

The onus of claiming an exemption under this Law shall lie on the undertaking looking for the exemption.

The Competition Commission of Pakistan is empowered by virtue of section 9 of the Ordinance to award individual or block exemptions in respect of an agreement that contributes towards improving manufacturing, distribution, promotes technical and economic progress and the benefits of these agreements outweighs the adverse impacts of these agreements.

For obtaining individual and block exemptions, the procedure is laid down in section 8 of the Competition Ordinance. This is up to the individual undertaking desirous of obtaining exemptions to convince the Commission or to establish that due to its benefits, the agreements should be exempted individually or through block exemptions from the purview of the Competition Ordinance 2007.

Since the Competition Commission of Pakistan has just started operation in Pakistan, it would be exciting to watch, what would be the penalties if the provisions of the Ordinance are infringed. In addition, the block exemptions

cannot be applied to the agreement and cannot be challenged in any court of law. The Commission may impose fines for the breaches.

For the first time Pakistani businesses and consumers are sheltered from deceptive marketing practices as per Section 10 of the Competition Ordinance. According to this section no undertaking shall enter into deceptive marketing practices. The deceptive marketing practices shall be deemed to have been resorted to or continuous 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 missing a reasonable basis, related to the price, quality, method or place of manufacture, properties, fitness for use, or feature of goods;
- c. false or misleading assessment of commodities in the process of publicity; or
- d. fraudulent use of another's brand name, firm name, or product tagging or packaging.<sup>86</sup>

According to Section 11 of the Competition Ordinance, 2007, No undertaking shall enter into a merger which substantially lessens competition by creating or strengthening a dominant position in the relevant market.

Where an undertaking, intends to purchase the shares or assets of another undertaking, or two or more undertakings intend to merger the complete or part of their businesses, such undertaking or undertakings shall apply for approval from the Commission of the proposed merger subject to meet the pre-merger notification thresholds stipulated in regulations prescribed by the Competition Commission.

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<sup>86</sup> Section 10, Competition Ordinance, 2007

The Application shall be in the form and accompanied by a processing fee as may be prescribed by the Competition Commission. The undertakings shall not carry on with the intended merger until they have received permission from the Competition Commission.

The Commission shall decide on whether the intended merger meets the thresholds and the assumption of dominance as determined in section 3 of the Ordinance. The order shall be made within thirty days of receipt of the application.

If, the Commission determines that the intended merger significantly lessens competition by creating or strengthening a dominant position after the second phase review, it may nevertheless approve the transaction, if it is shown that-

it contributes significantly to the efficiency of the production or distribution of goods or to the provision of services;

- a. such efficiency could not reasonably have been achieved by a less restrictive means of competition;
- b. the benefits of such efficiency clearly outweigh the bad effect of the absence or lessening of competition; or
- c. it is the least anti-competitive choice for the failing undertaking's assets, when one of the undertakings is faced with actual or imminent fiscal failure:

In case the Commission establishes that the merger deal under examination does not meet the criteria the Commission may:-

- d. disallow the consummation of the transaction;
- e. approve such transaction subject to the condition laid by the Commission in its order;

- f. approve such transaction on the stipulation that the said undertakings enter into legally enforceable agreements specified by the Commission in its order.

Where the Competition Commission has approved subject to some conditions, in that case the Commission may, within one year, review the order of approval of merger on its own or on the application of the undertakings concerned on the ground that it is fulfilled that the circumstances of the relevant market or the undertakings have so changed as to warrant review of the conditions imposed. If the Competition Commission establish that the approval was based on bogus or misleading information provided by the concerned undertaking, or the conditions prescribed in the relevant order of the Commission have not been fully complied with, the Commission may after affording the undertakings concerned an opportunity of being heard, undo such merger or acquisition or prescribe modifications or additions in the original order.<sup>87</sup>

The Competition Commission of Pakistan would have to judge the criteria of dominance taking into account our own local conditions. The risks resulting from mergers or acquisitions justify the Competition Commission under Competition Ordinance 2007 to exercise prior control on these acts. Therefore, no undertaking shall enter into a merger, or an acquisition agreement that substantially lessens competition by strengthening or creating a dominant position in the relevant market.

The Competition Ordinance 2007 does not provide direction/guidance as to how and which measure would be used to establish that a merger between the two undertakings would be regarded strengthening a dominant position or lessening the competition.

The Commission would frame rules / regulation in this respect soon and Competition Commission would have to draft very clear rules / regulations to ensure that applications for mergers and acquisitions of undertakings pay due regard to these rules before mergers, acquisitions and concentrations take place.

The Competition Commission may examine the status of these proposed mergers / acquisitions to ensure that the new undertakings after the mergers or acquisition do not abuse their economic wealth by becoming dominant.

Section 12 to 27 of the Ordinance deals with the Competition Commission of Pakistan,<sup>88</sup> these are purely connected with the administration of the Commission that's why this chapter will explain in briefly.

Section 12 of the Ordinance is regarding the establishment of Commission, According to that the Commission is a body corporate with perpetual succession and a common seal, and may sue and be sued in its own name and, subject to and for the purpose of this Act, may enter into contracts and may acquire, purchase, take, hold and enjoy moveable and immovable property of every description and may convey, assign, surrender, yield up, charge, mortgage, demise, reassign, transfer or otherwise dispose of or deal with, any moveable or immovable property or any interest vested in it, upon such terms as it deems fit.

The Commission shall be administratively and functionally independent, and the Government will use its best efforts to promote, enhance and maintain the independence of the Commission.

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<sup>88</sup> Section 12 to 27 Competition Ordinance, 2007.

According to Section 13, the head office of the Commission shall be in Islamabad. The Commission may establish and close offices at such other places in Pakistan as it considers necessary.

Section 14 deals Composition of the Commission According to that The Commission shall consist of not less than five and not more than seven Members. Section 15, 16 and 17 deals Chairman, Acting Chairman and Term of Office. Section 18 is regarding Restriction on employment of the Chairman and other Members in certain cases and Section 19 Termination of appointment of Members.<sup>89</sup>

Commission Fund, Accounts and Audits, and Annual Report deals under (Section 20, 21, 22).<sup>90</sup>

Section 23 to 27 deals Appointments by Commission, Meetings of Commission Disclosure of interest by Members, Notification of interest by staff of Commission and Public Servant.

The functions and powers of the Commission covered under Section 28 to 37, according to that the Commission may instigate proceedings in accordance with the procedures of Ordinance and make Orders in cases of breach of the provisions of the Competition Ordinance 2007 and carry out studies and enquiries into the affairs of any undertaking as may be necessary for the purposes of the ordinance.

Provide guidance / advice to undertakings asking for the same as to whether any act proposed to be taken by such undertakings is consistent with the provisions of this Ordinance.

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<sup>89</sup> Section 19 Competition Ordinance 2007.

<sup>90</sup> Section 20, 21, 22, Ibid.

The Competition Commission shall promote advocacy in competition through creating awareness, reviewing policy frameworks for fostering competition and making suitable recommendations for amendments to the Competition Ordinance 2007.

Hold open hearings on any issue affecting the competition in Pakistan or affecting the commercial activities and posting on Competition Commission website all inquiries and decisions and merger guidelines, educational material.

The Commission can initiate proceedings in cases of contravention where the Commission is satisfied that there has been or is likely to be a contravention of the provisions of Competition Ordinance as it may deem appropriate. The Commission may also impose a penalty at rates prescribed in all cases of contravention of the provisions of Ordinance. The Commission shall give notice of its intention to make such Order stating the reasons there for to such undertaking as may appear to it to be concerned in the contravention and give the undertaking an opportunity of being heard. In case the undertaking does not avail the chance of being heard, the Commission may decide the case ex-parte and publish its Orders for the information of the general public.

The Competition Commission shall, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (Act V of 1908), while trying a suit, in respect of the following matters like summoning and enforcing the attendance of any witness and examining him on oath; discovery and production of any document or other material object producible as evidence; accept evidence on affidavits; requisitioning of any public record from any court or office.



The Commission has full and free access to any premises, place, accounts, documents or computer, make an extract or copy of any accounts. In the event that an undertaking refuses without reasonable cause to allow the Commission to exercise the powers an investigating officer of the Commission may enter any place or building by force, if necessary.

**Penalty:** The Competition Commission may impose penalty on undertaking in the cases where has been found engaged in any activity prohibited under the Ordinance and in the cases where undertaking failed to fulfill an order or failed to provide a copy of the contract or any other papers/information as required under this Ordinance or provide bogus copy or information. In the cases of knowingly interferes with and or obstructs the procedure of the Commission in any manner: The Commission may impose penalties at the rates prescribed. In the contravention of any provision of the Chapter II of the Competition Ordinance , an amount not exceeding 50 million rupees or an amount not exceeding 15 percent of the annual turnover of the undertaking. For non-compliance of any, notice, order of the Competition Commission an amount not exceeding one million rupees, as may be decided in the circumstances of the case by the Commission.

In the cases where violation of the order of the Competition Commission is a continuing one, the Commission may impose further sum which may extend to one million rupees for every day after the first such violation.

In the cases of failure to comply with an order of the Competition Commission shall constitute a criminal offence punishable with imprisonment for a term which may extend to one year or with fine which may extend to 25 million rupees.

The Competition Commission may, if it is satisfied that any undertaking which is a party to a prohibited agreement and is alleged to have violated

Chapter II prohibitions has made true disclosure in respect of the alleged violation, impose on such undertaking a lesser penalty.

**Appeal to the Appellate Bench of the Competition Commission:** An appeal shall lie to an Appellate Bench of the Competition Commission in respect of an order made by any Member or authorized officer of the Commission. The person or undertaking aggrieved by such order may, within 30 days of the passing of the order submit an appeal, to the Appellate Bench of the Commission. The Appellate Benches comprising not less than two Members to hear the appeals.

The decisions of the Appellate Bench shall be made unanimously or by a majority of votes if the Appellate Bench comprises of more than two members. In the event of a split verdict, the original order appealed against shall hold and shall have effect as the final order of the Competition Commission.

Any person aggrieved by an order of the Competition Commission comprising two or more Members or of the Appellate Bench of the Commission may within 60 days of the communication of the order; prefer appeal to the Supreme Court.<sup>91</sup>

## **CONCLUSION:**

The Competition Ordinance 2007 does not seek to curb or reduce a dominant position but prohibits the abuse of dominance. Although it provides a threshold in terms of market share beyond which there is presumption of dominance, it does not rule out either dominance or abuse thereof at lower level of market share. The Ordinance prohibits any agreement that reduces

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<sup>91</sup> Competition Ordinance, 2007

competition within the relevant market whether or not it is “unreasonably restrictive”. Furthermore, Commission has power to grant block exemptions on grounds of efficiency or economic merit which did not exist earlier.

The Ordinance stipulates mandatory procedure for review and clearance of mergers and acquisition meeting the thresholds specified by the Commission. The Ordinance also forbids unfair trading practices.

Under the Ordinance, the requirement of registration of agreement has been done away with thus, eliminating unnecessary transactions or compliance costs.

In order to create awareness regarding competition issues Commission has to engaged itself in advocacy. Holding of open hearings publicly on matters affecting the state of competition in Pakistan and to issue a non-binding opinion or edict in this respect is another important aspect.

The power to enter forcibly and search any premises and to grant leniency or a reprieve as may be merited under the Ordinance also considerably strengthens the investigative capacity of the Commission.

To preserve independence of the CCP a certain degree of protection from arbitrary removal and security of tenure is given under the Ordinance.

Penalties under the Ordinance are much higher than MRTPO 1970 to make implementation effective. Recovery powers are also not restricted to recovery as arrears of land revenue but it can now be through attachment, and appointment of receiver.

An order under the Ordinance by a single member or an authorized officer can be appealed before an Appellate Bench (consisting of at least two

members). However, judicial redress can always be sought against the final orders of the Commission.

## Chapter IV

### Critical Analysis

**Introduction:** Crowning the whole discussion of the thesis, the concluding remarks / critical analysis would be posited in this chapter, evaluating MRTPO 1970 and newly introduced Competition Ordinance 2007. Concluding the whole discussion, in this chapter, it shall be assessed whether a newly introduced Competition Law fulfills the prime objectives of a competition law; i.e. consumer welfare and overall economic efficiency of a country.

The main purpose of any competition policy / law is to protect and promote competition as a means of ensuring the efficient allocation of resources in an economy. The competition law should lead to competitive prices and sufficient provisions for consumers, equitable distribution of income and faster growth in the economy of the Pakistan.

The Monopoly Control Authority was dispensed the function to regulate and monitor competition policy / law in the Pakistan. Neither the law nor the working of the Monopoly Control Authority undergoes any significant change in the last thirty six years.

In the present globalization and liberalization of the financial sector, the requirements was felt for having in place a new competition policy / law which would not only shelter domestic consumers but also lead to increased competitiveness of country's businesses.

In many countries Competition law followed a well researched / debated competition policy. However Pakistan decided for a Competition Law without having Competition policy. World Bank and the Department for International Development (DFID) provided full support, advisory and financial to Pakistan in framing the Competition Laws.

The distinctions between old and new laws are follows as under: -

The new competition law does not seek to reduce / curb dominance by an entity and addresses the abuse of dominance, instead. In addition, it does not rule out either dominance or abuse at lower levels of market share. The Law also indicate a definite minimum market share which is by no means measurable and definitive nor does a presumption or finding of dominance suggest in any way that the dominance is being abused. But in the MRTPO 1970 prohibited "restrictive" trade practices that "unreasonably" lessened competition, whereas the new Competition law forbids any agreement that lessen competition within the relevant market, whether or not it is "unreasonably restrictive". The new Competition law also prohibits unfair trading practices and stipulates a detailed procedure for review and clearance of acquisitions and mergers that meet the thresholds that would also be notified under the rules / regulations.

The Competition Ordinance prohibits any agreement that reduces competition within the relevant market but MRTPO 1970 prohibited only "restrictive" trade practices resulting in unreasonable lessening of competition whether or not it is "unreasonably restrictive". The Competition Commission of Pakistan has authority to allow block exemptions on grounds of efficiency or economic merit which is not present earlier in the old regime.

The Competition Ordinance forbids unfair trading practices stipulates mandatory procedure for review and clearance of acquisition and mergers meeting the thresholds specified by the Competition Commission, this is also not present in the old law.

The requirement of registration of agreement has been not required under the new law, thus, eliminating needless transactions and compliance costs.

Competition advocacy can play an important role in the lawmaking process in transition and developing economies as I suggest in my suggestions in Chapter II. In order to create awareness regarding competition issues Commission has to engage itself in advocacy and hold open hearings publicly on matters affecting the state of competition in the Country and to issue a non-binding opinion in this respect is another important aspect in which was not present in the old law.

The powers of enter forcibly and search any premises, and to grant leniency may be merited under the Competition Ordinance also significantly strengthens the investigation capacity of the Competition Commission. These powers were not present in MRTPO 1970.

To protect independence of the Competition Commission of Pakistan a certain degree of defense from arbitrary removal and security of tenure is given under the newly Competition Ordinance, the same is also not present in the MRTPO 1970.

To meet operational needs Competition Commission of Pakistan, tied sources of funding has been catered for without resort to subventions from the Federal Budget. MRTPO 1970 had no such provision and Monopoly Control Authority was wholly dependant upon allocations of the Federal budget.

Penalties under the Competition Ordinance are higher than MRTPO 1970 to make implementation effective and the powers of recovery are also not restricted to recovery as arrears of land revenue but it can now be through attachment, and appointment of receiver.

Orders of the Monopoly Control Authority were appealable to the High Court. But under the Competition Ordinance an order by a single member or an authorized officer can be appealed before an Appellate Bench (consisting of at

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## CONCLUSION:

Concluding the whole discussion, in this chapter, it is assessed that newly introduced Competition Law fulfills the prime objectives of a competition law; i.e. consumer welfare and overall economic efficiency of a country.

But on the other hand it is concluded Competition Commission is working with the aim that undertaking in the country should be penalized with fine and not taking cartelization criminal offence, that is because Cartel Mafia is very strong in the Pakistan. An example of this is that until now the bill of newly Competition Law is still pending in the Senate and National Assembly for assent.

The main concerns of the parliamentarians are:

1. There is no need of Competition Law in Pakistan
2. Old law can fulfil the requirements of Competition Law in Pakistan; there is no need to introduced new law.
3. Fine / Punishments are very high under new Competition Law.
4. Powers of forcibly entry is not justifiable.
5. Appeal against the final order of the Commission should be at High Court instead of Supreme Court.

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- Tharparkar Sugar Mills Limited
- Askari Cement Ltd ( Wah )
- Pencil manufacturers' case;
- Acquisition of the Polka Group of Companies by Lever Brothers Pakistan Limited;
- Merger of tea marketing companies;
- Merger in cigarette industry;
- Indus bank Ltd case;
- Batteries' case;

least two members). However, judicial redress can always be sought against the final orders of the Competition Commission.

In the last I can say that the Government of Pakistan understands that the resources made accessible for enforcing the new competition law will be a key issue. It is possible to have the whole things else in place but still has a weak competition organization due to inadequate enforcement of funds. A new competition enforcement organization will need to set priorities for its enforcement objectives.

Competition Commission of Pakistan will also be a policy in place for interface with sectoral regulatory authorities of Pakistan. These regulatory authorities of the country regulate competition in varying levels in their respective sectors. Like, Pakistan Electronic Media Regulatory Authority, Pakistan Telecommunication Authority, Oil & Gas Regulatory Authority and the National Electric Power Regulatory Authority.

Competition Ordinance 2007 does not supersede / affect the job of the country's sector regulators. It basically make available for the Competition Commission of Pakistan to have jurisdiction to fill the gap when the laws / regulations governing the sector specific regulatory agencies are quiet.

The mission of the Competition Commission of Pakistan is to protect / guard the competition in the Pakistan. It will only be regarded as well organised and structured if it actually fulfils this function effectively.

- Aminoplast moulding compound manufacturer's case;
- Engineering industry;
- On going: Polyester staple fiber case.
- Laptop case ( Bahria University )
- Iljin Electric Company Limited, Korea against Siemens ( Pakistan ) Engineering Company Limited Case
- Pakistan Banking Association Case
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### Web Resources:

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